28 WORKERS' COMPENSATION[370]

The Alaska Workers Compensation Act was dramatically revised by the Alaska Legislature in 1988.[371] Like most states, Alaska workers compensation benefits are the exclusive remedy of the employee against his or her employer.[372] This includes temporary employees working for temporary employers.[373] There are substantial civil and criminal penalties for an employer who fails to insure its employees. In addition, an employee of an uninsured employer may elect to pursue the employer under the Act or under common law. If the employee elects his remedy under the Act, it is presumed that the employee's injuries arise out of the course of his employment. In addition, the limits of liability do not apply.[374]

However, the presumption of compensability does not apply to mental stress claims. To receive benefits for mental stress injuries, the employee must demonstrate that the work stress was extraordinary and unusual in comparison to the stress experienced by others in comparable work environment and that the work stress was the predominant cause of the mental injuries.[375] Injuries resulting from disciplinary actions taken in good faith by the employer are not compensable.[376]

The Act covers only employees who work in a business or industry.[377] The Act does not apply to part-time baby-sitters, cleaning persons, harvest help and similar part-time or transient help, persons employed as entertainers on a contractual basis, and commercial fishermen.[378] Also, compensation is not owing to an otherwise covered employee for an injury proximately caused by the employee's willful intent to injure or kill any person, or by the intoxication of the injured employee, or by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician.[379]

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[370] The workers' compensation statutes are too voluminous for inclusion in the Law Summary. However, we will be happy to send you copies of the statutes you request.

[371] The New Act only applies to injuries occurring after the effective date of the statute – July 1, 1988.

[372] *See* AS 23.30.055.

[373] *Anderson v. Tuboscope Vetco*, 9 P.3d 1013 (Alaska 2000).

[374] *See* AS 23.30.080.

[375] *Williams v. State, Dep't of Revenue*, 938 P.2d 1065 (Alaska 1997); *see also* AS 23.30.120(c).

[376] *See* AS 23.30.120(c).

[377] *Goede v. Saunders*, 2002 WL 19998309, holding that homeowners were not "employers" where the "employee" was doing construction work on the house.

[378] *See* AS 23.30.230.

[379] *See* AS 23.30.235.

Disabilities

Alaska recognizes temporary partial disability ("TPD"), temporary total disability ("TTD"), permanent partial impairment ("PPI"), and permanent total disability ("PTD"). An employee's degree of permanent impairment is determined from the American Medical Association's Guides to the Evaluation of Permanent Impairment ("the Guides").

Under the Act, rehabilitation benefits must be elected by the employee within the first 90 days following the injury, unless the reemployment benefits administrator determines that the employee has an "unusual and extenuating circumstance that prevents the employee from making a timely request."[380] An employee is entitled to rehabilitation benefits upon the employee's written request and having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of his job as described in the U.S. Department of Labor's "Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles."[381] Furthermore, the Act places a $10,000 cap on the amount due under an approved rehabilitation program as well as a two (2) year limitation for completion of the plan.[382] The Alaska Supreme Court has held that any time and money spent on the implementation of a reemployment plan agreed upon or approved pursuant to AS 23.30.041(j) must be counted toward the statutory maximums set forth in AS 23.30.041(k) and (l). This is true even if the plan fails and a new plan is required.[383]

While in the rehabilitation process, an employee continues to receive his TTD benefits unless he becomes medically stable. At that point, he begins to receive his PPI benefits but in periodic payments equal to his TTD benefits. TTD benefits are terminated after the employee resumes employment.[384] If the PPI benefits are exhausted but the reemployment plan is still in effect, he will be paid "041(k)" benefits equal to 60% of his spendable weekly wages, not to exceed $525 per week.[385] However, this 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."[386] Thus, an employee may receive PTD benefits while participating in the reemployment plan.[387]

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[380] *See* AS 23.30.041(c).

[381] *See* AS 23.30.041(e).

[382] *See* AS 23.30.041 (k) and (l).

[383] *Binder v. Fairbanks Historical Preservation Found.*, 880 P.2d 117 (Alaska 1994).

[384] *Bauder v. Alaska Airlines* (Alaska 2002).

[385] *See* AS 23.30.041(k).

[386] *Meek v. Unocal Corp.*, 914 P.2d 1276, 1280 (Alaska 1996).

