Approved _____
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:00 a.m./~~p.m.~~ on March 27, 1985 in room 526-S of the Capitol.

All members were present except:
Representatives Bideau and Friedeman, both excused.

Committee staff present:

All present.

Conferees appearing before the committee:

Karen McClain, Kansas Association of Realtors
Senator Gus Bogins
Jerry Desch, Liscensed Real Estate Broker
Larry Lutz, Real Eastate Salesperson
Larry MaGill, Independent Insurance Agents
George McCullough, Kansas State Fed. AFL-CIO
John B. Rathmel, Director, Division of Workers' Compensation

S.B. 176: The first speaker was Karen McClain, see attachment #1, who spoke as a proponent on this bill. Senator Gus Bogina spoke next as the sponsor of this bill. Jerry Desch also spoke as a proponent of this bill and answered questions of the committee. Mr. Desch is an employee of Caldwell, Banker, Griffith and Blair. The final proponent of the bill was Larry Lutz.

Larry MaGill gave testimony on the bill, see attachment #2. John Rathmel provided the committee with further information.

George McCullough spoke briefly as an opponent of this bill.

The meeting was adjourned at 10:00a.m.

HOUSE LABOR & INDUSTRY

3-27-85

Name	Representing	City
Ros Hodges	KCCI	Topeka
KAREN McCLAIN	Ks. Assoc. of Realtors	Topeka
George Fowler	Ks. St. Fed AFL-CIO	Topeka
Richard Funk	KAHB	"
Wayne Maichel	Ks. AFL-CIO	Top
Janet Stubbs	HBAK	"
Rick Thornton	Guest Chaplain	Russell
Mark Bennett	Am Ins Assoc	Topeka
LARRY MAGILL	INDEP. INS. AGENTS OF KS.	"
Jan Mayer	KS ASSOC of REALTORS	TOPEKA
Larry Lutz	Coldwell Banker Griffith Blair	"
John Rathmel	KAHR - Workers Compensation	Topeka

TESTIMONY BEFORE

THE HOUSE LABOR AND INDUSTRY COMMMITTEE

KAREN MCCLAIN

THE KANSAS ASSOCIATION OF REALTORS®

3-27-85
Att. #1

MARCH 28, 1985

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE, I AM KAREN MCCLAIN, DIRECTOR OF GOVERNMENTAL AFFAIRS FOR THE KANSAS ASSOCIATION OF REALTORS®. I AM HERE TODAY TO ASK YOU TO PASS SB 176 OUT OF THIS COMMITTEE FAVORABLY.

WHAT THIS BILL PROPOSES TO DO IS QUITE SIMPLE. THE BILL WOULD INSERT A STATUTORY EXEMPTION OF QUALIFIED REAL ESTATE PERSONS INTO THE CURRENT WORKMEN'S COMPENSATION STATUTES. A QUALIFIED REAL ESTATE PERSON IS DEFINED IN THE BILL, ROUGHLY AS ONE WHO IS LICENSED TO SELL REAL ESTATE, IS PAID WITH A COMMISSION RATHER THAN ON A SALARY OR WAGE BASIS, AND THE BROKER AND SALESPERSON SIGN A WRITTEN CONTRACT, PROVIDING THAT THE SALESPERSON WILL NOT BE TREATED AS AN EMPLOYEE WITH RESPECT TO SUCH SERVICES FOR STATE TAX PURPOSES.

THE WORKMEN'S COMPENSATION STATUTES APPLY WHERE THERE IS AN EMPLOYER-EMPLOYEE RELATIONSHIP. K.S.A. 44-501 STATES "IF IN ANY EMPLOYMENT TO WHICH THE WORKMEN'S COMPENSATION ACT APPLIES, PERSONAL INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT IS CAUSED TO AN EMPLOYEE, HIS OR HER EMPLOYER SHALL BE LIABLE TO PAY COMPENSATION TO THE EMPLOYEE IN ACCORDANCE WITH THE PROVISIIONS OF THE WORKMEN'S COMPENSATION ACT."

THE WORKMEN'S COMPENSATION STATUTES DO NOT APPLY WHERE AN INDEPENDENT CONTRACTOR IS INVOLVED. K.S.A. 44-508 (b) STATES, IN PART, "WORKMAN" OR "EMPLOYEE" OR "WORKER" MEANS ANY PERSON WHO HAS ENTERED INTO THE EMPLOYMENT OF OR WORKS UNDER ANY CONTRACT OF SERVICE OR APPRENTICESHIP WITH AN EMPLOYER..." THERE IS NO LANGUAGE IN THE STATUTE WHICH DEFINES "EMPLOYMENT".

Atch. 1
3/27/85

IT IS A LONG TRADITION IN THE LAW THAT A PERSON WHO IS HIRED AS AN INDEPENDENT CONTRACTOR IS NOT CONSIDERED AN EMPLOYEE, BUT SOMEONE WHO IS HIRED TO PERFORM A FUNCTION IN AN INDEPENDENTLY ESTABLISHED OCCUPATION. WE SUGGEST TO YOU THAT A QUALIFIED REAL ESTATE AGENTS ARE INDEPENDENT CONTRACTORS BY THE VERY NATURE OF THE RELATIONSHIP BETWEEN THE BROKER AND THE SALESPERSON.

WE HAVE ASKED THAT QUALIFIED REAL ESTATE AGENTS BE SPECIFICALLY EXEMPTED OUT OF THE WORKMEN'S COMPENSATION STATUTES BECAUSE THERE HAVE BEEN PROBLEMS IN INTERPRETING THE STATUTE AND ITS APPLICATION AS IT NOW EXISTS. IT HAS BECOME A COMMON OCCURENCE FOR INSURANCE COMPANIES TO REQUIRE BROKER-OWNERS TO EITHER CARRY WORKER'S COMPENSATION INSURANCE ON THEIR SALESPERSONS OR THE COMPANY WILL BE UNABLE TO COVER THE WORKER'S COMPENSATION POLICIES HELD BY THE BROKER FOR THE CLERICAL EMPLOYEES IN THEIR OFFICE.

ON THE FACE OF THE STATUTE, WE FEEL THAT REAL ESTATE SALESPERSONS ARE NOT EMPLOYEES IN THE MEANING OF THE STATUTE AND THUS THE WORKMEN'S COMPENSATION STATUTE DOES NOT APPLY. HOWEVER, IN LIGHT OF THE PROBLEMS IN INTERPRETATION MENTIONED ABOVE IT SEEMS SOME CLARIFICATION MUST BE MADE. AND SO WE HAVE REQUESTED THAT THE SPECIFIC EXEMPTION FOR QUALIFIED REAL ESTATE PERSONS BE INSERTED IN K.S.A. 44-505.

