

ALASKA

1. Citation for the state's workers' compensation statute.

AS §23.30.005, *et. seq.*

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

An employee is a person employed by the State or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of the chapter and carried on in Alaska. Executive officers and sole proprietors may opt out. Part-time babysitters, cleaning persons, harvest and similar transient help, contract entertainers, statutorily-defined taxi cab drivers and statutorily defined commercial fishermen are also not employees. AS §§23.30.395(12), (13); AS §23.30.230.

3. Identify and describe any "statutory employer" provision.

If the employer is a subcontractor, the principal contractor is liable for and shall secure the payment of compensation to the employees of the subcontractor unless the subcontractor secures the payment. This is referred to as the "contractor under" provision. AS §23.30.045(a).

4. What types of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence" claims.

All accidental injuries or death arising out of and in the course of employment are covered, if the injury or disability would not have occurred but for the employment, and reasonable persons would conclude that the employment is a substantial factor in the injury or disability. Substantial factor means that reasonable persons would consider it to be significant and attach responsibility to it. Once a preliminary link is established between the employment and the injury or disability, there is a rebuttable presumption of compensability of the claim, and the employer must introduce substantial evidence to rebut that presumption. Once that has been introduced, the employee must prove his or her case by a preponderance of the evidence. The factual decisions

of the Alaska Workers' Compensation Board are reviewed on a substantial evidence basis. "Injury" includes breakage or damage to eyeglasses, hearing aids, dentures, or any prosthetic devices which function as part of the body and also includes an injury caused by the willful act of a third person directed against an employee because of the employment. AS §23.30.395(17); *Osborne Const. Co. v. Jordan*, 904 P.2d 386 (Alaska 1995).

B. Occupational disease (including respiratory and repetitive use).

Occupational diseases or infections which arise naturally out of the employment or unavoidably result from an accidental injury are subject to the same proof requirements referred to above. If a disease is caused by conditions of the employment and these conditions carry with them a risk of incurring the disease greater than that which prevails in employment and living conditions in general, then it is an occupational disease within the scope of the Act. AS §23.30.395(17).

5. What, if any, injuries or claims are excluded?

A compensable injury does not include mental injury caused by mental stress unless it is established that the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment and the work stress was the predominant cause of the mental injury. Furthermore, a mental injury is measured by actual events and is not considered to arise out of and in the course of the employment if it results from a disciplinary action, work evaluation, layoff, demotion, termination, job transfer or similar action taken in good faith by the employer. Also, injuries caused by an employee's willful intent to injure or kill any person, or caused by the intoxication of the employee, are not compensable. AS §23.30.395(17); §23.30.235.

6. What psychiatric claims or treatments are compensable?

See answer 5.

7. What are the applicable statutes of limitations?

The right to compensation is barred unless a claim is filed within two years after the employee has knowledge of the nature of the disability and its causal relationship to the employment. The maximum time for filing a claim, other than those involving an occupational disease, is four years from the date of injury. The right to compensation for death is barred unless a claim is filed within

one year after the death. However, if compensation payment has been made without an award, a claim may be filed within two years of the last payment of compensation. AS §§23.30.180, 23.30.185, 23.30.190, 23.30.215. In cases involving latent defects causing compensable disability, an injured employee has a right to file a claim, as determined by the Board, time limits notwithstanding. AS §23.30.105(a).

Failure to file a claim within the prescribed limitations period is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties of interest are given reasonable notice and opportunity to be heard. AS §23.30.105(b). The limitation periods are stayed during any period a person is mentally incompetent or a minor and no guardian or other authorized representative has been appointed. AS §23.30.105(c). Once a guardian or other representative is appointed the statute of limitations are applicable. In the case of a minor, if a guardian is appointed before the person becomes of age, the limitation period is applicable from the date the minor comes of age. AS §23.30.105(c).

If an employer brings a suit at law or in admiralty to recover damages with respect to injury or death, and that recovery is denied on the ground that the person was an employee and that the defendant is an employer within the meaning of the Worker's Compensation Statute and the employer has secured compensation to the employee under this statute, the limitation period of the Worker's Compensation statute begins to run only from the date of termination of any such suit. AS §23.30.105(d).

