BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE DIRECTOR OF INSURANCE

In the Matter of SEALASKA CORPORATION	OAH No. 06-0641-INS Division Case No. H 06-05

ORDER ON PROPOSED DECISION

I have reviewed the proposed decision of the administrative law judge in the above-captioned matter. Based on the evidence presented, I agree that silviculture should not be included in the logging or lumbering classification. Accordingly, I will issue an order to NCCI to create Classification Code 0124 utilizing the Oregon, Idaho, and Montana descriptions and adding commercial pre-thinning.

The ALJ's proposed decision appears to conclude that the rates charged for silviculture work are "unfairly discriminatory." I do not believe that a conclusion on rates, as opposed to classification, can be made one way or the other on the record presented.

Except to the extent of any inconsistency with the foregoing, in all other respects I adopt the proposed decision of the ALJ.

This Order is made pursuant to AS 21.06.080 and 21.06.100 and is the final administrative determination in this matter.

Dated this 9th day of January, 2008.

Linda S. Hall
Director
Division of Insurance

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DECISION

I. Introduction

Sealaska Corporation ("Sealaska") appeals a decision of the National Council on Compensation Insurance (NCCI), a rating organization licensed as such in Alaska under AS 21.39.060(a), to reject Sealaska's request that pre-commercial tree thinners be classified in a separate category for the purpose of rating workers' compensation insurance, instead of the current practice of classifying these workers in category 2702 – Logging or Lumbering of NCCI's Scopes Manual.

Sealaska initiated this case by requesting a hearing from NCCI regarding the classification of tree thinners under AS 21.39.090. Rather than provide a hearing directly, NCCI apparently referred the matter to an entity that refers to itself as the Worker's Compensation Grievance Committee. It appears that the membership of this entity is made up of the same members as the Workers Compensation Review and Advisory Committee, an entity that exists under 3 AAC 30.200 for the sole purpose of advising and assisting the Director of Insurance. It further appears that the Grievance Committee's meetings are held either immediately before or after the meetings of the Review and Advisory Committee. The members of the Grievance Committee are not employed by NCCI, but the decision document from which Sealaska appeals was signed by an employee of NCCI, and the decision document of the Grievance Committee was issued on NCCI letterhead.[1]

After the "Grievance Committee" rejected Sealaska's request without explanation, NCCI declined to hear the matter further. Sealaska appealed to the director. The director referred the matter to the Office of Administrative Hearings for hearing and a recommended decision. Administrative Law Judge Dale Whitney held a hearing on May 16, 2007. Jon Tillinghast represented Sealaska. Barbara Karl of the Division of Insurance monitored the hearing as an observer by telephone. Four witnesses testified. Robert Girt and Luther Coby testified as

[1] Letter of August 10, 2006, written "to advise all interested parties of the decision made by the Alaska Review and Advisory Committee (Committee) at its meeting on July 20, 2006."

experts from the logging and tree thinning industries. Barbara Thurston testified on the actuarial practices of workers compensation insurance. Ron Wolfe, Corporate Forester and Natural Resources Manager of Sealaska testified briefly regarding the commercial logging and tree thinning of Sealaska and its contractors.

The evidence supports Sealaska's position that and pre-commercial tree thinning should be rated in a separate classification. NCCI's division should be reversed.

II. Issue Presented:

Sealaska asserts that classifying tree thinners in the same category as commercial logging operations results in unfairly discriminatory rates in violation of AS 21.39.030(a)(1) because tree thinning and logging are fundamentally different in the nature of the activities involved and because there is no correlating relationship between either the qualitative or quantitative risk potentials of the two activities.

III. Facts

The decision in this case is guided by a comparison of the activities involved in logging and tree thinning, with particular attention to the inherent hazards and risks of injury of each industry. Messrs. Girt and Coby both have extensive knowledge and experience in commercial logging, and they are both credible experts on the industry in Alaska. In addition, Mr. Coby is an experienced expert in the field of pre-commercial tree thinning. Both men provided detailed and knowledgeable testimony about the operations and inherent injury hazards in commercial logging. Mr. Coby provided additional testimony regarding the activities and hazards of pre-commercial tree thinning. Except where noted, the following descriptions of the activities typical to the industry are derived entirely from their testimony.

Commercial Logging:

Commercial logging is the process of converting an area of standing timber into logs for delivery to a mill. As delivered to the mill, logs are a semi-finished product free of limbs and branches and cut to specified uniform lengths, ready for milling into dimensional lumber.