THE MOST RECENT KANSAS SUPREME COURT CASE, KIRBY VACUUM CLEANERS V. SECRETARY OF KANSAS DEPARTMENT OF HUMAN RESOURCES, DISCUSSED IN GREAT DETAIL WHAT STANDARDS THE COURTS USE TO DETERMINE WHETHER AN INDEPENDENT CONTRACTOR RELATIONSHIP EXISTS. THE COURT STATED, " AN INDEPENDENT CONTRACTOR IS GENERALLY DESCRIBED AS ONE WHO, IN EXERCISING AN INDEPENDENT EMPLOYMENT, CONTRACTS TO DO CERTAIN WORK ACCORDING TO HIS OWN METHODS, WITHOUT BEING SUBJECT TO THE CONTROL OF HIS EMPLOYER, EXCEPT AS TO THE RESULTS OR PRODUCT OF HIS WORK. . . THE PRIMARY TEST USED BY THE COURTS IN DETERMINING WHETHER THE EMPLOYER-EMPLOYEE RELATIONSHIP EXISTS IS WHETHER THE EMPLOYER HAS THE RIGHT OF CONTROL AND SUPERVISION OVER THE WORK OF THE ALLEGED EMPLOYEE, AND THE RIGHT TO DIRECT THE MANNER IN WHICH THE WORK IS TO BE PERFORMED, AS WELL AS THE RESULT WHICH IS TO

BE ACCOMPLISHED. IT IS NOT THE ACTUAL INTERFERENCE OR EXERCISE OF THE CONTROL BY THE EMPLOYER, BUT THE EXISTENCE OF THE RIGHT OR AUTHORITY TO INTERFERE OR CONTROL, WHICH RENDERS ONE A SERVANT RATHER THAN AN INDEPENDENT CONTRACTOR."

ACCORDING TO THIS LANGUAGE A REAL ESTATE SALESPERSON IS AN INDEPENDENT CONTRACTOR RATHER THAN AN EMPLOYEE. A REAL ESTATE SALESPERSON CONTRACTS TO DO CERTAIN WORK FOR A BROKER, NAMELY, LISTING AND SELLING REAL ESTATE FOR THE BROKER. THE SALESPERSON DETERMINES HOW AND WHEN THEY WILL SELL AND/OR LIST THE PROPERTY. THE SALESPERSON DECIDES WHICH HOURS THEY WILL WORK DURING ANY GIVEN DAY OR WEEK. THE BROKER CANNOT TELL THE SALESPERSON HOW OR WHEN TO DO THE WORK, EXCEPT FOR INSURING THAT THE SALESPERSON MEETS THE OBLIGATIONS IMPOSED BY LAW, AND WHICH THE LAW MAKES THE BROKER LEGALLY RESPONSIBLE FOR. THE BROKER OFTENTIMES HAS OFFICES AVAILABLE FOR THE USE OF THE SALESPERSON, HOWEVER, A SALESPERSON CAN WORK ENTIRELY OUT OF THEIR HOME IF THEY SO DESIRE, AND NEVER SHOW UP AT THE OFFICE. IN ADDITION, IF THEY DO USE OFFICE SPACE AT THE COMPANY OFFICE, THE COST OF THE USE OF OFFICE AND ANY OFFICE SUPPLIES ARE TAKEN INTO CONSIDERATION AT THE TIME THE COMMISSION IS NEGOTIATED BY THE BROKER AND THE SALESPERSON. IN OTHER WORDS, IF A SALESPERSON IS GOING TO USE THE OFFICE AND THE SUPPLIES OR CLERICAL HELP, THE PERCENT OF THE COMMISSION WHICH THE SALESPERSON RECEIVES IS REDUCED BY A PROPORTIONATE AMOUNT TO COVER THE BROKER'S COST OF PROVIDING THOSE SERVICES.

I HAVE INCLUDED A COPY OF A MODEL CONTRACT WHICH THE BROKER AND SALESPERSON BOTH SIGN AND WHICH LAYS OUT THE RIGHTS AND DUTIES OF EACH PARTY TO THE CONTRACT. THIS CONTRACT CLEARLY DEMONSTRATES THAT THE NATURE OF THIS RELATIONSHIP IS ONE OF CONTRACTOR AND INDEPENDENT CONTRACTOR, RATHER THAN EMPLOYER, EMPLOYEE. PARAGRAPH 10 ON THE BACK OF THE CONTRACT EXPLICITLY DEFINES THE RELATIONSHIP AND A DEFINITION SUCH AS THIS DESCRIBES WHAT THE COURTS HAVE DECLARED OVER THE YEARS TO BE, AN INDEPEDENT CONTRACTOR SITUATION, NOT AN EMPLOYER-EMPLOYEEE RELATIONSHIP.

IN ORDER TO GIVE YOU FURTHER GUIDANCE, IN 1982 THE UNITED STATES CONGRESS PASSED THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT (TEFRA). ONE OF THE TOPICS WHICH THAT ACT ADDRESSED IS THE ISSUE OF FEDERAL INCOME TAX WITHHOLDING, AND PROVIDED THAT FOR PURPOSES OF INCOME TAX WITHHOLDING, WHERE A QUALIFIED REAL ESTATE AGENT IS INVOLVED, THE INDIVIDUAL PERFORMING SUCH SERVICES SHALL NOT BE TREATED AS AN EMPLOYEE, AND THE PERSON FOR WHOM SUCH SERVICES ARE PERFORMED SHALL NOT BE TREATED AS AN EMPLOYER. THE SAME DEFINITION OF "QUALIFIED REAL ESTATE AGENT" WAS USED IN THAT STATUTE AS WHAT WE HAVE PROPOSED HERE. THUS THE FEDERAL GOVERNMENT HAS RECOGNIZED THAT THE REAL ESTATE SALESPERSON AND REAL ESTATE BROKER RELATIONSHIP IS NOT AN EMPLOYER, EMPLOYEE RELATIONSHIP. I HAVE ALSO ENCLOSED A COPY OF THAT LAW TO MY TESTIMONY, FOR YOUR REFERENCE.

IN ADDITION, THE 1984 KANSAS LEGISLATURE AMENDED K.S.A. 44-703 OF THE EMPLOYMENT SECURITY LAW AND SPECIFICALLY EXEMPTED QUALIFIED REAL ESTATE PERSONS FROM THE MEANING OF THE TERM "EMPLOYMENT", IN RECOGNITION OF THE INDEPENDENT CONTRACTOR STATUS INVOLVED IN THE BROKER-SALESPERSON RELATIONSHIP.

LADIES AND GENTLEMEN, THIS PIECE OF LEGISLATION IS THE LAST LEG OF WHAT HAS COME TO BE A THREE LEGGED TABLE OF LAWS. WHY SHOULD REAL ESTATE SALESPERSONS BE TREATED ANY DIFFERENTLY UNDER WORKMEN'S COMPENSATION LAWS THAN THEY ARE UNDER OTHER AREAS OF THE LAW?

THIRTEEN STATES HAVE EXPLICITLY EXEMPTED REAL ESTATE LICENSEES FROM WORKER'S COMPENSATION, FIVE OF WHICH HAVE UTILIZED THE SAME LANGUAGE USED IN THE TEFRA LEGISLATION. TWO OF THOSE STATES ARE OUR BORDERING STATES OF MISSOURI AND OKLAHOMA.