8. What are the reporting and notice requirements for those alleging an injury?

Notice of an injury or death must be given to the Board and to the employer within thirty days after the date of injury or death. Failure to give notice does not bar a claim if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the insurance carrier had knowledge of the injury or death, and the Board determines the employer or carrier has not been prejudiced by failure to give notice. In addition the Board may excuse the failure on the ground that for some satisfactory reason notice could not be given. A defense based upon failure to provide timely notice is waived unless it is raised before the Board at the first hearing of a claim for compensation in respect to the injury or death. AS §23.30.100(a) and (d).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

A claim is barred if the injury is the result of the employee's willful intent to injure or kill himself or herself. AS §23.30.235; *Walt's Sheet Metal v. Debler*, 826 P.2d 333 (Alaska 1992).

B. Willful misconduct, "horseplay," etc.

See answer 9A.

C. Injuries involving drugs and/or alcohol.

A claim is barred if the injury was caused by the intoxication or being under the influence of drugs, unless the drugs were prescribed by the employee's physician. AS §23.30.235.

10. What, if any, penalties or remedies are available in claims involving fraud?

There are criminal penalties for theft by deception for any person who willfully makes a false or misleading statement to obtain, or deny, workers' compensation benefits. AS §23.30.250.

11. Is there any defense for falsification of employment records regarding medical history?

Yes. An employee who knowingly makes a false statement as to his or her physical condition on an employment or pre-employment questionnaire may not receive workers' compensation benefits if: (1) the employer relied upon the false representation; (2) this was a substantial factor in the hiring; and (3) there is a causal connection between the false representation and the injury. AS §23.30.022.

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

If the employee's work is at a remote site, the answer is clearly yes. If the employee's work is not at a remote site, then the answer is maybe, depending upon whether the recreational or other non-work activities are of a substantial benefit to the employer or if the injury occurred at an employer-sanctioned or employer-provided facility. This is a fact-specific question. *LeSuer-Johnson v. Rollins Burdick Hunter of Alaska*, 808 P.2d 266 (Alaska 1991); *Anderson v. Employer's Liability Assurance Corp.*, 498 P.2d 288 (Alaska 1972).

13. Are injuries by co-employees compensable?

Yes. AS §§23.30.015(a); 23.30.055.

14. Are acts by third parties unrelated to work but committed on the premises, compensable (e.g. "irate paramour" claims)?

The liability of an employer for medical treatment is not affected by the fact that the employee was injured through the fault or negligence of a third party not in the same employee, unless the employee provides the employer with notice of election to sue the third party or a suit has been brought against the third party without giving notice to the employer. In addition, the employer has a cause of action against the third party to recover any amount paid by the employer for the medical treatment. The employee need not elect whether to receive compensation or to recover damages from the third party. Acceptance of Worker's Compensation operates as an assignment to the employer of all rights of the person entitled to the compensation to recover damages from the third person unless the employee commences an action against the third person within one year after the compensation award. An employer under an assignment may either institute proceedings for recovery of damages or may compromise with any liable third person. The amounts recovered by an employer under assignment are subject to statutorily prescribed distribution. AS §§23.30.015 and 23.30.050.

Injuries which arise out of and in the course of employment, i.e., of which the employment is a substantial factor and but for the employment would not have occurred, are compensable. In Alaska, "work relatedness" and compensability are presumed. AS 23.30.120. The employee will prevail on such claims, unless the employer can introduce substantial evidence to rebut the presumption by establishing another, non-work, cause for the injury, or effectively ruling out all probabilities that the injury is work-related. Therefore, "irate paramour" injuries may or may not be work-related and compensable.

BENEFITS

15. What criterion is used for calculating the average weekly wage?

The average weekly wage or, in Alaska, the spendable weekly wage, is the employee's gross weekly earnings minus payroll tax deductions. Gross weekly earnings are calculated under AS §23.30.220, which provides for different payment formulas (e.g. an employee paid weekly would receive gross

weekly earnings, while an employee paid monthly would receive monthly earnings multiplied by 12, then divided by 52).

