Approved: 4/30/97
Date

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR.

The meeting was called to order by Chairman Al Lane at 9:05 a.m. on March 19, 1997 in Room 526-S of the Capitol.

All members were present except: All members were present

Committee staff present: Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Bev Adams, Committee Secretary

Conferees appearing before the committee: Chip Winslow, KS State Board of Technical Professions
Trudy Aron, AIA
Murray Rhodes, Land Surveyor
Bill Henry, KS Society of Professional Engineers
Rep. Mike O'Neal
Phil Harness, KDHR
Terry Humphrey, KTLA
Wayne Maichel, Kansas AFL/CIO

Others attending: See attached list

Continued Hearing on: **HB 2509 - Board of technical professions, changing the board name, fee limits, reciprocity licenses, regulation of certain practices.**

Chip Winslow returned to answer questions. He summarized what the bill would do for the Board. (see Attachment 1)

Trudy Aron, American Institute of Architects (AIA), appeared as a supporter of the bill. The bill would change the name of the board and increases the application and renewal fee statutory maximum collected by the board. It also includes two deletions. (see Attachment 2)

Murray Rhodes, Land Surveyor Member of the board, appeared before the committee to offer his support of the bill.

Written testimony from George Barbee, Kansas Consulting Engineers, was passed out to the committee. (see Attachment 3)

Bill Henry, Executive Vice President of the Kansas Society of Professional Engineers, appeared in support of the bill. His group believe the increase in license fees is appropriate since the Board has not made any change in the existing fee ceilings for some time. (see Attachment 4)

No others were present to testify for or against the bill, and Chairman Lane closed the hearing.

Hearing on: **SB 137 - Procedural changes to workers compensation act.**

Rep. Mike O'Neal appeared before the committee for the Kansas Building Industries Association's Workers Compensation Fund, to explain one of the amendments contained in the bill. It deals with the issue of self-employed sub-contractors and arises out as a consequence of the Kansas Court of Appeal's holding in the case of *Allen v. Mills*. His attachment also includes a syllabus of a court case that cites the *Allen v. Mills* case. (see Attachment 5) He concluded by answering questions from the committee.

Phil Harness, Director of the Division of Workers Compensation, Kansas Department of Human Resources (KDHR), appeared in support of the bill which is a compilation of agreements reached by the Workers Compensation Advisory Council as of the end of January, 1997. (see Attachment 6)

Mr. Harness also provided the committee with a flow chart and notes on processing workers compensation cases. He spent a few minutes explaining the chart to the committee. (see Attachment 7)

Terry Humphrey, Kansas Trial Lawyers Association, appeared to offer her association's support of the bill. Wayne Maichel, Kansas AFL/CIO, appeared to offer his support of the bill in its entirety. He called the attention of the committee to the burial expense allowance which was recommended to be raised from $3300 to $4300, which would bring it up to the national average.

No others were present to testify for or against the bill, and Chairman Lane closed the hearing on the bill.

Hearing on:
SB 346 - Supplemental workers compensation advisory council recommendations.

Phil Harness, KDHR, appeared before the committee in support of the bill which is mostly a compilation of legislative recommendations made by the Workers Compensation Advisory Council. Section 5, concerning attorney fees, did not go through the advisory council. (see Attachment 8)

Chairman Lane announced that the hearing on **SB 346** would be continued on Monday, unless the tentative schedule for the House sessions for March 20 and March 21 changes.

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

The next meeting is tentatively scheduled for March 24, 1997.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE: March 19, 1997

NAME	REPRESENTING
Terry Leatherman	KCCI
Richard Thomas	DHR/Work Comp
David Shufelt	" " "
Phil Harness	" " "
Brenda Sabo	J. Small
Bill Henry	Ks Society of Prof Engineers
Mark Beck	KDOR
Susan Baker	Hein + Weir
JoLynn Copp	Kansas Insurance Department
Roland Smith	WIBA
ALAN COBB	KOCH INDUSTRIES
Brandon Hall	M J K
Bruce Jamee	BOEING
Harry Born	DOA/DPS
Judy Moler	KAC
Bill Bryson	KGS
Randy Allen	Ks. Association of Counties
Amy Campbell	R. Rice Law Office

KANSAS STATE BOARD OF TECHNICAL PROFESSIONS

(913) 296-3053

Suite 507, Landon State Office Building 900 S.W. Jackson Street Topeka, Kansas 66612-1257

HOUSE BILL 2509

KANSAS STATE BOARD OF TECHNICAL PROFESSIONS

The primary functions of the bill are the following:

- **Section 1-9 and 13-17** Changes the name of the board from the Kansas State Board of Technical Professions to the State Board of Professional Engineers, Architects, Land Surveyors and Landscape Architects.

- **Section 10. KSA 74-7009** Increases application and renewal fee statutory maximum collected by the board. The board is currently at the existing maximum for the above mentioned fees.

- **Section 11. KSA 74-7024** This section would remove the fee charge to a reciprocity applicant and place it under KSA 74-7009, the board's fee statute. The proposed language for a reciprocity fee will not be coupled with the fee charged for an original exam applicant. Section 11(b) deletes out-dated language that was deemed unclear by the Kansas Supreme Court in a 1994 case.

- **Section 12. KSA 74-7035(a)(f)** This language is being deleted, as it allows the unlicensed practice of a technical profession by an out-of-state applicant before the board has determined they are minimally competent to practice in the state of Kansas.

William "Chip" Winslow

Business, Commerce & Labor Committee
3/19/97
Attachment 1

AIA Kansas

A Chapter of The American Institute of Architects

March 18, 1997

TO: Representative Lane and Members of the House Committee on Business, Commerce and Labor

FROM: Trudy Aron, Executive Director

RE: Support for HB 2509

Mr. Chairman and members of the committee, I am Trudy Aron, Executive Director, of the American Institute of Architects in Kansas (AIA Kansas.) Thank you for this opportunity to support HB 2509 which was requested by the Kansas Board of Technical Professions.

This bill changes the name of the board to reflect the professions: architecture, engineering, landscape architecture and land surveying, which the board regulates.

Secondly, the bill allows the board to increase their fees. The board is currently at the existing fee maximums, in addition to needing greater flexibility in the amount of fees charged for reciprocal licenses.

The bill also deletes two provisions, one which has been deemed unclear by the Kansas Supreme Court and another which allows unlicensed practice by out-of-state practitioners before the board has determined their eligibility to practice in Kansas.

AIA Kansas requests that the committee acts favorably on HB 2509.

Thank you for your consideration.

Business, Commerce & Labor Committee
3/19/97
Attachment 2

700 SW Jackson, Suite 209
Topeka, Kansas 66603-3757
Telephone: 913-357-5308
800-444-9853
Facsimile: 913-357-6450

KANSAS CONSULTING ENGINEERS

Statement to
House Committee on Business, Commerce and Labor
House Bill 2509
Tuesday, March 18, 1997

Mr. Chairman and members of the committee, my name is George Barbee, executive director of the Kansas Consulting Engineers. The Board of Directors of the Kansas Consulting Engineers has reviewed the proposed amendments to House Bill 2509 and requested that I submit this written statement in support of the bill.

Sections 1-9 and 13-17 would change the name of the Kansas State Board of Technical Professions to one that is more specific by naming each of the design professions they license. This would eliminate some confusion by your constituents when trying to find the board that licenses their particular profession so they can obtain forms to apply for licensure or to ask questions.

Section 10 deals with K.S.A. 74-7009 and would increase the ceiling on the amount the Board may collect for application and renewal fees. The limit has not been increased in over a decade and the current ceiling does not allow for full recovery of cost.