IT HAS BEEN SUGGESTED THAT IF THE REAL ESTATE AGENTS ARE EXEMPTED OUT OF THIS STATUTE, OTHER PEOPLE WILL BEGIN COMING IN ASKING TO BE EXEMPTED. HOWEVER, REAL ESTATE AGENTS HAVE A STRONGER BASIS FOR THIS REQUEST WHICH OTHERS DO NOT HAVE, AND THUS YOU CAN, IN GOOD CONSCIENCE, PASS THIS PIECE OF LEGISLATION AND STILL BE ABLE TO TELL THOSE OTHER GROUPS NO. OTHER GROUPS ARE NOT SPECIFICALLY TREATED AS INDEPENDENT CONTRACTORS FOR FEDERAL TAX PURPOSES, AND, AT THE SAME TIME SPECIFICALLY EXEMPTED OUT OF BOTH THE FEDERAL AND STATE UNEMPLOYMENT COMPENSATION LAWS.

IN LIGHT OF THE PROBLEM WHICH I HAVE PRESENTED, AND IN LIGHT OF THE LONG RECOGNITION OF THE COURTS OF THE DIFFERENCE BETWEEN THE INDEPENDENT CONTRACTOR AND THE EMPLOYEE, I ASK THAT YOU PASS THIS BILL OUT FAVORABLY.

INDEPENDENT CONTRACTOR AGREEMENT

AGREEMENT entered into this_____ day of_____, 198_____, by and between

_____ ("BROKER") and

_____ ("SALESPERSON").

RECITALS

BROKER is engaged in business as a general real estate broker in _____, State of Kansas, among other places, and is qualified to and does operate a general real estate business and is duly qualified to and does procure the listings of real estate for sale, lease or rental, and prospective purchasers, lessees and renters thereof and has and does enjoy the good will of, and a reputation for fair dealing with the public; and

BROKER maintains an office in _____, State of Kansas properly equipped with furnishings and other equipment necessary and incidental to the proper operation of its business, and staffed with individuals capable of serving the public as a real estate broker; and

SALESPERSON is engaged in business as a licensed real estate salesperson and has enjoyed and does enjoy a reputation for fair and honest dealing with the public as such; and

It is deemed to be the mutual advantage of BROKER and SALESPERSON to form the association as set forth in this agreement.

IT IS AGREED:

1. **Listings and Cooperation**—BROKER shall make available to SALESPERSON all current listings of the office, except such as BROKER for valid and usual business reasons may place exclusively in the temporary possession of some other salesperson. BROKER may, upon request, assist SALESPERSON in his or her work by advice and instruction. BROKER shall provide to SALESPERSON full cooperation in every way possible. Nothing herein shall be construed to require that SALESPERSON accept or service any particular listing or prospective listing offered by BROKER; nor shall BROKER have any right or authority to direct that SALESPERSON see or service particular parties, or restrict SALESPERSON'S activities to particular areas. BROKER SHALL have no right, except to the extent required by law, to direct or limit SALESPERSON'S activities as to hours, leads, open houses, opportunity or floor time, production, prospects, reports, sales, sales meetings, schedules, services, inventory, time off, training, vacation, or other similar activities.

2. **Use of Facilities**—SALESPERSON may share with other salespeople all the facilities of the office now operated by BROKER at _____ (address), in _____ (city), Kansas in carrying out this agreement.

3. **Efforts by Salesperson**—SALESPERSON shall work diligently and with his or her best efforts to sell, lease or rent any and all real estate listed with BROKER, to solicit additional listings and customers for BROKER, and otherwise promote the business of serving the public in real estate transactions to the end that each of the parties to this agreement may derive the greatest profit possible. BROKER agrees that thereby BROKER obtains no authority or right to direct or control SALESPERSON'S activities, except as may be required by the statute of the State of Kansas and the rules and regulations of the Kansas Real Estate Commission, and SALESPERSON assumes and retains discretion for methods, techniques and procedures in soliciting and obtaining listings and sales, rentals, or leases of listed property.

4. **Conduct of Business**—SALESPERSON shall conduct his or her business in such a manner so as to maintain and to increase the good will and reputation of BROKER and SALESPERSON and shall conform to and shall abide by all laws, rules and regulations and codes of ethics that are binding upon or applicable to real estate brokers and real estate salespeople.

5. **Compensation of Salespersons**—The compensation of the SALESPERSON shall be based upon a proportionate share of the commissions charged by the BROKER for services rendered in real estate transactions in which the salesperson may be involved. When SALESPERSON shall perform any service pursuant to this agreement, whereby a commission is earned, the commission shall, when collected, be divided between BROKER and SALESPERSON pursuant to the schedule set out in Exhibit A, a copy of which is attached hereto and incorporated herein by this reference, and which SALESPERSON acknowledges he or she has received. BROKER shall advise SALESPERSON of any special contract relating to any particular transaction which SALESPERSON may undertake to handle in

the event of special arrangements with any client of BROKER or SALESPERSON on property listed with BROKER or controlled by SALESPERSON, a special division of commission may apply, such rate of division to be agreed upon in advance by BROKER and SALESPERSON. In the event that two or more salespeople participate in such a service, or claim to have done so, the amount of commission over that accruing to BROKER shall be divided between the participating salespeople according to agreement between them, or in the absence of an agreement, in accordance with the Uniform Arbitration Act, Kansas Statutes Annotated 5-401, et seq. In no case shall SALESPERSON be personally liable to BROKER for any commission, but, when the commission shall have been collected from the party or parties for whom the services were performed, BROKER shall hold it in trust for SALESPERSON and BROKER to be divided according to the terms of this agreement.

6. **Payment of Commissions**—The division and distribution of earned commission as set out in paragraph 5 of this agreement, shall take place as soon as practicable after collection of such commission from the party or parties for whom the services may have been performed.

7. **Expenses**—BROKER shall not be liable to SALESPERSON for any expenses incurred by SALESPERSON or for any of his or her acts, nor shall SALESPERSON be liable to BROKER for office help or expenses. SALESPERSON shall have no authority to bind BROKER unless specifically authorized in a particular transaction. The expenses of attorney's fees, multiple listing fees, costs, title expenses, and similar fees or expenses which must, by reason or necessity, be paid from the commission, or are incurred in the collection of or the attempt to collect the commission, shall be paid by the parties as provided for in this agreement in the division of the commission or as otherwise agreed to by the parties. Suits for commission shall be maintained only in the name of the BROKER.

8. **Termination**—This agreement and the association created hereby may be terminated by either party at any time, upon written notice given to the other, but the rights of SALESPERSON to any commissions which accrued prior to such notice shall not be divested by the termination of this agreement. Upon termination, all listings and prospects shall be those of BROKER as its sole property, and SALESPERSON shall return all listings, manuals and materials, forms and sales literature loaned to SALESPERSON by BROKER.

9. **Unfair Advantage**—SALESPERSON shall not, after the termination of this agreement, use to his or her advantage, or the advantage of any other person, firm or corporation any information gained for or from the files or business of BROKER.

10. **Legal Status and Responsibilities**—It is intended that the relationship established hereby is one of independent contractor and not that of servant, employee, joint venturer, agency or partnership. It is understood as follows:

(a) The BROKER has the right to control the result of the work and not the means or methods for accomplishing the result.

(b) The SALESPERSON shall pay any amounts due as a result of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Act (FUTA), and federal or state income tax in regard to the SALESPERSON'S earnings and to furnish proof of said payment in a form reasonably requested by BROKER.

(c) The SALESPERSON shall not be required to meet any sales quota.

(d) The SALESPERSON shall be entitled to engage in any other kind of work, besides real estate sales or leasing, for any other person.

