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9955 HOUSE LABOR & COMMERCE

one and one half hours work prior to falling. The employee argues that the completion of work proves that he did not have time to drink prior to his fall. However, the ambulance was not called until two and one half hours after Lee left the site. The employee failed to account for the extra time.

The employee also argues that he smelled of alcohol because he was lying on a alcohol-saturated ground. However, the medical providers stated that the employee's breath smelled of alcohol, not his clothes. Furthermore, they described his appearance as being drunk.

Based on the foregoing, we find the employee has failed to prove his claim by a preponderance of evidence. We conclude the employee's injury was proximately caused by his intoxication. Therefore, pursuant to AS 23.30.235(2) we deny the employee's claim for compensation and medical benefits.

ORDER

The employee's claim for compensation and medical benefits is denied and dismissed.

Dated at Anchorage, Alaska this 26th day of March, 1997.

ALASKA WORKERS' COMPENSATION BOARD

/s/ Patricia Huna

Patricia Huna,
Designated Chairman

/s/ Shawn Pierre

Shawn Pierre, Member

/s/ S.T. Hagedorn

S. T. Hagedorn, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the Board unless proceedings to appeal it are instituted.

Proceedings to appeal must be instituted in Superior Court within 30 days of the filing of this decision and be brought by a party in interest against the Board and all other parties to the proceedings before the Board, as provided in the Rules of Appellate Procedure of the State of Alaska.

RECONSIDERATION

A party may ask the Board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the Board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200 or 23.30.215 a party may ask the Board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter

of Curtis L. Naccarato, employee / applicant; v. Naccarato Construction, employer; and State Farm Insurance Co., insurer / defendants; Case No. 9513413; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, this 26th day of March, 1997.

_____

Donna Bodkin, Clerk

SNO

ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 25512

Juneau, Alaska 99802-5512

JACQUELYN PARRIS-EASTLAKE,

Employee,
Applicant,

v.

STATE OF ALASKA,
DEPARTMENT OF LAW,
(self-insured),

Employer,
Defendant.

DECISION AND ORDER

AWCB CASE No. 9520823

AWCB Decision No.96-0405

Issued in Anchorage, Alaska
on October 2, 1996

We heard this claim for temporary total disability benefits, medical benefits, transportation costs, reemployment benefits, penalties, interest, attorney fees, and legal costs ir Fairbanks, Alaska on April 18, 1996, and on July 18, 1996. Attorney Ann S. Brown represented the applicant employee, and Assistant Attorney General Kristin Knudsen represented the defendant employer. We requested additional briefing from the parties concerning the applicability of AS 23.30.235 to this case. The legal memoranda were received on September 30, 1996, at which time we closed the record and deliberated. As authorized under AS 23.30.005(f) we heard this case with a two-member quorum of the board panel.

ISSUES

1. Is the employee's claim barred under AS 23.30.100(a) for failure to give timely notice of injury?
2. Is the employee's claim entitled to a presumption of compensability under AS 23.30.120?
3. Is the employee's claim barred as a "mental injury" under AS 23.30.265(17)?
4. Is the employee's claim barred under AS 23.30.235?
5. Is the employee entitled to temporary total disability (TTD) benefits under AS 23.30.185 from February 3, 1995 through February 28, 1995; March 16, 1995 through April 7, 1995; August 3, 1995 through October 24, 1995; and continuing?
6. Is the employee entitled to medical benefits under AS 23.30.095(a) and transportation under 8 AAC 45.084 for the treatment of her addiction to prescription pain medications?
7. Is the employee entitled to an eligibility evaluation for reemployment benefits under AS 23.30.041(d)?
8. Is the employee entitled to penalties under AS 23.30.155(e) and interest under AS 23.30.155(d) on compensation which may be due under this claim?
9. Is the employee entitled to a reasonable attorney fee and legal costs under AS 23.30.145(b)?

BRIEF CASE HISTORY AND SUMMARY OF THE RELEVANT EVIDENCE

The employee began work as an Assistant District Attorney on November 21, 1990, prosecuting misdemeanor cases for the Fairbanks District Attorney's office. On January 24, 1992 nurse practitioner Nancy Schupp and J. Michael Carroll, M.D., diagnosed the employee to be suffering from "cluster headaches" and prescribed Anexsia, an opiod analgesic. On June 1, 1992 she came under the treatment of Richard Elson, D.C., for chiropractic treatment of her neck and shoulders. In his report, Dr. Elson notes her headache problems.

She continued intermittently under his care for approximately two years.

On June 30, 1993 she returned to Dr. Carroll for treatment of tension headache and neck pain. He noted that she was handling emotional court cases, referred her to physical therapy, and prescribed codeine. On December 6, 1993 Dr. Carroll prescribed Tylenol #3 with codeine. On December 14, 1993 he prescribed Fiorinol, with codeine, and amitriptyline, an anti-depressant. Dr. Carroll continued to prescribe Fiorinol with codeine, noting in his report of February 21, 1994 that her musculoskeletal headaches were probably aggravated by work tension. On April 12, 1994 he prescribed a muscle relaxant, Flexeril. The employee testified that April 12, 1994 was the first time she experienced a "buzz" from the medications.

The employee underwent an MRI at the Fairbanks Memorial Hospital on April 22, 1994, which revealed a disk herniation at the C5-C6 level, and Dr. Carroll referred her to orthopedic surgeon Roy Pierson, M.D. On April 27, 1994 Dr. Carroll switched her prescription to Anexsia.

Dr. Pierson prescribed Vicodin on May 3, 1994 and May 22, 1994. George Brown, M.D., also prescribed Vicodin on July 5, 1994. On referral from Dr. Pierson, James Foelsch, M.D., performed an electrophysiology exam and concluded that the employee's headaches were not related to her disk injury. Dr. Carroll continued to prescribe Anexsia, among other drugs. On October 10, 1994 Dr. Pierson prescribed Roxicet, Flexoril, and Percocet.

Dr. Pierson performed cervical fusion surgery on November 11, 1994. He renewed her prescription for Flexeril on November 29, 1994. The employee's husband, John Eastlake, M.D., telephoned Dr. Pierson on December 15, 1994 to indicate that the employee had become addicted to Vicodin. The following day Dr. Eastlake called Dr. Carroll to report his wife's addiction.

Dr. Carroll diagnosed addiction, and on December 20, 1995 discussed weaning her from the medications, giving her reduced prescriptions of Xanax and Anexsia. On December 21, 1994 Dr.

Pierson agreed that Dr. Carroll should control her medications and wean her by using methadone and decreasing the dosage of the other drugs. At the hearing Dr. Carroll testified that, with the employee's permission, he discussed the employee's condition with her supervisor, Marlin Smith, on January 30, 1995.

The employee was referred to psychiatrist Robert Schults, M.D., by the State's Human Affairs Office on February 2, 1995 for assistance with her prescription narcotic abuse, which was proving disruptive to her work. Dr. Schults recommended inpatient detoxification, and the employer provided leave through the Employee Assistance Program. She entered a 30-day chemical dependency program at Charter North in Anchorage on February 2, 1995. She left a few days later, because seeing a former sex abuse client reawakened her own memories of abuse in adolescence.

On February 15, 1995 the employee began to see Linda Porter, L.C.S.W., for counseling about her sexual abuse. On February 16, 1995, with the employee's permission, Dr. Schults discussed the employee's condition with her supervisor. On February 17, 1995 Ralph Wells, M.D., discovered a cystic ovarian mass, which resolved by March 13, 1995. Also on March 13, 1995, Dr. Schults counseled her concerning the recent death of her grandmother. Drs. Schults, Carroll, and Wells all provide a variety of pain and psychotropic medications for a time.

On April 7, 1995, Dr. Schults prepared a Certification of Physician form in reference to the Family and Medical Leave Act, indicating she was disabled from work from February 2, 1995 through April 10, 1995 due to a major depression. Dr. Wells diagnosed the employee to be suffering a tubal ectopic pregnancy, and surgically removed it on April 17, 1995. On April 28, 1995 Dr. Wells certified the ectopic pregnancy would disable the employee from April 16, 1995 through June 2, 1995.

On June 1, 1995 Randall McGregor, M.D., refused her request for narcotics. On or about June 27, 1995 the employee obtained Vicodin from Dennis Jeffers, D.D.S., an oral surgeon. On July 5, 1995 she received Percocet and Vicodin from Daniel Keir, D.D.S. On

or about July 18, 1995 she obtained Vicodin from Lee Payne, D.D.S.

On July 31, 1995 the employee complained to the State's Human Resources Office in Juneau, claiming inconsistent treatment at work after being required to fill out a leave slip that morning. On the same day, two fellow employees reported to District Attorney Harry Davis that the employee had previously attempted unsuccessfully to solicit prescription narcotics from them. When confronted with this report of solicitation on August 3, 1995, by Mr. Davis and Criminal Division Deputy Attorney General Laurie Otto, the employee admitted to one instance, but denied memory of the other. The employee bitterly complained of incidents of unfairness and stress in her work. Ms. Otto immediately suspended the employee with pay for having solicited the narcotics.

On August 7, 1995 the employee entered a residential detoxification program at Springbrook Northwest under the supervision of Gregory Skipper, M.D. Her employment terminated on August 18, 1995; the parties disagree over whether she resigned or was discharged. She left the Springbrook treatment program before completion because she broke program rules about avoiding exclusive friendships. In the hearing she testified that after leaving the Springbrook program she attended Narcotics Anonymous and Alcoholics Anonymous, and was treated by Dr. Schultz.

The employee's attorney sent a letter dated September 13, 1995 to Deputy Attorney General Otto. The letter indicated that the employee was protected under the Americans With Disabilities Act, 28 U.S.C. S12131(1)(B), and was entitled to continued suspension with pay during her detoxification treatment and reinstatement to her position upon the completion of the program. The letter also gave notice to the employer, pursuant to AS 23.30.100(a), that the physical manifestations of the employee's job-related stress had given rise to a claim for workers' compensation benefits.

The employee served an Application for Adjustment of Claim on October 13, 1995; she claimed benefits under the Alaska Workers' Compensation Act for time loss and treatment of an addiction to

prescribed medication, which she contended arose from work-related causes during her employment as an Assistant District Attorney. The employer filed the Report of Injury on October 16, 1995. The date of injury was listed as August 3, 1995, but the employee's portion of the report was not dated. The employer denied benefits in an Answer dated October 17, 1995; and filed a Notice of Controversion of the claim, dated October 24, 1995. After extensive procedural and discovery disputes, this claim came to a hearing on April 18, 1996 and July 18, 1996.

At the hearing Dr. Carroll testified he believed the stress of the employee's work aggravated the employee's headaches, and was a contributing factor to her developing an addiction to the prescribed medications. He also testified he may not have been aware of all the physicians from whom she was securing narcotics during his treatment of her.

In her testimony at the hearing and in her deposition, the employee repeatedly claimed that her work was stressful, and she was not treated fairly. Deputy Attorney General Otto testified in the hearing that the employee's workload and schedule were comparable to that of the other misdemeanor attorneys, and provided supporting documentation. Ms. Otto testified the employee never informed her that she felt her addiction was related to the work until after her separation from employment.

The employee testified the headaches tended to develop over the day at work, and would subside at home. In her testimony the employee admitted to exaggerating symptoms and lying to her physicians in order to get narcotics after being prescribed Anexsia or Vicodin and during the fall of 1994, before she was hospitalized. She testified that, as a result of her addiction, her judgment was impaired at work.

In his deposition Dr. Schults indicated the employee was exhibiting heightened interest in drugs by March through May of 1994 (Schults depo., pp. 55-6), but the quantities she could obtain were not sufficient at that time to cause physiological addiction. Id. at 54. He found her to be suffering physiological

addiction on or about the time of her cervical surgery in November of 1994, or shortly thereafter. Id. at 62. He testified the employee suffered from a number of sources of stress while under his care, including her childhood abuse and arguments with her spouse over money. Id. at 65. He testified the stress from her work was a possible factor in the development of her headaches and in the development of her opiate addiction. Id. at 64-5.

In his deposition Dr. Skipper testified the employee suffered a long history of substance abuse problems: marijuana beginning in the tenth grade, and four or five years of "partying" with marijuana, alcohol, and cocaine, which affected her performance in school. (Skipper depo., p. 25.) He felt she probably would have developed an addiction because of the other stressors in her life, whether or not she had been an attorney. Id. at 51. He also felt her pain put her into a position in which she was exposed, and had access, to drugs. Id. at 37.

The employer retained psychologist David Sperbeck, Ph.D., to evaluate the employee. In his deposition he testified the medical records indicate that she suffered headaches as far back as age of 18 years (Sperbeck depo., p. 47), and developed a drug dependency in her adolescence. Id. at 50-2. This addiction and her child sexual abuse set the stage for future addictions. Id. at 52, 53, 123. She developed a substance abuse disorder in adolescence and still suffers from it, though it was for a time in remission. Id. at 53. In his interview with her, the employee admitted to hoarding the Vicodin in order to take amounts in excess of what was prescribed in order to get "high". Id. at 55-6.

Dr. Sperbeck indicated her work stress may have been a factor aggravating or accelerating her pre-existing condition (Id. at 76), but it was not a substantial factor in bringing about her disability in 1995. Id. at 78. He felt part of the stress she was suffering arose from taking the drugs themselves. Id. at 71. Because of danger of relapse, he recommended she not return to her work as an attorney, at least for the time being. Id. at 142.

The employee argued that this is not simply a mental injury,

deprived of the presumption of compensability. She argued her injury was physical, a physiologic addiction; and it arose in the course of treating another physical harm, her headaches. She contended the testimony of Dr. Carroll, relating the employee's addiction to the treatment of her headaches, and relating the headaches to the work stress, lays a preliminary evidentiary link, raising the presumption of compensability.

She argued the employer is not able to overcome the presumption of compensability by showing that the work stress could not have been a substantial factor in producing the headaches and the consequent addiction, as required by the Alaska Supreme Court decision in Delaney v. Alaska Airlines, 693 P.2d 859, 863 (Alaska 1985). The employee admitted she had difficulties in other aspects of her life, but her work had been very stressful and had been performed in a mean-spirited office, which triggered the physical problems leading to her addiction.