Section 11 concerns K.S.A. 74-7024 and would relocate to K.S.A. 74-7009 certain fees charged. It would also delete some obsolete language that was deemed unclear by the Kansas Supreme Court in a 1994 case.

Finally, Section 12 concerns K.S.A. 74-7035(a)(f) and would delete current language that allows an unlicensed out-of-state applicant to practice without having shown competence to practice.

The Board of Directors of the Kansas Consulting Engineers supports these amendments and requests that you act favorably on House Bill 2509.

Business, Commerce
& Labor Committee
3/19/97
Attachment 3

GEORGE BARBEE, EXECUTIVE DIRECTOR • 700 SW JACKSON ST., STE 702 • TOPEKA, KS 66603-3758 • (913)357-1824 • FAX (913)357-6629

TESTIMONY
Business, Commerce and Labor Committee
March 18, 1997
HB 2509

Mr. Chairman, Members of the Committee, I am Bill Henry, Executive Vice President of the Kansas Society of Professional Engineers, one of the groups licensed by the Board of Technical Professions. I appear before you today in support of HB 2509.

Professional Engineers make up the largest group licensed by the Board of Technical Professions and we believe the increase in license fees is appropriate since the Board has not made any change in the existing fee ceilings for some time.

Secondly, the Kansas Society of Professional Engineers supports the name change as proposed by this bill.

The professions currently licensed by the Board of Technical Professions all have similar education backgrounds, experience requirements and continuing education requirements. The practice of all four professions licensed by the Board also have a definite relationship to the public's health and safety based upon their definitions of practice.

Based upon this reasoning, the Kansas Society of Professional Engineers supports this measure and hopes you will recommend the bill favorable for passage.

Respectfully submitted.
William M. Henry
Executive Vice President
Kansas Society of Professional Engineers
2300 SW 29th, Ste. 123
Topeka, Kansas 66611
913/267-2444

Business, Commerce & Labor Committee
3/19/97
Attachment 4

Testimony before House Business, Commerce & Labor Committee on S.B. 137
March 19, 1997

Michael R. O'Neal

Mr. Chairman and members of the Committee, I have been asked to explain the amendments contained in S.B. 137 dealing with the issue of self-employed sub-contractors. The specific amendments related to this issue appear on page 1 in lines 32-34 and on page 12 in lines 6-7.

The need for the amendments arises as a consequence of the Kansas Court of Appeal's holding in the case of Allen v. Mills, 11 Kan. App. 2d 415. A copy of the court syllabus is attached. Briefly stated, Plaintiff, a self-employed sawmill owner sued a wood plant owner for injuries arising out of an accident wherein the Plaintiff was driving Defendant's truck to deliver wood. Defendant alleged and the trial court ruled that the incident was covered by workers compensation and that Plaintiff was a statutory employee of the Defendant. As such, workers compensation was the Plaintiff's exclusive remedy. On appeal, the Court of Appeals reversed, holding that the self-employed sawmill owner could not be an employee of himself as a subcontractor for the Defendant, was not a "statutory employee" under K.S.A. 44-503, was not a "worker" as defined by K.S.A. 44-508, and was not covered by the workers compensation act.

Contractors are not interested in being exposed to general liability in tort for injuries arising in the workplace. K.S.A. 44-503 was enacted to provide workers compensation coverage for subcontractors under circumstances where the subcontractor has not purchased a policy of coverage. The trade-off was that in exchange for providing coverage to this class of worker, the contractor was protected from unlimited general liability.

Business, Commerce
& Labor Committee
3/19/97
Attachment 5

However, the Mills decision, while a correct interpretation of the statutes, have given rise to a great deal of confusion and inconsistent application. The best way to illustrate the problem is to consider the hypothetical case of a self-employed subcontractor who has a part-time employee working with him, for whom he has not purchased a policy of workers compensation coverage. The law does not require him to carry insurance on himself or his employee. Assume they are doing a subcontracting job for a contractor at a job site and are both injured when a roof truss falls on them. Without the amendments proposed in S.B. 137 their respective remedies are very different. The employee of the subcontractor would be covered by the contractor's workers compensation policy under the "statutory employee" provisions of K.S.A. 44-503. The self-employed subcontractor employer would not be covered under workers compensation at all and could sue the contractor in tort - for the same injuries. This is so because he is not deemed to be an employee of the contractor and is not covered by the Act.

In addition to this inconsistent application, it's difficult to underwrite the contractor's risk when he uses subcontractors on a regular basis. Many will be obvious risks but several may be hard to determine because of the difficulty in determining retrospectively whether certain subs fit the Mills test. There is also the confusion of having a subcontractor display a certificate of insurance to a contractor, many of whom require such a certificate before hiring the sub, only to have the contractor find out after an accident that the certificate covered only the subs employees because he was not required to carry insurance on himself. This latter problem, incidentally, was not cured by the 1994 amendments to K.S.A. 44-503 dealing with subcontractors.

The amendments on page 12 make it clear that a self-employed subcontractor performing work for a contractor will now fit the definition of

a "worker" under K.S.A. 44-508. Accordingly, the provisions of K.S.A. 44-503 will now apply to provide coverage under the "statutory employee" theory. General tort liability for the contractor would be eliminated.

The amendments on page 1 would prevent a self-employed subcontractor from avoiding the responsibility to provide coverage under circumstances where the "statutory employee" provisions would ordinarily apply. If the sub fails to secure insurance there is still coverage under K.S.A. 44-503, but the burden would be on the subcontractor to secure coverage.

The amendments help alleviate the underwriting problems related to evaluating the risk where contractors hire subs from time to time during the year, removes doubt about whether the Act applies to certain situations, and removes the unintended exposure contractors have to general tort liability for injuries in the workplace.

Citation 724 P.2d 143 (Cite as: 11 Kan.App.2d 415, 724 P.2d 143)
FOUND DOCUMENT
Database KS-CS
Mode Page

David N. ALLEN, Appellant,
v.
Tom MILLS, d/b/a F & M Box Company, Appellee.
No. 58192.
Court of Appeals of Kansas.
Aug. 21, 1986.

Self-employed sawmill owner brought action against wood plant owner for injuries that occurred when sawmill owner was driving plant owner's truck to deliver wood. The District Court, Reno County, William F. Lyle, Jr., J., granted summary judgment in favor of plant owner and determined that sawmill owner's sole remedy was under Workmen's Compensation Act. Sawmill owner appealed. The Court of Appeals, Paul W. Clark, District Judge, assigned, held that self-employed sawmill owner was not employee of wood plant owner and was not statutory employee and, therefore, was not covered by workmen's compensation.

Reversed.

Rees, P.J., concurred and filed opinion.

WORKERS' COMPENSATION k234
413k234
Self-employed sawmill owner, who was injured while driving wood plant owner's truck to deliver load of wood, was not employee of himself as subcontractor for plant owner, was not "employee" of wood plant owner, was not "statutory employee" of plant owner, was not "workman," and, therefore, was not covered by Workmen's Compensation Act. K.S.A. 44-501, 44-501 et seq., 44-503, 44-508(b), 60-256.
See publication Words and Phrases for other judicial constructions and definitions.

WORKERS' COMPENSATION k351
413k351
Self-employed sawmill owner, who was injured while driving wood plant owner's truck to deliver load of wood, was not employee of himself as subcontractor for plant owner, was not "employee" of wood plant owner, was not "statutory employee" of plant owner, was not "workman," and, therefore, was not covered by Workmen's Compensation Act. K.S.A. 44-501, 44-501 et seq., 44-503, 44-508(b), 60-256.
See publication Words and Phrases for other judicial constructions and definitions.