(e) The SALESPERSON may hire other people to assist with clerical and accounting work as needed.

(f) The company manual does not contain any mandatory rules.

(g) The BROKER shall not make appointments for SALESPERSONS or determine whether appointments are kept.

(h) No draw or other form of minimum income shall be provided by BROKER to the SALESPERSON.

(i) SALESPERSON shall not be treated as an employee with respect to the services performed hereunder for federal tax purposes.

(j) The SALESPERSON will not be treated as an employee with respect to the services performed by such SALESPERSON as a real estate agent for all Kansas tax purposes, including, but not limited to, income tax, unemployment insurance tax, and workman's compensation.

(k) All of the SALESPERSON'S remuneration (whether or not paid in cash) for the services performed as a real estate agent will be directly related to sales or other output rather than to the number of hours worked.

IN WITNESS WHEREOF, the parties hereby have signed or caused this contract to be signed, all on the day and date first written above.

_____

BROKER

_____

SALESPERSON

INDEPENDENT CONTRACTOR AGREEMENT

EXHIBIT A

This exhibit shall become a part of the Agreement between _____, Broker and _____, Salesperson, dated _____, 19____.
If revised, a revision date shall be shown on the revised copy and copies shall be given to both Broker and Salesperson.

IT IS AGREED:

1. Listing commissions shall be divided as follows:
   Salesperson ..... _____%
   Broker ..... _____%
2. Sales commissions shall be divided as follows:
   Salesperson ..... _____%
   Broker ..... _____%
3. Rental and/or leasing commissions shall be divided as follows:
   Salesperson ..... _____%
   Broker ..... _____%

REVISED: _____

_____

_____

_____

_____

furnished. For purposes of this section, the term "status determination date" means January 1, May 1, July 1, and October 1 of each year.

(2) PERIOD DURING WHICH CERTIFICATE REMAINS IN EFFECT.—An earned income eligibility certificate which takes effect under this section for any calendar year shall continue in effect with respect to the employee during such calendar year until revoked by the employee or until another such certificate takes effect under this section.

(3) CHANGE OF STATUS.—

(A) REQUIREMENT TO REVOKE OR FURNISH NEW CERTIFICATE.—If, after an employee has furnished an earned income eligibility certificate under this section, there has been a change of circumstances which has the effect of—

(i) making the employee ineligible for the credit provided by section 43 for the taxable year, or

(ii) causing an earned income eligibility certificate to be in effect with respect to the spouse of the employee,

the employee shall, within 10 days after such change in circumstances, furnish the employer with a revocation of such certificate or with a new certificate (as the case may be). Such a revocation (or such a new certificate) shall take effect under the rules provided by paragraph (1)(B) for a later certificate and shall be made in such form as the Secretary shall by regulations prescribe.

(B) CERTIFICATE NO LONGER IN EFFECT.—If, after an employee has furnished an earned income eligibility certificate under this section which certifies that such a certificate is in effect with respect to the spouse of the employee, such a certificate is no longer in effect with respect to such spouse, then the employee may furnish the employer with a new earned income eligibility certificate.

(4) FORM AND CONTENTS OF CERTIFICATE.—Earned income eligibility certificates shall be in such form and contain such other information as the Secretary may by regulations prescribe.

(5) TAXABLE YEAR DEFINED.—The term "taxable year" means the last taxable year of the employee under subtitle A beginning in the calendar year in which the wages are paid.

TEFRA

Source: New.

Amendments:	**Sec. as amended effective:**
P.L. 95-600, § 105(b)(1), (g)(2)	
P.L. 96-222, § 101(a)(2)(D)	

P.L. 96-222, § 101(a)(2)(D):

Amended Section 105(g)(2) of P.L. 95-600 to change the effective date of Code Sec. 3507 from June 30, 1978, to June 30, 1979.

P.L. 95-600, § 105(b)(1), (g)(2):

Added Code Sec. 3507, above, applicable to remuneration paid after June 30, 1978.

[Caution: Code Sec. 3508, below, as added by P.L. 97-248, applies to services performed after December 31, 1982.—CCH.]

[Sec. 3508]

SEC. 3508. TREATMENT OF REAL ESTATE AGENTS AND DIRECT SELLERS.

[Sec. 3508(a)]

(a) GENERAL RULE.—For purposes of this title, in the case of services performed as a qualified real estate agent or as a direct seller—

(1) the individual performing such services shall not be treated as an employee, and

(2) the person for whom such services are performed shall not be treated as an employer.

[Sec. 3508(b)]

(b) DEFINITIONS.—For purposes of this section—

(1) QUALIFIED REAL ESTATE AGENT.—The term "qualified real estate agent" means any individual who is a sales person if—

(A) such individual is a licensed real estate agent,

(B) substantially all of the remuneration (whether or not paid in cash) for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

(C) the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for Federal tax purposes.

(2) DIRECT SELLER.—The term "direct seller" means any person if—

(A) such person—

(i) is engaged in the trade or business of selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary prescribes by regulations, for resale (by the buyer or any other person) in the home or otherwise than in a permanent retail establishment, or

(ii) is engaged in the trade or business of selling (or soliciting the sale of) consumer products in the home or otherwise than in a permanent retail establishment,

(B) substantially all the remuneration (whether or not paid in cash) for the performance of the services described in subparagraph (A) is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

(C) the services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for Federal tax purposes.

(3) COORDINATION WITH RETIREMENT PLANS FOR SELF-EMPLOYED.—This section shall not apply for purposes of subtitle A to the extent that the individual is treated as an employee under section 401(c)(1) (relating to self-employed individuals).

Source: New.

Amendments:	**Sec. as amended effective:**	**P.L. 97-248, § 269(a):**
P.L. 97-248, § 269(a)	.....	Added Code Sec. 3508 to read as above, applicable to services performed after December 31, 1982.

[Caution: Code Sec. 3509, below, as added by P.L. 97-248, is effective on the date of enactment, except that its provisions do not apply to any assessment made before January 1, 1983.—CCH.]

[Sec. 3509]

SEC. 3509. DETERMINATION OF EMPLOYER'S LIABILITY FOR CERTAIN EMPLOYMENT TAXES.

[Sec. 3509(a)]

(a) IN GENERAL.—If any employer fails to deduct and withhold any tax under chapter 24 or subchapter A of chapter 21 with respect to any employee by reason of treating such employee as not being an employee for purposes of such chapter or subchapter, the amount of the employer's liability for—

(1) WITHHOLDING TAXES.—Tax under chapter 24 for such year with respect to such employee shall be determined as if the amount required to be deducted and withheld were equal to 1.5 percent of the wages (as defined in section 3401) paid to such employee.

(2) EMPLOYEE SOCIAL SECURITY TAX.—Taxes under subchapter A of chapter 21 with respect to such employee shall be determined as if the taxes imposed under such subchapter were 20 percent of the amount imposed under such subchapter without regard to this subparagraph.

