Approved March 26, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON LABOR, INDUSTRY AND SMALL BUSINESS

The meeting was called to order by Senator Dan Thiessen
Chairperson
at 1:30 ~~XXX~~ a.m./p.m. on Tuesday, March 19, 1985 in room 529-S of the Capitol.

All members were present except:
Senator Merrill Werts (excused)

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Gordon Self, Office of the Revisor of Statutes
Marion Anzek, Committee Secretary

Conferees appearing before the committee:
Senator August "Gus" Bogina
George Barbee, Executive Director, Kansas Consulting Engineers
Bill Henry, Executive Vice President, Kansas Engineering Society
Glenn Coulter, Manager, Kansas Contractors Association
Wayne Maichel, Executive Vice President, Kansas State Federation of Labor

The Chairman called the meeting to order at 1:35 p.m.

A motion was made by Senator Kerr, and seconded by Senator Daniels to approve the minutes of March 5, 11 and 18, 1985. Motion carried.

Chairman Thiessen brought the attention of the committee to HB 2084: An act concerning Workers' Compensation; relating to the liability of certain construction design prefessionals and employees thereof.

Senator Bogina Thank you Mr. Chairman and members of the committee. HB2084 is a much needed piece of legislation, concerning consulting engineers. I am a consulting engineer and we are not asking for relief of liability or any errors which we might encounter, because we intend to be fully responsible for those particular items as they occur. What this would address, is the commissioner has originated an interpretation by the courts of responsibility as far as on a construction project. It addresses the real problem. It is somewhat parallel to an Oklahome law that is in effect, and has worked very well. What has happened is in one particular construction project, there was a death due to a construction accident and it was deemed that the engineer had no relationship whatsoever. We specify and assist the owner in these kind of construction projects.

Senator Feleciano You say you have no responsibility. Once these plans leave your hands, who designs the highlights with specific standards. If the builder decides to skimp by maybe not putting in the greatest steel, you have no moral obligation?

Senator Bogina First of all, it depends on what kind of contract. We are charged with the inspection of the work. We have no control over the quality of the work.

Senator Morris I thought what we were trying to do was to exempt you from any liability by putting you under Workers' Compensation.

Senator Bogina No. This would not relieve us of any liability errors or admissions. If the design was faulty, than that is error of admission.

George Barbee For years, this group of documents has been known as the Standard Forms of Agreement, and has been recognized by the construction industry as the standard for construction contracts. All of the different documents are endorsed by the National Society of Professional Engineers.

Most construction projects, there is a 3 member team: the owner, the contractor and the designer. The owner and the contractor have a contract, and the designer and the owner have a contract. There is no contract between the contractor and the designer. In this 3 member team the limitation on

law suits represented by the Workers' Compensation Act is extended to all but one member of the team, the design professional. If equivalent protection from Workers' Compensation Law is extended to the design professional, then he can risk adding himself as guardian of the worker's safety.

A suit was filed in Kansas in 1978 as a result of a construction site accident. A sewer expansion project was under construction in Shawnee County and two summer employees of the contractor, were working in a trench and it caved in killing one of them. The widow received $50,000. in Workers' Compensation payment, then sued the contractor, the County and the engineering firm. The district court dismissed all defendants, by granting a motion for summary judgement. The Plaintiff appealed to the Kansas Supreme Court. The Kansas Supreme Court overturned the dismissal and the court with dissenting opinions, said that the engineering firm and the individual engineer should be tried by jury trial to determine if there was negligence. The trial was held in 1984 and the jury awarded a juggement of $425,000. Under the Kansas comparative negligence law, the contractor was found 51% negligent, and the engineer 49% negligent. In dissenting on the Supreme Court decision, Chief Justice Schroeder said, "The substance of the court's decision is to circumvent the limited recovery permitted by the Workmans' Compensation Act and make new law". It created new law. New law to circumvent the limited recovery permitted by the Workers' Compensation Act.

On behalf of the Kansas Consulting Engineers, I urge you to act favorably on HB 2084. (Attachment A).