WORKERS' COMPENSATION k352
413k352
Self-employed sawmill owner, who was injured while driving wood plant owner's truck to deliver load of wood, was not employee of himself as subcontractor for plant owner, was not "employee" of wood plant owner, was not "statutory employee" of plant owner, was not "workman," and, therefore, was not covered by Workmen's Compensation Act. K.S.A. 44-501, 44-501 et seq., 44-503, 44-508(b), 60-256.

No. 74,721

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

AETNA LIFE & CASUALTY,
Appellee,

v.

AMERICAS TRUCKWAY SYSTEMS, INC.,
Appellant.

SYLLABUS BY THE COURT

1.

Under K.S.A. 1995 Supp. 44-508(b), an individual employer, limited or general partners, and self-employed persons are not covered workers or employees under the Workers Compensation Act, unless there is a valid election in effect as provided in K.S.A. 44-542(a).

2.

The general provision in K.S.A. 1995 Supp. 44-503(a), which defines a person who undertakes to execute any work which is part of the principal's trade or business as a covered employee of the principal, is limited by the provisions of K.S.A. 1995 Supp. 44-508(b).

Appeal from Johnson District Court; LAWRENCE E. SHEPPARD, judge. Opinion filed January 3, 1997. Reversed.

Luke B. Harkins, of Kansas City, for the appellant.

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Louis J. Wade, of Overland Park, for the appellee.

Before ELLIOTT, P.J., LEWIS and PIERRON, JJ.

PIERRON, J.: Americas Truckway Systems, Inc. (ATS), defendant/appellant, appeals the district court's granting of summary judgment in favor of Aetna Life & Casualty (Aetna), plaintiff/appellee. The district court ruled that the self-employed, independent contractor drivers employed by ATS were covered by the Kansas Workers Compensation Act and Aetna was therefore entitled to an increased premium.

The facts presented to the district court were either stipulated, admitted, or entered into evidence without contradiction. ATS describes its business as primarily a brokering service for the driving and/or "piggy-backing" of semi-tractor trucks from one place to another, a/k/a "driveaway service." ATS's customers contract with ATS to hire independent contractor drivers to drive and/or "piggy-back" trucks to a specified location. ATS's consideration is a commission based on a per-mile charge, and ATS pays the drivers a per-mile rate established by contract between ATS and the drivers.

ATS obtained workers compensation insurance coverage through Aetna for a 2-year period, effective February 25, 1988. The insurance premium was based upon payroll amounts for the applicable classifications of ATS employees. ATS only included its sales and clerical staff in estimating the payroll figures. The premium was approximately $750.

In April 1989, during the second year of coverage, Aetna audited ATS's account, using actual payroll figures from the prior policy year, in order to adjust the premium. The audit contended that ATS used the truck drivers to conduct its business and therefore the drivers' payroll should have also been used to compute the insurance premium. Aetna billed ATS for an adjusted premium of $139,194. After ATS did not pay, Aetna filed suit to collect the adjusted premium.

Aetna filed a motion for summary judgment. After two hearings, the district court granted the motion. The court found the truck drivers involved with ATS were self-employed, independent contractors and not common-law employees of ATS, but that the drivers performed work integral and essential to ATS's business. The district court adopted the rule in *Thompson v. Harold Thompson Trucking*, 12 Kan. App. 2d 449, 456-58, 748 P.2d 430 (1987), *rev. denied* 243 Kan. 782 (1988), and held that the truck drivers were "statutory employees" and subject to premiums for workers compensation liability.

ATS then filed a motion for reconsideration of the court's decision of summary judgment, which was heard. Ultimately, the court found: (1) The facts were not in dispute and had been stipulated to; and (2) ATS conceded it could not prove any of the truck drivers had coverage for workers compensation which would have precluded ATS's liability to Aetna. The court concluded the insurance contract issued by Aetna could cover workers compensation claims by ATS drivers. This was the risk insured against by Aetna, thereby rendering ATS liable. Thus, the court ruled the drivers' payroll should have been included in the calculation of the premiums according to the terms and conditions of the contract.

At a later date, the court held a hearing on damages and granted judgment in favor of Aetna for $139,194.

ATS argues the district court erred in granting summary judgment because self-employed persons are generally excluded from coverage under the Kansas Workers Compensation Act, K.S.A. 44-501 *et seq*. ATS contends Aetna is not entitled to the adjusted insurance premiums based on the language in K.S.A. 1995 Supp. 44-503(a) and the holding in *Allen v. Mills*, 11 Kan. App. 2d 415, 724 P.2d 143 (1986). On the other hand, Aetna argues the district court correctly entered summary judgment in its favor since ATS's truck drivers were statutory employees under K.S.A. 44-503(a) and ATS is liable for workers compensation premiums under the statute. Aetna also argues ATS is liable for premiums under the insurance contract entered into by the parties.

Our standard of review for cases decided by summary judgment is well established:

> "The burden on the party seeking summary judgment is a strict one. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude

summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal we apply the same rule, and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citations omitted.]" *Mitzner v. State Dept. of SRS*, 257 Kan. 258, 260-61, 891 P.2d 435 (1995).

There are several provisions of the Workers Compensation Act relevant to a discussion of the issue presented to the court. K.S.A. 44-501(a) provides:

"If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act."

The act also defines individuals that are encompassed therein. K.S.A. 1995 Supp. 44-508(b) defines "workman", "employee," or "worker" as

"any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. . . . Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a and amendments thereto, such terms shall not include individual employers, limited or general partners or self-employed persons."

Pursuant to K.S.A. 44-501(a) and K.S.A. 1995 Supp. 44-508(b), ATS argues the drivers would not have been able to bring claims against Aetna under the Workers Compensation Act. Aetna concedes that self-employed persons are not generally considered "workers" under K.S.A. 1995 Supp. 44-508. Aetna argues the truck

drivers contracted with ATS to do ATS's work and are statutory employees. Therefore, the premium must be charged for that insured risk.

ATS relies heavily on *Allen v. Mills*, 11 Kan. App. 2d 415. Allen owned and operated a sawmill in Reno County. Mills operated a plant in Butler County where he sometimes used Allen's lumber to make goods for sale to the public. Usually, Mills would let Allen know when he needed a truckload of lumber, and Allen would tell Mills when it was ready. Mills would then dispatch his driver with a truck to pick up the load from Allen. On the occasion of the accident, Allen picked up Mills' truck, returned to Allen's sawmill, loaded the truck, and was injured when he delivered the wood back to Mills' plant.

The court found the case to be one of a nonelecting, self-employed person seeking workers compensation. The district court ruled that Allen was barred from bringing a civil action against Mills because his sole and exclusive remedy was under the Workers Compensation Act. The district court also ruled that Allen was his own employer, doing subcontract work for his principal, Mills. 11 Kan. App. 2d at 416-17. This court disagreed with the district court's reliance on K.S.A. 44-503 (Ensley 1981) and hung its hat on the self-employed person language in K.S.A. 1985 Supp. 44-508(b), which disqualified such individuals from the Act. The *Allen* court explained:

> "For K.S.A. 44-503 to be operative, it is necessary that there be a contract between the contractor and the worker that creates between them the relationship of employer and employee. There cannot be such a contract when one person is purportedly both the contractor and the employee. This is for a plain and simple reason. No man can

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contract with himself. 1 Williston on Contracts § 18, p. 32 (3d ed. 1957); 2 Williston on Contracts § 308, p. 450 (3d ed 1959). There must be at least two parties to the making of a contract. 1 Williston on Contracts § 18, p. 32. As our Supreme Court has said:

> 'There must be at least two parties to a contract. It is not possible for an individual, simply by his own mental operations, to enter into a contract with himself, or with himself and others, even though he acts in different capacities.' *Sinclair Refining Co. v. Long*, 139 Kan. 632, Syl. ¶ 2, 32 P.2d 464 (1934).

