

Approved: February 11, 1997
dlc

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on February 6, 1997 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Barone, Brownlee, Feleciano, Gooch, Jordan, Ranson, Steffes, Steineger and Umbarger.

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:
Representative Mike O'Neal
Philip Harness, Director, Workers Compensation Commission
Derek Chappell, Kansas Trial Lawyers Association
Wayne Maichel, AFL-CIO

Others attending: See attached list

SB 137 - Procedural changes to workers compensation act

Representative Mike O'Neal testified in support of changes in **SB 137** relating to subcontractors found in Section 1, Lines 32-34 and Page 12, Lines 6-7. Representative O'Neal stated these changes are the result of a Court of Appeals decision in Allen v. Mills, which held that a self-employed owner cannot be an employee of himself as a contractor; was not a "statutory employee" under KSA 44-503, was not a "worker" as defined by KSA 44-508, and not covered by the workers compensation act. Attachment 1

Representative O'Neal stated the amendment on Page 12, Lines 32-34 insures that all self-employed subcontractors performing work for a contractor are covered under the Workers Compensation Act. Page 1, lines 31-34 places the burden on the subcontractors to obtain a certificate of insurance for themselves and their employees; however, if the subcontractors are not covered they will be covered through the contractor's insurance.

Philip Harness, Director, Workers Compensation Commission, explained the amendments recommended by the Workers Compensation Advisory Council contained in **SB 137**. Page 4, Line 18, increases burial expenses to \$4,300. Page 5, Lines 33-34, allows the administrative law judge to enter a decision even if a party has failed to file a submission letter in a timely matter. This is in response to a recent case of Bradford v. Boeing. Page 8, Lines 33-43, Page 9, Lines 1-2, is the result of Elliott v. Dillon Co., and corrects the process whereby fraudulent and abusive claims are filed with both the commissioner of insurance and the district court. This amendment eliminates the duo track possibility by providing for claims to be dismissed by the director or the commissioner of insurance if there has been no hearing or other administration taken within 180 days of the filing of the complaint, thereby allowing a subsequent filing in district court. Page 16, lines 40-43, changes the formula for calculating the amount of security required of self insureds and requires a review by an actuary every five years. Page 17, lines 1-12, provides for mergers and the process of obtaining an application as a self-insured entity; Lines 25-26 conforms the counting of days with the code of civil procedure in the mailing of legal documents. Page 18, Line 35-40, provides payment of administrative law judge's fees and expenses from the workers compensation fee fund. Page 21, line 18, changes payment of pro temps from days to hours of actual service; and Page 23, lines 2-4, conforms the section with Section 4 of the bill. Mr. Harness stated an amendment is needed on Page 23, line 2, striking the word "section" and inserting in lieu thereof the word "subsection".

Derek Chappell, Kansas Trial Lawyers Association, testified in support of **SB 137**. Attachment 2

Wayne Maichel, AFL-CIO, a member of the Workers Compensation Advisory Council, appeared in support of **SB 137**.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m.
on February 6, 1997.

The hearing on **SB 137** was concluded

Senator Feleciano moved, seconded by Senator Ranson, that **SB 137** be amended on Page 23, Line 2, by striking the word "section" and inserting the word "subsection" in lieu thereof. The voice vote was in favor of the motion.

Senator Feleciano moved, seconded by Senator Steineger, that **SB 137** be recommended favorable for passage as amended. The recorded vote was in favor of the motion.