The employee additionally claimed reemployment benefits under AS 23.30.041, because the stress of practicing law, at least for the present, could cause a relapse into addiction. The employee requested reasonable attorney fees and costs in excess of the statutory minimum under AS 23.30.145(a), based on four affidavits: one dated April 15, 1996 claimed 205 hours, $30,529.50 in attorney and paralegal fees, and $1396.50 in costs; a second dated April 17, 1996 claimed 74.6 hours, $9,057.50 in attorney and paralegal fees, and $142.01 in costs; a third dated July 15, 1996 claimed 284.8 hours, $34,598.00 in attorney and paralegal fees, and $2,568.42 in costs; and a fourth dated July 22, 1996 claimed 61.9 hours, $9,080.00 in attorney and paralegal fees, and $1900.04 in costs. The affidavits total $83,257.00 in attorney and paralegal fees, and $7,006.97 in legal costs.

The employer argued the employee's drug addiction is a "substance abuse disorder", a mental illness brought about by long-term mental stress, as defined in AS 23.30.265(17). Under AS 23.30.120(b) such a mental injury enjoys no presumption of compensability, and the employee must prove all elements of her

claim by a preponderance of the evidence. The employer indicated the employee's stress at work was not extraordinary or unusual when compared to that of other misdemeanor attorneys, it was not the predominant cause of her addiction, it partially resulted from misperceptions of the fairness her treatment, and arose in the context of only routine work assignment. It contends all of the physicians felt that any work stress the employee suffered was no more than a minor factor in the development of her addiction.

It also argued the employee failed to provide timely written notice of her injury, barring her claim under AS 23.30.100(a). The employer contended the employee lied to a large number of doctors in order to obtain narcotics to self-medicate herself for the psychological distress from adolescent sexual abuse, long term substance abuse, multiple surgeries, marital distress, and death in her family. It argues that work provided only a "stage" on which the employee was able to pursue her drug habit; consequently her addiction should not be compensable under the rationale of the board decision in Nagamatsu v. Municipality of Anchorage, Fire Department, AWCB Decision No.86-0124 (May 18, 1989) at p. 33, following the Alaska Supreme Court's decision in Fox v. Alascom, 718 P.2d 977, 984 (Alaska 1986).

The employer objected to the attorney fees requested by the employee. It contended the employee's attorney failed to clearly identify in the affidavits the character of the work performed, and the persons contacted. It argued 8 AAC 45.180(b) bars the payment of the fees, at least as requested in the affidavits.

Among other points in the employer's Hearing Memorandum, dated April 11, 1996, the employer argued the statutory bar to compensation at AS 23.30.235 applies to this claim. Because the employee had not addressed AS 23.30.235, we entered an interlocutory decision and order, giving the parties an opportunity for fuller briefing of the issue. Legal memoranda were due to be filed on September 23, 1996, and responses due on September 30, 1996.

In its briefs the employer argued that the presumption

against causation by intoxication at AS 23.30.120(a)(3) does not apply. The employee failed to give timely written notice of her injury as required by AS 23.30.120(a), and consequently lost all presumptions favoring her claim. Even if the late notice is excused under AS 23.30.120(b), the presumption would be lost. The employer argued the record shows the employee used prescription drugs, but not as prescribed by the physicians. If she had not deceived the physicians, she would not have habituated herself to the point of physical dependency. It argued her claim should be absolutely barred under AS 23.30.235(2).

In her briefs the employee argued that AS 23.30.120(a) creates a presumption that the employee took her medicines as individually prescribed by her physicians, and that the employer brought forward no evidence to rebut the presumption. She additionally argued that the facts of this case are diametrically opposed to facts needed to trigger AS 23.30.235, and that section should not bar her claim. Section .235 contemplates intoxication causing physical injury. In this case the employee suffered physical injury (headaches), the treatment of which led to the addiction to the medication.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. IS THE EMPLOYEE'S CLAIM BARRED FOR FAILURE TO GIVE NOTICE UNDER AS 23.30.100(a)?

AS 23.30.100 provides, in part:

> (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer
>
> ....
>
> (d) Failure to give notice does not bar a claim under this chapter
>
> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or

> death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
>
> (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given ....

The Alaska Supreme Court in Alaska State Housing Authority v. Sullivan, 518 P.2d 759, (Alaska 1974) held that the 30-day limitation in section 100(a) serves a dual purpose: "[F]irst, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." Id., 518 P.2d. at 761, citing to 3 A. Larson, Workmen's Compensation S 78.20 at 17 (1971).[1]

The supreme court read into the language of AS 23.30.100 "an implied condition suspending the running of the statute until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." Sullivan, 518 P.2d at 761. (citation omitted). The court has labeled this the "reasonableness" standard, and the test is whether the employee acted reasonably in not reporting an injury at the time it occurred. Id., 518 P.2d at 761-762.

We find the record is replete with evidence of the employer's awareness of the employee's medical and social difficulties, including requests for medical leave, conversations between her physicians and her supervisor, and the disciplinary action taken by the employer. The record is also clear that she complained vociferously about her work and the perceived unfairness associated with it. It appears the employee was amply supported by the employer's programs during periods of sickness and disability before August 1995. At the time of her separation from work, her drug-related condition became clearly disabling, preventing her from practicing law at least temporarily.

We find the employee acted reasonably in considering her

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[1] Accord, Morrison-Knudsen Co. v. Vereen, 414 P.2d 536, 537 (Alaska 1966).

disability to begin with the termination of her employment, when her leave-with-pay ended as a result of her addiction. Her separation occurred on August 18, 1995; her attorney notified the employer of the claim in a letter on September 13, 1995, within 30 days.

Based on these findings, we conclude the employee acted reasonably in not reporting the injury until September 13, 1995. Hanzuk v. Fred Meyer, Inc., AWCB No. 96-0142 (April 11, 1996). We conclude the employee's claim is not barred under AS 23.30.100(a).

Even if we were to find the written notice was not timely under AS 23.30.100(a), the Alaska Supreme Court in State v. Moore, 706 P.2d 311 (Alaska 1985), adopted Professor Larson's view stated in 3 A. Larson, Workmen's Compensation Law §78.31(a) at 15-113 (1983):

> On the other hand, if the employer's representatives are aware of the circumstances surrounding the occurrence of the injury, and know as much about the symptoms as claimant himself could report, the knowledge will be deemed sufficient even if the employer and employee both underestimate the seriousness of the injury.

Id. at 313.

Given the actual notice to the employer at various times during the development of the employee's addiction, the gradual worsening of the symptoms, the subsequent written notice to the employer, and the employer's failure to demonstrate undue prejudice by the lateness of the notice, we would conclude under AS 23.30.100(d) that the employee's claim should not be barred. Tinker v. Veco, 913 P.2d 488, 491, 492 (Alaska 1996). *See also*, Roberts v. Veco, AWCB No. 96-0029 (January 18, 1996).

II. DOES THE PRESUMPTION OF COMPENSABILITY UNDER AS 23.30.120 APPLY TO THE EMPLOYEE'S CLAIM?

AS 23.30.120 provides, in part:

(a) In a proceeding for the enforcement of a claim for

> compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> ....
>
> (1) the claim comes within the provisions of this chapter
>
> ...
>
> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician....
>
> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

As explained in the preceding section, we find the employee's notice of injury is timely under AS 23.30.100(a). We did not find it necessary to excuse the employee under AS 23.30.100(d)(2). Consequently, we find the presumption of compensability under AS 23.30.120(a)(1)applies to the employee's claim. We also conclude AS 23.30.120(a)(3) requires us to presume that the employee's condition was not proximately caused by the employee being under the influence of drugs.

III. IS THE EMPLOYEE'S CLAIM BARRED UNDER AS 23.30.235?

AS 23.30.235 provides, in part:

> Compensation under this chapter may not be allowed for an injury
>
> ....
>
> (2) proximately caused by intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician.

AS 11.71.040 provides, in part:

> (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person
>
> ....

> (9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge
> ....

The possible application of the statutory bar to compensation at AS 23.30.235 is a threshold issue which we must consider before addressing the merits of the employee's claim for benefits. Although this provision was amended to its present language in 1982, it has been raised as an issue in only a few cases before the board. This section of the statute does not appear to have been interpreted by a state court.

The record is clear that the employee had a history of substance abuse extending back into adolescence; the record is also clear she engaged in drug-seeking behavior during the year-and-one-half to two years leading up to her entry into the Springbrook program. Based on her testimony and the medical records from Drs. Carroll and Pierson, we find that the employee was engaging in drug-seeking behavior, exaggerating symptoms, and deceiving her physicians in order to obtain narcotics from approximately the time she first experienced a "buzz" (April 12, 1994) or began to receive Vicodin (May 3, 1994).

Considering the criminal provision at AS 11.71.040(a)(9), we must conclude the employee's use of drugs obtained by deceit and misrepresentation following the spring of 1994 was not "drugs ... taken as prescribed by the employee's physician" within the meaning of AS 23.30.235(2).

We find Dr. Schults' tracing of the development of the employee's addiction to be persuasive; it is consistent with the medical record and testimony of the witnesses. Based on Dr. Schults' deposition testimony, we find that the drugs obtained by the employee during the spring of 1994 were not sufficient to cause physical addiction, that her drug use accelerated during the following months, and that the employee's physical addiction to the narcotics did not occur until roughly the time of her cervical surgery, November 11, 1994.

AS 23.30.120(a)(3) requires us to presume that "being under

the influence of drugs" did not proximately cause the injury. Nevertheless, we find the employee's testimony regarding systematic drug-seeking and drug-abusing behavior during the period leading up to her addiction is substantial evidence rebutting the presumption. Based on the testimony of the employee and Dr. Schults, and on the medical records, we find the overwhelming preponderance of the evidence to show the employee's physical addiction came about because of her systematic drug abuse and drug seeking behavior under the influence of that abuse. *See* Beebe v. Nabors Alaska Drilling, AWCB Decision No.87-0039 (February 13 1987) at pp.2-3. We conclude the employee's injury was proximately caused by her being under the ongoing influence of improperly obtained drugs. We conclude that her claim is barred by AS 23.30.235(2).

IV. WAS THE EMPLOYEE'S ADDICTION RELATED TO HER WORK?

In Burgess Construction v. Smallwood, 623 P.2d 312, 316 (Alaska 1981), the Alaska Supreme Court held that once a preliminary link has been established between the disability and the injured worker's employment and the presumption of compensability under AS 23.30.120(a) has attached, the employer must provide substantial evidence to rebut the presumption.

In their depositions Drs. Skipper and Sperbeck indicated the employee suffered from the addiction as a result of her other life experiences and previous addictive behavior, and probably not from causes linked to working for this employer. If the claim were not barred under AS 23.30.235, we would find the opinion of Drs. Skipper and Sperbeck to be substantial evidence rebutting the employee's claim. *See also* Miller v. ITT Arctic Services, 577 P.2d 1044, 1046 (Alaska 1978). Because there is substantial evidence that the injury was not related to work, the presumption would drop out, and all the elements of a claim against the employer would need to be proved by a preponderance of the evidence. Veco

Inc. v. Wolfer, 693 P.2d 865, 869, 870 (Alaska 1985).

After reviewing the record, the panel members came to different findings and conclusions regarding the relation of the employee's addiction to her work. Based on the record of the employee's previous drug usage, and the employee's admission that she deceived her physicians, panel member Guichici finds the employee not credible. AS 23.30.122. He finds that the physicians who believed that her addiction related in any way to her work, did so based on her unreliable representations to them. As noted in this decision's discussion of AS 23.30.235, Mr. Guichici finds that the employee's established drug-seeking behavior was the proximate cause of her addiction; and he finds the record to show no other substantial cause of the addiction. Mr. Guichici would find the preponderance of the evidence to indicate that the employee's condition did not arise in the course and scope of the her work.

Panel member Walters concurs that the proximate cause of the employee's addiction was her abuse of the drugs obtained by deception of her physicians. Nevertheless, based on the testimony of the employee's long-term treating physicians, Drs. Carroll and Schults, he finds the preponderance of the evidence to show that the stress of the employee's work was also a substantial factor in the development of her addiction.

Although the panel could not come to a decision regarding the work relatedness of the addiction, the statutory bar at AS 23.30.235 resolves the employee's claim. To avoid waste of the resources of the parties and the Workers' Compensation Division, we will exercise our discretion under AS 23.30.135, and will decline to incorporate a third member into our panel or to proceed further in any other manner.

V. OTHER ISSUES

Because this claim is barred under AS 23 30.235(2), the other

statutory defenses raised by the employer and the claims for specific benefits raised by the employee are all moot, and must be dismissed. Accordingly, we will decline to address those issues.

ORDER

The employee's claim for workers' compensation benefits is barred under AS 23.30.235(2); and the claim is denied and dismissed.

Dated at Anchorage, Alaska this _____ day of _____, 2000.

ALASKA WORKERS' COMPENSATION BOARD

_____

William Walters, Designated Chairman

_____

John Giuchici, Member

APPEAL PROCEDURES

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

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of Jacquelyn Parris-Eastlake, employee / applicant; v. State of Alaska, Department of Law, self-insured employer; / defendant; Case No. 9520823; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, this _____ day of _____, 2000.

_____

Mary Malette, Clerk

Coghill, 836 P.2d at 926 ("the superior court properly exercised its discretion and, on the basis of the most complete evidence before it, chose the best indicator of [appellant's] future earning capacity"); *Renfro v. Renfro*, 848 P.2d 830, 833 (Alaska 1993) ("This court has approved of an averaging approach when a parent's future earnings are uncertain.").

V. *CONCLUSION*

The superior court properly denied Robert's Civil Rule 60(b) motion for relief from the superior court's order dated September 29, 1990. However, in granting Judith's cross motion for modification of child support under Civil Rule 90.3, the superior court erred in adopting the Master's report since the Master's underlying factual findings concerning Robert's business and tax deductions are clearly erroneous. Accordingly, the superior court is AFFIRMED in part and REVERSED in part. The superior court's modification order dated January 7, 1994 is VACATED and REMANDED for proceedings consistent with this opinion.[12]

James R. MEEK, Appellant,

v.