See *Kumberg v. Kumberg*, 232 Kan. 692, 699, 659 P.2d 823 (1983)." 11 Kan. App. 2d at 418.

The *Allen* court ultimately held that Allen was not an "employee" under the Act for the reason that he had no contractual relationship with another as employer and employee. The court decided that Allen was engaged in an arms-length transaction with Mills and was not a statutory employee of Mills for purposes of applying the Workers Compensation Act. 11 Kan. App. 2d at 418.

Aetna argues *Allen* is not applicable to our case. Aetna cites the distinguishing factors that (1) Allen was self-employed, whereas ATS is a corporation, and (2) Allen claimed to be an employee of *himself* and undertook to do his own work, whereas ATS specifically contracted with independent, self-employed contractors to do its work. Aetna states that ATS's business is a corporation providing transportation services for its customers. ATS does not do the work itself, in which case the employees would be eligible for workers compensation coverage, but instead contracts with independent truckers.

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Aetna contends the Workers Compensation Act specifically addresses this situation. K.S.A. 1995 Supp. 44-503(a) provides:

> "Where any person (in this section referred to as principal) undertakes to execute any work which is part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed."

K.S.A. 1995 Supp. 44-503 creates an employer-employee relationship for purposes of workers compensation where such a relationship would not be recognized under common-law principles. Workers who are eligible for benefits through application of this section are therefore frequently referred to as "statutory employees." Kansas Workers Compensation Handbook § 4.06A (rev. ed. 1990). The court in *Zehring v. Wickham*, 232 Kan. 704, 707, 658 P.2d 1004 (1983), observed that a principal purpose of 44-503(a) is "'to prevent employers from evading liability under the act by the device of contracting with outsiders to do work which they have undertaken to do as a part of their trade or business.' *Hoffman v. Cudahy Packing Co.*, 161 Kan. 345, Syl. ¶ 4, 167 P.2d 613 (1946). See also *Fugit, [Administratrix v. United Beechcraft, Inc.,]* 222 Kan. [312, 315, 564 P.2d 521 (1977)]."

Aetna relies heavily on *Thompson v. Harold Thompson Trucking*, 12 Kan. App. 2d 449, as the governing law that ATS's drivers were statutory employees under K.S.A. 1995 Supp. 44-503(a). In *Thompson*, Harold Thompson, doing business as Harold Thompson Trucking, was engaged in hauling salt water, fresh water, and crude oil to and from oil field operations. Thompson Trucking employed Richard E. Shreve, who had worked for the company for approximately 6 to 8 weeks before the accident. On the day of the accident, Thompson and Shreve were cleaning an oil tank on a lease operated by Murfin Drilling Company. Murfin had contracted with Thompson Trucking to clean the oil tank. Thompson and Shreve were injured when the oil tank exploded. 12 Kan. App. 2d at 450.

The district court considered whether Thompson was a statutory employee of Murfin Drilling. The question was whether Thompson Trucking's insurance company or Murfin's insurance company would be responsible for paying Thompson's workers compensation claim. The district court found that Thompson was not the statutory employee of Murfin. On appeal, this court reversed the decision of the district court and held that the work Thompson was doing at the time of the accident was an integral part of Murfin's operation pursuant to K.S.A. 1995 Supp. 44-503(a). 12 Kan. App. 2d at 451, 457.

Additionally, the court also held that it made no difference that the claimant was the owner of the company contracting with Murfin since Thompson had elected to come under the act as an employee of his company. The court recognized that Murfin had not contracted with Thompson to perform the work, as had been the situation in *Allen*. Rather, Murfin had contracted with the company owned by

Thompson. See *Robinson v. Flynn's Ferry Service, Inc.*, 6 Kan. App. 2d 709, 714, 633 P.2d 1166, *rev. denied* 230 Kan. 819 (1981) (court held that where principal contracted with the business and not with the owner-operator individually, 44-503(a) applied and the owner-operator was a statutory employee of the principal.) The court concluded that Thompson was a statutory employee of Murfin and could recover workers compensation benefits from it. 12 Kan. App. 2d at 458.

ATS argues that *Thompson* is highly distinguishable because it deals with the exception to the rule that self-employed persons are not covered by the Workers Compensation Act. Under K.S.A. 1995 Supp. 44-508(b), this exception applies only to self-employed persons who make an election under the Act, as Thompson had done, to be covered pursuant to K.S.A. 44-542a. Since it is uncontroverted that none of the ATS truck drivers had ever made such an election, ATS argues *Thompson* does not apply and its truck drivers could not have brought a claim under the Act.

ATS cites *Miller v. Miller*, 13 Kan. App. 2d 262, 264, 768 P.2d 308 (1989):

> "The presence of the introductory qualifying or conditional phrase in the last sentence of K.S.A. 1988 Supp. 44-508(b) produces the corollary that, where there is a valid election in effect, the statutory term "employee" includes self-employed persons. An electing self-employed person is an "employee" for the purposes of the Act for the single reason that that is what the Act says."

Aetna argues that ATS disregards the express language of the insurance contract and fails to address the trial court's reliance on the same. The record contains what appears to be Aetna's standard workers compensation insurance

policy. Aetna argues the district court's ruling squares perfectly with the provisions of the insurance contract. Aetna directs the court's attention to Part V, § C of the insurance policy, which reads:

> "Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. The premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:
>
> 1. all your officers and employees engaged in work covered by this policy; and
>
> 2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations."

Aetna states it is uncontroverted that ATS has not provided any proof that the truck drivers had their own workers compensation coverage. Therefore, Aetna insists it is properly entitled to insurance premiums for workers compensation coverage of the truck drivers used by ATS.

Last, Aetna argues that ATS's position is compromised with regard to the language in the contracts it used to hire the truck drivers. The "Independent Contractor Agreement" between ATS (Company) and the truck drivers (Contractor) provides:

"Drivers and Helpers. Contractor shall, at his own expense, employ all necessary drivers, driver helpers, and laborers to carry out this Agreement. Company shall not be responsible for the wages and expenses, employment taxes (federal or state), nor social security, or insurance of Contractor's employees, agents, or servants.

"Contractor shall hold Company harmless from any liability arising from a relationship between Contractor and any of Contractor's employees, agents or servants, whether under industrial accident laws, workers' compensation laws, employment taxes, or other state or federal laws applicable to employees, and employers. Contractor shall maintain workers' compensation coverage for any employee, agent or servant whom Contractor employs in the performance of this Agreement.

"In addition, Contractor represents that he will withhold state and federal income taxes upon the wages paid by Contractor to Contractor's employees, and Contractor will be solely responsible for all employment taxes owing to the state and federal governments."

Aetna argues the district court correctly concluded that ATS's failure to police and monitor its own contracts with the truck drivers has now caused it to be liable for the increased premium. Aetna asserts that if ATS truly believed it had no exposure for workers compensation claims filed by the truck drivers, then there would be no need to contractually require the truck drivers to obtain and maintain workers compensation insurance. Therefore, Aetna argues ATS knew it was liable for workers compensation claims filed by the truck drivers.

ATS argues this provision applies to people hired by their contract drivers, not the contract drivers themselves.

5-16

It is apparent a possible conflict exists between the definition of employee under K.S.A. 1995 Supp. 44-508(b) and the "statutory employee" under K.S.A. 1995 Supp. 44-503(a). K.S.A. 1995 Supp. 44-503(a) is silent as to whether an individual who falls within the purview of this statute must have elected to bring himself or herself within the act in order to receive compensation. *Thompson* is uninstructive on the subject because the individual there had already elected to be covered by the Act. *Miller* is no help because it stands for the proposition that a self-employed person who elects under the Act falls within the definition of "employee" under K.S.A. 1995 Supp. 44-508(b) and has no bearing on a determination under K.S.A. 1995 Supp. 44-503(a).