[387] *Id.*

Medical Benefits

Injured workers are also entitled to payment of medical benefits related to the injury.[388] The medical benefits must be paid for the period that the nature of the injury or the process of recovery requires. The employee is entitled to change physicians only once without the employer or carrier's written consent unless the current physician becomes unwilling or unavailable to treat or sends the employee to a specialist.[389] If the employee makes a change not in accordance with this rule, the employer is not responsible for the medical expenses related to the unauthorized change. Furthermore, if the frequency of the employee's medical treatments will exceed the statutory standard, the employee's health care provider must submit a treatment plan following the procedure provided for in 8 AAC 45.082(g), or the Board *cannot* allow the more frequent treatments.[390]

An employee who suffers a work-related injury must give written notice to his or her employer within thirty (30) days.[391] This thirty-day time period begins, at the earliest, when a compensable event occurs, such as when the employee first visits a healthcare provider for the injury and incurs medical costs.[392] However, failure to give formal notice does not bar a claim if the employer had actual knowledge of the injury and the board determines that the employer or carrier has not been prejudiced by the employee's failure to give formal notice.[393] For purposes of giving actual notice under AS 23.30.100(d)(1), the employee gives notice to the employer when he or she informs a supervisory co-worker of his or her problems from the injury.[394] It is not necessary that the employer have knowledge of the work-relatedness of the injury.[395] Furthermore, both the thirty day notice period and the two-year statute of limitations for filing a claim are suspended until the injury's work-relatedness is diagnosed if the employee's injury is a latent injury.[396] Nevertheless, a claimant will be required to file a claim within the two-year statute of limitations once he has actual or chargeable notice of his disability.[397]

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[388] *See* AS 23.30.095.

[389] *Bloom v. Tekton*, 5 P.3d 235 (Alaska 2000).

[390] *Grove v. Alaska Constr. and Erectors*, 948 P.2d 454 (Alaska 1997); *see also* AS 23.30.095(c).

[391] *See* AS 23.30.100(a); *Dafermo v. Municipality of Anchorage*, 941 P.2d 114 (Alaska 1997).

[392] *Cogger v. Anchor House*, 936 P.2d 157 (Alaska 1997).

[393] *See* AS 23.30.100(d)(1); *see also Kolkman v. Greens Creek Mining Co.*, 936 P.2d 150 (Alaska 1997); *Williams v. State, Dep't of Revenue*, 938 P.2d 1065 (Alaska 1997); *Dafermo*, 941 P.2d 114; and *Cogger*, 936 P.2d 157.

[394] *Cogger*, 936 P.2d 157; *see also Williams*, 938 P.2d 1065.

[395] *Dafermo*, 941 P.2d 114; *see also Kolkman*, 936 P.2d 150.

[396] *Dafermo*, 941 P.2d 114; *see also* AS 23.30.105(a).

[397] *Collins v. Arctic Builders*, 31 P.3d 12886 (Alaska 2002).

Alaska law includes one of the most liberal attorney fees statutes for workers' compensation claims. Statutory minimum fees are awarded to an injured worker's attorney for securing benefits for the employee.[398]

Settlements of workers' compensation claims must be approved by the Workers' Compensation Board. The Board will consider whether the settlement is in the best interest of the employee. Unless the Board is satisfied that settlement is in the employees' best interest, it is unlikely to approve the settlement. For example, an employee's settlement may be set aside if it was the product of fraud or misrepresentations by the employer or the employer's insurance company.[399]

Insurance carriers are subject to the same claims handling standards with respect to injured workers as they are with first party insureds. Therefore, it is imperative that insurers follow the rules set forth in Alaska's Unfair Claims Settlement Practices Act.[400]

Additional changes to the Act were adopted in 1995. Among the modifications included were changes in the definition of "spendable weekly wage" used in calculating an injured employee's benefits,[401] limited immunity for design professionals for civil suits by persons injured at a construction site;[402] immunity to those who have conducted workplace safety inspections from suits brought by injured workers;[403] and penalties for fraudulent or misleading statements made in connection with workers' compensation claims.[404]

In 1997 the Legislature enacted more sweeping changes to Alaska's tort laws and civil rules. An important change for workers' compensation carriers to recognize and beware of is that employers are now[405] included among those to whom fault may be allocated. If fault is allocated to an employer, the employee can reduce the amount

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[398] *See* AS 23.30.145.

[399] *Blanas v. The Brower Co.*, 938 P.2d 1056 (Alaska 1997).

[400] *See* Tab 18 Unfair Claim Settlement Practices.

