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February 15, 2018

Alaska State Representatives by e-mail

Dear Representative,

I request that you oppose HB 303 and SB 112, two acts designed to eviscerate our workers compensation system.

I represent injured Alaskans in workers compensation claims. The vast majority of my clients want to "get fixed" (receive medical treatment) and go back to work as soon as possible. On the occasions it turns out they cannot go back to their job, they want retraining so they can work. Working, earning wages and paying their bills like responsible citizens are core values of these people.

These bills are designed to deny injured workers the opportunities to get fixed and go back to work. Ultimately they will be shifted onto the backs of working Alaskans to support and provide treatment for as an ever-growing body of unemployed and homeless expands.

These are the specific problems I see with these bills:

HB 303. The net effect of this bill is that it will render more injured workers permanently totally disabled, creating an increase in benefits owed by employers, as they will be unable to complete retraining:

Section 5 would amend AS 23.30.041(e) to create two separate classes of workers who would be denied reemployment benefits if they have the physical capacities to perform (2) "other jobs that exist in the labor market" (A) that the employee has held or received training for within 10 years before the injury; or (B) that offer wages that ensure remunerative employability for the employee that the employee has held following the injury..." There is no rational basis for drawing a distinction between workers who had jobs before their injury which do not provide remunerative employability and those workers who after their injury held jobs that did provide remunerative employability. As such, I foresee a constitutional challenge.

Section 9 would amend AS 23.30.041(h) to provide for retraining that would include (3)(A) on-the-job training, (B) vocational training, (C) academic training; (D) self-employment; or (E) a combination of (A)-(D). These are laudable goals. However the cost of the employment plan makes no allowance for costs of starting up a self-employed business. Moreover, the $19,300 total cost of plan set out in Section 12 is inadequate for academic training and self-employment especially when University of Alaska raises its tuition every year.

Section 11 would amend AS 23.30.041(k) to limit benefits prior to plan approval to one year and benefits post-approval to two years. In the event that a plan could not be approved or completed within those time periods, the injured worker only has two choices: complete their plan without any income to support

themselves, a luxury most laborers do not have, or quit. This is a particularly draconian result when the amendments also may preclude him from seeking job dislocation benefits instead of retraining[1], settling these benefits[2] and, because the injured worker participated in a reemployment plan, he will be forever barred from seeking reemployment benefits again[3] if he was fortunate enough to obtain another job.

Additionally there is a draconian denial of modification can be sought in the amendments. Under Section 17, AS 23.30.041(s)(5) precludes an injured worker from modifying his decision to select job dislocation benefits, even if these benefits are far less than he would have received in retraining and even if there was a change in conditions or a mistake. He is also precluded from modifying a decision to terminate the plan under proposed (w)(3) even if he was unable to convert his decision into job dislocation benefits because of passage of time and even if there was a change in conditions or a mistake.

SB 112. The primary issues with this bill is that it will prevent injured workers from obtaining the medical treatment they need so they can go back to work, terminate temporary total disability benefits after two years even if the worker is not medically stable and cannot work and unconstitutionally denying access to counsel. Again, the net result is more Alaskans who cannot work imposing a burden on the state to provide them with support and medical treatment in direct conflict with the proposed amendment section 5 which adds the language that "the workers' compensation system shall be cost-effective to the citizens of the state."

More specifically:

First, the several provisions which would eliminate the Workers' Compensation Board and shift claim-level litigation to the Office of Administrative Hearings would not be cost-effective. Currently with the Board, we are blessed with a body of hearing officers versed in the highly-technical and complicated area of law. Removing and replacing them with ALJs would create a maelstrom of incorrectly decided cases and a flood of appeals.

The amendments to AS 23.30.041 proposed in Section 24 are irrational. Under (h), the voucher would expire within two years after the date it is issued or five years after the date of injury. So, if the voucher was issued four years and ten months after the date of injury, it would expire in two months even if retraining had not been completed because the injured worker had the misfortune of having a complicated injury and it took that long for him to receive the voucher.

Under proposed (j), "[a]n employer may not be liable for compensation for injuries incurred by the employee while using a voucher issued under this section." What does that mean? If the work-injury is reinjured during the course of retraining, the employer is not liable? Who then will pay for the treatment necessary so the employee can continue retraining?

Under proposed (k), there is no wage replacement while retraining other than the lump-sum payment of permanent partial impairment ratings. Then how is the injured worker to survive while he goes through retraining? Very few workers have the luxury of living without an income while they are going to school.

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[1] Section 17 amendment to AS 23.30.041(s)
[2] Section 15 amendment to AS 23.30.041(q)
[3] AS 23.30.041(k)(e)(3)

The employee is forever barred from receiving permanent total disability benefits if he qualifies for a voucher and fails to use it. So he finds himself in a situation where he cannot complete retraining because he has no wage replacement so he is permanently unemployable. Who will support this person and his family? Who will provide for his medical benefits? The State of Alaska will.

Section 26 limits treatment guidelines to the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines regardless of the specialty of the treating physician. If treatment outside of the guidelines is requested, the employer or insurer may request an administrative review, however there is no such provision for the employee.

Treatment is cut off in its entirety two years after the date of injury under Section 26's amendments to AS 23.30.095(a) regardless of whether treatment or care is necessary. However later in the same paragraph, treatment after two years is authorized only for prosthetic devices, braces and supports, certain pain medication under certain conditions, and life-preserving modalities. So in those cases we typically see where a joint (hip, knee, shoulder or elbow) must be replaced because of the injury, the subsequent replacement surgeries typical of those injuries are barred even if there is no intervening circumstances or superseding cause.