Logging operations are conducted in a designated area of forest described as a "unit." The operations will vary depending on the size, topography and terrain of the unit, but there is enough similarity among units that harvesting of a typical unit can be described. The logging of a unit consists of two principle activities, felling and yarding. The term "logging" can be used broadly, but within the industry it is often used to describe just the yarding portion of the operation and not felling. Thus, loggers often do not consider cutting down trees a part of

"logging." Yarding can be divided into two different techniques: hi-lead, or cable logging, and helicopter logging.

Felling.

When the harvesting of a unit begins, the unit is divided into separate bands that run from the downhill portion of the unit to the uphill boundary. Each band is assigned to a feller, who is a member of the felling crew. The feller's job is to bring down all of the trees within his band, to remove all of the limbs that he can, and to buck the tree into the lengths specified in the contract if he can safely do so. Each feller will begin at the downhill end of his band and work towards the uphill boundary. When felling of all the bands is finished, the fellers' work in the unit is complete, and the felling crew will move on to work in some other unit. Beyond felling standing trees and limbing and bucking them to the greatest extent possible, the fellers do not participate in the logging of the unit. Felling is not regarded as the most difficult or dangerous part of the work on a unit, and it consists very roughly of about a third of the time and labor devoted to harvest of each unit, depending on the particular circumstances.

The feller approaches a standing tree by first choosing the best direction to fell the tree. He uses a large chainsaw to cut a notch out of one side of the tree, and he then makes a straight cut on the other side of the tree, creating a hinge on which the tree will pivot as it comes down. There are numerous variations on this method and different techniques used to bring down a tree, depending on such circumstances as the surrounding terrain, relative location of other standing trees or natural obstacles such as boulders, prevailing winds, and irregularities in the tree such as a lean, split, or internal rot. Other tools, such as wedges driven by sledgehammers, are sometimes used in the cuts to force the tree to lean in the proper direction.

A typical mature tree might be between 100 and 200 feet tall, and weigh around 30,000 pounds. The limbs of a mature tree can be expected to each weigh several hundred pounds, to vary in length up to more than 20 feet, and to be over a half a foot in diameter at the base of the limb. Often times there will be detached limbs suspended in the tops of trees due to previous windstorms or snowfall. These limbs are referred to as "widowmakers," though there seems to be a number of other objects or situations in this industry to which this term is sometimes applied. These widowmakers occasionally fall from the canopy, either as a result of wind, or from the movement and vibration of the chainsaw or driving of wedges into the tree. Because widowmakers will fall with relative silence amongst the noise of saws and felling activities, and while the feller is wearing hearing protection, the feller must always remain alert for the

unexpected falling of widowmakers, which, at several hundred pounds each, have the potential to spike or crush the feller.

After the feller detaches the trunk of the tree from the stump, the tree does not always fall in the manner and direction the feller intended. Even when the tree does fall in the correct direction, it frequently happens that the tree will fall against another tree, particularly in dense stands of forest. In this situation, the feller has several options. A common solution is to fell a third tree onto the first one, thereby dislodging it and bringing both trees all the way down to the forest floor. If this fails, the feller might drop a fourth tree onto the first ones, or he might try cutting the tree that is supporting the first one. In any of these situations, the feller faces a situation in which tens of thousand of pounds of wood are suspended high in the air in precarious situations, with extreme tension. It cannot be predicted exactly when the breaking of limbs, perhaps with the help of a slight gust of breeze, might suddenly bring the whole pile of trees down to the forest floor. Trees in this situation will often be spring-loaded with tens of thousands of pounds of force; when one or all of them break free, either end of the trees may suddenly whip or lurch in an unexpected directions.

After the feller brings a tree to the ground, he must limb it. He does this by walking along the trunk of the tree and on the ground alongside, cutting off the limbs with his chainsaw. Typically, the feller is unable to cut the limbs on the bottom side of the tree because they will be supporting the tree up off the ground. The feller removes as many limbs as he can. The limbs, which as noted above will weigh several hundred pounds and often exceed twenty feet in length, are often spring-loaded by the tension between the tree trunk and the ground. When the limb is cut, the base will often spring quickly away from the trunk, and the feller must attempt to foresee the direction the limb will move and position himself to avoid being hit when the limb detaches from the trunk.