Senator Steineger Can we have copies of the Supreme Court decision, and a copy of the instructions given by the Judge to the jury in the case of the award made by the jury. So we can see what questions the jury after hearing the evidence, determined their vote against the instructions.

Chairman Thiessen Yes, we can get this.

Bill Henry I feel what we are talking about here is a matter of control and under provision of HB 2084 we are saying to you that any engineer who has control over a worker at a job site should be liable, but we are asking you to say to us, now "is that in a case where we have no control, we should not be brought to bear the action" that is basically what we are talking about. The Supreme Court said "that the design professional, even though he has no contract or control over a worker on a job site, he can be held liable". We think, that quite frankly, is wrong because we have no way of controlling or protecting that individual through our contractual agreements. So we are talking about two distinct situations. The injuries to the workman should be taken care of by Workers' Compensation, and it is now, and this will in no way effect the rate of any individual, it will not effect the rate of the contractor, nor will it effect the rate of the engineer or the professional designers. (Attachment B).

Senator Feleciano How are you paying insurance premiums, for what I consider an extended coverage plan?

Bill Henry We are paying premiums under the umbrella of employees.

Senator Feleciano You are paying premiums under the umbrella of your employees, and under this act you are brought under an umbrella with the workers contract. Take the court case from the Supreme Court, and had the employee been under your employ and that employee had been injured, would that employee have been covered to the extent of coverage under Workers' Compensation?

Bill Henry Yes, and that is in the previous law. That has always been a theory of Kansas Law, until the Balagna case, that workers' compensation should be the avenue for recovery for the injured worker and we agree with that.

Ed De Vilbiss What this court case did is precipitate action on the part of the professional and rightly so, because there have been numerous occasions where a professional was brought into a law suit, even worse than

the 3rd party. Maybe, there are three engineers in Architect involved in a job, and one brought into the suit, because he was one of the design professionals, and because they were on the job, they were brought in saying, maybe both were involved. There was a case in Kansas City, MO where in final settlement, the firm went bankrupt.

I would like to say a few words about the term affirmative action, and I hope this committee will consider removing that from this bill. Principally because the term itself is not one that is readily understood. We have precise words to describe everything that we want to describe about the relationship that isn't already clear, but I think it is clear without those words, and we will help this committee find the right words to use, but affirmation action is not the kind of term that is significant to "I am going out on the job today, and do some affirmative action", that doesn't ring true, and all it is going to do, is further cloud the issue and then come back later and the courts are going to have to decide what those terms mean, because it is not specific right now. You are better off to have a good law, without extending the exposure to a bad law.

Glenn Coulter We also support HB 2084, and ask this committee to consider favorable passage of the bill.

We believe that contractors should be responsible for the safety of their employees and consulting engineers should be responsible for the safety of their employees and that one group should not attempt to tell other employees how to perform their work in a safe manner. (Attachment C).

Wayne Maichel I appear before this committee as neither a proponent or opponent. We do not believe the bill has anything to do with Workers' Compensation. I beleive that if the committee is going to pass the bill then you should put it in the statutes, where it belongs, but not in the Workers' Compensation statutes. For instance, the design engineer gets in a vehicle on a construction site and runs over a construction worker and kills that construction worker. That construction worker can draw workers compensation to a maximum of $100,000. Then, can the contractor sue that design engineer? This law may permit that and I don't think that is right.

Chairman Thiessen We will get the information the committee has requested on the Supreme Court case, and have that information delivered to your office, so you can look at what the courts did, before our next meeting.

Chairman Thiessen adjourned the meeting at 2:32 p.m.