Upon motion of Senator Steineger, seconded by Senator Steffes, the Minutes of the February 5, 1997 Meeting were unanimously approved.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for February 11, 1997.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: February 6, 1997

NAME	REPRESENTING
TERRY LEATHERMAN	KCCI
NORSA MENAHER	State Farm
ANDREW COONEY	KS Insurance Dept.
KEVIN ROBERTSON	KS SELF-INSURERS ASSN.
JANET STUBBS	Ks. Bldg. IND. ASSN.
Philip S. Harless	K.D.H.R. - Workers Comp.
RICHARD L THOMAS	KBITA - WORKERS COMP
Connie Ueber	SRS - Am/EPs Commission
Roger Franzke	BK IV
Susan Baker	Hein + Weir
DEREK R. CHAPPEL	KANSAS TRIAL LAWYERS ASSOC.
Roy T. Detman	KS Dept. of Administration
Doug Farmer	DOB
Paul Jancee	BOEING
Bernie Koch	Wichita Area Chamber of Commerce

Testimony before Senate Commerce Committee
on S.B. 137
February 6, 1997

Michael R. O'Neal

Madam 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.

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 .

*Senate Commerce Committee
February 6, 1997*

Attachment 1-1 thru 1-3

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 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 FOUND DOCUMENT
 (Cite as: 11 Kan.App.2d 415, 724 P.2d 143)

Database
 KS-CS

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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.

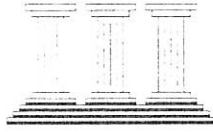
WORKERS' COMPENSATION k351
 413k351

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.

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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

February 6, 1997

TO: Senate Commerce Committee, Senator Alicia Salisbury, Chairperson
FROM: Timothy J. King and Derek Chappell, Attorneys at Law
Kansas Trial Lawyers Association Workers' Compensation Committee

RE: Senate Bill No. 137

The Kansas Trial Lawyers Association represents thousands of Kansas consumers in a variety of legal matters, including representation in Workers' Compensation claims. We appreciate the opportunity afforded us to provide testimony and input regarding those portions of Senate Bill No. 137 relevant to our clients.

1. Proposed amendments to KSA 44-505(a) (2) and KSA Supp. 44-508 (b)

This issue involves a question of whether self-insurance funds can charge a premium for subcontractors who may constitute an exposure under the statutory employee provisions of K.S.A. 44-503, but who do not fit the definition of an "employee" under K.S.A. 44-508. provisions of K.S.A. 44-505 are also applicable since certain self-employed subcontractors are technically not required to carry Workers' Compensation insurance because of the exemption under K.S.A. 44-505 (a) (2). In short, some self insured fund members when audited claim self-employed sole proprietor subcontractor status, that they are neither an employee under K.S.A. 44-508 nor required to carry insurance under K.S.A. 44-505 and, therefore do not constitute an exposure for Workers Compensation claims. However, in reality, there is a great likelihood that in an injury under such circumstances the claim would be held compensable under the subcontractor's provisions of K.S.A. 44-503. The added language under Senate Bill No. 137 would close this potential "loophole", thus helping to ensure a more level playing field for employers and self-insurance fund members.

2. Proposed amendment to K.S.A. 44-523 ©

This proposed change is in response to the recent case of Bradford vs. Boeing, wherein a procedural problem arose in that a final award in a claim cannot be issued by the administrative law judge until all parties have submitted the case to the judge for decision. The potential problem arises when one party fails or refuses to submit to the judge, therefore, delaying indefinitely the final award. This proposed fix would allow the judge to enter a decision even if a party has failed to file a submission letter in a timely manner.

*Senate Commerce Committee
February 6, 1997*

Terry Humphrey, Executive Director

3. Proposed amendments to K.S.A. 44-5, 120(e) and K.S.A. 44-5,121

These proposed amendments create a procedure for fraud and abuse claims under the Workers' Compensation Act similar to that of discrimination claims under the Equal Employment Opportunity Commission. That is, the complainant must first exhaust administrative remedies with the commissioner of Insurance prior to the filing of a petition in District Court.

4. Proposed amendment to K.S.A. 1996 Supplement 44-551 (b) (1)

Applications for Review to the Workers' Compensation Board must be made within ten (10) days of the Award of the Administrative Law Judge. This proposed amendment simply excludes from the time computation intermediate Saturdays, Sundays and legal holidays thus allowing a more reasonable appeal time.