[401] *See* AS 23.30.220(a). The "spendable weekly wage" and thus the employee's weekly benefit rate, is computed with reference to the employee's earnings at "the time of injury." AS 23.30.220(a). When the employee has suffered a series of injuries, the injury used as the basis for the rate calculation must be a legal cause of the disability (i.e. a substantial factor in causing the disability) that the employee claims prevents him or her from earning the wages the employee was earning at the time of the injury. *See Wells v. Swalling Constr. Co.*, 944 P.2d 34 (Alaska 1997).

[402] *See* AS 23.30.017.

[403] *See* AS 23.30.263.

[404] *See* AS 23.30.250.

[405] The changes only apply to causes of action accruing on or after August 7, 1997.

owed to the employer for workers compensation payments under AS 23.30.015(g) by an amount equal to the employer's share of the damages assessed under AS 09.17.080(c). If the carrier has assumed payment of compensation, under AS 23.30.105(i) the carrier is subrogated to all the rights of the employer. Thus, the carrier may find that where the employer is apportioned a percentage of fault, the carrier has lost a portion of its lien against the worker's recovery of damages. These changes are intended to negate *Lake v. Construction Machinery, Inc.*, 787 P.2d 1027 (Alaska 1990), and to modify *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994). A final caveat is that this section of the statutory law is poorly written, and is likely to be subject to further revisions.

Appendices:

AS 09.17.080
AS 23.30.015
AS 23.30.017
AS 23.30.041
AS 23.30.055
AS 23.30.080
AS 23.30.095
AS 23.30.100
AS 23.30.105
AS 23.30.120
AS 23.30.145
AS 23.30.230
AS 23.30.235
AS 23.30.250
AS 23.30.263

Sec. 09.17.080. Apportionment of damages. (a) In all actions involving fault of more than one person, including third-party defendants and persons who have settled or otherwise been released, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages unless the person was identified as a potentially responsible person, the person is not a person protected from a civil action under AS 09.10.055, and the parties had a sufficient opportunity to join that person in the action but chose not to; in this paragraph, "sufficient opportunity to join" means the person is

(A) within the jurisdiction of the court;

(B) not precluded from being joined by law or court rule; and

(C) reasonably locatable.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. Except as provided under AS 23.30.015(g), an assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that action and may not be used as evidence of civil liability in another action.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault. (§ 1 ch 139 SLA 1986; am §§ 15, 16 ch 14 SLA 1987; am 1987 Initiative Proposal No. 2, § 1; am §§ 11 — 13 ch 26 SLA 1997)

Sec. 23.30.015. Compensation where third persons are liable. (a) If on account of disability or death for which compensation is payable under this chapter the person entitled to the compensation believes that a third person other than the employer or a fellow employee is liable for damages, the person need not elect whether to receive compensation or to recover damages from the third person.

(b) Acceptance of compensation under an award in a compensation order filed by the board operates as an assignment to the employer of all rights of the person entitled to compensation and the personal representative of a deceased employee to recover damages from the third person unless the person or representative entitled to compensation commences an action against the third person within one year after an award.

(c) Payment of compensation into the second-injury fund as a result of death operates as an assignment to the employer of all rights of the representative of the deceased to recover damages from the third person.

(d) An employer under an assignment may either institute proceedings for the recovery of damages or may compromise with a third person, either without or after instituting an action.

(e) An amount recovered by the employer under an assignment, whether by action or compromise, shall be distributed as follows:

(1) the employer shall retain an amount equal to

(A) the expenses incurred by the employer with respect to the action or compromise, including a reasonable attorney fee determined by the board;

(B) the cost of all benefits actually furnished by the employer under this chapter;

(C) all amounts paid as compensation and second-injury fund payments, and, if the employer is self-insured or uninsured, all service fees paid under AS 23.05.067;

(D) the present value of all amounts payable later as compensation, computed from a schedule prepared by the board; and the present value of the cost of all benefits to be furnished later under AS 23.30.095 as estimated by the board; the amounts so computed and estimated to be retained by the employer as a trust fund to pay compensation and the cost of benefits as they become due and to pay any finally remaining excess sum to the person entitled to compensation or to the representative; and

(2) the employer shall pay any excess to the person entitled to compensation or to the representative of that person.

(f) Even if an employee, the employee's representative, or the employer brings an action or settles a claim against the third person, the employer shall pay the benefits and compensation required by this chapter.