After the feller has removed the limbs, he will buck the tree, which means cutting the tree into the specified lengths for merchantable logs. Depending on the height of the tree and the desired log length, a single tree might yield two or three logs. Depending on the size of the tree and whether it is cut from the base or top end, each log will typically weigh from three to four tons, a weight well in excess of a large fully-loaded pickup truck. The feller will measure out the tree, and then cut it into the desired lengths. As he does this, the tree trunk will be supported at different points along its length by the limbs, the ground or objects on the ground. These different support points will result in competing tension along the length of the tree, and as the

logs are separated they may quickly snap into unexpected positions, roll, or otherwise move as they are separated from the support of the rest of the tree.

When each feller has completed felling, limbing, and bucking the trees within his band, the felling process is complete. As specialists, fellers do not participate in the logging (or yarding) of the unit, which remains to be done and is the greater part of the operation. When their work is finished, the felling crew notifies the yarding crew that felling is complete, and the fellers will pack up and move on to other jobs or units.

Yarding.

There are two methods of yarding, high-lead or cable yarding and helicopter yarding. In cable yarding, an open pad is prepared on or next to the road that accesses the unit. The pad is where most of the equipment and activity of the yarding operation will be sited. The vast majority of logging in Alaska is conducted in the Southeast region, where steep hillsides dominate the topography. Steep hillsides limit the possible size of the pad, resulting in a more crowded and dangerous working environment than would typically be found in the Lower 48.

In the center of the pad, a tower called the yarding tower is erected. The yarding tower will typically be about ninety feet high, and supported by guy cables. Beginning on the downhill side of the unit, a person called a hooktender will select a sturdy tree left standing at the perimeter of the unit. The hooktender will climb forty to sixty feet up into this tree using a belt and spurs on his boots that stick into the tree bark. As he climbs, the hooktender removes limbs with a chainsaw that he carries up the tree. When he reaches the desired altitude, the hooktender will attach a large pulley block to this tree. A closed loop of cable will then be strung from this block to a block at the top of the yarding tower, and then down the tower very a large and powerful motor that can alternately move the cable loop forward and backward. The purpose of this cable is to move the logs lying on the ground around the unit to the pad, where they can be further processed and then loaded onto trucks. The loop of cable is run forward to move logs toward the pad, and then backwards to the original position after the logs have been removed; the loop does not run continuously in one direction in the manner of a ski lift. The direction of the cables is controlled by a person called a yarder operator, who controls the yarding winches in response to auditory whistle signals.

From the ground, a person looking up would see two cables running between the tree and the yarding tower, though the two cables are actually one connected loop. The two cables are called the main line and the haulback line. Attached to the main line will be three or more cables

of about a hundred feet in length called the chokers. Each choker is attached to a log, and the logs will then be dragged across the unit to the pad. When the logs reach the pad, they are disconnected from the chokers, and the cables are run in reverse, with the haulback line now being pulled towards the tower. The chokers are thus moved back out into the unit to be connected to more logs.

The persons attaching the chokers to the logs are called the chokersetters. The chokersetter's job is the most dangerous and physically demanding. This position is usually assigned to the newest and least experienced member of the logging crew. The chokersetters are supervised by a rigging slinger, who directs the chokersetters to connect chokers to particular logs.

At the end of each choker is an enlarged nub that retains a hook on the choker called the bell. The bell can slide up and down the choker cable, but it does not slide off the cable because of the nub at the end of the choker cable. The bell also has a second hole in it, into which the cable can be looped back through after encircling the log. The chokersetter's job is to slide the bell up the choker, wrap the choker around the log, and then pass the end of the choker back through the bell, where the nub locks it in place when tension is placed on the choker. When each choker is set on a log, the rigging slinger will send an audible signal from a loud air-powered whistle attached to his belt. When the yarder operator hears the signal, he will engage the yarding winch to move the main line towards the tower. Each choker will tighten around its log, like a slipknot. As the chokers tighten, one end of each log will be lifted, and the logs will begin to be dragged toward the tower.