[Sec. 3509(b)]

(b) EMPLOYER'S LIABILITY INCREASED WHERE EMPLOYER DISREGARDS REPORTING REQUIREMENTS.—

(1) IN GENERAL.—In the case of an employer who fails to meet the applicable requirements of section 6041(a), 6041A, or 6051 with respect to any employee, unless such failure is due to

Testimony on SB 176
Before the House Labor & Industry Committee
By: Larry W. Magill, Jr., Executive Vice President
Independent Insurance Agents of Kansas

3-27-85
Att. #2

Thank you for the opportunity to appear on SB 176 exempting "qualified real estate agents" from coverage under the Workers' Compensation Act if they met two tests. The two tests would be that they are paid on the basis of sales or other output and that they performed under a written contract that provides they are not treated as an employee with respect to such services for tax purposes. Our association's position is either support of the exemption in SB 176 or conversely specifying in the statute that they are considered employees, but not to leave the existing situation.

The present situation involving all types of independent contractors is extremely gray. In the absence of an actual court decision on the facts of a specific situation, there is no way that either an employer, or their insurance agent or insurance company, can determine in advance if a situation is one of contractor/independent contractor or employer/employee. Attached to our testimony is a copy of the Division of Workers' Compensation newsletter from 1979 laying out some of the tests involved in establishing an independent contractor relationship, some court cases and providing some advice.

Specifically, the court in Evans vs. Board of Education of Hays, 178 Kan. 275, stated that, "It is not the exercise of discretion, supervision or control over a workman which determines whether he is a servant or an independent contractor, but the right to exercise such direction, supervision or control." Their particular relationship could actually fluctuate back and forth between independent contractor and employee based on the amount of control exercised by an employer.

The bulletin also goes on to point out that, "The right to hire or discharge the worker also can be an important element in this test.

Atch. 2
3/27/85

Generaly if an independent contractor does not perform a job he was contracted to do in a satisfactory manner, the legal recourse is not to discharge that person but to sue the person for breech of contract due to faulty workmanship or incomplete services."

We feel that in most cases where an injured real estate agent brings suit for workers' compensation benefits, that the Division of Workers' Compensation is likely to find an employer/employee relationship. Their general approach is to construe interpretation of the workers' compensation statutes liberally in favor of the employee.

Also attached is a copy of the Knoble vs. National Carriers, Inc., Supreme Court decision involving an independent contractor relationship in the trucking industry. The decision goes into an extensive review of all the facts that the court took into consideration in determining that it was actually an employer/employee relationship.

This gray area of defining who is an independent contractor versus employee provides insurance agents with a number of problems. For example, in the case of an employer broker with no other payroll except sales agents, that employer could conceivably decide not to buy workers' compensation coverage. If a real estate agent is subsequently severely injured and sues the employer, the employer would have no insurance and it could very likely end up as an errors and omissions professional liability claim against the insurance agent for the broker. Unless the insurance agent has documented his file that he recommended the coverage and the broker declined it, a court is likely to find in favor of the real estate broker. For that reason, we would advise all of our members to obtain a signed document stating that they recommended that the broker buy coverage even though the broker considered all real estate agents as independent contractors and had no other payrolls. Once a court finds that it is an employee relationship, then the broker is personally liable for benefits even if the workers' compensation fund ultimately pays them to the employee.

Even though a company might write an initial workers' compensation policy that did not include any real estate agent payroll, that is not necessarily assurance that they would not pick those payrolls up on audit at the end of the policy term unless they had agreed not to in the beginning. This could conceivably happen even in the Assigned Risk Plan.

In the case of a broker with other payrolls that buys workers' compensation coverage, the insurance company is then placed in the position of providing automatic coverage on those real estate agents should they be found by a court to actually be employees and not independent contractors. For this reason, companies have frequently taken the position that those real estate agent payrolls must be included on the workers' compensation policy.

This is an established rule of law that holds the general contractor liable for workers' compensation benefits for employees of an uninsured subcontractor. Of course, if the real estate agents provided the broker with a certificate of insurance showing that they had purchased individual workers' compensation coverage, then the insurance company would have no exposure and no reason to charge any premium. Again, this is analogous to the construction industry.

Whether or not a company requires a real estate broker to include agents' payrolls depends on company underwriting rules. Most independent insurance agents represent a number of companies and probably can find one without that requirement. However, workers' compensation is generally not written by itself but rather as a part of all the commercial insurance needs for a broker. Therefore, there may be other reasons why an agent would not want to move the entire account. In that case, coverage could be placed through the Workers' Compensation Assigned Risk Plan.

The weight of court decisions and administrative interpretation of present statutes is on the side of finding real estate agents employees. If this committee and the legislature wish to address this problem, we urge them to either clearly include real estate agents as employees or clearly allow them to be excluded, which SB 176 appears to do. We would be happy to provide any additional information desired by the committee.

No. 46,829

DEBORAH J. KNOBLE, WIDOW, CAMILLE E. KNOBLE AND SONJA G. KNOBLE, MINOR DAUGHTERS OF VIRGIL LEO KNOBLE, DECEASED, *Appellees*, v. NATIONAL CARRIERS, INC. AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, *Appellants*.

(510 P. 2d 1274)

SYLLABUS BY THE COURT

1. WORKMEN'S COMPENSATION—*Extent of Review—Judgment of Trial Court Supported by Evidence—Question of Law.* Under K. S. A. 44-556, the appellate jurisdiction of this court in workmen's compensation cases is limited to reviewing questions of law only. Whether the district court's judgment in a compensation case is supported by substantial competent evidence is a question of law as distinguished from a question of fact.

2. SAME—*Determining Whether Evidence Supports the Findings—When Conclusive.* In reviewing the record to determine whether it contains substantial evidence to support the district court's factual findings, this court is required to review all of the evidence in the light most favorable to the prevailing party below. Where the findings of fact made by the district court are based on substantial evidence, they are conclusive, and we have no power to weigh the evidence and revise those findings or reverse the final order of the court. Although this court may feel the weight of the evidence, as a whole, is against the findings of fact so made, it may not disturb those findings if they are supported by substantial competent evidence.

3. SAME—*Determining Employer-Employee Relationship—Test.* The primary test used by the courts in determining whether an employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor.

4. SAME—*Findings Supported by Evidence—Freedom of Contract Not Violated—Venue.* In a workmen's compensation case the record is examined and it is *held:* (1) there was substantial competent evidence to support the trial court's finding that the relationship of employer and workman existed; (2) such finding did not violate the employer's constitutional right to freedom of contract; and (3) the order of the workmen's compensation director fixing venue was not error.

Appeal from Crawford district court, division No. 1; DON MUSSER, judge. Opinion filed June 9, 1973. Affirmed.

Carry W. Lassman, of Keller, Wilbert, Palmer and Lassman, of Pittsburg, argued the cause and was on the brief for the appellants.

Murvyl M. Sullinger, of Pittsburg, argued the cause and was on the brief for the appellees.

The opinion of the court was delivered by

Foth, C.: In 1971 Virgil L. Knoble and Dean W. Bateman were joint owners of a 1968 International tractor which they had leased to National Carriers, Inc., a nationwide trucking firm whose chief business was hauling beef for its parent company, National Beef Packing Company, of Liberal, Kansas. Their contract with National Carriers required the partners to furnish not only the tractor but their own services as drivers (or those of acceptable substitutes).