(g) If the employee or the employee's representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A) — (C) of this section insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter. If the employer is allocated a percentage of fault under AS 09.17.080, the amount due the employer under this subsection shall be reduced by an amount equal to the employer's equitable share of damages assessed under AS 09.17.080(c).

(h) If compromise with a third person is made by the person entitled to compensation or the representative of that person of an amount less than the compensation to which the person or representative would be entitled, the employer is liable for compensation stated in (f) of this section only if the compromise is made with the employer's written approval.

(i) If the employer is insured and the carrier has assumed the payment of compensation, the carrier shall be subrogated to all the rights of the employer.

(j) Notice of the commencement of an action against a third party shall be given to the board and to all interested parties within 30 days. (§ 30 ch 193 SLA 1959; am § 7 ch 42 SLA 1962; am § 1 ch 73 SLA 1965; am § 2 ch 75 SLA 1977; am § 36 ch 26 SLA 1997; am § 3 ch 89 SLA 2000)

Sec. 23.30.017. Immunity for third-party design professional. (a) A person entitled to compensation under this chapter as a result of injury occurring at the job site of a construction project may not bring a civil action to recover damages for that injury against a design professional or an employee of a design professional who provides professional services for the construction project.

(b) This section does not apply to a person receiving compensation under this chapter who is injured at a job site at which the design professional or employee of the design professional

(1) specifically assumed responsibility for job site safety practices under a contract;

(2) actually exercises control over the premises where the injury occurred; or

(3) prepared design plans or specifications, the plans or specifications contributed to the injury, and the plans or specifications were prepared negligently, recklessly, or with intentional misconduct.

(c) In this section,

(1) "design professional" means a person registered under AS 08.48 as an architect, engineer, or land surveyor;

(2) "professional services" means services provided by a design professional that are within the scope of services for which the design professional is registered. (§ 3 ch 75 SLA 1995; am § 7 ch 20 SLA 2002)

Effect of amendments. — The 2002 amendment, effective May 18, 2002, substituted "registered" for "licensed" in paragraphs (c)(1) and (c)(2).

Sec. 23.30.041. Rehabilitation of injured workers. (a) The board shall select and employ a reemployment benefits administrator. The board may authorize the administrator to select and employ additional staff. The administrator is in the partially exempt service under AS 39.25.120.

(b) The administrator shall

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

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

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

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

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

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

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

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

(D) the cost of reemployment benefits;

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

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

(c) If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request. The administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation.

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. The administrator may grant up to an additional 30 days for performance of the eligibility evaluation upon notification of unusual and extenuating circumstances and the rehabilitation specialist's request. Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.

(e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" for

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

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."

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

(1) the employer offers employment within the employee's predicted post-injury physical capacities at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater, and the employment prepares the employee to be employable in other jobs that exist in the labor market;

(2) the employee has been previously rehabilitated in a former worker's compensation claim and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury; or

(3) at the time of medical stability no permanent impairment is identified or expected.

(g) Within 15 days after the employee receives the administrator's notification of eligibility for benefits, an employee who desires to use these benefits shall give written notice to the employer of the employee's selection of a rehabilitation specialist who shall provide a complete reemployment benefits plan. Failure to give notice required by this subsection constitutes noncooperation under (n) of this section. If the employer disagrees with the employee's choice of rehabilitation specialist to develop the plan and the disagreement cannot be resolved, then the administrator shall assign a rehabilitation specialist. The employer and employee each have one right of refusal of a rehabilitation specialist.

(h) Within 90 days after the rehabilitation specialist's selection under (g) of this section, the reemployment plan must be formulated and approved. The reemployment plan must require continuous participation by the employee and must maximize the usage of the employee's transferrable skills. The reemployment plan must include at least the following:

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

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

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

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

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

(6) the date that the plan will commence;

(7) the estimated time of medical stability as predicted by a treating physician or by a physician who has examined the employee at the request of the employer or the board, or by referral of the treating physician;

(8) a detailed description and plan schedule;

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

(10) a provision requiring that, after a person has been assigned to perform medical management services for an injured employee, the person shall send written notice to the employee, the employer, and the employee's physician explaining in what capacity the person is employed, whom the person represents, and the scope of the services to be provided.

(i) Reemployment benefits shall be selected from the following in a manner that ensures remunerative employability in the shortest possible time:

(1) on the job training;

(2) vocational training;

(3) academic training;

(4) self-employment; or

(5) a combination of (1) — (4) of this subsection.