In setting chokers, the chokersetter is constantly climbing and scrambling around the loose logs, dragging the heavy cables of the chokers. He must sometimes dig under a log to pass the choker cable under it, or climb fairly high off the ground to attach the choker at the right location. The logs, weighing several tons, are often in unstable positions where they are subject to rolling and pivoting. As the chokers slide and tighten, the cables may slip loose from the log and move through the air with great speed and force, while the log is left to roll back down the hill toward the chokersetter. As the log is dragged up the hill, it will encounter obstacles on the ground, particularly stumps. As the force of the yarding winch increases, the log may suddenly upend and pivot over the top of the stump, or the stump and its entire root system may be ripped out of the ground by the yarding winch, which is capable of pulling over 100,000 pounds. As the logs approach the tower, they may impact the stumps to which the tower guys are attached. If

these stumps are loosened, there would be no immediate effect, as tension will be on the guys behind the tower. As the operation moves around to the other side of the unit, however, tension will be placed on the loosened guy. If the stump has been loosened enough that the root system breaks free from the ground and the guy cable is released, the tower and its cables may come crashing down when there is a heavy load on the main line.

There are three principal personnel working at the pad: the yarder operator, the shovel operator, and the chaser. The chaser has several duties. First, as logs approach the tower, the chaser must remove the chokers, so that the yarder operator can send them back out to be set on more logs by the chokersetter. The chaser must then take a chainsaw and remove any remaining limbs on the logs. Most logs will still have the limbs that were pointing downwards into the ground and could not be removed by the feller. Some logs will have uneven ends or be of improper lengths, because they were in a position in which the feller could not safely remove the end. In this case the chaser must saw the log even to the correct length. The chaser will also do anything necessary on the ground to assist the shovel operator, and he will also assist the truck drivers in securing loads.

The shovel operator is operating a large piece of equipment called the log shovel. The log shovel is a tracked piece of equipment with a large hydraulic arm and claw. The arm and cab of the shovel rotates, and the shovel operator's duty is to pick up the logs prepared by the chaser and load them onto a waiting logging truck. When the logging truck is fully loaded, there will usually be another one waiting at the perimeter of the pad to immediately replace it. The chaser will assist the truck driver in loading and securing the logs onto the truck.

There is a great deal of simultaneous and fast-paced activity at the pad. The chaser is moving quickly to finish trimming logs before the next set arrives from the chokersetters. The shovel is moving around on its tracks and also pivoting as it grabs logs and swings them onto the truck. Trucks are moving onto and off of the pad, and the yarder operator is continually working the yarding winch. The chaser and the shovel operator are supposed to maintain visual contact with each other, but the shovel operator's range of vision in his cab is limited to about 180 degrees. The shovel operator must be careful not to hit the chaser with the shovel's arm as it pivots back to pick up logs, and the chaser likewise must take care to get out of the way of the shovel and its pivoting arm. The shovel operator must also take care to monitor the chokers as they arrive at and depart the pad in order to avoid entangling his shovel with the cables. The

chaser must monitor all of this activity while at the same time devoting the appropriate attention to the chainsaw work he is doing on the arriving logs.

When all of the logs within reach of the chokers have been recovered, there will be an area of the unit the shape of a pie-slice in which logging is complete. At this time, the hooktender will climb back up the tree holding the block and outer end of the yarding cables, and recover the block. He will select another tree in the next pie-slice-shaped area, and repeat his earlier task of climbing, cutting limbs, and attaching the block and yarding cables. At this point, the process begins anew.

As the operation rotates around the tower and pad, it eventually moves to the uphill side of the pad, and the crew begins what is called "downhill logging." Downhill logging is more difficult and more dangerous than uphill logging. In downhill logging, the logs moving toward the pad are propelled not just by the force of the yarding winch pulling on the chokers, but also by the force of gravity pulling on the logs themselves. The logs may have an inclination to get ahead of the yarding cables and come quickly and unstoppably toward the chaser, the yarder operator and the shovel. Also, as they drag across the ground, the logs will dislodge other loose logs, stumps, and boulders. In a very steep unit, the risk of extremely large and heavy objects rolling and sliding down the hill onto the people working at the pad is very serious.

At any point in the logging operation, there is an assortment of opportunities for injury. Snapping of damaged cables is a significant hazard, whether the cables are chokers, yarding cables, guys supporting the tower, cables securing the load on a truck, or various other uses to which ropes, cables and chains are employed in the operation. The cables are heavy and under great tension, and when they snap they tend to take out whatever is in their way. Even within the area of the pad, the ground may be soft or uneven, especially after heavy rain. It is not unheard of for even large pieces of machinery such as the log shovel or a logging truck to tip over and roll down a hillside, particularly in very steep units. Because of the immense size of the machinery, even routine maintenance can result in tragic accidents. For example, parts such as the drum on the yarder winch or the claw on the log shovel weigh hundreds of pounds, and they must be occasionally removed and reattached for servicing. In doing so, the risk of severing a hand, foot or a complete limb is very real.