* On January 8, 1971, they were hauling one of National Carriers' refrigerated trailers loaded with National Beef's meat to Worcester, Massachusetts. Near Indianapolis, Indiana, they had a collision in which Knoble was killed. His dependents applied for benefits under the workmen's compensation act, which were allowed at both the administrative and district court levels. National Carriers and its workmen's compensation insurance carrier have appealed, contending primarily that Knoble and Bateman were independent contractors, and not employees of National Carriers.

The trial court found, as had the workmen's compensation examiner, that "the relationship of employer and workman existed between the respondent and the decedent." Our scope of review is, of course, severely limited:

"Under K. S. A. 44-556, the appellate jurisdiction of this court in workmen's compensation cases is limited to reviewing questions of law only. Whether the district court's judgment in a compensation case is supported by substantial competent evidence is a question of law as distinguished from a question of fact. (*Holley v. Dickey Clay Mfg. Co.*, 157 Kan. 355, 139 P. 2d 846, 148 A. L. R., Anno., 1131; *Coble v. Williams*, 177 Kan. 743, 747, 282 P. 2d 425; *Bowder v. Elmdale Developing Co.*, 185 Kan. 785, 347 P. 2d 391.) In reviewing the record to determine whether it contains substantial evidence to support the district court's factual findings, this court is required to review all of the evidence in the light most favorable to the prevailing party below. Where the findings of fact made by the district court are based on substantial evidence, they are conclusive, and we have no power to weigh the evidence and revise those findings or reverse the final order of the court. Although this court may feel the weight of the evidence, as a whole, is against the findings of fact so made, it may not disturb those findings if they are supported by substantial competent evidence. (*Evans v. Board of Education of Hays*, 178 Kan. 275, 284 P. 2d 1068; *Barr v. Builders, Inc.*, 179 Kan. 617, 296 P. 2d 1106; *Weimer v. Sauder Tank Co.*, 184 Kan. 422, 337 P. 2d 672; *Durnil v. Grant*, 187 Kan. 327, 356 P. 2d 872.) Numerous decisions of like import

are cited in 9 West's Kansas Digest, Workmen's Compensation, §§ 1940, 1969, and 5 Hatcher's Kansas Digest (Rev. Ed.), Workmen's Compensation, § 153." (*Jones v. City of Dodge City*, 194 Kan. 777, 778-9, 402 P. 2d 108.)

In *Shay v. Hill*, 133 Kan. 157, 158, 299 Pac. 263, we put it a little differently when we asked "Was there evidence, whether opposed or not, warranting a reasonable inference, although a contrary inference might reasonably be drawn, to sustain the judgment of the district court?" We look, then, for evidence from which the trial court might reasonably have drawn its inference that Knoble and Bateman were employees rather than independent contractors; we are not concerned with evidence from which the contrary inference might be drawn.

Such evidence must, of course, meet certain yardsticks. In *Jones*, supra, we said:

"It is often difficult to determine in a given case whether a person is an employee or an independent contractor since there are elements pertaining to both relations which may occur without being determinative of the relationship. In other words, there is no exact formula which may be used in determining if one is an employee or an independent contractor. The determination of the relation in each instance depends upon the individual circumstances of the particular case.

"*The primary test* used by the courts in determining whether an employer-employee relationship exists is *whether the employer has the right of control* and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. (*Evans v. Board of Education of Hays*, [178 Kan. 275, 284 P. 2d 1068]; *Davis v. Julian*, 152 Kan. 749, 756, 107 P. 2d 745; *Schroeder v. American Nat'l Bank*, 154 Kan. 721, 121 P. 2d 186.)" (194 Kan., at 780. Emphasis added.)

See also, *McCarty v. Great Bend Board of Education*, 195 Kan. 310, 403 P. 2d 956.

In particular, therefore, we seek evidence to satisfy the "primary test" of the "right of control." We look first at the description of the parties' relationship given by the surviving partner, Bateman, as summarized by the examiner:

"Bateman related that although the tractor unit was leased to Respondent, he and Knoble drove it. They received their instructions from the dispatcher of National Carriers, Inc. These instructions included what commodity was to be hauled, to whom, where and when it was to be delivered.

"After leaving with a load of a particular commodity, which was usually beef, from Liberal, Kansas, they were to make what was termed 'check calls' each day between 8:00 a. m. and 10:00 a. m. and 4:00 p. m. and 6:00 p. m. to

Respondent's dispatcher. The purpose of these 'check calls' was to inform the dispatcher of their location, distance from destination, approximate arrival time and receive further instructions, if any.

"Upon arrival at a destination, they were required to call Respondent's dispatcher and inform him that they were ready to unload. They would usually then be instructed to call the dispatcher when they unloaded. After unloading the beef, company policy (National Carriers, Inc.) required that the trailer be washed and cleaned for the next load. After unloading and cleaning the trailer, they would then receive instructions from Respondent's dispatcher in regard to their next load; what commodity it was to be, when and where it was to be delivered.

"The return load was usually as close to the midwest as possible and could be any commodity. Bateman and Knoble had no control over the commodity, its destination or arrival time and they had no authority to contract with shippers on their own.

"Upon returned [sic] to the Midwest, Bateman and Knoble would usually call in to Respondent's dispatcher for further instructions. They were then told what they were to do next.

"The tractor unit owned by Bateman and Knoble and leased to National Carriers, Inc., was subject to regular safety inspection by Respondent; was driven on license tags and I. C. C. and K. C. C. permits issued to Respondent; Respondent paid the fuel tax for the tractor and the unit fuel. Respondent carried public liability, property damage and cargo insurance as well as collision insurance on the trailer. Bateman and Knoble insured the tractor unit for collision insurance.

"Bateman and Knoble were pretty well regulated in the time they could spend at home and away from their truck because of the obligation to deliver loads on time.

"If they were at home, they had to make their regular check calls twice daily and were subject to a $25.00 fine if they failed to do so.

"Bateman and Knoble were paid 70 percent of the gross revenue taken in by the truck; no social security or withholding tax was withheld or paid in or for their behalf.

"Bateman and Knoble were responsible for the expense of maintenance and repair of the tractor.

"Bateman signed the contract or lease agreement in his own behalf and that of the decedent Virgil Knoble, the original of which is a part of the record as Respondent's Exhibit No. 1.

"According to the terms of the contract, Bateman and Knoble were to furnish the tractor and labor to haul up to 4,000,000 pounds of commodities, although there was no promise on the part of Respondent to furnish any commodities to haul. Respondent was to have the exclusive possession, control and use of the leased tractor. The contract could be terminated immediately for violation of its terms and without cause on thirty days written notice.

"The contract further provided that the parties did not intend to create an employer-employee relationship between Respondent and Bateman and Knoble or any of their employees, if any.

"The contract provided that it was to become effective upon its execution and remain so for not less than 30 days and 'that upon completion of the

obligation of transportation as provided in paragraph 1, by the contractor, this contract and all its terms and conditions shall be automatically renewed to the extent of the obligation of transportation provided in paragraph 1. This contract shall likewise be automatically renewed upon each subsequent completion of transportation, as provided in paragraph 1, unless terminated in the manner hereinbefore provided'.

"Bateman and Knoble had no prescribed days or time they had to work, but they were required to haul their loads and adhere to I. C. C. regulations regarding working time.

"Bateman and Knoble were furnished with identification cards showing them to be employees of Respondent for purposes of identification on the road and for gaining admission to the premises of National Carriers, Inc. and National Beef Packers, Inc.