We believe the proper avenue to address this statutory conflict is through the fundamental rule that specific statutes prevail over general statutes. "General and special statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, the special statute will prevail unless it appears the legislature intended to make the general statute controlling." *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 353, 770 P.2d 423 (1989). "One rule of statutory construction is that where a statute dealing generally with a subject and a statute dealing specifically with a certain phase of the subject are conflicting, the more specific statute generally controls unless the legislature intended otherwise." *State v. LaMunyon*, 259 Kan. 54, Syl. ¶ 1, 911 P.2d 151 (1996).

We believe 44-508(b) is the more specific statute. It is obvious that individual employers, limited or general partners, or self-employed persons routinely undertake to execute work which is part of the principal's trade or business.

5-17

Therefore, the 44-508(b) requirement that to be covered, such person must execute a valid election, would seem to specifically limit the general rule of inclusion under 44-503(a).

We note that courts have held that 44-503(a) is to be liberally construed to effectuate the purpose of the Workers Compensation Act. See *Bailey v. Mosby Hotel Co.*, 160 Kan. 258, 268, 160 P.2d 701 (1945). The court in *Bright v. Cargill, Inc.*, 251 Kan. 387, 393, 837 P.2d 348 (1992), *aff'd* 254 Kan. 853, 869 P.2d 686 (1994), stated that the provisions of the Workers Compensation Act are to be liberally construed for the purpose of bringing a worker under the Act whether or not desirable for the specific individual's circumstances. But such latitude does not permit the court to enlarge upon the plain terms of the statute. See *Leslie v. Reynolds*, 179 Kan. 422, 427, 295 P.2d 1076 (1956).

We therefore find the self-employed truck drivers involved here, who apparently did not elect to be covered pursuant to a valid election under K.S.A. 44-542(a), were not required to be covered by ATS. It follows that Aetna provided no coverage for those drivers under the law or its contract with ATS and is not entitled to a premium for doing so.

Reversed.

O'neal
3/19

5-18

TESTIMONY BEFORE THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE

WEDNESDAY, MARCH 19, 1997

BY PHILIP S. HARNESS, DIRECTOR OF DIVISION OF WORKERS COMPENSATION

RE: SENATE BILL 137

Senate Bill 137 is a compilation of agreements reached by the Workers Compensation Advisory Council as of the end of January, 1997:

1. Sections 1 and 6 deal with the problem of an insured employer claiming that a subcontractor was not an employee and, therefore, not covered by the Workers Compensation Act. Self-employed subcontractors would be covered even if they don't meet the payroll requirement since they are engaged in work that would be subject to the provisions of K.S.A. 44-503 dealing with subcontractors. The self-employed sole proprietor subcontractor would at all times be considered an employee of the contractor.

2. Section 2 seeks to raise the burial expense allowance from $3,300 to $4,300.

3. Section 3 seeks to address the issue raised in the *Bradford v. Boeing*, case as decided by the Court of Appeals wherein it held that, although the present statute states that an administrative law judge shall issue an award within 30 days, the 30 days does not start running until the tendering of a submission letter. Obviously, under the Court's interpretation, the 30 days would never start running if a submission letter is never tendered. The proposed amendment would not require the administrative law judge to await the submission letter.

4. Section 4 is designed to address another issue raised by the Court of Appeals. Specifically, K.S.A. 44-5,121 allows a civil cause of action to any person who has suffered economic loss by a fraudulent or abusive act. Present legislation would allow, for example, a claimant to file a claim and also allow a civil action to be filed based on an alleged fraudulent withholding of benefits. The administrative law judge may make a decision that the case is not compensable at all, whereas the district court judge may conclude a completely different result and award damages for an alleged fraudulent withholding of benefits. If that were to happen, the remedy at that point would seem to be to go to the Court of Appeals to straighten it out. Section 4 seeks to avoid (hopefully) that possible situation by imitating a procedure currently used by the federal EEOC which would give the insurance commissioner (in a case of entities regulated by the insurance commissioner) or the Director of the Division of Workers Compensation (in a case of entities which are monitored by the director) the "first shot" on acting on a complaint of alleged fraudulent or abusive conduct for the first 180 days of the filing of the complaint. After that, the complainant is deemed to have exhausted the administrative remedies and

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is then free to file a civil action in district court for alleged fraudulent activities by virtue of Section 5 of the bill. Section 10 is likewise amended accordingly.

5. Section 7 provides that the method for calculating the amount of security required of self-insureds shall be reviewed by an actuary every five years beginning this year. The Division had already done that for this year; the advisory council felt it was a good idea to put that on a regular schedule.

6. Section 8 seeks to equate the time computation in workers compensation with that of the code of civil procedure, that is, on time computations of less than 11 days that intermediate Saturdays, Sundays and legal holidays shall be excluded.

7. Also, in Section 8, if there has been a vacancy in one of the administrative law judge positions, if a special administrative law judge is appointed on a temporary basis to hear or decide cases, under present law the respondent pays the fees due that special temporary administrative law judge. Under the proposed language, those fees would come out of the workers compensation fee fund for all hearings except settlement hearings.

8. Section 9 clarifies that if a pro tem is appointed to hear cases with the appeals board, that person receives compensation at the hourly rate a board member is paid, rather than the present law which sets forth a daily rate.

Thank you for your courtesy.

March 19, 1997

PROCESSING WORKERS COMPENSATION CASES

FLOWCHART and NOTES

Kansas Division of Workers Compensation
800 SW Jackson, Suite 600
Topeka, KS 66612

