

Approved Arthur Douville 4-22-86  
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. on February 25, 1986 in room 526-S of the Capitol.

All members were present except:

Representative R.D. Miller, excused.

Committee staff present:

All present.

Conferees appearing before the committee:

Mr. George McCullough  
Representative Jim Braden  
Judge Ruth Browne, District Magistrate of Clay County  
Evelyn Gates, Office of Judicial Administration  
Mark Roberts, Chief Court Service Officer Specialist  
Bill Morrissey, Dept. of Human Resources, Div. of Workers' Comp.

The chairman called Representative Braden to the speakers stand. Representative Braden is the sponsor of H.B. 2891. Rep. Braden read his submitted written testimony to the committee and then answered questions. (See attachments 1 and 2)

The next speaker was Judge Ruth Browne, who also spoke as a proponent of H.B. 2891. A question and answer period followed.

Evelyn Gates was the next person who spoke as a proponent of H.B. 2891. She said that the Office of Judicial Administration feels that H.B. 2891 is a good first step in eliminating the situation we are involved in right now. Ms. Gates then introduced Mark Roberts to the committee. The chairman asked for a good example of how this works. Mr. Roberts explained to the committee and then answered questions.

Bill Morrissey was the next speaker and said he felt the bill was an excellent idea.

George McCullough spoke in reference to some possible amendments to the bill.

Hearings on this bill will continue at another time.

Representative Friedeman made a motion to accept the minutes as passed out the previous week. Representative Green seconded the motion. There being no discussion a vote was taken and the motion passed.

The meeting was adjourned at 9:55 a.m.

HOUSE COMMITTEE ON  
LABOR AND INDUSTRY

Guest List

Date 2-25-86

Name	City	Representing
Bill Morrissey	Topeka	DHR/WC
George McLaughlin	"	Ks. AFL-CIO
John Rathmell	"	DHR/WC
Ruth Browne	Clay Center	Personal
Paul Shuman	Topeka	Rep. Bureau
Paul Wilbur	Topeka	Dir. Courts
Rob Hodge	Topeka	KCCI
Evelyn Gates		Off. of Judicial Admin
Mark Roberts		"

JAMES D. BRADEN  
MAJORITY LEADER

ROOM 381-W. CAPITOL BUILDING  
TOPEKA, KANSAS 66612  
(913) 296-2302



TOPEKA

HOUSE OF  
REPRESENTATIVES

TESTIMONY BEFORE THE HOUSE LABOR AND INDUSTRY COMMITTEE

HOUSE BILL 2891

FEBRUARY 25, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THERE HAS BEEN CONSIDERABLE CONCERN ABOUT THE POSSIBLE LIABILITY OF A PUBLIC AGENCY OR NON-PROFIT COMMUNITY AGENCY IF A DEFENDANT SENTENCED TO PERFORM COMMUNITY SERVICE FOR THE AGENCY SHOULD INJURE THE DEFENDANT'S SELF OR ANOTHER PERSON.

IN 1984, LEGISLATIVE POST AUDIT RELEASED A PUBLICATION ENTITLED "LIABILITY IN COMMUNITY SERVICE WORK PROGRAMS." DISCUSSED IN THE PUBLICATION ARE THE PERTINENT ISSUES SURROUNDING COMMUNITY SERVICE PROGRAMS. FOR WORKER'S COMPENSATION PURPOSES, THE REPORT POINTS OUT, PERSONS SENTENCED TO COMMUNITY SERVICES ARE NOT COVERED BY THE WORKMEN'S COMPENSATION ACT. GENERALLY, AN OFFENDER INJURED DURING THE COURSE OF EMPLOYMENT WOULD NOT BE COVERED BY INSURANCE. LIABILITY FOR INJURY TO OTHER PERSONS OR PROPERTY IS ALSO DISCUSSED IN THE REPORT. OFFENDERS IN THE COMMUNITY SERVICE

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Att. #1  
H. L. I.