"They were given advances for expense money which were deducted from their payments upon completion of a load."

This testimony was supplemented by that of the general manager of National Carriers at the time of the accident, similarly summarized:

"Some trailers used for the hauling of quartered beef carcasses were owned by Respondent and some were leased from individual contractors or operators.

"National Beef Packing Company and National Carriers, Inc. used the same yards or facilities located in Liberal, Kansas. Trailers were loaded with beef by employees of National Beef Packing Company. Drivers normally do not go in the loading area and supervise loading, but they can make suggestions as to how the load could be apportioned so that the trailer would not be overloaded on one end or the other.

"Drivers were instructed as to what temperature was to be maintained in the trailer, and instructed not to drive fast over rough roads or railroad tracks. Drivers were required to call in twice daily while they were on a trip. A fine of $25.00 would be levied if they failed to do so.

"If drivers had permission to be at home, they were not considered to be on duty and were not required to make check calls, except possibly on Thursday for possible loading on Friday.

"Respondent furnished motel facilities for drivers who were waiting in Liberal, Kansas, for their trailer to be loaded.

"Upon unloading beef at is destination, which was performed by consignee's, drivers were to call in for information on their next load. They could not accept a return load without Respondent's knowledge and permission.

"In some instances, Respondent would 'trip lease' the tractor-trailer unit to other companies for a return trip. In this case, the drivers would, to a degree, be under the control of the company to which they were leased, but the drivers would still 'check call' Respondent's dispatcher and still follow Respondent's instructions.

"All revenue from hauling and trip leases went to and was handled by Respondent. Respondent paid all fuel tax with the exception of the state of Ohio.

"Any one expecting to operate one of Respondent's trucks was required to fill out a job application form; and although the Department of Transportation

Regulations required that a driver be physically and mentally qualified and experienced, Respondent did control whether a particular person could drive one of the leased units.

"Mr. Pruitt was partly responsible for the formation of the lease agreements and his purpose in trying to set up an independent contractor relationship was to relieve Respondent of the obligation of deducting and paying social security and withholding taxes.

"Drivers could not be allowed to pick up loads of freight on their own but must haul loads contracted for by Respondent 'because no company—National Carriers included—could just let operators go helter skelter and not know where they were at, what they were doing, and where they were going. They couldn't have any control over that type of operation'."

All the foregoing testimony was substantially uncontradicted.

Respondent's efforts before the examiner were largely devoted to explaining the control which it clearly exercised by pointing to the requirements of the governmental regulatory agencies under which it operated. While such regulations may indeed furnish reasons for at least part of the control exercised, they do not alter the fact of its existence.

One witness, the company controller, pointed out that National Carriers owned all the trailers and some of the tractors it used, and to drive the latter employed drivers on its regular payroll. For its payroll drivers it carried a group Blue Cross-Blue Shield policy; its "contract" drivers were not eligible for that policy, so for them the company carried a group policy with Bankers Life affording hospitalization, major medical, life and disability insurance. The payroll drivers had, he said, "certain rules and regulations they had to follow." Asked what different status the "contract" drivers had as to complying with the company's rules and regulations, he replied:

"A. Two big differences I think of right off, drivers on our company owned tractors were required to leave the tractors on National Beef's lot every night when they left. The tractor never went home with them. They were also required to be there. Another one was we told our drivers where to fuel up, where to fill the tractor up with gas, with fuel. We have certain areas designated, designated areas, where they go in, fill up, sign a ticket and leave. They do not pay for it.

"Q. These persons operating under this contract don't have to do that, is that right?

"A. No."

Other evidence showed that while the partners might be able to take their truck home they were not permitted to use it, even for moving Knoble's own mobile home.

Without recapitulating, we think the evidence amply supports

the examiner's conclusion, adopted by the trial court, "that Respondent exercised or had the right to exercise as much control over the drivers of leased vehicles as it desired or was required to exercise in order to operate efficiently." On this record the inference of an employer-employee relationship is clearly permissible. See *Watson v. Dickey Clay Mfg. Co.*, 202 Kan. 366, 450 P. 2d 10, *Willbeck v. Grain Belt Transportation Co.*, 181 Kan. 512, 313 P. 2d 725; and *Shay v. Hill*, supra. In each of these cases an owner-driver of a truck, operating under arrangements closely analagous to the one at bar, was held to be an employee and not an independent contractor.

The company, however, urges that this conclusion squarely contradicts the express language employed by the parties in their written contract, and thus deprives it of its constitutionally guaranteed freedom of contract. The simple answer to this contention is that, as demonstrated by the authorities previously cited, the relationship of contracting parties depends on *all* the operative facts; the label which they choose to employ is only one of those facts. Parties are free to contract as they please, but mere terminology cannot bind a court or prevent it from assessing the effect of the overall conduct of the parties.

Finally, the company objects to the order of the director fixing Crawford County as the place for hearing by the examiner. Both parties recognize that the act contains no venue provision applicable to an out-of-state accident covered by the Kansas act. To fill the gap the director had duly adopted K. A. R. 51-3-6:

"The law does not provide for the venue of hearing a claim when the accident occurred out of the state. It is the ruling of the director that when an accident has occurred outside of the state of Kansas, and the Kansas workmen's compensation director has jurisdiction to determine the claim, the workmen's compensation director for the state of Kansas shall have jurisdiction to designate the county in Kansas where the claim shall be heard, and the setting of the claim for hearing in a certain county in Kansas shall constitute the order designating venue. The district court of the county in which such claim arising from an injury which has occurred outside the state of Kansas is finally set for determination shall have jurisdiction of an appeal taken from an award of the director. The director will entertain an application of the employee or employer as to where a claim arising out of an injury which occurred outside of the state of Kansas shall be set for hearing, to accommodate the parties."

The company requested the director to fix venue in Neosho County, where claimants lived, while the claimants objected to

moving it from Crawford County where counsel for both sides were officed, where most of their witnesses lived, and where they intended to move. On appeal, the company also suggests that Seward County would have been a proper venue, since that was the situs of the contract.

The company's position depends on borrowing venue provisions from the Code of Civil Procedure, a course which we have consistently rejected. See, *Kissick v. Salina Manufacturing Co., Inc.*, 204 Kan. 849, 466 P. 2d 344, Syl. ¶ 3; *Magers v. Martin Marietta Corporation*, 193 Kan. 137, 392 P. 2d 148, Syl. ¶ 1; *Fleming v. National Cash Register Co.*, 188 Kan. 571, 363 P. 2d 432, Syl. ¶ 4. The director is authorized by K. S. A. 44-573 to promulgate such rules and regulations as may be necessary to administer the act, and K. A. R. 51-3-6 fell within that authority. (The subsequent amendment of the regulation is not material here.) The director was required by regulation to exercise his discretion; we find no abuse in its exercise here, and certainly no prejudice to the respondent.

The judgment is affirmed.

APPROVED BY THE COURT.

DEPARTMENT OF HUMAN RESOURCES

DIVISION OF WORKERS' COMPENSATION

217 S.E. FOURTH, 1ST FLOOR TOPEKA, KANSAS 66603-3599
913-296-3441

(Taken from March, 1979, Workers' Compensation Information Letter)

INDEPENDENT CONTRACTOR OR EMPLOYEE?