UNOCAL CORPORATION (Self-Insured) and The Alaska Workers' Compensation Board, Appellees.

No. S-6462.

Supreme Court of Alaska.

April 26, 1996.

The Workers' Compensation Board denied claimant's request for permanent total disability benefits due to fact that claimant had made previous request for reemployment benefits. Claimant appealed. The Superior Court, Third Judicial District, Anchorage, Dana Fabe, J., affirmed. Claimant appealed. The Supreme Court, Compton, J., held that: (1) claimant's prior request for reemployment benefits did not preclude claim for permanent total disability benefits; (2) presumption of compensability applied to claimant's request for permanent total disability benefits; (3) claimant was not limited to receiving interim wages once he agreed to participate in reemployment plan; and (4) statute and regulation defining remunerative employability did not violate equal protection or due process.

Superior Court's decision affirmed in part and reversed in part; remanded.

1. Workers' Compensation ⇨1939.1

Court reviews Workers' Compensation Board's denial of benefits claim under independent judgment standard, making its own interpretation of statutes involved.

2. Workers' Compensation ⇨1939.1

Court reviews constitutional challenges to workers' compensation statutes de novo, adopting rule of law that is most persuasive in light of precedent, reason and policy.

3. Workers' Compensation ⇨1939.3

Because superior court acts as intermediate court of appeal in workers' compensation cases, Supreme Court gives no deference to its decision.

4. Workers' Compensation ⇨846

Fact that workers' compensation claimant had made prior request for reemployment benefits did not preclude his subsequent claim for permanent total disability benefits. AS 23.30.041.

5. Workers' Compensation ⇨1371

Presumption of compensability under Workers' Compensation Act applies to claims

12. Given this disposition, Robert's contention that the superior court improperly denied his Motion to File Erratum and Addendum to Objections to Master's Report, and for Order Rejecting Master's Report and Granting Evidentiary Hearing is rendered moot. Similarly, Robert's other listed points on appeal are either moot, meritless, or have been expressly waived.

for permanent total disability benefits. AS 23.30.120(a)(1).

6. Workers' Compensation ⇐1357

Presumption of compensability under Workers' Compensation Act goes far beyond issue of whether injury is work-related. AS 23.30.120(a)(1).

7. Workers' Compensation ⇐844, 846

Workers' compensation claimant was not limited to receiving interim wages once he agreed to participate in reemployment plan, and therefore claimant could still make claim for permanent total disability benefits.

8. Constitutional Law ⇐245(4)
Workers' Compensation ⇐26

Workers' compensation claimant who lived near his workplace and who did not receive room and board from employer was not similarly situated to remote site workers who did receive room and board, and therefore distinction in workers' compensation statute and regulation defining remunerative employability between those claimants who received room and board and those who received other work benefits did not violate equal protection. Const. Art. 1, § 1; AS 23.30.041(p)(7); Alaska Admin. Code title 8, § 45.490.

9. Constitutional Law ⇐301(4)
Workers' Compensation ⇐26

Workers' compensation statute and regulation which made distinctions based on type of compensation received by claimants in defining remunerative employability were reasonably related to legitimate governmental purpose of ensuring quick, efficient, fair and predictable delivery of indemnity and medical benefits to injured workers at reasonable cost to employers and, therefore, did not violate due process. Const. Art. 1, § 7; AS 23.30.041(p)(7); Alaska Admin. Code title 8, § 45.490.

10. Constitutional Law ⇐48(4.1)

Party asserting due process claim bears heavy burden of demonstrating that no rational basis exists, and if any conceivable legitimate public policy for enactment is apparent on its face or is offered by those defending enactment, opponents of measure must disprove factual basis for such justification. Const. Art. 1, § 7.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Dana Fabe, Judge, Superior Court No. 3AN-93-6216 Civil.

William J. Soule, Law Office of William J. Soule, Anchorage, for Appellant.

Constance E. Livsey and Suzanne K. Ishii-Regan, Faulkner, Banfield, Doogan & Holmes, Anchorage, for Appellees.

Before RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

COMPTON, Justice.

I. *INTRODUCTION*

The issues in this workers' compensation case are whether Meek may claim permanent total disability benefits after requesting reemployment benefits, and whether the statute and regulation defining remunerative employability are constitutional. The Alaska Workers' Compensation Board held that Meek was not entitled to permanent total disability benefits, but declined to address the constitutional issues. On appeal, the superior court affirmed the benefits decision, and held that the statute and regulation are constitutional. We affirm the superior court's decision regarding the constitutionality of the statute and regulation, but reverse its decision regarding benefits.

II. *FACTS AND PROCEEDINGS*

James Meek was injured in January, 1991 in the course of his employment with Unocal. At the time of his injury, Meek worked seven days on, seven days off. He was compensated at a rate of $23 per hour, but also received significant overtime pay due to his unusual hours.

As a result of his injury, Meek collected temporary total disability (TTD) benefits under Alaska's Workers' Compensation Act (Act). AS 23.30.005-.270. After a brief return to light-duty work, Meek intermittently collected TTD and temporary partial disability (TPD) benefits. He was declared medical-

ly stable in February, 1992, and thereafter collected permanent partial impairment (PPI) benefits.

Meek requested and was deemed eligible for reemployment benefits under AS 23.30.041. That statute provides for the development of a reemployment plan, at employer expense, to return injured persons to the work place. AS 23.30.041. When Meek's PPI benefits were exhausted, Unocal began paying him subsection .041(k) interim wages. *See* AS 23.30.041(k). The reemployment plan eventually developed called for Meek to be retrained as an electronics technician. Unocal agreed to the plan's provisions, but Meek did not. The rehabilitation benefits administrator (RBA) approved the plan.

At a hearing before the Workers' Compensation Board (Board), Meek sought review of the RBA's approval of the reemployment plan, arguing that he was unable to perform the physical tasks required of an electronics technician, and that he could not achieve the remunerative wage the reemployment plan forecast. Meek also claimed he was eligible for permanent total disability benefits (PTD) from the time his PPI benefits were exhausted until a reemployment plan was in place, and, accordingly, that subsection .041(k) interim wages were not an appropriate substitute. Finally, Meek challenged the constitutionality of the statute and regulation used to calculate his remunerative employability wage rate.

The Board remanded the reemployment plan to the RBA to determine whether Meek could perform the physical tasks required of an electronics technician. The Board also directed the RBA to make findings of fact about the viability of Meek's forecasted remunerative employability rate of $13.98 an hour upon completion of the plan. The Board denied Meek's request for PTD benefits, concluding it would be "incongruous" to hold that an "employee, for whom a reemployment plan is being devised, is, at the same time, an employee who is permanently and totally disabled." *Meek v. Unocal*, AWCB No. 9101334 (June 18, 1993) (quoting *Bell v. Dalton Electric, Inc.*, AWCB No. 92-0287 (Nov. 23, 1992). The Board declined to address Meek's constitutional arguments.

Meek appealed to the superior court, *see* Alaska Appellate Rules 601–611, which affirmed the Board's denial of Meek's PTD benefits claim. The superior court considered and rejected Meek's constitutional challenges. Meek appeals.

III. *DISCUSSION*

A. *Standard of Review*

[1–3] We review the Board's denial of Meek's PTD benefits claim under the independent judgment standard, making our own interpretation of the statutes involved. *Rydwell v. Anchorage School Dist.*, 864 P.2d 526, 528 (Alaska 1993). We review Meek's constitutional challenges *de novo*, adopting the "'rule of law that is most persuasive in light of precedent, reason, and policy.'" *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1243 n. 5 (Alaska 1992) (quoting *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979)). Because the superior court acted as an intermediate court of appeal, we give no deference to its decision. *Rydwell*, 864 P.2d at 528.

B. *The PTD Benefits Claim*

1. *A claim for PTD benefits is not incompatible with a request for reemployment benefits.*

[4] Unocal argues, in line with the Board's holding, that Meek cannot claim PTD benefits after requesting reemployment benefits. Nothing in the Act, however, implies that an employee must be less than permanently and totally disabled to be eligible for reemployment benefits, nor is it "incongruous" for an employee who has requested reemployment benefits to claim PTD benefits.

The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." AS 23.30.265(10). We have held that "total" disability means "the inability because of injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *J.B. Warrack Co. v. Roan*, 418 P.2d 986, 988 (Alaska 1966). Under the "odd-lot" doctrine, which

we have adopted, "'total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.'" *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 674 (Alaska 1991) (quoting 2 Arthur Larson, *Workmen's Compensation*, § 57.51, p. 10–53 (Desk Ed.1990)).

The concept of total disability includes an education component. *See Roan, supra; Vetter v. Alaska Workmen's Compensation Bd.*, 524 P.2d 264, 266 (Alaska 1974) ("Factors to be considered in making [a finding that a person's earning capacity was decreased due to a work-related injury] include not only the extent of the injury, but also age, education, employment available in the area for persons with the capabilities in question, and intentions as to employment in the future."). Thus, a person's lack of education, as much as his physical injury, may be the "handicap" preventing him from obtaining all but "odd-lot" jobs. *See generally* 1C Arthur Larson, *Workmen's Compensation Law* § 57.51(d), p. 10–336 (1994) ("A considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury was constricted by lack of mental capacity or education.").

If a lack of education can be overcome through vocational rehabilitation, then a disability that was once "total" may no longer be so. This is precisely what section .041 aims to do; its goal is to retrain and educate permanently impaired employees [1] so that they can attain "remunerative employability."[2] *Id.* "Reemployment benefits" available under section .041 include on-the-job training, vocational training, academic training, and self-employment. AS 23.30.041(i). Through the rehabilitation process established by section .041, a person suffering from a "total" disability can gain the skills and education necessary to allow him or her to reenter the job market and attain "remunerative employability." As this analysis makes clear, a claim for PTD benefits is not incompatible with a request for reemployment benefits. The Board therefore erred in holding that Meek could not claim PTD benefits after requesting reemployment benefits.[3]

2. *The presumption of compensability applies to Meek's claim.*

[5, 6] AS 23.30.120(a)(1) [4] establishes a presumption of compensability which places the burden of producing evidence on the employer. *Sokolowski v. Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). Unocal argues that AS 23.30.120(a)(1) only creates a presumption that an injury is work-related, and does not apply to an employee's claim that his or her disability "fits within a particular category, such as PTD." However, "[i]t is well established that the presumption [of compensability] goes far beyond the issue of whether an injury is work-related." *Cluff v. Nana–Marriott*, 892 P.2d 164, 170 n. 5 (Alaska 1995). We have held that "the text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 (Alaska 1991) (emphasis added). In *Wien Air Alaska v. Kramer*, 807 P.2d 471, 474 (Alaska 1991), we applied the presumption of compensability to a temporary total disability claim. We now hold that the "pro-worker" presumption in

1. An employee is not eligible for reemployment benefits if, *inter alia*, "at the time of medical stability no permanent impairment is identified or expected." AS 23.30.041(f)(3).

2. "'[R]emunerative 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...." AS 23.30.041(p)(7).

3. Subsection .041(k) interim wages may not be paid while an employee is receiving PTD benefits since subsection .041(k) interim wages are only payable upon the exhaustion of the employee's permanent impairment benefits. AS 23.30.041(k).

4. AS 23.30.120(a)(1) provides:

> In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary that (1) the claim comes within the provisions of this chapter....

AS 23.30.120(a)(1), *Nana–Marriott*, 892 P.2d at 170, also applies to PTD claims.[5]

On remand, the Board should apply the presumption of compensability to Meek's claim. Unocal may rebut the presumption with substantial evidence that Meek is not permanently totally disabled.[6] *See Olson*, 818 P.2d at 672. If Unocal produces such substantial evidence, the presumption will "drop out," and Meek will then have the burden of proving all elements of his PTD claim.[7] *Burgess Const. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981).

3. *Meek may receive PTD benefits while participating in the reemployment plan.*

[7] Unocal argues that once Meek agreed to participate in a reemployment plan, he was limited to receiving interim wages under AS 23.30.041(k). That provision speaks only to the employer's obligations when an employee's PPI benefits are exhausted, and does not limit an employee's benefits exclusively to subsection .041(k) interim wages. *See* AS 23.30.041(k) ("If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall provide wages equal to 60 percent of the employee's spendable weekly wages but not to exceed $525, until the completion or termination of the plan."). Subsection .041(k) contemplates the payment of other types of benefits during the pendency of a plan. *See Id.* (providing that an employee receiving TTD benefits before completion of a reemployment plan is entitled to PPI benefits once he or she reaches medical stability). Unocal's argument that Meek is limited to subsection .041(k) interim wages is without merit.

C. *The Constitutional Challenges*

Meek argues AS 23.30.041(p)(7) and 8 AAC 45.490, the statute and regulation defining "remunerative employability" and "gross hourly wages," violate the equal protection clause[8] and due process clause[9] of the Alaska constitution.

AS 23.30.041(p)(7) defines "remunerative employability" to mean wages equivalent to "at least 60% of the worker's gross hourly wages at the time of injury." According to Board regulation, "gross hourly wages" is determined in accordance with 8 AAC 45.490, which reads:

> (1) If the employee was paid on an hourly basis at the time of injury, gross hourly wages are the actual hourly wage at the time of injury, exclusive of premium time or overtime.

5. AS 23.30.180, which governs PTD benefits, does not require that PTD benefits be excluded from the presumption. Rather, the statute specifies that, except for certain predetermined disabilities which automatically constitute permanent total disability, permanent total disability "is determined in accordance with the facts." AS 23.30.180(a). This language does not exempt PTD benefits from the presumption of compensability.

Unocal argues that there is a presumption against permanent total disability, but the cases it cites do not support this proposition. Rather, they hold that once an employee establishes a claim of disability, the employee retains the presumption of continuing disability, unless and until the employer introduces substantial evidence to the contrary. This does not mean that the employee presumptively remains in one category of disability until substantial evidence is introduced to place the employee in another category. *See Olson v. AIC/Martin J.V.*, 818 P.2d 669, 672 (Alaska 1991) ("[W]e hold that an employee [who has received TTD benefits] presumptively remains temporarily totally disabled unless and until the employer introduces 'substantial evidence' to the contrary."); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 n. 10 (Alaska 1991) (same); *Bailey v. Litwin Corp.*, 713 P.2d 249, 254 (Alaska 1986) (Presumption of compensability applies to a claim of temporary total disability.).