(j) The employee, rehabilitation specialist, and the employer shall sign the reemployment benefits plan. If the employer and employee fail to agree on a reemployment plan, either party may submit a reemployment plan for approval to the administrator; the administrator shall approve or deny a plan within 14 days after the plan is submitted; within 10 days of the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110; the board shall uphold the decision of the administrator unless evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator; the board shall render a decision within 30 days after completion of the hearing.

(k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the plan, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the plan to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.

(*l*) The cost of the reemployment plan incurred under this section shall be the responsibility of the employer, shall be paid on an expense incurred basis, and may not exceed $13,300.

(m) Only a rehabilitation specialist may accept case assignments as a case manager and sign eligibility determinations and reemployment plans. A person who is not a rehabilitation specialist may perform rehabilitation casework if the work is performed under the direct supervision of a rehabilitation specialist employed in the same firm and location.

(n) After the employee has elected to participate in reemployment benefits, if the employer believes the employee has not cooperated, the employer may terminate reemployment benefits on the date of noncooperation. Noncooperation means

(1) unreasonable failure to

(A) keep appointments;

(B) maintain passing grades;

(C) attend designated programs;

(D) maintain contact with the rehabilitation specialist;

(E) cooperate with the rehabilitation specialist in developing a reemployment plan and participating in activities relating to reemployability on a full-time basis;

(F) comply with the employee's responsibilities outlined in the reemployment plan; or

(G) participate in any planned reemployment activity as determined by the administrator; or

(2) failure to give written notice to the employer of the employee's choice of rehabilitation specialists within 15 days after receiving notice of eligibility for benefits from the administrator as required by (g) of this section.

(o) Upon the request of either party, the administrator shall decide whether the employee has not cooperated as provided under (n) of this section. A hearing before the administrator shall be held within 30 days after it is requested. The administrator shall issue a decision within 14 days after the hearing. Within 10 days after the administrator

files the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110; the board shall uphold the decision of the administrator unless evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator; the board shall render a decision within 30 days after completion of the hearing.

(p) When the United States Department of Labor publishes a new edition, revision, or replacement for the "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" referred to in (e) of this section, the board shall, not later than 90 days after the last day of the month in which the new edition, revision, or replacement standard is published, hold an open meeting under AS 44.62.310 to select the date on which the new edition, revision, or replacement standard will be implemented to make all eligibility determinations required under (e) of this section. The date selected by the board for implementing the new edition, revision, or replacement standard may not be later than 90 days after the last day of the month in which the new edition, revision, or replacement standard is published. After the meeting, the board shall issue a public notice announcing the date selected. The requirements of AS 44.62.010 — 44.62.300 do not apply to the selection or announcement of the date under this subsection.

(q) Notwithstanding AS 23.30.012, after medical stability has been determined and a physician has predicted that the employee may have a permanent impairment that may cause the employee to have permanent physical capacities that are less than the physical demands of the employee's job at the time of injury, an employee may waive any benefits or rights under this section, including an eligibility evaluation and benefits related to a reemployment plan. To waive any benefits or rights under this section, an employee must file a statement under oath with the board to notify the parties of the waiver and to specify the scope of benefits or rights that the employee seeks to waive. The statement must be on a form prescribed or approved by the board. The board shall serve the notice of waiver on all parties to the claim within 10 days after filing. The waiver is effective upon service to the party. A waiver effective under this subsection discharges the liability of the employer for the benefits or rights contained in this section. The waiver may not be modified under AS 23.30.130.

(r) In this section

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

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

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

(A) area of residence;

(B) area of last employment;

(C) the state;

(D) other states;

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

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

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

(7) "remunerative employability" means having the skills that allow a worker to be compensated with wages or other earnings equivalent to at least 60 percent of the worker's gross hourly wages at the time of injury; if the employment is outside the state, the stated 60 percent shall be adjusted to account for the difference between the applicable state average weekly wage and the Alaska average weekly wage. (§ 3 ch 93 SLA 1982; am § 10 ch 79 SLA 1988; am § 11 ch 126 SLA 1994; am §§ 1, 2 ch 59 SLA 1998; am §§ 2 — 7 ch 105 SLA 2000)

Sec. 23.30.055. Exclusiveness of liability. The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. (§ 4 ch 193 SLA 1959; am § 1 ch 42 SLA 1962; am § 11 ch 79 SLA 1988)