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& Labor Committee
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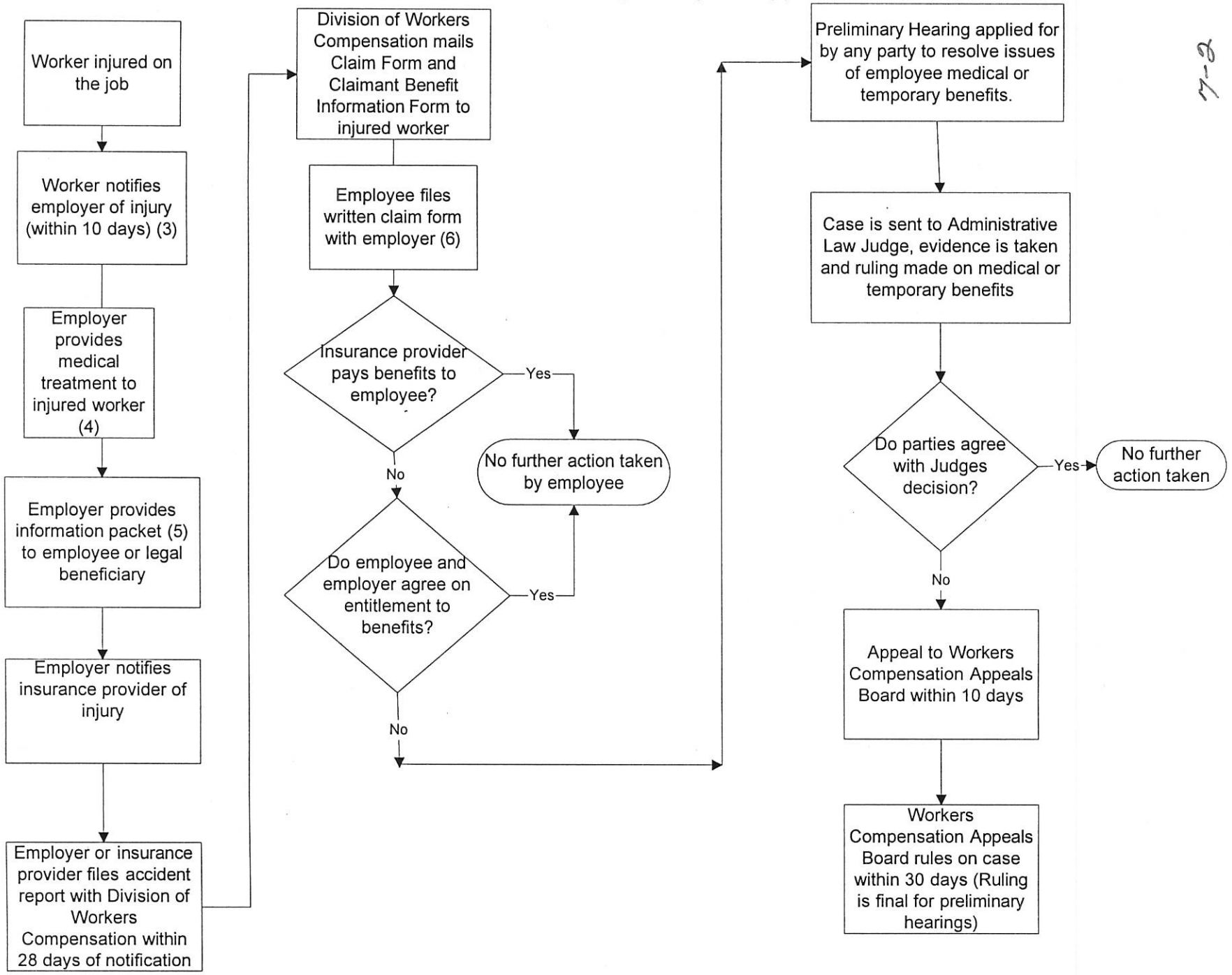
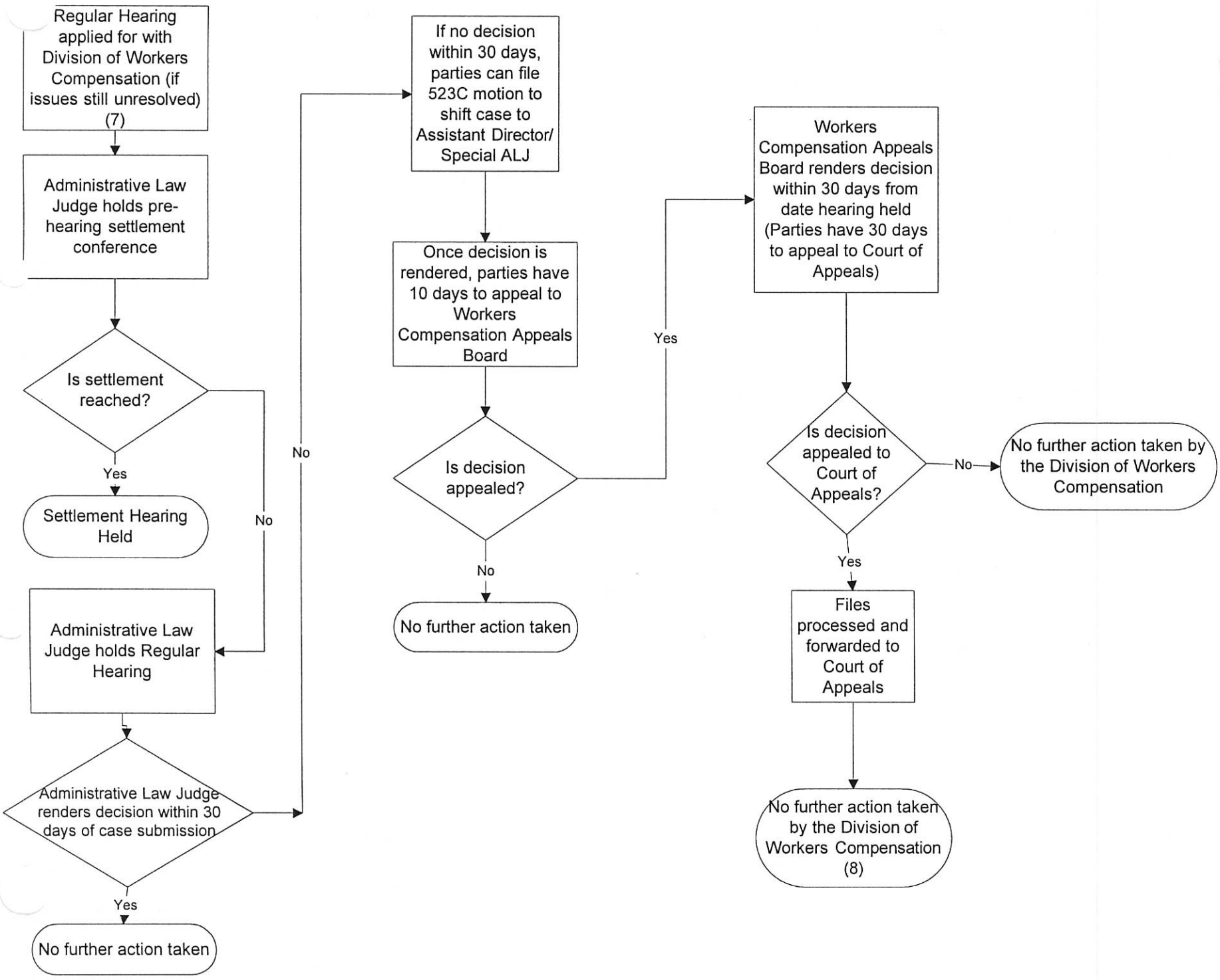
Ombudsman section available to assist parties during any stage of the process (1)

Mediation available to parties during any stage of the process (2)



(*) Footnote information attached on page 3.


Regular Hearing applied for with Division of Workers Compensation (if issues still unresolved) (7)
Administrative Law Judge holds pre-hearing settlement conference
Is settlement reached?
Yes
Settlement Hearing Held
No
Administrative Law Judge holds Regular Hearing
Administrative Law Judge renders decision within 30 days of case submission
Yes
No further action taken
No
If no decision within 30 days, parties can file 523C motion to shift case to Assistant Director/ Special ALJ
Once decision is rendered, parties have 10 days to appeal to Workers Compensation Appeals Board
Is decision appealed?
No
No further action taken
Yes
Workers Compensation Appeals Board renders decision within 30 days from date hearing held (Parties have 30 days to appeal to Court of Appeals)
Is decision appealed to Court of Appeals?
No
No further action taken by the Division of Workers Compensation
Yes
Files processed and forwarded to Court of Appeals
No further action taken by the Division of Workers Compensation (8)

PROCESSING A WORKERS COMPENSATION CASE

Flowchart Footnotes

(1) Ombudsman section of the Division of Workers Compensation are available to assist parties of the case **(see attached brochure K-WCP 101.)**

(2) Mediation available to parties of the case **(see attached Mediation Form K-WC 1701.)**

(3) Worker notifies employer of injury within 10 days of injury, or within 75 days if just cause is shown.

(4) The majority of work related injuries conclude at this step in the claim process.

(5) Employer provides information packet to employee or legal beneficiary, including Form 27 List of Workers Rights and Employers Responsibilities. Ombudsman toll free number is listed in this packet.

(6) Employee files written Claim Form with employer within 200 days, or within 1 year if no accident report filed with the Division.

(7) Regular hearing not scheduled until injured worker reaches maximum medical improvement.