6. Unocal argues that it has presented substantial evidence that Meek is not permanently totally disabled. We prefer to allow the Board to make the initial determination as to whether Unocal has satisfied its burden.

7. In this context it is worth noting that a failure to achieve remunerative employability does not, by itself, constitute permanent total disability. AS 23.30.180(b).

8. "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaska Const. art. I, § 1.

9. "No person shall be deprived of life, liberty, or property, without due process of law." Alaska Const. art. I, § 7.

(2) If the employee was paid on a weekly or monthly salary basis at the time of the injury

(A) The weekly salary must be multiplied by 52 and divided by 2080 to compute gross hourly wages; or

(B) the monthly salary must be multiplied by 12 and divided by 2080 to compute gross hourly wages.

(3) If at the time of injury the employee received bonuses, commissions, gratuities, or room and board during the course of employment, gross hourly wages are computed by dividing the gross weekly earnings, as determined under AS 23.30.220, by 40.

To determine Meek's gross hourly wages, the RBA applied 8 AAC 45.490(1), and found that Meek's remunerative employability wage was $13.98, or 60% of his actual hourly wage of $23 per hour.

[8] Meek's equal protection challenge is based on his claim that North Slope workers have their remunerative wage calculated under 8 AAC 45.490(3), and that this difference in methodology "arbitrarily distinguish[es] between similarly situated workers." We agree with the superior court that "Meek's work situation was not at all the same as that of a remote site worker who receives room and board; Meek lived near his work place and did *not* receive room and board." *Meek v. Unocal Corp.*, 3AN-93-6216, Decision at 10 (June 10, 1994). Because Meek was not similarly situated to North Slope workers, his equal protection argument must fail. *See Coghill v. Coghill*, 836 P.2d 921, 929 (Alaska 1992) ("[E]qual protection has never required that differently situated persons be treated in the same way.").

[9, 10] Meek argues that AS 23.30.041(p)(7) and 8 AAC 45.490 violate due process because they bear no reasonable relationship to any legitimate governmental purpose. *See Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1244 (Alaska 1992) ("Substantive due process is denied when a legislative provision bears no rational relationship to a legitimate government interest."). The party asserting a due process claim bears the heavy burden of demonstrating that no rational basis exists, and "if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification." *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974).

The purpose of the Alaska Workers' Compensation Act is to "ensure the quick, efficient, fair and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers." § 1, ch. 79, SLA 1988. Classifying a worker's gross hourly wages based on the type of compensation received is entirely consistent with this purpose. The reason North Slope workers have their remunerative wage calculated under 8 AAC 45.490(3) is that they, unlike Meek, receive room and board as part of their compensation; hence, in order to fully compensate Slope workers, different treatment is required. The challenged statute and regulation legitimately and rationally distinguish between those employees who receive certain types of benefits or non-wage compensation and those who do not. Meek's due process argument is without merit.

IV. *CONCLUSION*

The Board's decision denying Meek's PTD benefits claim, and the superior court's affirmance of that decision, are REVERSED. The superior court's decision rejecting Meek's constitutional arguments is AFFIRMED. This case is REMANDED to the Board for proceedings consistent with this opinion.

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ALASKA WORKERS' CO

P.O. Box 1149 Juneau, Alaska 99802

FILED with Alaska Workers' Compensation Board-Anchorage

FEB 13 1987

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BEEBE

ROBERT BEEBE,

Employee,
Applicant,

v.

NABORS ALASKA DRILLING,

Employer,

and

PACIFIC MARINE INSURANCE CO.,

Insurer,
Defendants.

DECISION AND ORDER

Case No. 613086

This claim was heard in Anchorage, Alaska on December 10, 1986. The applicant was represented by attorney Stephen M. Sims. The employer and its insurer ("employer") were represented by attorney Robert J. McLaughlin. The record was left open at the end of the hearing for a period of ten days. The record closed on January 7, 1987 when the Board next met.

The applicant was injured on July 13, 1986 when a truck he was driving for the employer overturned. He suffered head (subdural hematoma), hip, and shoulder injuries. The employer timely controverted the applicant's claim on July 31, 1986 on the basis of AS 23.30.235(2). That section of the Alaska Workers' Compensation Act addresses disallowance of compensation where an injury is proximately caused by intoxication. The sole issue at the hearing was whether the applicant's injuries were proximately caused by intoxication and therefore not compensable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Since July 1, 1982 AS 23.30.235 has provided what Professor Larson describes in his treatise as an intermediate standard for determining compensability of injuries allegedly caused by intoxication. "Compensation under this chapter may not be allowed for an injury . . . proximately caused by intoxication of the injured employee. . . ." That standard falls between the extremes of denying compensation based on intoxication without regard to the intoxication having caused the injury (which Professor Larson decrys) and denying compensation only if the intoxication was the "sole cause" of the injury. Until 1982, AS 23.30.235 required the

In the Board's view, attempting to return to a gravel road surface when both right wheels are off that surface while driving at 45 miles per hour is extremely dangerous. The physical evidence at the accident scene as sketchily described by the witnesses does not appear, of itself, to indicate actions so far from the norm that intoxication can be reasonably inferred as a substantial factor in causing them. The Board is well aware of its limitations in interpreting this evidence without expert assistance. The Board finds that the employer has not proven by a preponderance of the evidence that the applicant's injuries would not have occurred but for his intoxication or that the intoxication was a substantial factor in the truck leaving the road and ultimately overturning. The employer shall therefore pay the applicant compensation and benefits for the injuries arising from the July 13, 1986 accident.

The employer controverted the payment of compensation. The applicant retained an attorney who successfully prosecuted his claim. The Board has awarded the previously controverted compensation and benefits. The employer shall pay the applicant's attorney a statutory minimum fee, under AS 23.30.145(a), based on the compensation now awarded.

ORDER

1. The employer shall pay the applicant compensation and benefits for the disability resulting from the July 13, 1986 injuries.

2. The employer shall pay the applicant's attorney a statutory minimum fee.

Dated at Anchorage, Alaska, this 13th day of February, 1987.

ALASKA WORKERS' COMPENSATION BOARD

/s/Paul F. Lisankie
Paul F. Lisankie, Designated Chairman

unavailable for signature
Mary A. Pierce, Member

/s/Robert G. Anders
Robert G. Anders, Member

PFL:vlh

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

intoxication to have been the "sole cause" of the injury. See, generally, 1 A. Larson, The Law of Workmen's Compensation, §34.31, p.6-89 (1986).

Professor Larson also states in his treatise, Id. 6-92, "Since intoxication is an affirmative defense, the burden of proof of intoxication and the requisite degree of causation is on the employer. . . ." (footnotes omitted) Using Professor Larson's analysis, the employer must prove by a preponderance of the evidence that the injured employee was intoxicated and that the intoxication had a sufficient causal relationship to the injury. (In the context of AS 23.30.235(2), proximate cause.) The general need of an employer to prove affirmative defenses in the context of workers' compensation was recognized by the court in Anchorage Roofing Co., Inc. v. Gonzales, 507 P.2d 501, 504 (Alaska 1973). "If an affirmative defense to the claim is asserted by the employer, then he has the burden of proof as to such defense."

The Board's analysis is complicated, however, by AS 23.20.120 and the court's construction of this provision in a series of cases culminating in VECO, Inc. v. Wolfer, 693 P.2d 865, 870 (Alaska 1985). AS 23.30.120 provides in part:

> In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter . . . (3) the injury was not proximately caused by the intoxication of the injured employee. . . .

Construing AS 23.30.120(a)(1), the "presumption of compensability," the court stated in VECO, pp. 869-870,

> The presumption of compensability shifts the burden of production to the employer once the employee has established a preliminary link. Since the presumption shifts only the burden of production and not the burden of persuasion, the evidence tending to rebut the presumption should be examined by itself. The court does not weigh the evidence tending to establish causation against the rebuttal evidence in deciding whether the employer has produced substantial evidence to rebut the presumption of compensability.
>
> When the presumption of compensability has been successfully rebutted, it drops out and the employee must prove all elements of his case by a preponderance of the evidence. Miller v. ITT Arctic Services, 577 P.2d at 1046. (footnote omitted)

Following the rationale of the court, once the employer rebutted the presumption of AS 23.30.120(a)(3) with substantial evidence, the applicant would have to prove by a preponderance of the evidence that intoxication was not the proximate cause of his injury.

The Board finds the result of this rationale, if followed in the context of the intoxication defense, would be incongruous. If the legislature had been silent on the question of intoxication

proximately causing injuries, the employer would clearly have the burden of proving the affirmative defense of intoxication by a preponderance of the evidence. Since the legislature has "aided" employees by presuming any intoxication was not the proximate cause of the injury, the employer must produce substantial evidence to make the employee disprove intoxication as the proximate cause of his injury. The Board concludes that, despite the suggestion otherwise in VECO, the employer must prove by a preponderance of the evidence that the applicant was intoxicated and that his injury was proximately caused by his intoxication. The Board relies upon Anchorage Roofing and general principles described by Professor Larson in reaching this conclusion.

The term "intoxication" is not specifically defined in the Alaska Workers' Compensation Act. A term which is neither a "technical word" nor one with a "peculiar meaning" developed through legislative definition or judicial construction is to be construed according to its "common and approved usage." AS 01.10.040; United States Jaycees v. Richardet, 66 P.2d 1008, 1011 (Alaska 1983). This approach is also consistent with the general rule that terms be given practical and popular meaning while avoiding technical constructions. See, for example, Bob's Market v. Brossow, 3 AN 85-17148 Civil (Alaska Super. Ct. September 27, 1986). The Board finds "intoxication" is not a technical word or one with a peculiar meaning. Therefore, the Board applies the common and approved usage. "A condition of being drunk, having the faculties impaired by alcohol." Webster's Ninth New Collegiate Dictionary (1984 ed.)

To establish the applicant's intoxication, the employer relied upon the testimony of witness Wing, Marlowe, Pryor, and Dr. Rodgers. The applicant relied upon his deposition testimony, the deposition of Kenny Harris, and the statement of Harry Cross.

Wing and Marlowe testified that they assisted the applicant at the accident site. Both testified they smelled an odor on the applicant's breath which they associated with alcohol. Wing testified the odor was that of whiskey. Pryor testified he overheard two roustabouts talking about the applicant at dinner time before the accident. Pryor stated the roustabouts (one named Davis and the other he could not identify) described the applicant as being very drunk.

The applicant objected to Pryor's testimony because it was hearsay and because he claimed the employer should have disclosed the testimony to him before hearing pursuant to discovery requests he had made. Two letters to the employer's attorney requesting discovery were admitted as Hearing Exhibits 1 and 2. The employer countered that hearsay evidence may be considered by the Board, the requests did not mention evidence such as Pryor's testimony, and

that it had no independent obligation to disclose the testimony before hearing.

AS 23.30.30.135(a), which exempts Board proceeding from evidentiary rules, permits the Board to, "[C]onduct its hearings in the manner by which it may best ascertain the rights of the parties." The Board finds the prejudicial nature of Pryor's testimony exceeded its probative value, there was no evidence the declarants were unable to testify, and the applicant was denied an opportunity to seek out the declarants. The Board finds, therefore, that it may best ascertain the rights of the parties in this instance by excluding Pryor's testimony. The Board did not consider Pryor's testimony as a result.[1]

Dr. Rodgers, a board-certified forensic pathologist, testified concerning blood alcohol levels in general and the applicant's in particular. In the deposition of toxicologist Stephen Davis, it was disclosed that the applicant's blood alcohol level at 3:50 a.m. July 14, 1986 was .062. Dr. Rodgers testified that the rates at which alcohol was absorbed into and removed from the blood stream were known to fall within certain limits. Applying the removal rate to the .062 level remaining approximately 7.5 hours after the accident (when the blood sample was drawn), Dr. Rodgers estimated the applicant's blood alcohol level at the time of injury had been .184± 10%. Even the lower level at the time of this estimate would exceed the .10 level at which a driver is presumed to be under the influence of intoxicating liquor in a criminal or civil action. AS 28.35.033. Dr. Rodgers also testified that nothing he had seen while reviewing the applicant's medical records was indicative of the applicant having been in "shock" following the accident. This was important because shock alters the body's blood flow, a body in shock would likely remove alcohol from the blood stream more slowly than normal. Dr. Rodgers' extrapolation of the applicant's blood alcohol level was based on values developed in tests of normal subjects not in shock.

The applicant testified in his deposition that he had had only one beer about two hours before the accident. He testified he could not remember the accident and denied that a partially full bottle of whiskey found at the accident scene was his. Co-worker Kenneth Harris testified he had talked to the applicant

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[1]This panel, which has tried repeatedly to insure sufficient discovery is available without the restrictions of formal rules, is distressed that this potentially critical evidence went undisclosed. This panel may change its views concerning the necessity of requiring witness lists and pre-filing exhibits or testimony if applicants and employers continue to "sandbag" each other in ways which may appear to be contrary to the requirements of due process.

approximately 30 minutes before the accident. They talked for five minutes and the applicant did not smell of liquor or appear drunk. A copy of a report by security officer Harry Cross, which was part of the employer's accident investigation report and was a part of the hearing record, concerned a conversation between Cross and the applicant at approximately 8:13 p.m. July 13, 1986. Cross stated the applicant did not smell of alcohol or appear to be intoxicated.

The Board finds the applicant's statement that he had had only one beer hours before the accident not to be credible. The Board finds, based on the testimony of toxicologist Davis, and Dr. Rodgers, that a reliable blood test was taken from which Dr. Rodgers reasonably inferred that applicant's blood alcohol level at the time of injury was in the vicinity of .184. The applicant's having had only one beer was completely inconsistent with that blood alcohol level. The Board finds the applicant's blood alcohol level at the time of injury was likely somewhat less than .184 but that the applicant was intoxicated at the time based on a preponderance of the evidence. The Board does not find the testimony of Harris and Cross incredible or totally inconsistent with the evidence establishing intoxication. Rather, as explained below, the Board relies in part on that evidence to find that the applicant's intoxication was less than .184 and was not the proximate cause of his injury.