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

The maximum compensation rate is 120% of the average weekly wage, as calculated by the Commissioner applicable on the date of injury of the employee. A Commissioner shall determine the average weekly rate by December 1, of each year, by dividing the average annual wage in Alaska for the preceding calendar year by 52. The resulting figure is the average weekly wage in Alaska applicable for the period beginning January 1, and ending December 31, of the following calendar year. The Alaska average weekly wage and minimum/maximum compensation rates for each calendar year are published in a bulletin generated by the Alaska Worker's Compensation Division. The maximum average weekly wage for the period from January 1 through December 31, 2008 is \$782.68. Therefore, the maximum compensation rate (120% percent of the AAWW) is \$939.00. The minimum compensation rate (22% of the maximum compensation rate) is \$207.00. The Alaska Workers' Compensation Division publishes compensation rate tables based on these formulas. These tables are then referenced throughout the statute. AS §§23.30.175, 23.30.185.

17. How long does the employer/insurer have to begin temporary benefits from the date disability begins?

Payment must be made within 14 days after knowledge of the injury or death. AS §23.30.155.

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out ____ days before recovering benefits for the first ____ days)?

The employee must be out more than 28 days before receiving benefits for the first 3 days. AS §23.30.150.

19. What is the standard/procedure for terminating temporary benefits?

Temporary benefits may not be paid past the date of medical stability, which is the date after which further objectively measurable improvement is not reasonably expected to result from additional medical care. Medical stability is presumed in the absence of objectively measurable improvement for a period of 45 days. AS §§23.30.185, 23.30.395(21). In addition, a claimant, per

AS §23.30.187, does not have a right to receive temporary total or permanent total disability benefits during any week in which unemployment compensation benefits have also been collected. However, per *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1228 (Alaska 2003): "Receipt of unemployment benefits does not absolutely bar temporary total disability benefits if the unemployment benefits are paid back."

20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?

No.

21. What disfigurement benefits are available and how are they calculated?

None are available.

22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?

- A. How many weeks are available for scheduled member/parts, and the standard for recovery?

Permanent partial disability benefits are no longer paid according to a schedule. See answer 22B.

- B. Number of weeks for "whole person" and standard for recovery.

Permanent partial impairment is paid on the basis of multiplication of \$177,000 by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment is the percentage of impairment to the particular body part or function converted to the percentage of impairment of the whole person as provided under the American Medical Association Guides to the Evaluation of Permanent Impairment. Furthermore, the ratings must be reduced by a permanent impairment that exists before the compensable injury. AS §23.30.190.

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

There are extensive requirements. If an employee suffers a compensable injury that may permanently preclude a return to the occupation at the time of the injury, the employee may request an eligibility evaluation for re-employment benefits. This must be done within 90 days after the notice of injury unless it is determined that there is an unusual and extenuating circumstance that prevents a timely request. Thereafter, a rehabilitation specialist retained by the administrator performs an eligibility evaluation. The administrator then decides whether the employee is eligible, and this decision may be appealed. An employee is eligible for re-employment benefits upon a written request and by having an employee predict that he or she will have permanent physical capacities that are less than the physical demands of the employee's job at the time of the injury or any other jobs that the employee has held or received training for within the ten years prior. Benefits include the preparation of a rehabilitation plan, which may not extend past two years from the date of its approval, and the cost shall not exceed \$10,000. AS §23.30.041.

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

The minimum and maximum rates are the same as for any other type of disability. Permanent total disability is determined on a case-by-case basis, but loss of both hands, both arms, both feet, both legs, both eyes, or any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. Alaska utilizes a concept of disability that rests upon loss of earning capacity rather than medical impairment. AS §23.30.180.

25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

Reasonable and necessary funeral expenses up to \$5,000.00 are covered. AS §23.30.215.

B. Dependency claims.

1) Death Benefits for fatalities prior to January 1, 2007.