An alternative method of logging commonly employed in Alaska is helicopter yarding. In this method, the felling operation is similar to that of cable logging, but the fellers will choose only the largest and most valuable trees for felling. The remaining trees will be left standing.

Instead of setting up an overhead cable system, a helicopter is used to lift logs from around the unit to the pad. The chokersetter will set shorter chokers on the logs, but these chokers are not connected to anything. When the helicopter approaches, it will be dangling a cable that will be about 100 feet in length with a hook on the end. When the helicopter descends, the chokersetter will attach a loop on the end of the choker to the hook, and give a signal to the pilot, who then begins lifting the log. On the ground, the chokersetter will be working in a downwash of wind that may exceed 50 or 60 miles per hour. As the helicopter begins to ascend, it will usually not be lifting straight up; the helicopter will be moving in a forward motion. The log will initially drag across the ground, and as the helicopter gains enough altitude to lift the log clear the log and cable will rapidly swing forward. The chokersetter thus must take great care to anticipate the direction of movement and to be clear of the log. It occasionally happens that a log will slip out of its choker, or that for some reason the choker will come unhooked from the helicopter's drop cable.

The most remarkable difference between cable and helicopter logging is the pace of the operation. While cable loggers work as fast as they can, helicopter logging occurs at an extremely fast pace. Helicopters can only work for about an hour before they must be refueled, and flight time is very expensive. According to a report by the state Division of Epidemiology, the typical time for a cycle of lifting a log, carrying it to the pad, unhooking it and returning to the chokersetter for another log will be one to three minutes.[2] At this pace, there is no time to load the logs onto trucks. The logs are piled on a "log deck" on the pad, to be loaded onto trucks at a later time. These piles of logs might reach as high as 25 feet. An inherent danger in stacking round logs is that the logs might roll, bringing the entire pile down onto the chaser or shovel operator.

Logging places extraordinary stress on the helicopter and its drive train, and the use of cables near rotor blades creates an extraordinarily dangerous flying condition. According to a 1993 study, in the period from February 1992 through May 1993 six logging-related helicopter crashes in Alaska resulted in nine worker fatalities and ten serious injuries.[3] These crashes resulted in the equivalent of a 19% annual crash rate and an average of .29 per helicopter in

service per year, although improved safety measures put in place since the issuance of this study have reduced crash rates. According to the Centers for Disease Control,

> Long-line helicopter logging is a technology application with an unusually high risk for occupational fatalities. General aviation regulations restrict the number of hours pilots can fly during given time periods; however, long-line helicopter logging involves carrying loads outside the rotorcraft, and there are no legal limitations on crew flight hours. Although flight-crew work schedules and daily flight hours vary greatly by logging company, flight-crew duty periods can exceed 10 hours per day for 10 consecutive days.
>
> Helicopter logging operations often place heavy demands on helicopter machinery and associated equipment. The highly repetitive lift/transport/drop cycles are frequently conducted at or beyond maximum aircraft capacity in remote areas, where rugged terrain, extremely steep mountain slopes (as great as 70 degrees), and adverse weather conditions prevail. Complex operations under such circumstances may increase the likelihood of both human error and machine failure. In addition, conditions are unfavorable for successful autorotation during most helicopter long-line operations.[4]

Pre-commercial Tree Thinning:

As the name implies, tree thinning is the process of removing young trees from a previously logged area to permit the selected remaining trees to grow faster and healthier. Thinning operations are conducted by contractors who may be experienced in logging and forestry, but do not do any other kind of logging work. Forest owners do not always choose to thin their forests; whether to thin is a matter of business judgment, and will depend on the landowner's particular business plans and objectives, as well as the nature of the particular forest.

In a thinning operation, a thinning crew will arrive to a unit in a crewcab-style pickup. The unit will be divided into bands, similar to a felling operation. Each member of the thinning crew will be assigned a band, and like fellers, the thinners will start at the downhill end of the band and work upward.

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[2] Bulletin 32, *Helicopter Logging: Alaska's Most Dangerous Occupation?* Alaska Department of Health and Social Services, Division of Public Health, Epidemiology Section (August 16, 1993)(attached as Exhibit A). See also *Risk for Traumatic Injuries from Helicopter Crashes During Logging Operations -- Southeastern Alaska, January 1992-June 1993,* Morbidity and Mortality Weekly Report vol 43, no. 26, U.S. Dept. Health Human Services, Center for Disease Control, (July 8, 1994), http://www.cdc.gov/mmwr/preview/mmwrhtml/00031811.htm (accessed May 18, 2007)(attached as Exhibit B).