While the Board finds the applicant was intoxicated at the time of his accident, he is still entitled to compensation unless the intoxication proximately caused his injury. In order to find the intoxication the proximate or "legal" cause of the injury, the Board must find that "but for" the intoxication the injury would not have occurred and that the intoxication was so important in bringing about the disability that reasonable mon would regard it as a cause and attach liability to it. State v. Abbott, 498 P.2d 712, 727 (Alaska 1972).

The employer produced evidence from Dr. Rodgers that blood alcohol levels as low as .04 would impair a driver's judgment, reflexes and peripheral vision. William Basham, the employer's safety director, testified he sent the truck driven by the applicant for an inspection of the brakes and steering after the accident. He testified the systems had no problems. The employer's accident report contains a shop work order reflecting 4.5 hours. One half hour was spent towing the truck into the shop and four hours were spent checking the brakes and steering. It was reported these systems, "Checked out good."

The accident scene was described somewhat by security officer Wing and in an incident report prepared by security officer C. Williams. The accident scene was a straight part of a 39-foot wide gravel road. The road was recently graded, relatively smooth, and appeared dry. The speed limit was 45 miles per hour. The

truck was found upright oriented across the road with the applicant underneath. Although upright, the vehicle had flipped end over end before coming to a stop.

Officer Williams' report described the vehicle's course during the accident sequence. The sequence apparently began when the truck's right wheels left the gravel road and hit the right shoulder. The truck came to rest 594 feet from where the wheels first hit the shoulder. The truck first came back onto the road, continued across, and wound up with the left wheels off on the left shoulder. The truck continued down the road for about 279 feet. It then came back onto the road, continued across, and again put its right wheels off the road onto the shoulder. At this point the truck apparently returned to the road, skid marks were found but indicated only the front tires. Blue paint and gouges on the road surface indicated the truck turned end over end before landing back on its wheels across the road.

The opinions of an accident reconstruction expert were apparently never sought. No evidence was introduced showing the applicant was driving in excess of the speed limit, the accident report estimated the truck's speed at 45 miles per hour. The consistency of the "shoulder" area, the difference between the gravel road level and the shoulder level (if any), and the nature of the surrounding off-road area were not put in evidence. Photographs of the accident scene, mentioned in the accident report, were not produced at the hearing.

Looking at the evidence relied upon by the employer by itself, as the Board must under VECO, the Board does not find it to be substantial evidence rebutting the presumption that the injury was not proximately caused by intoxication. If the Board did find the presumption had been rebutted, it would have found that the employer did not prove by a preponderance of the evidence that the injury was proximately caused by the intoxication.

The injuries suffered by the applicant were no different than those which might have been suffered by an unintoxicated driver involved in a serious auto accident; The focus was therefore whether the accident resulting in the injuries was proximately caused by intoxication. The Board sees the accident as occurring in two phases. Initially, the truck's right wheels ended up on the right shoulder. Thereafter, the evidence noted on the roadway by security officer Williams indicated the truck crossed the roadway twice while the applicant presumably attempted to regain control. Instead, the truck turned over on the roadway.

In considering whether the accident was proximately caused by intoxication, the Board also relies on the testimony of Harris and security officer Cross that the applicant did not appear drunk. The Board finds that testimony important for two reasons. First, it is strong evidence that while the applicant may have been

intoxicated at that time (consistent with Dr Rodgers' testimony that a superficial physical appearance of sobriety can be misleading) he was at least not grossly affected. The testimony of Cross on this point is important. The applicant apparently drove the truck to the checkpoint manned by Cross, stopped and talked for five minutes, and drove on. This testimony indicates that a trained security officer, with a substantial opportunity to observe the applicant's driving and speaking no more that 15 minutes before the accident, saw nothing to cause him to conclude that the applicant was intoxicated.

Second, Cross testified he did not smell alcohol while talking to the applicant at 8:13 p.m. This testimony must be coupled with the statement of Wing and Marlowe, that the odor of alcohol was obvious at 8:30 p.m. A partially filled whiskey bottle was also found at the scene of the accident. The Board finds, based on the above, that the applicant drank some whiskey after talking to Cross and before the accident. Given the testimony concerning the strength of the odor, the fact that the applicant was drinking whiskey straight from the bottle, and the clandestine nature of the drinking (as he tried to circumvent the drinking ban imposed by the employer in working and living areas) the Board finds the amount of alcohol ingested shortly before the accident was likely substantial. Oddly enough, based on the testimony of Dr. Rodgers that alcohol is gradually absorbed into the blood stream, the Board finds the drinking shortly before the accident would not have raised the applicant's blood alcohol level much until after the accident. Therefore, the Board finds the applicant's blood alcohol level at the time of the accident was lower than that testified to by Dr. Rodgers. However, based on Dr. Rodgers' testimony that eight drinks would be necessary to raise the applicant's blood alcohol level to .184, the Board found the applicant was intoxicated before his last drink.

The Board also considers a few other bits of information. Dr. Rodgers testified the blood alcohol level at which "passing out" might occur in most people was .350. The applicant testified he had been working since 11:30 a.m., he was therefore about nine hours into his 12 hour shift at the time of the accident. He also testified that he had been up drinking whiskey the previous night until approximately 2:30 a.m. He stated he got up at 10:30 that morning. Finally, security officer Wing testified he had previously seen caribou in the area where the accident occurred. He did not observe anything at the accident site, though, which had indicted the presence of caribou that day.

The Board does not believe the applicant's testimony about the drinking he had, or had not done, the day of the accident or his denial of having owned the whiskey bottle found at the scene of the accident. Given the severity of his head injury, however, the

Board believes the applicant's testimony relating to his inability to recollect the events surrounding the accident. The Board finds all the other witnesses credible.

Professor Larson's treatise contains a number of case notes concerning motor vehicle accidents which have involved application of the proximate cause standard to workers' compensation claims. See, generally, Larson, §34.33. As expected, the results are as varied as the jurisdictions and fact patterns involved. Generally speaking, it appeared that the known circumstances surrounding the accident determined whether the intoxication was found to have proximately caused the accident. Occasionally, a very high blood alcohol level alone was the basis of finding the intoxication proximately caused the accident. Two cases involving sudden swerves necessitated by attempting to avoid other vehicles suddenly blocking the road resulted in finding intoxication had not proximately caused the injuries. The cases split where the accident was unobserved and unexplained.

The Board finds that the accident here was essentially unexplained and apparently unobserved. Although the term "swerved" was used to describe the initiation of the accident sequence, the Board finds the sequence started when the right wheels of the truck encountered the "shoulder" of the road. The Board uses quotes around the term shoulder because, in its experience, gravel service roads rarely have the improved margins typically described as shoulders. A previously noted, no evidence of the consistency and level of the shoulder was addressed.

The Board finds that the applicant's blood alcohol level and observed behavior shortly before the accident do not support a finding that the applicant was so intoxicated he was likely to have been driving "all over the road" unable to maintain position. The Board finds that driving too close to the edge of a gravel road, involving an error of only several feet from the normal safe position on the road, is a not uncommon occurrence which might easily have happened to an inattentive but sober driver. The evidence also suggests the applicant might have been tired near the end of a long work shift. The Board does not find, therefore, that the applicant's truck would not have had two wheels off the road "but for" the intoxication. The Board also finds that the intoxication was not a substantial factor in the truck's wheels ending up on the right shoulder.

Even though the intoxication may not have proximately caused the initial deviation from the road, the applicant's intoxication might still have proximately caused the injuries if it was a substantial factor in preventing him from keeping control of the truck. No expert evidence was offered to show that the applicant's efforts to regain control of the truck were out of the ordinary and therefore inferentially attributable to intoxication.

Anchorage Anch. Daily News 7 Mar 2000

Workers threatened by bill The governor, in response to a labor/management ad hoc committee, sponsored Senate Bill 278, touted to "make a real difference in the lives of injured workers and their families." How true! This bill has the potential to devastate these folks!

Section 7(r) of SB 278 allows injured workers to waive their potential retraining benefit under the workers' compensation system, even before they know whether they will be able to return to work, without counsel and without a thorough understanding of the value of that benefit.

While only 300 out of 27,994 workers injured each year actually qualify for the "re-employment benefit," SB 278 discourages access to even this small group after a legislative audit concluded that the eligibility criteria under the present act are too restrictive and tend to disadvantage injured workers. Furthermore, the audit found that the public policy objective of decreasing workers' compensation premiums has been achieved (by the 1988 Act).

That being the case, I wonder why injured workers are being further sacrificed to solve a nonproblem. Why are the Legislature and the governor in such a rush to give injured workers a hand-out from the state (with benefits from the Divisions of Public Assistance and Vocational Rehabilitation) in lieu of requiring private insurers to give them a hand-up. Passage of Section 7(r) of SB 278 will deny these once-proud workers the ability to learn to earn a living.

-- Marjorie T. Linder

Anchorage

---

him and minimized the trauma and danger for everyone involved.

— *Marilyn M. Dallis*
Anchorage

ADN 13 Mar 2000

Workers bill is 'Grinchy' stuff

I was reminded by Ms. Marjorie T. Linder's letter ("Workers threatened by bill," March 7) of the Dr. Suess book "How the Grinch Stole Christmas."

I went to the Legislative Audit and found out these disturbing facts: Workers' compensation rates are currently reduced by 41.5 percent from the level they were in 1988 when the law was changed. However, Alaska workers have paid the price because they can't get the retraining they need to preserve their incomes or support their families. Section 7 (r) of SB 0278 aims to make it even harder.

Workers may not know what they are signing when they sign a waiver to this benefit too early in their claim. They may not know that they could be giving up $20,000 to $60,000 in benefits. They may not understand that they are really signing up for welfare.

Yep, before they know what hit them, they'll be "down the road" and off the insurance dole. Why is the state so eager to support injured workers who should get retraining to support themselves from the insurance companies? Pretty "Grinchy" stuff, if you ask me!

— *Nancy Harsh*
Anchorage

ADN 13 Mar 2000

Bill hurts injured workers

Thanks for your expose on the workers' compensation audit. In these days when there is a move to privatize state government, I wonder why there is legislation proposed to take over responsibilities of the private sector. I am talking about Senate Bill 0278 and, more specifically, about Section 7 (r).

Under the 1988 Workers' Compensation Act, changes were made to reduce access to the retraining benefit for injured workers. This law has become so restrictive that only 300 out of 28,000 injured workers per year are even found eligible for the benefit.

The number of these folks, whose injuries prevent them from returning to any of the jobs they held in the 10 years preceding their injury, will likely be further reduced, if SB 0278, Section 7 (r) goes through. This section encourages injured workers to waive the re-employment benefit even before they know they may need it. They likely will not understand the value of the benefits they are waiving, which sometimes go as high as $60,000.

Once they've signed the waiver, they'll have no training funds or financial support for themselves and their families. When that happens, these workers will be forced to seek relief from public assistance and Social Security, the state Division of Vocational Rehabilitation and utilize their savings, etc. to stay afloat until they can find a new occupation. The taxpayer will pick up the tab for insurers!

— *John Micks*
Anchorage

Subject: RE: HB 419
Date: Fri, 17 Mar 2000 11:15:42 -0900
From: "Carey, Sally Ann" <Sally_Ann_Carey@Natchiq.com>
To: "'Janet Seitz'" <Janet_Seitz@legis.state.ak.us>
CC: "Ecsword (E-mail)" <Ecsword@cs.com>

Thanks ! I will forward to others to share. Wish I could be available to give testimony but I have to be at Providence ER to handle a company medivac coming in about 2PM. Mary Shields is there and I expect her to be making a testimony. I really appreciate you keeping us so well posted. Thanks again!

-----Original Message-----
From: Janet Seitz [mailto:Janet_Seitz@legis.state.ak.us]
Sent: Friday, March 17, 2000 10:52 AM
To: sally_ann_carey; wvanhemert
Subject: HB 419

<< File: Card for Janet Seitz >> Rep. Rokeberg will have an amendment pending on HB 419 at today's meeting. The amendment reads:

Page 7, line 16, following "employee." INSERT: "This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury."

The Department recommends that "applicable" be changed to "relative" but has no other problems with it.

Mary Shields is in town and will be provided a copy. Do you have any problems with this amendment.

The amendment is to make sure that when an employee is injured that the information requested is directed only at the injury and not a broad brush of the employee's life. It is not meant to limit additional requests for information if, for example, there is a prior injury to the same area involved, or other factors need to be considered about the injury.

Please let me know your feelings, comments, suggestions. HB 419 is probably going to be fourth on the agenda today.

Janet

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 419
2000 LEGISLATIVE SESSION

Revision Date/Time 03/13/2000 Dept. Affected All State Agencies
Title "An act relating to workers' compensation reform. BRU
Component
Sponsor House Rules Committee
Requester House Labor & Commerce Committee Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services	762.9	762.9	762.9	762.9	762.9	762.9
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	762.9	762.9	762.9	762.9	762.9	762.9
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts	75.0	75.0	75.0	75.0	75.0	75.0
1016 Federal Incentive Payments	0.3	0.3	0.3	0.3	0.3	0.3
1133 Indirect Cost Reimbursement	0.1	0.1	0.1	0.1	0.1	0.1
1003 GF Match	18.7	18.7	18.7	18.7	18.7	18.7
1004 GF	372.4	372.4	372.4	372.4	372.4	372.4
1005 GF/Program Receipts	27.5	27.5	27.5	27.5	27.5	27.5
other (GF)	28.0	28.0	28.0	28.0	28.0	28.0
Other (Specify Type)	240.9	240.9	240.9	240.9	240.9	240.9
TOTAL	762.9	762.9	762.9	762.9	762.9	762.9

Estimate of any current year (FY2000) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Consolidation of statewide risk management costs to departments' personal services expense. See attached for detailed fund source amounts.