(8) No further action taken by the Division of Workers Compensation unless case is remanded from Court of Appeals back to the Division of Workers Compensation.

KANSAS
DEPARTMENT OF HUMAN RESOURCES
DIVISION OF WORKERS COMPENSATION
800 SW JACKSON, STE 600
TOPEKA, KS 66612-1227

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WORKERS COMPENSATION FACTS

- Injured workers must report an injury to their employer within 10 days or 75 days if there is just cause for failure to report within 10 days.
- A written claim must be filed within 200 days of the accident or last date benefits are paid.
- Most employers that have an annual estimated payroll of $20,000 are required to have workers compensation insurance.
- Employers must file accident reports with the Division within 28 days of being notified of an accident.
- An accident must be reported if an employee misses more than the remainder of the day, shift or turn on which the injury was sustained.
- Employers must give an Informational (KWC 27/270) to every employee who reports an on the job injury.
- Employers are responsible for providing reasonable medical treatment.
- Employers have the right to select the treating physician.
- Employees have up to $500 of unauthorized medical expenses for examination, diagnosis, or treatment.
- Injured workers may receive 66 2/3 of their gross average weekly wages,not to exceed the maximum of 75% of the states average weekly wage.

K-WC-P 101 (11-96)

7-5

Workers Compensation

OMBUDSMAN/CLAIMS ADVISORY SERVICES

"Protecting employee and employer rights under the Workers Compensation Act"

7-5

OMBUDSMAN SERVICES WITHIN THE WORKERS COMPENSATION SYSTEM

The Kansas Division of Workers Compensation established a Claimant Advisory Section in 1978. In 1993 the Legislature followed a national trend and, by statute, created the Ombudsman Program. The workers compensation reform legislation of 1993 mandated an expanded role for the Claims Advisory Section, to enable a more proactive approach to assisting all parties in understanding their rights and responsibilities under the Workers Compensation Act.

OMBUDSMAN

The Division of Workers Compensation employs full time personnel who specialize in aiding injured workers, employers and insurance professionals with claims information and problems arising from job related injuries and illnesses. The ombudsman acts in an impartial manner and is available to assist the parties with general information about the current issues within the workers compensation system. For example, the ombudsmen have current information on legislative changes, or changes due to decisions made by the Workers Compensation Board or the Courts. The Ombudsman Section can also assist with specific issues on current workers compensation claims.

7-6

ASSISTING INJURED WORKERS

- Providing General Information
- Obtaining Medical Treatment
- Benefits Not Being Paid or Not Being Paid on a Timely Basis
- Unpaid Medical Benefits
- Calculations of Benefits
- Timely Notification of Employer
- Timely Submission of Written Claims
- Procedures for Filing for a Hearing
- Obtaining Survivors Benefits
- Informal Dispute Resolution
- Mediation Assistance
- Interpretation for Spanish Speaking Workers

ASSISTING EMPLOYERS/INSURANCE COMPANIES

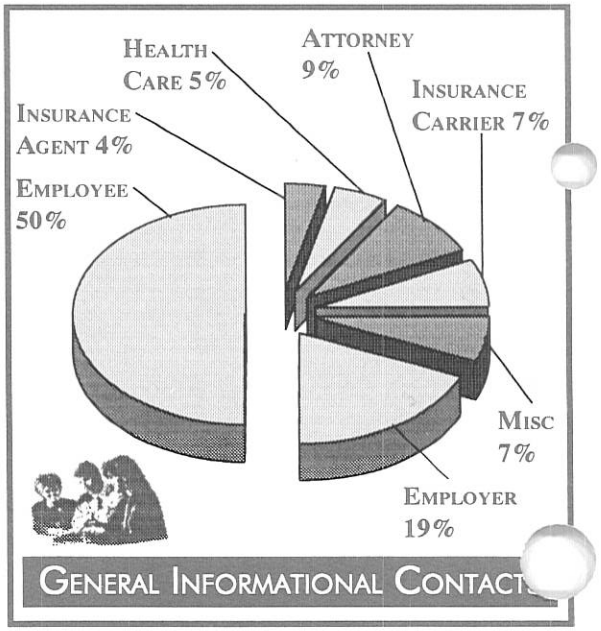
- Providing General Information
- Posting Workers Compensation Notice (KWC 40)
- Providing Required Information to Injured Workers (KWC 27/270)
- Timely Submission of Accident Reports
- Timely and Appropriate Payment of Medical Services
- Election Information
- Assistance With Death Benefit Requirements
- Informal Dispute Resolution
- Assistance With Spanish Speaking Workers
- Site Visits for Hands on Assistance

OTHER ASSISTANCE PROVIDED

- Look-up Insurance Company
- Assist With Collection of Medical Bills
- Research for Prior Injuries
- Legislative Inquiries
- Informational Presentations
- Child Support Orders and Workers Compensation Benefits
- Referrals to Other Agencies

Ombudsman assistance is available both in person or by telephone. Call **(913) 296-2996** or a toll free number, **1-800-332-0353** is available to assist parties in reaching an ombudsman.

The pie graph below shows who is contacting the Ombudsman Section for general information.



7-6

MEDIATION

Definition: Mediation is now an option which was created by passage of Senate Bill No. 649, Section No. 15. It is a process in which the parties to a dispute have voluntarily elected to use an impartial third party to facilitate the resolution of their dispute. The goal of mediation is to obtain a voluntary agreement created by the parties themselves.

As of April 1996, mediation is available through the Division of Workers Compensation. For scheduling purposes please call Ruth Norris at 913-296-0848.

Specific Considerations

Mediator's role: The mediator's role is to assist the parties in reaching a resolution. The mediator will work with the parties in identifying the issues in dispute, reducing misunderstandings, and clarifying priorities. The mediator will hopefully bring the parties together on the issues, and on an agreement.

Parties' role: Mediation is a non-hostile and informal process. Because the goal of mediation is to an agreement that both parties had a hand in creating and with which they can live, it is the parties' self-determination that is the fundamental principle of the mediation process. Mediation requires the parties' willingness to negotiate in good faith.

Full disclosure: Full disclosure is necessary for the development of factual information. Without full disclosure, the parties are unable to honestly and fully evaluate the disputed issues.

Confidentiality: Any information transmitted between the parties during mediation, whether written or verbal, shall be confidential communication. Therefore, admissions, representations, or statements made in mediation are not admissible as evidence nor subject to discovery. The mediator is prohibited from disclosing any matter discussed during mediation, unless the parties consent to a waiver, or unless required by law or other public policy.

Termination: Whenever the parties are no longer able to mediate in good faith, either party can terminate the mediation. Likewise, the mediator can terminate the mediation when the parties are lacking the willingness to participate in good faith or are at an impasse. The termination of the mediation shall be without prejudice to either party as in any other proceeding.

Mediation concluded: The mediation can be concluded through termination or upon the parties reaching a written agreement, which must be reviewed by their attorneys when appropriate and signed by the parties.

MEDIATION PROCESS

A. In order to initiate the process of mediation, a party will need to make a request. (The request for mediation can be made by any of the following methods)

1. A letter to the Division of Workers Compensation requesting mediation.
2. A phone call to the Division of Workers Compensation (Mediation Section 913-296-0848).

A party requesting mediation shall inform the Division of Workers Compensation what issues are in dispute. (Any workers compensation issue that is in dispute may be mediated)

B. Once a request for mediation has been made, the Division of Workers Compensation will contact the opposing party.

1. The opposing party will be contacted by phone regarding the request for mediation.
2. If the opposing party does not wish to participate in mediation, the requesting party will be notified of such refusal.
   a) Since mediation is a voluntary process, a conference to mediate the dispute can not be scheduled upon a party's refusal to participate.
3. If the opposing party agrees to mediate their dispute, the Division of Workers Compensation will schedule a mediation conference.