[3] *Id.*

[4] *Risk for Traumatic Injuries from Helicopter Crashes During Logging Operations -- Southeastern Alaska, January 1992-June 1993,* Morbidity and Mortality Weekly Report vol 43, no. 26, U.S. Dept. Health Human Services, Center for Disease Control, (July 8, 1994), http://www.cdc.gov/mmwr/preview/mmwrhtml/00031811.htm (accessed May 18, 2007)(attached as Exhibit B).

The thinning crew arrives at the unit many years after the earlier logging operation has been finished, and thinning lacks the feeling of intense industrial activity present in a logging operation. Thinners enjoy working on units not directly accessible by a road, as they consider the hike of a mile or two through the forest to the unit as a pleasant way to warm up in the morning. The thinning crew's work environment contrasts from the fellers' in that thinners work in areas that are open and bright, as opposed to the dense forest in which the feller works under a heavy canopy of mature trees.

The thinner's principal tool is a chainsaw, but this chainsaw will weigh about half as much as the saw used by a feller. The chainsaw bar will usually be around 24 inches in length, as opposed to a 42-inch bar typically used by a feller. The trees to be cut by a thinner will typically be the size of an average Christmas tree. The largest trees might be as tall as ten or twelve feet, and six inches in diameter at the base of the trunk. Most trees, however, will be around five to seven feet high. When cut, the weight of these trees will never be such that they cannot be lifted by one person: a marked contrast to the 30,000-pound tree being cut by the feller.

When the thinner begins work on his band, he starts by choosing an area of 12 to 14 feet in diameter. Within this area, the thinner identifies one tree that can be regarded as the "best of the best." This tree will be saved to grow to maturity, while its competitors for light, water and soil nutrients in the immediate area will be cut down. In choosing the tree to save, the thinner looks first for the most valuable species. A cedar tree, for example, should be saved over a spruce, and a spruce is better than a hemlock. The thinner also looks for trees that are straight, free of blemishes, healthy in appearance, and that appear to have a stable root system. After choosing the tree to be saved, the thinner will use his chainsaw to cut down all the competing trees in the immediate area. Once cut, these competing trees are not removed; they are simply left to decompose on what will be the forest floor. The thinner then moves on to the next 12-14 area and begins the process anew. As he works back and forth across his band, the thinner will "bounce off" the bands being worked by the other thinners. Like fellers, thinners work in an uphill direction. When the thinners reach the top of their bands, the thinning operation is complete. After the thinning crew departs, it will be decades before anyone returns to the forest, when fellers return to cut the mature trees.

While the thinners are often within shouting distance and frequently within sight of each other, the thinner generally works alone in his band. His safety does not depend on the actions of

any other thinners, nor does his work present a hazard to anyone but himself. Besides the chainsaws, the only piece of equipment used in a thinning operation is the pickup truck the thinners travel in. The hazards involved with this truck are no greater than for any occupation in which auto travel is required. The ground in a thinning operation has not been recently disturbed, as in logging, and the pickup generally does not need to go into soft, unstable ground, as a log shovel or logging truck might need to.

The chainsaw used by a thinner is easier to control than a feller's saw, as it will weigh only about half as much. The sharp blades of the saw are a cutting hazard, although somewhat surprisingly most injuries occur when the saw is not running. Cutting a Christmas tree-sized trunk takes only a moment, and, like the feller, the thinner is usually carefully positioned and paying close attention while he cuts. A thinner hiking up a hill while carrying his saw may slip and fall on his saw, as may a feller. Chains must be sharpened and saws maintained, and there is a risk of a cut in performing this work. Mr. Coby testified that he once reached into a container of chains and suffered a cut on his hand that required four stitches, and he displayed the scar to prove it. But the thinner, unlike every worker in a logging operation, lacks exposure to the movement of large, extremely heavy objects and machines. Further, the thinner is not exposed to dangers resulting from the actions of coworkers. Like a logger, the thinner may slip and fall, or cut himself or poke his eye with a branch. But unlike a logger, nobody else is likely to strike the thinner with a large machine, tighten a cable around his body, or drop several tons of wood on top of him.