Prepared by: Joan Brown, Chief Budget Analyst Phone 465-4681
Division Office of Management and Budget Date/Time 3/13/00 12:23 PM
Approved by Director Annalee McConnell Date 03/07/2000
Agency Governor's Office

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HB419 and SB278

Workers' Compensation Reform

Fund Code	Fund Source	Category	Adminstration 105.9	Comm. & Econ. Dev. 6.2	Corrections 93.0	Court System 13.5	Ed & Early Dev. 11.2	Environmental Conservation 10.0	Fish & Game 39.8	Health & Social Srvcs. 117.2	Labor & Workforce Dev. 19.9	Law 8.3	Legislature 5.3	Military & Veterans Affairs 8.0	Natural Resources 40.4	Office of the Governor 3.7	Public Safety 77.2	Revenue 9.1	Transportation & Public Facilities 194.2	Total
1002	Fed Rcpts	Fed	1.4	0.1	2.2		1.2	2.6	10.6	30.0	13.7	0.1		4.3	2.6	0.2	1.7	3.3	1.0	75.0
1016	Fed Incentive Payments	Fed																0.3		0.3
1133	Indirect Cost Reimbursement	Fed																0.1		0.1
		Fed	1.4	0.1	2.2	0.0	1.2	2.6	10.6	30.0	13.7	0.1	0.0	4.3	2.6	0.2	1.7	3.7	1.0	75.4
1003	GF Match	GF	0.4	0.1			0.2	0.6	0.2	14.4	0.8	0.0		0.7	0.3	0.3	0.6		0.1	18.7
1004	GF	GF	46.1	1.0	84.2	13.5	4.0	1.4	12.5	44.3	2.2	4.7	5.3	2.2	22.5	3.2	70.4	1.2	53.7	372.4
1005	GF/PR	GF	10.4	2.0			0.2	0.9	1.3	0.9	0.2	0.1			5.5		1.3	0.5	4.2	27.5
1037	GF/Mental Health	GF	14.9		3.6		0.0			7.1		0.0								25.6
1118	Pioneers Homes Rcpts	GF	2.4																	2.4
		GF Total	74.2	3.1	87.8	13.5	4.4	2.9	14.0	66.7	3.2	4.8	5.3	2.9	28.3	3.5	72.3	1.7	58.0	446.6
1007	IA Recpts	Other	6.8	0.8	0.3		3.1	0.3	2.8	16.0	2.6	3.3		0.4	2.9		2.2	0.4	2.5	44.4
1011	Advance College Tuition Payment Fund	Other																0.0		0.0
1014	Donated Commodity / Handling Fee	Other					0.1													0.1
1017	Benefit Systems Rcpts	Other	2.3																	2.3
1018	Exxon Valdez Oil Spill	Other						0.0	0.9						0.2					1.1
1021	Ag Loan Fund	Other													1.0					1.0
1023	FICA Admin Fund	Other	0.1																	0.1
1024	Fish & Game Fund	Other							7.9			0.0					0.6			8.5
1025	Science & Tech	Other		0.2																0.2
1026	Hwy Working Capital	Other																	14.9	14.9
1027	International Airports Revenue Fund	Other																0.0	34.0	34.0
1029	PERS	Other	3.7																	3.7
1031	Second Injury Fund	Other									0.1									0.1
1032	Disabled Fishermans Reserve Acct	Other									0.1									0.1
1033	Surplus Property	Other	0.3																	0.3
1034	TERS	Other	1.5																	1.5
1035	Vets Revolving Loan Fund	Other		0.0																0.0
1036	Comm Fish Revolving Loan Fund	Other		0.4																0.4
1040	Real Estate Surety Fund	Other		0.0																0.0

Fund Code	Fund Source	Category	Adminstration 105.9	Comm. & Econ. Dev. 6.2	Corrections 93.0	Court System 13.5	Ed & Early Dev. 11.2	Environmental Conservation 10.0	Fish & Game 39.8	Health & Social Srvcs. 117.2	Labor & Workforce Dev. 19.9	Law 8.3	Legislature 5.3	Military & Veterans Affairs 8.0	Natural Resources 40.4	Office of the Governor 3.7	Public Safety 77.2	Revenue 9.1	Transportation & Public Facilities 194.2	Total
1042	Judicial Retirement System	Other	0.0																	0.0
1045	Natl Guard Retirement System	Other	0.1																	0.1
1046	Student Revolving Loan Fund	Other																0.0		0.0
1049	Training & Building Fund	Other									0.1									0.1
1050	Perm Fund Dividend Fund	Other															0.2	0.6		0.8
1051	Rural Dev Initiative Fund	Other		0.0																0.0
1052	Oil/Haz Response Fund	Other						2.5												2.5
1053	ILTF	Other																0.0		0.0
1055	IA Oil & Haz	Other							0.0			0.1		0.2	0.0		0.1			0.4
1057	Small Bus Loan Fund	Other		0.0																0.0
1061	CIP Rcpts	Other	0.2	0.2	0.6		0.0	0.6	1.1	0.8				0.2	2.2			0.3	74.7	80.9
1066	Public School Fund	Other																0.0		0.0
1067	Mining Revolving Loan Fund	Other		0.0																0.0
1068	Child Care Revolving Loan Fund	Other		0.0																0.0
1069	Historical District Revolving Loan Fund	Other		0.0																0.0
1070	Fisheries Enhancement Revolving Loan Fund	Other		0.1																0.1
1071	Alternative Energy Revolving Loan Fund	Other		0.0																0.0
1075	Clean Water Loan Fund	Other						0.1												0.1
1076	Marine Hwy System Fund	Other																	8.3	8.3
1079	Storage Tank Asst Fund	Other						0.2												0.2
1081	ISF	Other	12.8																	12.8
1092	MHTAAR	Other	0.1		0.1					1.5					0.6					2.3
1093	Clean Air Protection Fund	Other						0.6												0.6

Fund Code	Fund Source	Category	Adminstration 105.9	Comm. & Econ. Dev. 6.2	Corrections 93.0	Court System 13.5	Ed & Early Dev 11.2	Environmental Conservation 10.0	Fish & Game 39.8	Health & Social Srvcs 117.2	Labor & Workforce Dev. 19.9	Law 8.3	Legislature 5.3	Military & Veterans Affairs 8.0	Natural Resources 40.4	Office of the Governor 3.7	Public Safety 77.2	Revenue 9.1	Transportation & Public Facilities 194.2	Total
1094	Mental Health Trust Admin	Other																0.1		0.1
1098	Children's Trust Fund Earnings	Other																0.0		0.0
1100	Alaska Drinking Water Fund	Other						0.1												0.1
1101	Aerospace Dev Corp Rcpts	Other		0.0																0.0
1102	AIDEA Rcpts	Other		0.5																0.5
1103	AHFC Rcpts	Other																1.7		1.7
1104	Municipal Bond Bank Rcpts	Other																0.0		0.0
1105	Perm Fund Corp Rcpts	Other													1.0			0.6		1.6
1106	Post-Secondary Ed Comm Rcpts	Other					2.1													2.1
1108	SDPR	Other	2.2		2.0		0.3	0.1	1.1	2.2	0.1	0.0			1.6		0.1	0.0	0.8	10.5
1109	Test Fisheries Rcpts	Other							1.4											1.4
1115	International Trade & Bus Endowment Income	Other		0.0																0.0
1141	RCA Rcpts	Other		0.8																0.8
1147	Public Bldg Fund	Other	0.2																	0.2
		Other	30.3	3.0	3.0	0.0	5.6	4.5	15.2	20.5	3.0	3.4	0.0	0.8	9.5	0.0	3.2	3.7	135.2	240.9
		Grand	105.9	6.2	93.0	13.5	11.2	10.0	39.8	117.2	19.9	8.3	5.3	8.0	40.4	3.7	77.2	9.1	194.2	762.9

Enclosed is testimony given on March 13, 2000 at the State of Alaska Teleconference Site, in downtown Anchorage. This is testimony given in regards to HB 419, and as requested by the committee chairman that session, I am submitting my final points, as requested for review by the committee. Thank you for listening.

Thomas Allen Smith

4-27-2000

Thomas Allen Smith
POB 222104
Anchorage, Alaska
99522-2104
907-243-8346
tas@gci.net

"Next I'd like to go back to Anchorage to Thomas Smith, please to be followed by Robert Sheldon", (Intro by committee chairman from Juneau).

(I am given the high sign by the assistant to speak)

Yes; this is Thomas Smith, and I appreciate the opportunity to speak in front of this body...I'm a little nervous. I haven't done anything like this to date, but I'll give it a try.

My name is Thomas Smith and I am an injured worker. I currently have two injuries. One is a back injury, and one is a foot injury. I'm currently collecting benefits from an insurance company for Worker's Comp. Benefits. I was injured over a year and a half ago after working ten years for the same employer. It became apparent I was not going to be able to work anymore doing the physical labor my back and foot injuries precluded me from doing. I became more reliant on the Worker's Comp. System to help me as the statutes provide. I have also been a resident of Anchorage and the State of Alaska for 43 years, and know it quite well. The reason I bring this up is because I think most of the details about the unfairness of this act are going to come out if they already haven't, er...or..this bill. But I want to address maybe, kind of like the feelings people have about this in general if I may.

Like I've said, I've been a resident since of Anchorage since 1957. That's some 43 years. My father and mother brought me up here when I was just 4 years old from Seattle. I met many of the characters that spice up the nature of this state. My father was a friend to many of these men and women; legislators, governors, senators. From these historical figures, I acquired many of my values. At one point in my life, I actually sat down to lunch with Senator Gruening, and Senator Bartlett when I was a child at a convention in Wash. D.C. It was quite a thrill. I say this because as I read House Bill 419, **AND** I understand it, I wonder what some of these great men would say about House Bill 419 as its written today. I wonder what they would say about Section 7, AS23.30.041, stating, "that notwithstanding an employee may **waive** at anytime any benefits or rights under this section of his rehabilitation benefits. .....Now....., why is that necessary and why would.....why would anybody use this kind of language for something that we have the right to already.

I wonder what these great men would say about a system so **lopsided** in favor of insurance companies that the distinguished bodies that the State of Alaska Legislature **should be** would be reduced to writing words, that can only be considered unfriendly, and difficult.

I wonder what happened to that sense of fairness and justice my father encountered as a new resident to Alaska in 1957, when words were plain and men and women were **obliged** to do the **right** things.

(At this point, I was interrupted by the chairman to clarify my referral to the Section 7 23.30.041 amendment. His statement was "Mr. Smith, if I could interrupt you

just a moment there.... In regards to Section 7 of the bill, it says, "**MAY**"! It is entirely discretionary upon the employee. I'm not sure I understand your point here"

Thomas..."Oh, .I'm probably not speaking as clearly as I'd like to....."

Chairman: "No, No, it could be under drafting menu.? The laws as written in the State of Alaska aren't as clear as they should be when (garbled).... bring to your attention."

Thomas: "Yes, I have that in front of me, and in my nervousness, I might have misspoke but it says here "an employee, may waive at any time", but that's always been our right. Why would they include something like that and make it sound like they are doing us a big favor or something? Like if we don't waive these rights, something terrible is going to happen, like we're going to be **forced** to be retrained or something. That is confusing to me, and though I have a pretty good education, reading these bills and statutes, I am a little bit challenged, so forg".....(interrupted again).

Chairman:" I've been here 6 years and I am too, and I've spent plenty of years in college myself."

Thomas interrupts: "I could use a few more myself,to tell you the truth sir. Ummmm.... I have a few things more to say but I've been told that my time is limited and I **respect** that, and I **appreciate** the opportunity to **TRY** and make my **point**."

Chairman: "Mr. Smith, do you have any other points written down er"....
(Thomas)..,"Yes sir, I do!"
Chairman: "If you could please provide the committee, we'll certainly take the time to review them. And I want to thank you for participating today."

Thomas: "THANK YOU!"

At this point, I would like to submit the rest of my points as the chairman permitted.

"I wonder what happened to that sense of fairness and justice my Father encountered as a new resident to Alaska in 1957, when words were plain and men and women were obliged to do the right things. (new testimony in red or, from this point on) Workers were treated with dignity, and the long history of frontier kindnesses were commonplace, much like the authors of our New State, and the nature of our governments, local, state, and Federal had envisioned. There was the expectation of being treated with concern and expediency, which a new State could and should muster.

Now, the isolation in Juneau of our legislatures to the main body of its constituents, have bred a mean spiritedness, that our founders would most likely have shuddered at.

I have encountered one confusing moment after another, not only in trying to understand the rules and statutes of Workers Compensation, but in trying to have the rules, as I understand them, enforced.

I am certainly no lawyer, though I have the benefit of a good education. But even with that, I can barely wade through the complicated forms and protocol, which can only now be identified as **roadblocks** to my rights.

As little as I do know, about this **user-unfriendly** system, which to the layman, is fully in concert with the obvious wishes of insurance companies, and we suppose, the legislature, I find myself trying to help out other injured workers fill out the simplest of their forms. Because of the complicated nature of trying to deal with their injuries in a manner which they consider fair, many have turned to other injured workers for advice.

To this day, I have not even received my basic proper wage determination for my best 13 weeks. I was injured on 10-16-98.

I ask the ladies and gentlemen of the legislature, to ask themselves "why the mean spiritedness", and if I am (hopefully) wrong, then "why the obvious bias towards insurance companies" or at the very least, "if you are not going to enforce the laws as they are written on the books, then why put them in, in the first place.?"

Please take care of the citizens who are the backbone of our working force in Alaska, and protect the less educated and weaker who get lost in the jungle of laws, obviously not responsive to our most basic needs.

Please remember the past, and the integrity it embodied. If you are not from the Alaska of many years ago, do a little research about it, and try and capture the intent of our founders. So much time has passed, and so much fairness and kindness have vanished. This is not the Alaska, my father brought my family to, in 1957, looking for a new start, and a sense of fairness.