Special Problems Presented by Truck Drivers, Real Estate Salespersons, Ministers and Others

This office is frequently contacted in regard to the problem of the independent contractor. The basic question is whether an individual is an independent contractor or an employee. This can be a very important question in regard to whether an employer must cover the worker as an employee or whether the worker is indeed an independent contractor, and therefore, not subject to the employer's insurance coverage. Under the Kansas Workmen's Compensation Law if a worker is an employee, he cannot be required to contribute towards purchasing the workers' compensation insurance. If the worker is an employee, then the employer must purchase the insurance and the employer cannot withhold funds from the employee's pay or commission to purchase the insurance.

In workers' compensation the determination of whether a worker is an employee or an independent contractor is through the so-called "common law test" as applied by the Kansas Supreme Court or Kansas Court of Appeals. In other words there is no statute in our Workmen's Compensation Law that sets the definition for the legal requirement as to whether a certain individual is an employee or an independent contractor. A workers' compensation examiner, or the Director, or other appeal courts will arrive at this determination by examining the prior decisions of our Supreme Court as to how they have defined an employee. In the case of Snyder v. Lamb, 191 Kan. 446, our Supreme Court said, "The question whether, in a given situation, an injured workman occupied the status of an independent contractor--as distinguished from an employee—has been before this court many times. Generally speaking, an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer except as to the result of his work." The court further noted in that case that the right of control test is not an exclusive test to determine the relationship, but other relevant factors are also to be considered. The court in the case of Evans v. Board of Education of Hays, 178 Kan. 275, noted, "...an independent contractor represents the will of his employer only in the result of his work and not as to the means by which it is accomplished." The court further noted in that decision, "It is not the exercise of direction, supervision or control over a workman which determines whether he is a servant or an independent contractor, but the right to exercise such direction, supervision or control."

It is not always easy for a workers' compensation examiner or an appeal judge to determine whether the purported employer did have the right of control over the worker's activities. As the court noted above, it is not whether the right of control is actually exercised, but rather it was reserved. The right to hire or discharge the worker also can be an important element in this test. Generally if an independent contractor does not perform a job he was contracted to do in a satisfactory manner, the legal recourse is not to discharge that person but to sue the person for breach of contract due to faulty workmanship or incomplete services. Usually an independent contractor cannot be discharged at the whim of the person contracting the work. An employee, however, can be subject to this type of termination. Generally where an independent contractor is involved the person engaging the independent contractor usually enters into a written agreement where a certain end result is contracted for and a certain set amount of money will be paid once that end result is completed. For instance if a home owner contracted with a plumbing service to build a bathroom for a certain amount of money and did not engage in the supervision of the independent contractor while he performed the job, then that person performing the job would most probably be an independent contractor. However, if a person was a contractor who built homes and contracted with a certain individual that he would be paid so much an hour while he did the plumbing work, generally gave directions how the plumbing work should be completed and had the right to discharge that person at any time during the progress of the work, that person doing the work would most probably be an employee. The problems that exist are in the "gray" areas where there exists an extremely close question of whether that person is an employee or an independent contractor. All we can advise someone in that situation is that a person may be taking a financial risk if they do not cover the worker, because if it is determined that the worker is an employee, the employer would be required to pay the benefits even though he is uninsured. Sometimes general contractors and others will require certificates of insurance from all persons doing work for them, and therefore, avoid the contractor vs. employee question and protect themselves from workers' compensation claims. The only problem with this is that some workers might complain that they are being required to carry workers' compensation insurance on themselves even though they believe themselves to be employees. Therefore, the problem can arise even before an accident may occur. Several areas of special interest are noted below in regard to whether the relationship of employer-employee may exist.

When the law was revised in 1974, we had many inquiries whether church ministers would be considered employees or independent contractors. This question arose chiefly due to the fact that the Internal Revenue Service apparently considers most ministers self-employed and not employees. However, applying the "common law test" to most situations involving ministers indicated to our office that these people most probably were in the status of being employees rather than independent contractors. In most cases the minister is subject to discharge by a church board and they do have a certain right of control over his ministerial activities in regard to directions as to his duties and how he generally should perform them. There may be certain special circumstances where the minister would not be considered an employee, but in most cases reviewed, it was felt that the church should provide workers' compensation coverage for the minister.

Another area of special interest is in regard to real estate salespersons. Apparently most real estate salespersons consider themselves self-employed in regard to filing Federal income tax returns. Of course, most real estate salespersons earn their livelihood by strictly commission sales. The fact that a person is paid on a commission basis does not, in itself, determine that a person is an independent contractor. The problem in this area seems to be whether there is a right of control over these individuals by the real estate broker. In the situations we look at, most real estate salespersons work for one broker only and represent themselves as being affiliated with that broker. Usually the broker has the right to discontinue the relationship at any time he wishes. Sometimes an agreement between the broker and the salesperson is drawn up in such a manner that it specifically states that the salesperson is not an employee but an independent contractor. It is noted that our Supreme Court has said that these written agreements are not controling where the actual conduct of the parties is otherwise.

Another area of prime interest is in the trucking industry. We have somewhat a better guideline in this area due to a fairly recent Supreme Court case, that of Knoble v. National Carriers, 212 Kan. 331. This case can also be applicable to other situations involving the question of employee vs. independent contractor. In the Knoble case the truck driver owned the tractor and leased it to the trucking firm. The employee, with his tractor, towed the trailer of the trucking firm. The truck driver and the trucking firm had a written contract which specifically stated the parties did not intend to create an employer-employee relationship. Truck drivers were not prescribed as to the number of days they had to work or times they had to work; however, they had to conform to the I.C.C. regulations as to the amount of time they could work in a given day. The truck drivers were given advances for expense money which was deducted from their payment on completion of delivery of a load. Some of the evidence brought out in the case was that the drivers received instructions from the dispatcher as to what commodities were to be hauled and where they were to be delivered. The drivers were required to check with the employer on a call-in basis at least once a day. The employee was paid on the basis of 70% of the gross revenue taken in by the truck and no social security or withholding tax was withheld or paid by the trucking firm. The Supreme Court in that case concluded that the lower court was correct in finding an employer-employee relationship to exist. The court in making this finding, noted, "that Respondent (trucking company) exercised or had the right to exercise as much control over the drivers of leased vehicles as it desired or was required to exercise in order to operate efficiently." The court further noted that there was no exact formula which may be used in determining if one is an employee or an independent contractor and concluded, "The determination of the relation in each instance depends upon the individual circumstances of the particular case."

It might also be noted that where one person is exclusively associated with another in order to conduct his business efficiently, the principle in the relationship, as a practical matter, must exercise or reserve some control over the worker's activities. Also it might be observed that a person who is willing to be considered an independent contractor may have a change of feeling as to this status once he is injured on the job.

Generally in a contact by an employer, insurance agent or employee, it is difficult for our office at times to give a definite opinion whether a person is an independent contractor or an employee. We can only point out the case law as noted above. The final determination of this question is up to a workers' compensation examiner or appeal judge. Where an employer-employee relationship is found to exist, the employer would be required to pay the benefits even though he did not carry workers' compensation insurance. The liability can be very high because of unlimited medical and present overall dollar maximums, along with the employer's attorney's fees.