Statistical data:

Statistical information is derived from the testimony and exhibits presented by Barbara Thurston, an actuary with a great deal of experience in the rating of worker's compensation insurance. Besides her testimony at the hearing, Ms. Thurston provided a detailed written affidavit with cites to a number of statistical resources.

Ms. Thurston testified that several states, including Maine, Idaho, Montana, Oregon, and Washington maintain separate categories for logging and for silviculture or similar industries. There is variation among the category description of the non-logging classifications, but silviculture would generally fit into these categories or would at least be a comparable activity. The pure premium (ratio of money actually paid for losses exclusive of expenses and profit over the total payroll for the industry) for silviculture categories in these states is far below the pure

premium for logging, ranging from less than one fourth of the cost of logging losses in Oregon to about two-thirds of the cost in Idaho.[5]

Silviculture in Alaska is a young industry with a relatively small amount of activity. The small payroll limits the credibility of worker' compensation loss statistics, but the data that is available is still valuable. As the principal landowner employing silviculture contractors in Alaska, Sealaska has been able to assemble most of the loss data available.[6] From 1998 through 2006, losses for silviculture worker's compensation have been 2.50 percent of the more than $5 million in payroll for that period. For the last five years, the period normally used to establish rates, the silviculture pure premium has been 1.93 percent. For logging in Alaska, the pure premium for the same period was 34.85 percent. The comparison of $1.93 in losses per $100 of payroll in silviculture to the $34.85 per $100 for logging payroll presents a striking contrast.

As noted above, silviculture workers are exposed to some of the hazards that loggers face, including use of chainsaws, but loggers face additional hazards associated with the movement of large, heavy objects. Ms. Thurston references a study that examines the cause of logging losses, which is summarized in a table in Exhibit VII. This study dates from 1976, but there does not appear to have been significant changes in logging practices since then, with the possible exception of an increase in helicopter logging.

To the uninitiated, the thought of dangers inherent in logging often calls to mind chainsaws, which are intuitively dangerous. But a Bureau of Labor Statistics study of logging accidents showed that of a number of logging accidents, only 20 percent were caused by chainsaws.[7] A Washington state study showed that of 135 logging fatalities over a five-year period, none were caused by chainsaws. The causes of logging deaths, in order of frequency, were as follows: "struck by tree brought down by deceased," "struck by rolling log," "struck by log being dragged," "struck by mobile equipment," "equipment rollover," "struck by tree felled by another person," "other," "struck by boom or rigger," and with 2 percent of fatalities each were "electrocution," "struck by log falling from truck during loading," and "unknown." With the possible exception of the 7 percent of "other" causes and 2 percent "unknown," none of these deaths was caused by a chainsaw, and none of them was caused by any of the activities typical to silviculture.

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[5] See Affidavit of Barbara Thurston, pages 19-22.
[6] Exhibit VIII.
[7] Exhibit V.

One item of reference material that was not entered into evidence is a State of Alaska Epidemiology Bulletin from 1993 entitled, "Helicopter Logging: Alaska's Most Dangerous Profession?"[8] This bulletin described a study that found during a 16-month period in 1992 and 1993 that six helicopter crashes resulted in nine logging deaths. These numbers translated to a 19 percent annual crash rate for helicopters involved in logging, with an average 0.29 percent death rate per helicopter in service each year.

There is no evidence that there has ever been a fatality in Alaska resulting from tree-thinning. Even if the scale of the tree-thinning industry in Alaska were proportionate to the amount of logging activity in the state, such an accident would probably be considered a highly unusual event.

IV. Discussion

The setting of insurance rates in Alaska is governed by AS 21.39.030, which reads in part:

> (a) Rates, including loss costs under AS 21.39.043 or any other provision of law, shall be made in accordance with the following provisions:
>
> (1) rates shall not be excessive, inadequate, or unfairly discriminatory;
>
> (2) consideration shall be given to past and prospective loss experience inside and outside this state; to the conflagration and catastrophe hazards; to a reasonable margin for underwriting profit and contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to past and prospective expenses both countrywide and those specially applicable to this state; and to all other relevant factors inside and outside this state;
>
> * * * * *
>
> (4) risks may be grouped by classifications for the establishment of rates and minimum premiums; classification rates may be modified to produce rates for individual risks in accordance with rating plans that establish standards for measuring variations in hazards or expense provisions, or both; the standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses....