GUEST LIST

COMMITTEE: SENATE LABOR, INDUSTRY & SMALL BUSINESS DATE: 3-19-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
George Barbee	Topeka	Ks. Consulting Engrs.
Glenn Coulter	Topeka	Ks. Contractors Assn.
Dan Ramlow	Topeka	Ks. Contractors Assn.
MARY VINCENT	TOPEKA	AGC of KANSAS
Helen Stephens	Topeka Topeka	Ks. Engineering Society
Bill Penny	Topeka	Ks. Engineering Society
Bob Holden	"	KCCI
DAN MORGAN	Topeka	AGC of KS, Inc.
ED DE VILBISS	MANHATTAN	Ks. Soc of ARCHS.
Jon Snider	Topeka	Ks. Soc. of Archs.
James F. Reeves	TOPEKA	KS. SOC. of Archs.
KAREN BALL	Topeka	AP
M. Hawver	"	Cap-Journal

3-19-85
Att A
Senate Labor, Industry & Small Business

March 19, 1985

STATEMENT TO SENATE LABOR & INDUSTRY COMMITTEE

Re: HB-2084

My name is George Barbee and I am the Executive Director of the Kansas Consulting Engineers. The consulting engineers are strongly in favor of House Bill 2084.

There are a number of representatives from associations and agencies appearing today in support of this bill, and perhaps it will help to set the stage if I explain some existing contract language; recent construction site accidents; and legal decisions that have caused the need for this bill.

For years, even decades, the construction industry has recognized that the Standard Forms of Agreement are the standard for construction contracts. They cover just about all the variations that occur in construction agreements. They are prepared by the Engineers Joint Contract Document Committee. That committee is made up of representatives from the National Society of Professional Engineers, the American Consulting Engineers Council, the American Society of Civil Engineers and the Construction Specification Institute. The documents are approved and endorsed by the Associated General Constractors of America.

In the Standard General Conditions of the construction contracts, the subject of the responsibility for the safety of employees of the contractor and safety on the construction site is addressed. The document states, "Contractors shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the work. Contractors shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to: 1) all employees on the work and other persons and organizations who may be affected thereby; and 2) all the work and materials and equipment to be incorporated therein, whether in storage on or off the site."

In 1982, there was a suit filed as a result of a construction site accident in Oklahoma. The Oklahoma suit was filed against the design firm following an accident which killed two workmen and injured another.

The case went to the Oklahoma Supreme Court. The firm won the case when the court held that the design firm was not responsible for the construction procedures under a contract with the owner. The firm, however, was subject to considerable expense in defending its position.

Because of the case, the Consulting Engineers Council of Oklahoma successfully lobbied for a bill that would extend the exclusive remedy provisions of the workers' compensation law to protect the design professional. The law was passed and therefore an injured workman will not be able to sue a design professional if the workman has received workers' compensation benefits unless the accident was the result of the negligent preparations of design plans and specifications. The law in Oklahoma was the first ever passed in the United States.

In the meantime, in Kansas, a similar story was developing. In 1978 a sewer expansion project was under construction here in Shawnee County. The project was simply one to relocate and expand a small sewage treatment project to accommodate the needs of a successful housing development.

Two summer employees of the contractor were in a trench which had just begun to be dug. The contractor's supervisor and an engineer from the design firm were standing next to the trench for a short while. The workers got out of the trench. The engineer left the immediate site to perform the duties he had come to do in the first place. The contractor's foreman went to get the carpenters to have them build trench shoring with material that was already at the trench site. The workers returned to the trench for some unknown reason and it caved in, killing one of them.

Some of you may be familiar with this case. It was a terribly tragic accident. He was 21 years old, a KU football player and the father of a ten-day old baby.

The widow received $50,000 in workers' compensation payment. That figure is now in the statutes as $100,000 instead of $50,000, but this case was a 1978 accident. The widow then sued the contractor, the county and the engineering firm. The district court dismissed all defendents by granting a motion for summary judgement.

The plaintiff appealed to the Kansas Supreme Court. Until now the Oklahoma and the Kansas cases have been parallel, but here they differ. The Kansas Supreme Court overturned the dismissal and the court, with dissenting opinions, said that the engineering firm and the individual engineer should be tried by jury trial to determine if there was negligence.