If there is a surviving spouse or children, then percentages of the spendable weekly wages of the deceased are paid as follows: 80 percent for the spouse with no children; 50 percent for a spouse with one child and 40 percent for the child; 30 percent for the spouse with two or more children and 70 percent divided among the children; 100 percent for an only child with no spouse; if there is no spouse or children, then for the support of father, mother, grandchildren, brothers or sisters if dependent, 42 percent of the spendable weekly wage of all such beneficiaries, not to exceed \$20,000 in the aggregate. There are minimums of \$25 per week to a child or \$50 for children and \$75 for a spouse, and the maximum is as stated elsewhere. AS §23.30.215.

2) Payment for fatalities on or after January 1, 2007.

Death benefits payable to a surviving spouse with one child are fixed at:

(a) If the employee's compensation rate in the tables is \$801.00 or above, the payments are fixed at \$500.00 per week for the surviving spouse and \$400.00 a week for the surviving child.

(b) If the employee's compensable rate in the tables is \$800.00 or below, the surviving spouse is entitled to the employee's compensation rate divided by $.8 \times .5$. The surviving child's compensation rate is equal to the employee's compensation rate divided by $.8 \times .4$.

Death benefits payable to a surviving spouse with two or more surviving children are paid as follows:

(a) If the employee's compensation rate in the tables is \$721.00 or above, the payments are fixed at \$270.00 per week for the surviving spouse, and \$631.00 per week for the surviving children.

(b) If the employee's compensation rate in the tables is \$720.00 or below, the surviving spouse is entitled to compensation at the employee's compensation rate divided by $.8 \times .3$. The surviving children's compensation is the total of the employee's compensation rate divided by $.8 \times .7$.

- (c) The total weekly amount of compensation may not be less than \$75.00 for a surviving spouse, or less than \$50.00 for surviving multiple children.

Death benefits in cases with only one child and no surviving spouse, or two or more surviving children and no surviving spouse are paid as follows:

- (a) If the employee's compensation rate in the tables is \$721.00 or above, the payments are fixed at: \$901.00 per week for the only surviving child, or \$901.00 per week divided equally among multiple surviving children.

- (b) If the employee's compensation rate in the tables is \$720.00 or below, a sole surviving child is entitled to the employee's compensation rate divided by .8. Multiple surviving children are entitled to the employee's compensation rate divided by .8, equally divided among the children.

- (c) The total weekly amount of compensation may not be less than \$25.00 to a child or less than \$50.00 for children.

If the surviving spouse remarries, the surviving spouse is entitled to be paid a lump sum amount equal to the compensation to which the surviving spouse would otherwise be entitled in the two years commencing on the date of remarriage, as full and final settlement of all sums due.

AS 23.30.215; Alaska Worker's Brokers' Compensation Division, Bulletin No. 07-03 January 4, 2007.

26. What are the criteria for establishing a "second injury" fund recovery?

If an employee has a permanent physical impairment from any cause and incurs a subsequent disability arising out of the employment, resulting in compensation for a disability that is substantially greater by reason of the combined effects of the two injuries than would have resulted from the subsequent injury alone, the employer/insurer must first pay all the disability, but is reimbursed from the Second Injury Fund for all payments made after 104 weeks. The employer must establish by written records that it had knowledge of the permanent physical impairment before the subsequent injury and that the employee was hired or retained with that knowledge. Also, permanent physical impairment means any one of 27 specifically listed conditions or any other condition which would support a disability rating of 200 weeks or more. AS §23.30.205.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

The Board may, before one year after the date of the last payment of benefits, or before one year after the rejection of a claim, review a compensation case, on the ground of a change of conditions, or because of a mistake in a determination of fact. AS §23.30.130.

28. What situation would place responsibility on the employer to pay an employee's attorney fees?

In Alaska, generally every circumstance will suffice. If the employer either controverts or resists payment, then it is liable for the employee's attorneys fees. AS §23.30.145.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The compensation remedy is exclusive and in place of all other liability of the employer and any fellow employee, unless the employer fails to secure payment of compensation as required. AS §23.30.055.