The term "unfairly discriminatory" is not defined by statute. According to the American Academy of Actuaries,

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[8] State of Alaska Epidemiology Bulletin No. 32, August 16, 1993. Available from the Section of Epidemiology ((907) 269-8000) or online at www.epi.hss.state.ak.us/bulletins/docs/b1993_32.htm. A party objecting to the taking of official notice of these facts may file an objection and submit evidence or authority to refute the officially noticed facts. Any such filing should be made prior to the date set in this case for submission of proposals for action under AS 44.64.060(e), and should be submitted separately from any proposal for action filed under that provision.

> Since adverse selection occurs when the prices are not reflective of expected costs, a reasonable risk classification system designed to minimize adverse selection tends to produce prices that are valid and equitable--i.e., not unfairly discriminatory. Differences in prices among classes should reflect differences in expected costs with no intended redistribution or subsidy among the classes.
>
> Ideally, prices and expected costs should also match within each class. That is, each individual risk placed in a class should have an expected cost which is substantially the same as that for any other member of that class. Any individual risk with a substantially higher or lower than average expected cost should be placed in a different class.[9]

The evidence shows that pre-commercial tree thinning and commercial logging are qualitatively different activities. Thinners and loggers perform different kinds of work. They use different tools, have different skills, do different activities as part of their work, and are subject to substantially different risks of injury.

Different kinds of activities could be rated together so long as the respective levels of risk are the same or similar. The evidence clearly supports the intuitive proposition that cutting down saplings and leaving them on the ground is substantially less risky than cutting down 30,000 pound trees, processing them into logs weighing as much as a truck, and hauling the logs out of the forest. Comparison of the actual activities of loggers and tree thinners shows a large difference both in kind and degree of risks of physical injury and death. Because Alaska's tree thinners are a small group, loss experience for Alaska thinners is somewhat lacking in statistical credibility. Nevertheless, the difference in losses for Alaska tree thinners and Alaska loggers is striking. While there is some variation in the ways that other states categorize tree thinners, all of the experience from other states supports one simple truth: it costs substantially more to insure loggers than tree thinners. When loggers and tree thinners are classified together, the result is unfair discrimination. Tree thinners will inevitably subsidize losses incurred by loggers. To avoid unfairness, the two groups must be categorized separately.

There are several possible solutions to the current inequity. Ms. Thurston has recommended that NCCI create a new class identified as "0124 – Reforestation in Alaska" that would adopt a definition similar to that currently used in Oregon, but expanded to include silviculture. This approach would permit NCCI to use experience from several other states to supplement the small amount of loss data available in Alaska. Ms. Thurston points out, however, that NCCI currently has several Alaska special state classifications with payroll

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[9] Testimony of Barbara Thurston; AMERICAN ACADEMY OF ACTUARIES, COMMITTEE ON RISK CLASSIFICATION, RISK CLASSIFICATION STATEMENT OF PRINCIPLES (publication date unavailable). Exhibit II to Ms. Thurston's affidavit at page 6.

comparable to the Alaska silviculture industry that are rated entirely on Alaska experience. The five-year payroll for Alaska silviculture workers is $3.5 million. Class 2101 – Fish Curing is a state special classification that is rated entirely on a $2.3 million five-year payroll. Class 7418 – Aircraft or Helicopter Operation: Patrol, Photography other than mapping or Survey Work: Flying Crew is a classification unique to Alaska that is rated on five-year Alaska payroll of $3.8 million. The significance of these options is that rating Alaska's silviculture industry in its own category would not present any particular difficulties in rating that have not been shown to be surmountable in other industries.

Under AS 21.39.090, after a hearing the director "may affirm or reverse" NCCI's decision to not classify silviculture workers separately. Reversal of NCCI's decision would not infringe on the rating organization's use of its own expertise in establishing the best method for rating a separate classification. Sealaska correctly asserts that any method of rating silviculture workers in a category separate from commercial logging would be a vast improvement over the current inequitable classification of silviculture workers with commercial loggers.

IV. Conclusion

The classification of silviculture and pre-commercial tree thinning workers with commercial logging for purposes of determining rates for workers' compensation insurance results in unfair discrimination in violation of AS 21.39.030(a)(1). Upon adoption of this decision as a final administrative decision, NCCI's decision to deny Sealaska's request to create a separate classification for silviculture and pre-commercial tree thinning shall be REVERSED.

DATED this 5th day of October, 2007.

By: _____
DALE WHITNEY
Administrative Law Judge