C. Upon agreement by the parties to mediate, the Division of Workers Compensation will contact both parties for scheduling purposes.

1. The date, time and place for the mediation conference will be set by agreement of the parties.
2. The Division of Workers Compensation will send the parties a confirmation letter regarding the upcoming mediation conference.
   a) The confirmation letter will contain the following information.
      i. Names of the parties;
      ii. Date, time and place of the mediation onference;
      iii. Issues that are in dispute (although the issues are identified prior to the mediation conference, new issues issues may be raised at the mediation conference).
3. The parties should submit to the Division of orkers Compensation any evidence that they plan to present during the mediation conference.

D. Participation during the mediation conference

1. All parties with final settlement authority **shall** be present in person for the mediation conference.
2. It is beneficial for the parties to bring any and all relevant evidence to the mediation conference.
3. Upon arrival for the mediation conference, the parties will be given an "agreement to mediate" form.

a) Before the start of the mediation conference, the agreement to mediate form must be read and signed by the parties.
b) The agreement form will contain the following:
   i. names of the parties;
   ii. role of the parties during the mediation conference; and
   iii. rules to be use during the mediation conference.

4. The mediation conference will be conducted by a qualified mediator pursuant to the Dispute Resolution Act, K.S.A. 5-501, et seq, and amendments thereto, and any relevant rules of the Kansas Supreme Court as authorized pursuant to K.S.A. 5-501, and amendments thereto.
5. The mediation conference shall be conducted in ccordance with the Dispute Resolution Act, K.S.A. 5-501, and amendments thereto.

E. During the mediation conference, the parties can agree to resolve a particular issue or settle the entire claim.

1. If an agreement is reached, the agreement will be reduced to writing by the mediator.
   a) The agreement will then be read and signed by the parties.
   b) Thereafter, the agreement is forwarded to the ALJ for approval.
   c) Upon approval by the ALJ, the agreement will have the same force and effect as an agreed order or award.
   d) The agreement will become part of the docket file.
2. If no agreement is reached.
   a) The mediator will prepare a report indicating that an agreement was not reached during the mediation conference.

F. The Mediation Conference may be concluded in several ways.

1. Either party may terminate the conference at any time;
2. The mediator may terminate the conference when an impasse has been reached;
3. The conference may be terminated upon an agreement being reached.

For additional information or to schedule a mediation conference, please call or write:

Division of Workers Compensation
Mediation Section
800 SW Jackson St., Ste. 600
Topeka, KS 66612-1227
(913)296-0848

III
3/19/97

7-9

TESTIMONY BEFORE THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE ON SENATE BILL NO. 346, AS AMENDED

BY PHILIP S. HARNESS, DIRECTOR OF WORKERS COMPENSATION MARCH 19, 1997

Chairman Lane and committee persons:

Thank you for allowing me the opportunity to address you on the provisions of Senate Bill No. 346, which is mostly a compilation of legislative recommendations made by the Workers Compensation Advisory Council, pursuant to K.S.A. 44-596.

1. Section One (Page 1, Lines 27 and 28) provides for a continuance of a workers compensation case (technically known as a terminal date extension) upon mutual agreement of all parties.

2. Section Two (Page 3, Line 23) provides for the schedule of maximum medical fees to be revised as necessary at least every two years, rather than the present statutory "annual review." While medical fees do fluctuate, it was not felt that it is necessary to review the schedule annually but that a bi-annual revision is more appropriate.

3. Section Three (Page 8, Line 22) grants the Kansas Workers Compensation Fund the status of a party to request a determination of benefits or compensation due to an injured worker. Under present law, only the employer, worker, or insurance carrier has standing to make such a request.

4. Section Four (Page 10, Lines 32-34) limits the time available to certify overpayments by an employer or insurance carrier to the Division to one (1) year from the date of the final order. K.S.A. 44-534a provides that, if workers compensation has been paid by the employer or its insurance carrier either voluntarily or pursuant to an award and, after a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than that which was paid, the employer or its insurance carrier is entitled to be reimbursed from the Workers Compensation Fund. Procedurally, the Division of Workers Compensation certifies to the Insurance Commissioner the amount to which the employer or insurance carrier should be reimbursed and, upon receipt of such certification, the Insurance Commissioner then pays that amount to the employer or its insurance carrier. This proposed amendment sets a time limit for the employer or its insurance carrier to make such a request.

5. Section 5 is the only proposed amendment which did not go through the advisory council. Summarizing, if there is no offer on the table, the fee would be capped at 25%. If there is an offer on the table prior to the hiring of the attorney, the fee would be capped at 50% of the amount over and above the offer, but not to exceed 25% of the total. In post award matters (review and modification, additional medical benefits, penalties, etc.) if there is additional

Business, Commerce & Labor Committee
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disability compensation, any attorney's fees would be paid from such amounts. If such services do not involve additional disability compensation, but do result in an additional award of medical compensation, penalties, or other benefits, the employer pays the attorney's fees. If the services result in a denial of additional compensation, the ordering of claimant's attorney's fees from the respondent is discretionary.

6. Section six (Page 14, Lines 16-18) is intended to address the issues presented by the decision of the Court of Appeals in the *Shain* case. Specifically, that case concluded that any decision made by an administrative law judge, whether it be a final decision disposing of the case, or even a ruling on evidence, may be appealed to the Workers Compensation Board. The proposed amendment allows appeals only in the area of final orders, awards, modifications of awards, or preliminary awards.

7. Section seven (Page 16, Lines 5-7) provides that the Director may contract with the Secretary of the Department of Health and Environment to collect information necessary for the setting of the maximum medical fee schedule. Currently, the Secretary of Health and Environment collects data for the Insurance Commissioner under the auspices of the health-care data governing board.

Section seven also proposes an amendment (Page 16, Lines 24-31) to require each workers compensation pool, insurance carrier, and health care provider to submit certain medical information, by procedure, charge and zip code, in order to facilitate the gathering of data for the purposes of setting the maximum medical fee schedule. Under current law, there is no method of compulsion for reporting that data, and the Division of Workers Compensation must rely on the voluntary submission and generosity of others to submit information in order to set the maximum medical fee schedule.

8. Section eight (Page 18, Lines 21-33) provides that in those cases where the Workers Compensation Fund has been properly impleaded and where an award has been entered deciding all the issues in the employee's claim against the employer, but leaving unresolved those issues between the employer and the Workers Compensation Fund, the Workers Compensation Fund may file an application requesting that it be dismissed from the case. The employer would have a period of six (6) months from the filing of such an application in which to complete its evidence on the fund liability issues and submit the case to the administrative law judge for decision. If the employer would fail to complete its evidence and submit the case within that six (6) month period, the fund would be dismissed. The fund would have sixty (60) days to present its evidence.

9. Section nine (Page 20, Line 43) requires a 10-day notice to implead the fund. Under current law, there is no minimum time requirement prior to the first full evidentiary hearing for the fund to be impleaded.

10. Section ten (Page 21, Lines 25-26) provides for a waiver of assessments (used to pay for

the cost of the Workers Compensation Division) of $10.00 or less. Currently, the Division levies an assessment of approximately two percent of the paid losses suffered by insurance carriers, self-insured employers, and group pools. While those payors number in the hundreds, there are approximately a dozen which pay a very low assessment, usually related to writing only one workers compensation policy in the state. Time spent on calculating those extremely low assessments, sending out the bill, and making sure it is paid outweighs the less than $40.00 that the Division would otherwise receive from these dozen or so payors.

Thank you for your courtesy in receiving this testimony and the Division is, of course, happy to answer any questions regarding it.