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

The exclusivity provision does not bar an intentional tort claim. There can be no contractual waiver, but contractual indemnity is not precluded. Furthermore, a common law damage action by an illegally employed child is not barred. AS §23.30.055; *Bell Helicopter Textron, Inc. v. U.S.*, 967 F.2d 307 (9th Cir. 1992); *Whitney-Fidalgo Seafoods, Inc. v. Beukers*, 554 P.2d 250 (Alaska 1976).

30. Are there any penalties against the employer for unsafe working conditions?

Yes, State and Federal OSHA have jurisdiction over the employer under their statutes and

regulations, and the exclusive remedy provision has no effect on them.

31. What is the penalty, if any, for an injured minor?

This depends upon the nature of the employment. If the minor is illegally employed, then there is no exclusivity, and an ordinary tort suit is permitted. Furthermore, such a minor could also obtain enforcement of various fines through OSHA. See also answer 29B.

32. What is the potential exposure for "bad faith" claims handling?

The Workers' Compensation Board can fine or impose a penalty upon an employer who controverts a claim in bad faith. To date, however, there have been no reported opinions of viable lawsuits against an employer/insurer claiming bad faith in the handling of a workers' compensation claim. It is thus unclear what, if any, liability they would have. AS §23.30.155.

33. What is the exposure for terminating an employee who has been injured?

An employee may not be terminated for having a workers' compensation claim. Terminating an employee because he or she is no longer physically fit to do the job, because of an injury, simply establishes the employee's permanent disability. AS §23.30.247.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. AS §23.30.015.

35. Can co-employees be sued for work-related injuries?

No. AS §23.30.055.

36. Is subrogation available?

Yes, unless the employee sues first. If the employee does not sue, then the employer/insurer may sue a third party. AS §23.30.015.

MEDICALS

37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

Medical bills must be paid within 14 days, or a 25% penalty is assessed. AS §§23.30.095, 23.30.155.

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

Medical reports are required to be filed with the Board by the parties upon receipt. No payment of the provider is required unless the provider files reports with the Board. No payment is required if the employee fails to execute a medical or other records authorization. Upon written request, an employee must provide written authority to the employer or carrier to obtain medical and rehabilitation information relative to the employee's injury, although the employee does have the right to file a petition for protective order with the division. AS § 23.30.107, AS §§23.30.095(c), (h); 8 AAC §45.095.

39. What is the rule on (a) Claimant's choice of a physician; (b) Employer's right to second opinion and/or Independent Medical Examination?

A. Claimant's choice of a physician.

The employee may choose a physician, and may change physicians once if written notice is given. The employee may not change more than once without permission from the employer. AS §23.30.095.

B. Employer's right to second opinion and/or Independent Medical Examination.

The employer has the right to an IME. AS 23.30.095(e). The Alaska Workers' Compensation Board has the right to order an SIME (second IME) at the employer's expense. AS 23.30.095(k).

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

The employer is to pay medical care for two years from the date of injury but the Board may extend that time. Medical care is broadly defined to include physicians' fees, nurses' charges, hospital services, hospital supplies, medical and prosthetic devices, physical rehabilitation, and transportation charges. "Physician" includes medical doctors, surgeons, chiropractors, osteopaths, dentists and optometrists. AS §23.30.095.

41. Which prosthetic devices are covered, and for how long?

Such prosthetic devices as may be reasonably required, and which arise out of or are necessitated by an injury, are covered. These include, but are not limited to, eyeglasses, hearing aids, dentures, and other such devices and appliances, and the repair or replacement of such devices necessitated by ordinary wear and tear. They are covered for the same time period as other medical care. AS §23.30.095.

42. Are vehicle and/or home modifications covered as medical expenses?

This is a fact-specific question. The Act neither precludes nor requires such coverage.

43. Is there a medical fee guide or schedule or other provisions for cost containment?

There is no cost containment guideline, but there are maximum treatment frequency guidelines, and each medical care provider must submit a treatment plan. AS §23.30.095.

44. What, if any, provisions or requirements are there for "managed care"?

None.

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

The employer either controverts a claim, in whole or in part, or petitions the Board for a determination of certain allegations. AS §23.30.155.