The trial was held and in 1984 the jury awarded a judgement of $425,000. Under the Kansas comparative negligence law, the contractor was found 51% negligent, and the engineer 49% negligent. The engineering firm paid $208,250. The contractor paid no additional amount because of the exclusive remedy provisions in the workers' compensation law.

As mentioned earlier, the responsibility of the safety of the employees of the contractor was not the responsibility of the engineer and he was not even at the immediate location whent the accident occurred. He was elsewhere at the construction site performing unrelated duties. But, the award was made because the Supreme Court allowed this to be decided by a jury trial. This terrible tragic accident created the emotion that overcame the facts.

In dissenting on the Supreme Court decision, Chief Justice Schroeder said, "The substance of the court's decision is to circumvent the limited recovery permitted by the Workman's Compensation Act and make new law". It created new law. New law to circumvent the limited recovery permitted by the Worker's Compensation Act. It allows suits to be filed to attack the deep pockets that are supposed to be filled with insurance dollars. Well, I have a surprise for some plaintiffs' attorneys. Not all firms have insurance. It is not even available to some, and if it is, the cost is prohibitive to many of those firms.

The majority of the engineering firms that are members of the Kansas Consulting Engineers, and that's most of them that work in this state, employ less than 20 people. They are small businesses and they cannot assume the responsibility of the contractors' employees safety, nor can they underwrite the court settlements that will come in the future. Other cases are already filed using this court case as a precedent.

Engineering firms do not have the right or the duty to stop the job if they do not agree with the contractor's methods of enforcing safety requirements. And, the contractors will tell you today that the design professional should not have that right or the duty to stop the job.

To restore balance to the construction site responsibilities, we need the provisions of HB-2084.

This bill has two amendments for the workers' compensation law. One would define a design professional to be someone that is licensed by the Board of Technical Professions and that covers architects, engineers, land surveyors and landscape architects, or firms that are granted certificates of authorization to perform those services.

The other amendment, in essence, would extend the exclusive remedy right to those design professionals or those that are working for the design professionals on the construction site. It is important to note that this does not extend to protect the design professional against law suits for the negligent preparation of design plans or specifications.

It does not change the award of any of the workers' compensation settlements. It does not change any procedures for seeking those settlements. It simply extends the exclusive remedy to the design firm.

It should be pointed out that on most of the construction projects there is a three member team: the owner, the contractor and the designer. The owner and the contractor have a contract, and the designer and the owner have a contract. There is no contract between the contractor and the designer. In this three member team the limitation on law suits represented by the Workers' Compensation Act is extended to all but one member of the team: the design professional.

If equivalent protection from the workers' compensation law is extended to the design professional, then he can risk adding himself as guardian of the workers' safety.

On behalf of the Kansas Consulting Engineers I urge you to act favorably on this bill.

Att. B 3-19-85
Senate Labor
Industry &
Small Business

Kansas Engineering Society, Inc.
216 West Seventh, P.O. Box 477
Topeka, Kansas 66601 (913) 233-1867

William M. Henry
Executive Vice President

Testimony for the Senate Labor, Industry &
Small Business Committee
Re: H.B. 2084
March 19, 1985

Mr. Chairman, members of the committee I am Bill Henry, Executive Vice President of the Kansas Engineering Society, and I appear on behalf of the society today in support of H.B. 2084.

The Kansas Engineering Society is composed of more than 1200 engineers who are employed in private practice, government, industry, construction and education.

For several years engineers have operated under the theory that any negligence during the design of a facility should be apportioned and the engineer who is negligent is liable for that negligence and should pay for it.

Indeed, included in the code of professional conduct for engineers and other professions that are licensed under the Kansas Board of Technical Professions, is the duty to design any project or product, whether for private or public use, to insure the public safety.

Negligence in the performance of this duty is unacceptable in any form and the legal liability for such negligence should be clearly met by the professional responsible for the same.

But as the result of the case of Balagna vs. Shawnee County, 233 Kan. 1068, 668 P. 2d 157, (1983), we find that the duties and responsibility of an engineer have been broadened by judicial fiat to lead to liability over which the engineer has absolutely no control.