WORK PROGRAMS, WHILE NOT CONSIDERED EMPLOYEES FOR WORKMEN'S COMPENSATION COVERAGE, AND HENCE NOT COVERED, ARE CONSIDERED EMPLOYEES UNDER THE KANSAS TORT CLAIMS ACT. THE EMPLOYING PUBLIC AGENCY COULD BE HELD LIABLE UNDER THESE CIRCUMSTANCES. ALONG THESE LINES, THE ATTORNEY GENERAL, IN A RECENT OPINION HAS DECLARED THAT COMMUNITY SERVICE WORKERS ARE EMPLOYEES OF THE ORGANIZATIONS OR AGENCY, PUBLIC OR PRIVATE, WHICH HAS THE RIGHT TO CONTROL THEIR COMMUNITY SERVICE ACTIVITIES. FURTHER, PARTICIPATING AGENCIES CANNOT CIRCUMVENT THIS LIABILITY BY REQUIRING THE OFFENDER TO SIGN A WAIVER OR RELEASE FORM.

DURING THE INTERIM HEARINGS A REPRESENTATIVE OF THE KANSAS COUNTY AND DISTRICT ATTORNEYS' ASSOCIATION STATED THAT PLACING AN OFFENDER IN COMMUNITY SERVICE IS MUCH MORE ECONOMICAL THAN PLACING AN OFFENDER IN JAIL.

HOUSE BILL 2891 SPECIFICALLY INCLUDES CERTAIN PERSONS PERFORMING COMMUNITY SERVICE IN THE DEFINITION OF "EMPLOYEE" UNDER CERTAIN CONDITIONS. IT DOES NOT ATTEMPT TO ADDRESS THE PROBLEM OF 3RD PARTY INJURY, BUT IT SHOULD SUBSTANTIALLY IMPROVE THE SITUATION REGARDING POSSIBLE INJURY TO THE DEFENDANT.

THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE THE COMMITTEE. I URGE YOUR FAVORABLE CONSIDERATION OF HOUSE BILL 2891.

I WOULD BE HAPPY TO ANSWER ANY QUESTIONS.



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

September 27, 1982

MAIN PHONE (913) 296-2215  
CONSUMER PROTECTION 296-3751

ATTORNEY GENERAL OPINION NO. 82- 213

Bryce B. Moore, Director  
Division of Worker's Compensation  
Department of Human Resources  
Sixth Floor, 535 Kansas Avenue  
Topeka, Kansas 66603

Re: Automobiles -- Serious Traffic Offenses -- Driving  
While Under Influence of Alcohol; Performance of  
~~Community Service Not Covered by Workmen's Compensation~~

Synopsis: As amended by L. 1982, ch. 144, §5, K.S.A. 1981  
Supp. 8-1567 provides that a person convicted of  
a violation of the offense of operating a motor  
vehicle while under the influence of alcohol may  
be ~~required to perform public or community service~~  
work as an alternative to incarceration or payment  
of a fine. In performing such work, a person re-  
ceives no compensation, but rather fulfills a con-  
dition of his or her sentence from the district  
or municipal court. Accordingly, ~~such a person is~~  
~~not a workman, employee or worker, as those terms~~  
~~are defined by K.S.A. 44-508(b) of the Workmen's~~  
~~Compensation Act, and is therefore not covered by~~  
the terms of the Act. Cited herein: K.S.A. 1981  
Supp. 8-1567 (as amended by L. 1982, ch. 144, §5),  
K.S.A. 44-508, K.S.A. 1981 Supp. 75-6102.

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Dear Mr. Moore:

As Director of the Division of Worker's Compensation of the  
Department of Human Resources, you request our opinion on a  
question involving the scope of certain amendments to K.S.A.  
1981 Supp. 8-1567, which relates to the offense of operating  
a vehicle under the influence of alcohol. Specifically, you  
inquire as to the effect of provisions which allow a person

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who has been convicted of a violation to perform community service work in lieu of serving time in jail or paying all or part of a fine. Your question concerns the status of such a person under the Kansas Workmen's Compensation Act, K.S.A. 44-501 et seq., which is administered by your office.

As amended, subsection (c) of K.S.A. 1981 Supp. 8-1567 provides:

"Upon a first conviction of a violation of this section, a person shall be sentenced to not less than 48 hours' imprisonment or 100 hours of public service nor more than 6 months' imprisonment and fined not less than \$200 nor more than \$500, or by both such fine and imprisonment." (Emphasis added.)