46. What is the method of claim adjudication?

A. Administrative level.

The initial adjudication of claims is before an administrative body, the Alaska Workers' Compensation Board. It is composed of a state employee which is the hearing chairperson, and two private citizens appointed by the governor, representing labor and management, respectively. AS §§23.30.005, 23.30.105, 23.30.110. The standard of proof in claims at this level is that of a "preponderance of the evidence" as provided in *Denuptiis v. Unocal Corp.*, 63 P.3d 272 (Alaska 2003).

B. Trial court.

The state trial court hears the first level of appeal from the Alaska Workers' Compensation Board. AS §23.30.125.

C. Appellate.

There is a second level of appeal from state superior court or trial court to the state supreme court. AS §23.30.125.

47. What are the requirements for stipulations or settlements?

Stipulations and settlements must be approved by the Alaska Workers' Compensation Board to be effective. There are certain technical requirements that the Board has imposed for the approval of stipulated settlements, specifically that they be found to be in the best interest of the employee. AS §23.30.12.

48. Are full and final settlements with closed medicals available?

Yes, but they are not favored by the Board. See AS §23.30.012 and corresponding regulations.

49. Must stipulations and/or settlements be approved by the state administrative body?

Yes. AS §23.30.012.

RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

An employer is required either to insure its liability under the Act with an insurer or association authorized to do business in the state or be an approved self-insurer. Private insurance is available, and for those who cannot obtain it there is an assigned risk pool. AS §23.30.025.

51. What are the provisions/requirements for self-insurance?

A. For individual entities.

There are extensive regulations dealing with self-insurance. The Workers' Compensation Board may allow self-insurance if the employer provides satisfactory proof that it has the financial ability to meet its obligations, has available claims facilities within the state, has been in business in Alaska for at least five years, has a safety/loss control program, has at least 100 employees in Alaska or in another state or states, and has a net worth of at least \$5,000,000. One or more of these can

be waived if appropriate. Proof of financial ability requires review of audited financial statements for about 18 different types of information. AS §23.30.090; Alaska Admin. Code tit. 8, §46.010, *et seq.*

B. For groups or "pools" of private entities.

Joint ventures can be approved if each member of the venture qualifies. The requirements for members of such groups are essentially the same as for those seeking individual self-insured status. See answer 51A.

52. **Are "illegal aliens" entitled to benefits of workers' compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of "employee"?**

This has not been decided in Alaska. However, an illegally employed minor can, if he wishes, avoid the exclusive remedy provisions of the Act and sue for damages or use the Act's benefits. *Whitney Fidalgo Seafoods v. Home Ins. Co.*, 447 F. Supp. 393 (D. Alaska 1978).

53. **Are terrorist acts or injuries covered or excluded under workers' compensation law?**

Neither the Alaska Workers Compensation Board nor the Alaska Supreme Court have specifically addressed this issue. However, coverage has been found to exist in unexplained situations and unprovoked attacks on employees by drunks and lunatics. See *e.g. Fireman's Fund Am. Ins. Companies v. Gomes* 544 P.2d 1013 (Alaska 1976). Therefore, it is likely Alaska would find a terrorist attack to be a "neutral assault" such as attacks by lunatics, drunks, small children, and "other irresponsibles." See 1 A. Larson, *The Law of Workmen's Compensation*, § 8.03, at 8-58 (2001). See also *Temple v. Denali Princess Lodge*, 21 P.3d 813, 822 (Alaska 2001)(holding the positional risk doctrine, which provides compensation for injuries that "would not have occurred but for the fact that the conditions and obligations of employment placed the claimant in the position where he was injured," did not apply where the origin of assault was private and personal and the employer did not facilitate the assault.) Therefore it is likely Alaska would hold coverage applies. See also, Answer 14.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

Alaska statutes and regulations do not specifically address Medicare/Medicaid trusts, liens, subrogation rights, or the Secondary Payer Act. However, pursuant to 8 AAC 45.040(c) 'any person who may have a right to relief . . . should be joined as a party.' The Alaska Supreme Court has interpreted this provision to authorize the Worker's Compensation Board to join a health insurance provider having a right to relief as an equitable subrogee of the health care providers it has paid, unless the insurer explicitly waives its subrogation right. *Sherrod v. Municipality of Anchorage*, 803 P.2d 874 (1990). Therefore, the Board and or the Alaska Supreme Court could also determine Medicare falls under the purview of 8 AAC 45.40.040(c), and the parties should address this issue prior to settlement.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

The Federal Medicaid statute requires States to include in their plan for medical assistance provisions (1) that the individual will assign to the State any rights to payment for medical care from any third party and (2) that the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. §1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. §1396k(b).