The effect of the court's decision in that case went contrary to several of the other cases that the court has held on regarding engineering liability. In addition, the effect of the decision in that case has allowed our Workers Compensation Act to be circumvented.

It is the feeling of the Kansas Engineering Society that H.B. 2084 is a fair way of correcting the narrow situation of liability involving the design professional in the event of an injury accident or death related to a construction injury.

The situation created by the Balagna case could have the following effect on professional licensed engineers in these areas:

The most obvious instance where this will have an effect on the engineer is in the area of private practice where the engineer or his firm has contracted for the design of a project. As a result of the Balagna case that engineer is now potentially liable for any accident or injury that occurs on the job site if he happens to be on the job site at the time it occurs. This is despite the fact that the general contract language between the contractor and the engineer in nearly every contract today clearly sets out the responsibility for the control and protection of the construction employees with the contractor.

But this decision could also affect the engineer who is working for a large manufacturing firm. Suppose that engineer has designed the manufacturing apparatus for a plastic stamping device. If that engineer goes to check to see if that device is being assembled correctly in his plant and he happens to be observing the assembly when a worker injures himself during the installation process then the engineer could be liable for the damages suffered by the workman even though the engineer had no control over the worker.

Because of this imbalance in treatment we feel that H.B. 2084 is a means of correcting this situation.

I would emphasize H.B. 2084 does not:

In any way attempt to limit the number of years for which an engineer is liable for design problems.

In no way sets limits for damages that an engineer might be found liable for in a case of negligence.

Does not put any type of limitation on punitive damages that might be awarded in a case where an engineer is negligent.

Nor does the measure attempt to put the responsibility for the negligence of an engineer on the backs of anyone else.

One final consideration for supporting H.B. 2084 is that it will continue to encourage the professional designer to monitor the project and keep up with its progress and check it carefully to see that it meets with all the specifications that will protect the public health, safety and welfare. Frankly, in the current situation with the Balagna case, if I were advising a professional engineer or architect on how they should conduct themselves on a particular design project, I would discourage them from being on the job site. The moment they step on that site they face total liability for injury to workmen that they do not know, that they have no control over, and whom they do not employ.

In the House a floor amendment was approved at lines 80-81 with which we have no problem. It clearly narrows the immunity to the construction site situation where the employer's failure to comply with safety standards is the reason for the injury. However because of this amendment KES now believes the language at line 84-85, **"or by the affirmative action"** is no longer necessary and is superfluous. We would recommend amending H.B. 2084 by eliminating that language.

Respectfully submitted,

William M. Henry

William M. Henry
Executive Vice President
Kansas Engineering Society

Att'h C
3-19-85
Senate Labor
Industry &
Sm. Bus.

TESTIMONY

MARCH 19, 1985

SENATE LABOR, INDUSTRY AND SMALL BUSINESS COMMITTEE

HOUSE BILL 2084

Mr. Chairman, members of the committee. Thank you for the opportunity to visit with you for a few minutes on House Bill 2084. My name is Glenn Coulter and I am Manager of the Kansas Contractors Association. Our association supports passage of this bill.

We believe the contractor should be totally responsible for the safety of his or her employees on the job site and that the consulting engineer should not be expected to shoulder any of this responsibility.

Employees of consulting engineers are on the job site to assure the specifications are being met and to assist the contractor in guaranteeing a quality product for the owner.

All contractors should be very familiar with OSHA regulations regarding construction. To assist them, our association sponsors comprehensive safety seminars each winter.

We believe that contractors should be responsible for the safety of their employees and consulting engineers should be responsible for the safety of their employees and that one group should not attempt to tell other employees how to perform their work in a safe manner.

The consulting engineer and the contractor work together as a team with clearly defined responsibilities. Safety should be the responsibility of each employer.

Thank you very much.

Senate Lbr., Ind. &
Sm. Bus. 3-19-85
Attachment C