Audit Report

DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WORKERS' COMPENSATION

October 31, 1999

Audit Control Number:

07-4601-00

Division of Legislative Audit

P.O. Box 113300, Juneau, Alaska 99811-3300

HB

422

(7) HOUSE COMMITTEE REPORT

Date Referred to Committee: February 25, 2000 FURTHER REFERRALS:

Date of Committee Action: March 8, 2000

The LABOR AND COMMERCE Committee considered: HB 422

HOUSE BILL NO. 422 WORKERS' COMPENSATION:DRUGS & ALCOHOL

"An Act relating to workers' compensation benefits for injuries resulting from consumption of alcohol or use of drugs; and providing for an effective date."

recommends it be replaced with the following committee substitute _____ [ ] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) DLWD 3/7/00

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
John P. Harris	✓			
Bettencourt	✓			
Lou Bunce			✓	
Jim Sanders			✓	
[illegible]	✓			
Norm Rokeberg	✓			

CHAIR'S SIGNATURE Norm Rokeberg 3-8-2000

3/8/00 Halcro out w/ amdmt + fiscal note

HOUSE BILL NO. 422

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Introduced: 2/25/00
Referred: Labor and Commerce

A BILL

FOR AN ACT ENTITLED

"An Act relating to workers' compensation benefits for injuries resulting from consumption of alcohol or use of drugs; and providing for an effective date."

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

*** Section 1.** AS 23.30.080(a) is amended to read:

(a) If an employer fails to comply with AS 23.30.075, the employer may not escape liability for personal injury or death sustained by an employee when the injury sustained arises out of and in the usual course of the employment because

(1) the employee assumed the risks inherent to or incidental to or arising out of the employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of an employer to furnish reasonably safe tools or appliances; or because the employer exercises reasonable care in selecting reasonably competent employees in the business;

(2) the injury was caused by the negligence of a co-employee;

(3) the employee was negligent, unless it appears that the negligence was wilful and with intent to cause the injury or was the result of wilful **consumption of an alcoholic beverage** [INTOXICATION] on the part of the injured party.

* **Sec. 2.** AS 23.30.120(a) is amended to read:

(a) In a proceeding for the enforcement of a claim for compensation under this chapter, it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter;

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

(3) the injury was not proximately caused by **consumption of an alcoholic beverage by** the [INTOXICATION OF THE] injured employee or proximately caused by the **employee's use** [EMPLOYEE BEING UNDER THE INFLUENCE] of drugs [UNLESS THE DRUGS WERE TAKEN AS PRESCRIBED BY THE EMPLOYEE'S PHYSICIAN];

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

* **Sec. 3.** AS 23.30.235 is amended to read:

Sec. 23.30.235. Cases in which no compensation is payable. Compensation under this chapter may not be allowed for an injury

(1) proximately caused by the employee's wilful intent to injure or kill any person;

(2) proximately caused by **consumption of an alcoholic beverage by** [INTOXICATION OF] the injured employee or proximately caused by the **employee's use** [EMPLOYEE BEING UNDER THE INFLUENCE] of drugs unless the drugs were taken as prescribed by the employee's physician.

Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to an employee who is injured on or after the effective date of this Act.

* **Sec. 5.** This Act takes effect July 1, 2000.

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 422

Revision Date/Time (Note if correction):
Title: Workers' Compensation: Drugs & Alcohol
Sponsor: House L&C
Requestor: House L&C

Department Affected: Labor & Workforce Development
SRU: Workers' Compensation
Component: Workers' Compensation

COMPONENT SERIAL NO. 344

EXPENDITURES/REVENUES: (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
CHANGE IN REVENUE FUND SOURCE #						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other (New Fund)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY00) impact: $ 0.0

ANALYSIS: (Attach a separate page if necessary)

This bill bars an employee's workers' compensation claim if the injury is a result of the employee's willful consumption of an alcoholic beverage or the result of the employee's use of drugs unless the drugs were taken as prescribed by the employee's physician. The department does not anticipate an increase in operating costs as a result of this bill.

Prepared by: Paul Grossi, Director
Division: Workers' Compensation
Phone : 465-2790
Date/Time: 3/7/00 9:13 AM

Approved by Commissioner: Ed Flanagan, Commissioner
Agency: Department of Labor
Date: 3/7/00

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ALASKA STATE LEGISLATURE
HOUSE LABOR AND COMMERCE COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Andrew Halcro, Vice-Chairman
Representative John Harris
Representative Lisa Murkowski
Representative Jerry Sanders
Representative Tom Brice
Representative Sharon Cissna

State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4954
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HOUSE BILL 422

An Act relating to workers' compensation benefits for injuries resulting from consumption of alcohol or use of drugs; and providing for an effective date

House Bill 422 would strengthen workers' compensation laws concerning an employee's use of alcohol or drugs that might lead to an on-the-job accident.

Many Alaskan employers have adopted written policies concerning use of drugs and/or alcohol on the job or being under the influence of such items while at a job site. The State should support those employers who have a zero tolerance policy. Workers' compensation is a system to compensate workers for injuries sustained on the job; however, if that injury is caused by a violation of a state or federal law or employment policy concerning consumption or influence of drugs or alcohol, the employer should not bear the full brunt of the cost of the accident.

While Alaska law does currently cover intoxication and a person being under the influence of drugs, HB 422 would strengthen these sections of current law. It would be made clear that no compensation would be payable in incidents in which an injury was proximately caused by the consumption of an alcoholic beverage or employee's use of drugs. It should be noted that drugs prescribed by a physician would not cause worker's compensation to be loss.

HB 422 would only apply to injuries occurring on or after the effective date of the bill, which is July 1, 2000.

ED1:03/02/00

ALASKA STATE LEGISLATURE

HOUSE LABOR AND COMMERCE COMMITTEE

Representative Norman Rokeberg, Chairman
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HOUSE BILL 422

An Act relating to workers' compensation benefits for injuries resulting from consumption of alcohol or use of drugs; and providing for an effective date

Section 1: Amends 23.30.080 - Employer's failure to insure: Amends to replace "intoxication" with "consumption of an alcoholic beverage".

Section 2: Amends 23.30.120 - Presumptions: Amends presumption statute to reflect consumption of alcoholic beverage and employee's use of drugs.

Section 3: Amends 23.30.235 - Causes in which no compensation is paid: Amends to reflect consumption of alcoholic beverages or employee's use of drugs.

Section 4: Applicability: Act applies to injuries on or after effective date.

Section 5: Effective Date: July 1, 2000.

HB 440

(7)

HOUSE COMMITTEE REPORT

Date Referred to Committee: March 29, 2000 FURTHER REFERRALS: Finance

Date of Committee Action: April 14, 2000

The LABOR AND COMMERCE Committee considered: HB 440

HOUSE BILL NO. 440 PROTECTION FROM NEEDLE & SHARPS INJURIES

"An Act relating to needle stick and sharps injury protections and the use of safe needles by health care facilities and health care professionals; relating to the vaccination of health care workers against diseases transmitted by bloodborne pathogens; and providing for an effective date."

recommends it be replaced with the following committee substitute CSHB440(L+C) [✓] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) _____

_____

[✓] zero fiscal note(s) DH+SS 4/5/00; Corrections 4/4/00

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

_____

[ ] zero fiscal note(s) _____

_____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
			✓	
	✓			
			✓	
			✓	
	✓			

CHAIR'S SIGNATURE _____ 4-14-2000

AMENDMENT #1

OFFERED IN THE HOUSE

OFFERED TO CSHB 440 (L&C), LS1580\H, CRAMER, 4/13/00

Page 1, line 14: DELETE: "(h)"
INSERT: "(g)"

Page 3, lines 19-22: Delete subsection (f).

Reletter remaining subsections.

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DOCUMENT(S)
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AMENDMENT #2

CSHB 440 (L&C) - LS1580/H, Cramer, 4/13/00
DELETE
Page 2, line 19/from "engineering control" through line 22 "procedure"

INSERT: "needleless systems and sharps with engineered sharps injury protections are not required if:" and continue with Insert #1 below

INSERT #1

(A) the devices are not available in the marketplace;

(B) the evaluation committee described in (g) of this section determines by means of objective product evaluation criteria that use of the devices may jeopardize patient safety if used for

(i) a class or type of procedure; or

(ii) a class or type of procedure when performed on a certain type of patient;

(C) a certified or licensed health care worker directly involved in the patient's care determines, in the reasonable exercise of clinical judgment, that use of the devices will jeopardize the patient's safety or the success of the particular medical procedure involving the patient; a health care worker who

makes this determination shall file a report with the employer, in writing, including the date, time, patient, and procedure involved, and a statement of the reasons why the employer failed to use an approved needleless system or sharp with engineered sharps injury protections;

(D) the employer can demonstrate by means of objective product evaluation criteria that use of the devices is not more effective in preventing exposure incidents than the alternative used by the employer; or

(E) the employer can demonstrate, with respect to an engineering control that has not been available in the marketplace for at least 12 months, that reasonably specific and reliable information is not available regarding the safety performance of the engineering control for the employer's procedures, and that the employer is actively determining by means of objective product evaluation criteria whether the use of the engineering control will reduce the risk of exposure incidents occurring in the employer's workplace;

AMENDMENT #3

TO: CSHB 440 (L&C) - LS1580/H, Cramer, 4/13/00

Page 3, line 5, after "exposure incident"
INSERT: "that must include" and continue with Insert #2 below

INSERT #2

(A) the job classification of the exposed employee;

(B) the department or work area where the exposure incident

occurred;

(C) the procedure that the exposed employee was performing at the time of the incident;

(D) how the incident occurred;

(E) the body part involved in the exposure incident;

(F) if the sharp had engineered sharps injury protections, whether the protective mechanism was activated, and whether the injury occurred before the protective mechanism was activated, during activation of the mechanism, or after activation of the mechanism;

(G) if the sharp had no engineered sharps injury protections, the injured employee's opinion as to whether and how such a mechanism could have prevented the injury, as well as the basis for the opinion; and

(H) whether an engineering, administrative, or work practice control could have prevented the injury, as well as the recorder's basis for the opinion.

AMENDMENT #4

TO: CSHB 440 (L&C) - LS1580/H, Cramer, 4/13/00

Page 3, lines 27-31: DELETE current language and insert new language as below:

INSERT #3

(g) An employer who employs 10 or more front-line health care workers shall establish an evaluation committee, at least half the members of which are front-line health care workers. An employer who employs fewer than 10 front-line health care workers shall establish an evaluation committee with at least one member who is a front-line health care worker. An employer who has established a committee before the effective date of this section that satisfies the requirements of this subsection is not required to establish an additional committee under this subsection.

AMENDMENT #5

TO: CSHB 440 (L&C) - LS1580/H, Cramer, 4/13/00

Page 4, line 24, after "workplace;"

INSERT new definition as below

INSERT #4

(6) "front-line health care worker" means a nonmanagerial employee responsible for direct patient care with potential occupational exposure to sharps-related injuries;

renumber remaining sections as necessary

AMENDMENT #6

TO CSHB 440 (L&C), LS 1580/H, Cramer, 4/13/00

Page 5, line 7 after "18.60.880(c)" INSERT ";" and new definition as below:

INSERT #5

(11) "work practice controls" are controls that reduce the likelihood of exposure by altering the manner in which a task is performed.

Page 5, line 8 after "2003." INSERT new Section 3 as below:

INSERT #6

Page 5, after line 8, insert new Section:

Section 3: The uncodified law of the State of Alaska is amended by adding a new section to read:

EMPLOYERS WITH LESS THAN TWENTY-FIVE FULL TIME EQUIVALENT EMPLOYEES: Notwithstanding AS 18.60.880 and 18.60.890, enacted by sect. 1 of this Act, an employer who has fewer than 25 full-time-equivalent employees is not required to comply with AS 18.60.880 and 18.60.890.

Renumber remaining section

1-LS1580\H
Cramer
4/13/00

CS FOR HOUSE BILL NO. 440(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to needle stick and sharps injury protections and the use of safe needles by health care facilities and health care professionals; relating to the vaccination of health care workers against diseases transmitted by bloodborne pathogens; and providing for an effective date."

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

*** Section 1.** AS 18.60 is amended by adding new sections to read:

Article 13. Health Care Protections.

Sec. 18.60.880. Needle stick and sharps injury protections for health care workers. (a) An employer shall conduct product evaluations of needleless systems and sharps with engineered sharps injury protections. The product evaluations shall include the categories of devices that are used in the employer's facilities. For each category of device, the product evaluations shall be performed by front-line health care workers representing all wards and medical specialties where the devices are used. The evaluation committee described in (h) of this section shall determine the amount

of time necessary for the front-line health care workers to perform product evaluations under this subsection. The categories of devices to be evaluated under this subsection include

(1) IV catheters;

(2) IV access devices and IV connectors;

(3) vacuum-tube blood collection devices;

(4) blood-drawing devices including phlebotomy needle and tube holders, butterfly-type devices, and syringes and other similar devices;

(5) syringes used for purposes other than blood drawing;

(6) suture needles;

(7) scalpel devices; and

(8) any other category of device used at the employer's facility where there is a sharps injury risk.

(b) The department shall, by regulation, adopt a standard concerning the use of needleless systems and sharps with engineered sharps injury protections for devices listed in (a) of this section. The regulations must provide that

(1) needleless systems and sharps with engineered sharps injury protections must be included as engineering and work practice controls; however, the engineering control is not required if an evaluation committee established in (h) of this section determines by means of objective product evaluation criteria that use of the devices will jeopardize patient or employee safety with regard to a specific medical procedure;

(2) a written exposure control plan include an effective procedure for identifying and selecting existing needleless systems and sharps with engineered sharps injury protections; the procedure must provide that an evaluation committee described in (h) of this section has responsibility for identifying and selecting the devices;

(3) written exposure control plans shall be updated when necessary to reflect progress in implementing needleless systems and sharps with engineered sharps injury protections as determined by the evaluation committee described in (h) of this section; updating must occur at least once every year;

(4) information concerning exposure incidents shall be recorded in a

sharps injury log as required by (c) of this section.

(c) A sharps injury log must include at least

(1) the date and time of the exposure incident;

(2) the type and brand of sharp involved in the exposure incident; and

(3) the description of the exposure incident.

(d) The department shall adopt regulations to implement AS 18.60.880 - 18.60.890 and to revise the bloodborne pathogen standard to prevent sharps injuries or exposure incidents. The regulations may include

(1) training and education requirements;

(2) measures to encourage the vaccination of health care workers against diseases transmitted by bloodborne pathogens;

(3) requirements for the strategic placement of sharps containers as close to the work area as practical; and

(4) requirements for the increased use of personal protective equipment.