See Answer 54.

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

45 C.F.R. 164.512 (l) (HIPAA) excludes protected health information as authorized by and to the extent necessary to comply with the laws relating to workers' compensation or other similar programs. Pursuant to Alaska Statute, upon written request, an employee must provided written authority to the employer, carrier, rehabilitation specialists, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injuries. The request to the employee for written authority must include notice of the employee's right to file a petition for a protective order with the division, and must be served either by certified mail to the employee's address on the notice of injury, or by hand delivery. AS §23.30.107. Medical or rehabilitation records contained in an employee's file, maintained by the division, or held by

the board are not public records subject to public inspection and copying. AS §23.30.107(b). Reemployment Benefits Administrators, the Division of Workers' Compensation, the Department of Labor and Work Force Development, and the Workers' Compensation Board may, without the employee's consent, release medical or rehabilitation records in an employee's file to a physician providing medical services under AS §23.30.095(k) or §23.30.110(g), a party to a claim filed by the employee, or a governmental agency. The division may not assemble or provide information respecting individual records for commercial purposes that are outside the scope of the Alaska Workers' Compensation Act. AS §23.30.107.

57. What are the provisions for "Independent Contractors"?

Compensation or benefits are payable for disability or death with a need for medical treatment for employees only, if the disability or death of the employee or the employee's needs for medical treatment arose out of and in the course of employment. AS §23.30.010(a). The Board will determine whether a person is an "employee" based on the "relative-nature-of-the-work test. The test includes a six part determination of whether the work:

- A. is a separate calling or business; if the person performing the services has the right to hire or terminate others to assist in the performance of the service for which the person was hired, there is a inference that the person is not an employee; if the employer
- 1) has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee statute;
 - 2) and the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;
 - 3) has the right to extensive supervision of the work then there is a strong inference of employee status;
 - 4) provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;
 - 5) pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employment status; and
 - 6) and a person performing the services entered into either a written or oral contract,

the employment status the parties believed they were creating in the contract will be given deference; however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;

- B. is a regular part of the employer's business or service; if it is a regular part of the employer's business, there is an inference of employee status;
- C. can be expected to carry its own accident burden; this element is more important than 4-6; if the person performing the services is unlikely to be able to meet the costs of an industrial accident out of the payment for the services there is a strong inference of employee status;
- D. involves little or no skill or experience; if so there is an inference of employee status;
- E. is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job; if the work amounts to hiring of continuous services, there is an inference of employee status;
- F. is intermediate, as opposed to continuous; if the work is intermediate there is a weak inference of no employee status.

Factor 1 is the most important factor and is independent with factor 2. At a minimum, either factor 1 or factor 2 must be resolved in favor of employee status for the board to find a person is an employee. 8 ACC 45.890.

See also answer 59.

- 58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?**

No.

- 59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?**

Yes. An individual who drives a taxi cab and 1) is compensation for taxi cab services exclusively by customers of the service, 2) whose written contractual arrangements of owners of taxi cab

vehicles, taxi cab permits, or radio dispatch services are based upon flat contractual rates and not based on a percentage share of the individual's receipts from customers, and 3) whose written contract with owners of taxi cab vehicles, taxi cab permits, or radio dispatch services specifically provides that the contract places no restrictions on hours worked by the individual, or on areas in which the individual may work except to comply with local ordinances, is not covered by the Alaska Workers' Compensation Act, unless the hours worked by the individual or the areas in which the individual may work are restricted except to comply with local ordinances. AS §23.30.230(7).