The employer is allowed to designate the attending physician under this same amendment. And that designation does not constitute an independent medical evaluation. Thus the employer is allowed to dictate who the treating physician is as well as choose its own expert whereas under existing law. There is no advocate for the employee.

Section 28 proposes an amendment to AS 23.30.095(e) which would allow an employer to demand a mental health examination of an injured worker with no rational basis for doing so. Unfortunately, it is a common insurance ploy to claim that an injured worker is not really injured but instead manifesting secondary gain, conversion syndrome or some other psychological reason that would cause him or her to claim pain is being suffered. This section gives the insurance company carte blanche to claim this defense in every case and, because the employee is not allowed to pick his or her treating physician, there is no one to advocate for the employee.

Under Section 32, AS 23.30.095(o) limits palliative care to the same evidence-based guidelines when necessary only so the employee can continue working. Palliative care necessary for retraining is eliminated. Palliative care to relieve chronic debilitating pain is eliminated even if it was caused by the work injury.

Section 52 would modify AS 23.30.122 to limit the Board's ability to determine credibility which is otherwise in its sole province.[4] There is no such legislation curtailing a jury or judge's credibility determinations in court, nor any legislation in any other administrative matters. It is doubtful that this distinction can pass constitutional muster.

Additionally, Section 52 limits the use of lay testimony under proposed (c). It cannot be relied upon for causation, impairment, ability to work, physical capacities, or past and future medical treatment. Thus, the

[4] AS 23.30.122

injured worker's family, those people most familiar with the injured worker's abilities before and after the injury and efficacy of treatment would be excluded from testifying. Again, this does not appear it would pass constitutional muster.

Section 69 would terminate permanent total disability if the employee begins to receive social security, pension or other retirement benefits. This provision is unfair to the injured worker and designed to keep aged, injured, disabled workers in a state of poverty. The reason it is unfair is that a disabling work injury would prematurely stop the employee's contributions to his social security fund, pension or other retirement benefits thus he would be forced to live on whatever benefits were amassed before the disabling injury. A much more fair system is in place now whereby the insurance company is entitled to a deduction for these types of benefits.

Section 70 would amend AS 23.30.185 to cap temporary total disability benefits to a maximum of two years even if the injured worker is disabled. It is rare, but sometimes happens, that a worker is so injured that he or she is not medically stable within two years of the date of injury. What is more common is that after medically stability, the injured worker needs a second or a third surgery which necessitates a lengthy recovery. This provision is designed to prevent payment of those benefits even if the worker cannot work even if the disability was wholly caused by the work injury.

The bill would runs afoul with the injured worker's constitutional right to counsel. *Langfeldt-Haaland v Saupe Enterprises, Inc*, 768 P 2d 1144, 1146 (Alaska, 1989). See Section 63. It would limit attorney's fees to certain percentages regardless of the amount of effort it took to bring the case to conclusion. It would wipe out compensation for all the work done if a settlement offer was made at least thirty days before a hearing. By language in (d), successfully obtaining medical benefits after hearing would not lead to the award of attorney's fees at all.

The intent is to make it uneconomical for attorneys to practice workers compensation law which is fundamentally unfair to the injured workers. In the present system, attorneys are only paid if they are successful in obtaining benefits, benefits to which the injured worker was entitled but were denied by the insurance companies. This is a fair system. After every hearing, the employer has the opportunity to object to attorneys fees sought both in the amount per hour and line item of services provided. If the insurance companies were interested in limiting employee attorney fees, they have a simple solution available to them: do not deny benefits unfairly.

There is no other area of law where attorneys fees are limited to the amount recovered. It is true that in civil cases, attorneys have a contingency fee agreement whereby the client pays the attorney a portion of their settlement or judgment and that Civil Rule 82 provides for the payment of fees pursuant to a schedule but that does not preclude the attorney from being paid by his client. However, even under Rule 82, the court may award full fees depending on a number of factors including "vexatious or bad faith conduct" of the other party.

But that provision is not in place here which would lead to abuse whereby the insurance company is free to stall, delay and impede the litigation process forcing the employee's attorney to expend an extraordinary amount of effort to conclude the case and that attorney would only be paid for benefits over and above medical benefits when medical benefits are usually the core of the case.

Because there is no other area of law where fees are limited in this way, this distinction leads to a constitutional challenge.

Currently it is illegal for an attorney to accept fees from an injured worker unless for a consultation in a case in which the attorney will not appear,[5] however employer attorney fees are not regulated at all and approximately two-thirds of litigation costs currently paid by insurance companies are paid to their own attorneys.[6]

I wish to stress that in every instance I have identified as problematic, and there may be more if these bills are passed, litigation would no doubt ensue putting more pressure on Alaska legal system.

To summarize, Alaska's economy is not improved by creating a larger population of disabled people. They cannot earn money to pay their bills. They cannot contribute to the state's resources. They cannot pay taxes. They will draw welfare and Medicaid. As the Alaska population in poverty expands, crime is bound to as well.

So please vote to keep the social contract between employer and employee in place, the one which the legislature worked very hard on since statehood to make sure that employees will have access to benefits when they are hurt on the job and employers will have access to able-bodied employees.

Thank you for your time and consideration.

Cordially,

Law Office of Keenan Powell

Keenan Powell

[5] 8 AAC 45.180(c).
[6] 8 AAC 45.180(h).