(e) The department shall compile and maintain a list of sources of information on existing needleless systems and sharps with engineered sharps injury protections. The department shall make the list available to assist employers in complying with the requirements of the bloodborne pathogen standard adopted under this section.

(f) Subject to appropriation, the department shall establish a needlestick injury fund. The department may make grants from the fund for research into, development of, and product evaluation of, needleless systems and sharps with engineered sharps injury protections.

(g) Standards adopted under (b) of this section do not apply to the use of a drug or biologic prepackaged within an administration system or used in a prefilled syringe that is approved for commercial distribution or investigational use by the federal Food and Drug Administration.

(h) An employer with more than 15 full-time employees shall establish an evaluation committee, at least half the members of which are front-line health care workers. An employer with fewer full-time employees shall designate the person or persons who are responsible for the committee's functions under (a) and (b) of this section.

(i) Standards adopted under this section do not apply to an employer or supervised employee who primarily uses needles and other sharps for intraoral procedures.

Sec. 18.60.890. Definitions. In AS 18.60.880 - 18.60.890,

(1) "bloodborne pathogens" means pathogenic microorganisms that are present in human blood and can cause disease in humans, including hepatitis B virus, hepatitis C virus, and human immunodeficiency virus;

(2) "department" means the Department of Labor and Workforce Development;

(3) "employer" means an employer having an employee with occupational exposure to human blood or other material potentially containing bloodborne pathogens;

(4) "engineered sharps injury protections" means a physical attribute built into

(A) a needle device used for withdrawing body fluids, accessing a vein or artery, or administering medications or other fluids that effectively reduces the risk of an exposure incident by a mechanism such as barrier creation, blunting, encapsulation, withdrawal, retraction, destruction, or other effective mechanisms; or

(B) another type of needle device, or a nonneedle sharp, that effectively reduces the risk of an exposure incident;

(5) "engineering controls" means controls, including needleless systems and sharps with engineered sharps injury protections, that isolate or remove the bloodborne pathogens hazard from the workplace;

(6) "needleless system" means a device that does not use needles for

(A) the withdrawal of body fluids after initial venous or arterial access is established;

(B) the administration of medication or fluids; or

(C) another procedure involving the potential for an exposure incident;

(7) "sharp" means an object used or encountered in a health care setting

that can be reasonably anticipated to penetrate the skin or any other part of the body and to result in an exposure incident, including needle devices, scalpels, lancets, broken glass, and broken capillary tubes;

(8) "sharps injury" means cuts, abrasions, needlesticks, or other injuries caused by a sharp;

(9) "sharps injury log" means a written or electronic record satisfying the requirements of AS 18.60.880(c).

* **Sec. 2.** AS 18.60.880(g) is repealed December 31, 2003.

* **Sec. 3.** This Act takes effect January 1, 2001.

April 4, 2000

TO: Senator Torgerson

FROM: Senator Elton

RE: Proposed Finance CS for CSSB 261 (HESS)

The proposed Finance CS includes the following changes:

1. Dentists are excluded from the requirements of the bill.
   - Needleless devices and devices with sharps injury protection have not been shown to be successful in dental settings because of the difficulties of intraoral injections.
   - Needlesticks don't appear to be a big problem in dentistry and I haven't heard concerns from dental hygienists.

2. References to dental devices are removed from the definitions section

3. The six-month evaluation period is changed to a period that's as long as necessary to determine the efficacy of the devices, as determined by an evaluation committee which includes frontline health care workers.
   - A mandated length for the evaluation period was a concern for the State's Division of Public Health, as well as several hospitals in the state. The new wording allows more flexibility but ensures the involvement of frontline workers and has been accepted by HSS.

4. Wording is clarified with regard to the product evaluation committee. This committee is established by the employer and at least half of its members must be front-line health care workers. This committee is responsible for identifying and selecting devices as part of an exposure control plan, and for determining when the exposure control plan needs to be updated with regard to safer devices. In the old version, the references for this committee were incorrect.

5. Language concerning the product evaluations is clarified. In the current bill, there is a possibility that the bill can be interpreted as only requiring facilities to evaluate safer devices that they are *already* using. In the CS, it will be clear that facilities will evaluate safer devices that fall in the categories listed in section (a). Employees need only evaluate devices for categories used in the facilities (i.e., a clinic won't need to evaluate I.V.'s since they don't use that category of device).

Please contact my office if you have questions or concerns.

1-LS1580\D
Cramer
4/5/00

CS FOR HOUSE BILL NO. 440( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to needle stick and sharps injury protections and the use of safe needles by health care facilities and health care professionals; relating to the vaccination of health care workers against diseases transmitted by bloodborne pathogens; and providing for an effective date."

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

* **Section 1.** AS 18.60 is amended by adding new sections to read:

Article 13. Health Care Protections.

Sec. 18.60.880. Needle stick and sharps injury protections for health care workers. (a) An employer shall conduct product evaluations of needleless systems and sharps with engineered sharps injury protections. The product evaluations shall include the categories of devices that are used in the employer's facilities. For each category of device, the product evaluations shall be performed by front-line health care workers representing all wards and medical specialties where the devices are used. The evaluation committee described in (h) of this section shall determine the amount

of time necessary for the front-line health care workers to perform product evaluations under this subsection. The categories of devices to be evaluated under this subsection include

(1) IV catheters;

(2) IV access devices and IV connectors;

(3) vacuum-tube blood collection devices;

(4) blood-drawing devices including phlebotomy needle and tube holders, butterfly-type devices, and syringes and other similar devices;

(5) syringes used for purposes other than blood drawing;

(6) suture needles;

(7) scalpel devices; and

(8) any other category of device used at the employer's facility where there is a sharps injury risk.

(b) The department shall, by regulation, adopt a standard concerning the use of needleless systems and sharps with engineered sharps injury protections for devices listed in (a) of this section. The regulations must provide that

(1) needleless systems and sharps with engineered sharps injury protections must be included as engineering and work practice controls; however, the engineering control is not required if an evaluation committee established in (h) of this section determines by means of objective product evaluation criteria that use of the devices will jeopardize patient or employee safety with regard to a specific medical procedure;

(2) a written exposure control plan include an effective procedure for identifying and selecting existing needleless systems and sharps with engineered sharps injury protections; the procedure must provide that an evaluation committee described in (h) of this section has responsibility for identifying and selecting the devices;

(3) written exposure control plans shall be updated when necessary to reflect progress in implementing needleless systems and sharps with engineered sharps injury protections as determined by the evaluation committee described in (h) of this section; updating must occur at least once every year;

(4) information concerning exposure incidents shall be recorded in a

sharps injury log as required by (c) of this section.

(c) A sharps injury log must include at least

(1) the date and time of the exposure incident;

(2) the type and brand of sharp involved in the exposure incident; and

(3) the description of the exposure incident that must include

(A) the job classification of the exposed employee;

(B) the department or work area where the exposure incident occurred;

(C) the procedure that the exposed employee was performing at the time of the incident;

(D) how the incident occurred;

(E) the body part involved in the exposure incident;

(F) if the sharp had engineered sharps injury protections, whether the protective mechanism was activated, and whether the injury occurred before the protective mechanism was activated, during activation of the mechanism, or after activation of the mechanism;

(G) if the sharp had no engineered sharps injury protections, the injured employee's opinion as to whether and how such a mechanism could have prevented the injury, as well as the basis for the opinion; and

(H) whether an engineering, administrative, or work practice control could have prevented the injury, as well as the recorder's basis for the opinion.

(d) The department shall adopt regulations to implement AS 18.60.880 - 18.60.890 and to revise the bloodborne pathogen standard to prevent sharps injuries or exposure incidents. The regulations may include

(1) training and education requirements;

(2) measures to encourage the vaccination of health care workers against diseases transmitted by bloodborne pathogens;

(3) requirements for the strategic placement of sharps containers as close to the work area as practical; and

(4) requirements for the increased use of personal protective equipment.

(e) The department shall compile and maintain a list of sources of information on existing needleless systems and sharps with engineered sharps injury protections. The department shall make the list available to assist employers in complying with the requirements of the bloodborne pathogen standard adopted under this section.

(f) Subject to appropriation, the department shall establish a needlestick injury fund. The department may make grants from the fund for research into, development of, and product evaluation of, needleless systems and sharps with engineered sharps injury protections.

(g) Standards adopted under (b) of this section do not apply to the use of a drug or biologic prepackaged within an administration system or used in a prefilled syringe that is approved for commercial distribution or investigational use by the federal Food and Drug Administration.

(h) An employer shall establish an evaluation committee, at least half the members of which are front-line health care workers.

(i) Standards adopted under this section do not apply to an employer or supervised employee who primarily uses needles and other sharps for intraoral procedures.

Sec. 18.60.890. Definitions. In AS 18.60.880 - 18.60.890,

(1) "bloodborne pathogens" means pathogenic microorganisms that are present in human blood and can cause disease in humans, including hepatitis B virus, hepatitis C virus, and human immunodeficiency virus;

(2) "department" means the Department of Labor and Workforce Development;

(3) "employer" means an employer having an employee with occupational exposure to human blood or other material potentially containing bloodborne pathogens;

(4) "engineered sharps injury protections" means a physical attribute built into

(A) a needle device used for withdrawing body fluids, accessing a vein or artery, or administering medications or other fluids that effectively reduces the risk of an exposure incident by a mechanism such as barrier

creation, blunting, encapsulation, withdrawal, retraction, destruction, or other effective mechanisms; or

(B) another type of needle device, or a nonneedle sharp, that effectively reduces the risk of an exposure incident;

(5) "engineering controls" means controls, including needleless systems and sharps with engineered sharps injury protections, that isolate or remove the bloodborne pathogens hazard from the workplace;

(6) "needleless system" means a device that does not use needles for

(A) the withdrawal of body fluids after initial venous or arterial access is established;

(B) the administration of medication or fluids; or

(C) another procedure involving the potential for an exposure incident;

(7) "sharp" means an object used or encountered in a health care setting that can be reasonably anticipated to penetrate the skin or any other part of the body and to result in an exposure incident, including needle devices, scalpels, lancets, broken glass, and broken capillary tubes;

(8) "sharps injury" means cuts, abrasions, needlesticks, or other injuries caused by a sharp;

(9) "sharps injury log" means a written or electronic record satisfying the requirements of AS 18.60.880(c).

* Sec. 2. AS 18.60.880(g) is repealed December 31, 2003.

* Sec. 3. This Act takes effect January 1, 2001.

HB 440/SB 261—Safer Needles Bill

Sponsor Statement

SB 261 brings needed protection to health care workers from accidental needlestick injuries.

Health care workers are at particular risk on the job because of the danger of disease transmission. Accidental needlesticks can transmit bloodborne diseases such as hepatitis B, hepatitis C, and human immunodeficiency virus (HIV). Nationwide, health care workers suffer between 600,000 and one million accidental needlesticks per year. Between 50,000 and 60,000 health workers have contracted serious diseases from needle sticks in the last decade, and on average one health care worker per week is exposed to HIV.[1] While HIV is the highest profile disease, experts now estimate that more health care workers will eventually die from exposure to hepatitis C than from HIV.[2] Medical workers are four times more likely than police officers to die from a job-related injury.[3]

A number of manufacturers currently produce safer needle devices with self-retracting needles, self-blunting tips, or other technology, and their effectiveness in reducing injuries has been demonstrated in evaluations by the Centers for Disease Control and Prevention. 250 such devices are FDA-approved, yet only 15% of hospitals use safer needles.[4]

Health care facilities have been slow to use safer needles because they are more expensive. But these devices save money in the long-term by reducing testing and care for workers accidentally exposed through needlesticks. The cost for testing following a high-risk needlestick injury is nearly $3,000, even when no infection occurs. A serious infection can cost upwards of $1 million when you include lost time and disability payments. In California, the first state to pass a safer needle law, hospitals and health care employers are expected to save $100 million per year thanks to reduced accidents. As ever more health care facilities use safer needles, prices can be expected to go down.[5]

SB 261 requires health care facilities to evaluate safer needle devices, and triggers new regulations requiring the use of safer needles when appropriate. The bill requires the Department of Labor to adopt regulations requiring health care facilities to:

- include safer needles as engineering and work practice controls (except in cases where a committee including frontline health care workers determines these devices will jeopardize safety);
- include a procedure for identifying safer needles in the facility's exposure control plan;
- update the exposure control plan as new technology is developed; and
- record exposure incidents in a sharps injury log.

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[1] Source: *San Francisco Chronicle*, 4/13/98, p. A1
[2] Washington State Legislature, Senate Bill Report for ESSB 6416
[3] Source: *San Francisco Chronicle*, 4/13/98, p. A1
[4] Source: American Nurses Association
[5] Source: *San Francisco Chronicle*, 12/18/98

In addition the Department of Labor may adopt regulations that include training and education requirements, measures to increase vaccinations, requirements for placement of sharps waste containers, and requirements for the use of personal protective equipment. The Department of Labor is required to compile a list of safer needle devices and to make the list available to employers. Finally, a needlestick injury fund is established which, subject to appropriation, may make grants for research, development, and product evaluation of safer needles.

Five states have already passed safer needle legislation and bills are pending in 20 states besides Alaska. In Washington, a similar bill recently passed the state senate by an overwhelming bipartisan margin. In Massachussetts, a safer needle bill was spurred on by testimony from the president of the Massachussetts Nurses Association, who acquired both HIV and hepatitis C from an accidental needlestick.

SB 261 is based on model legislation being used around the country. The American Nurses Association has led efforts to pass safer needle legislation at the state and federal level, and this bill is strongly supported by the Alaska Chapter of the ANA.

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. CSSB 261 (HES)

Revision Date/Time (Note if correction): _____ Dept. Affected: Health and Social Services

Title: Relating to needle stick and sharp injury protections

BRU: State Health Services

Component: Nursing

Sponsor: Elton

COMPONENT SERIAL NO. 288

Requestor: Senate FIN

See also (SN#): _____

Expenditures/Revenues: (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: $0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Peter M. Nakamura, MD, MPH Phone: 465-3090

Division: Division of Public Health Date/Time: 3/30/00 1:37 PM

BT

Approved by Commissioner: Karen Perdue, Commissioner Date: 3/31/00

Agency: Department of Health & Social Services

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