The provision for the performance of public service is a new feature of the subsection, which previously allowed the imposition of jail time, a fine or both. Subsection (g) of the statute as amended provides a further alternative concerning payment of any fine imposed, to-wit:

"In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to \$5 for each full hour spent by the person in the specified community service." (Emphasis added.)

A previous opinion of this office, No. 82-183, concluded that the terms "public service" and "community service" were synonymous.

Two previous opinions of this office have concluded that individuals performing such work are within the meaning of the term "employee" as defined by the Kansas Tort Claims Act at K.S.A. 1981 Supp. 75-6102(d). Attorney General Opinion Nos. 82-157, 82-183. As such, a governmental unit which utilizes the services of convicted violators in such circumstances could potentially be liable under that act for injuries and damages inflicted or suffered by such persons. You inquire whether the provisions of the Kansas Workmen's Compensation Act would by analogy also apply.

In our opinion, such would not be the case. It has been repeatedly held that for the provisions of K.S.A. 44-501 et seq. to apply, there must be an employer-employee relationship in

existence. See, Dorst v. City of Chanute, 185 Kan. 593 (1959) and cases cited therein at 598. At K.S.A. 44-508(b), the following definition appears:

"'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. Such terms shall include but not be limited to: Executive officers of corporations; professional athletes; persons serving on a volunteer basis as duly authorized law enforcement officers, ambulance attendants, mobile intensive care technicians, firemen or fire fighters, but only to the extent and during such periods as they are so serving in such capacities; persons employed by educational, religious and charitable organizations, but only to the extent and during the periods that they are paid wages by such organizations; persons in the service of the state, or any department, agency or authority of the state, any city, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof, under any contract of service, express or implied, and every official or officer thereof, whether elected or appointed, while performing official duties; volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; and minors, whether such minors are legally or illegally employed." (Emphasis added.)

It is noteworthy that the above definition looks to the existence of a "contract of service" between the employer and employee, which must exist before the other provisions of the Act come into play. Dorst v. City of Chanute, supra; Gaston v. San Ore Construction Co., 206 Kan. 254 (1970). Such a contract does not establish tort liability. Yocum v. Phillips Petroleum Co., 228 Kan. 216 (1980). This is in contrast to the Tort Claims Act, which looks to the degree of control which one person has over the actions of another. Thus, while the latter act covers employer-employee relationships, it also covers master-servant relationships in which no contract of service may exist. K.S.A. 1981 Supp. 75-6102(d); Attorney General Opinion No. 82-157.

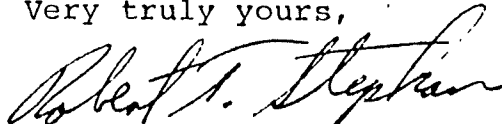
It is our opinion that this distinction is determinative here, where any agreement made by a convicted violator is with the court or prosecuting attorney and not the entity which receives the benefit of the service. Such agreements are not in the

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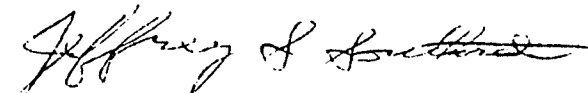
nature of a contract of employment, but rather are a condition of one's sentence, to be performed in lieu of serving jail time. Further, while the ~~recipient of the service~~ whether a governmental entity or a private organization, ~~has~~ ~~persons' actions as to invoke the~~ ~~Compensation Act~~, it makes no agreement with them as to compensation, length of time to be served, deadline for completion or the consequences of a failure to perform assigned tasks of community service work.

In conclusion, as amended by L. 1982, ch. 144, §5, K.S.A. 1981 Supp. 8-1567 provides that a person convicted of a violation of the offense of operating a motor vehicle while under the influence of alcohol may be required to perform public or community service work as an alternative to incarceration or payment of a fine. In performing such work, a person receives no compensation, but rather fulfills a condition of his or her sentence from the district or municipal court. Accordingly, such a person is not a workman, employee or worker, as those terms are defined by K.S.A. 44-508(b) of the Workmen's Compensation Act, and is therefore not covered by the terms of the Act.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
Assistant Attorney General

RTS:BJS:JSS:hle