

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 January 27, 1998 in Room 526-S of the Capitol.

All members were present except: Rep. David Adkins - excused

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

Conferees appearing before the committee: Bob Nugent, Revisor
Tom Murry, KAIA
Phil Harness, Director, Workers Compensation
Sen. Karin Brownlee
Dawn Atwell, Small Business owner
Tony Plunkett, President, Dakota, Inc.

Others attending: The guest list was not passed.

The Workers Compensation Advisory Council Minutes that Chairman Lane had requested from Phil Harness were handed out to the committee. (See Attachment 1)

Hearing on: **HB 2591 - Exempting self-employed subcontractors from workers compensation.**

Bob Nugent, Revisor, gave the committee a short explanation of the bill. It would reverse two sections of **HB 2011**, which was passed as part of the 1997 Legislative Session. **House Bill 2591** was the product of the Joint Committee on Economic Development which voted unanimously to introduce it. When **HB 2011** was in the Senate Committee of the Whole, several Workers Compensation provisions were loaded into the bill, including **SB 137**. When the bill came back to the House on a motion to concur or non-concur, it did not go through the committee process but was debated on the floor of the House. The main focus was the attorney fees part of the bill.

The changes affecting self-employed subcontractors in **HB 2011** resulted from two court cases. Two of the changes were the opt-out part of workers compensation and the \$20,000 payroll threshold which was required by statute. The main philosophy is a no-fault worker compensation system. Proponents of the changes in law contained in **HB 2011** want the costs of workers compensation to fall directly on the individual worker who was injured, instead of transferring the liability to another party.

Tom Murry, Kansas Association of Insurance Agents, appeared before the committee as a proponent of the bill. Since the end of the 1997 Legislative Session, KAIA has been working to get some precise answers to the multitude of questions that have arisen since the passage of **HB 2011**. He asked, "How large of a problem did we really have to begin with, and how much more of a problem has been created?" Because of the consequences of **HB 2011**, the association asks for a repeal of the "self-employed subcontractor" language as provided in **HB 2591**. (See Attachment 2) He ended his testimony by answering questions from the committee.

Phil Harness, Director of Workers Compensation, offered an interpretation of the new law (**HB 2011**), that it would apply to all sub-contractors. He also explained that the workers comp premiums were figured on a flat salary of \$26,800.

Senator Brownlee appeared as a proponent and provided the committee with written testimony she had presented before the Economic Development Committee in November. (See Attachment 3)

Dawn Atwell, a small and medium sized business owner, appeared as a proponent of the bill. She illustrated how the enactment of last year's bill has affected the businesses owned by her and her husband. The added costs of insurance would be passed on to customers. She stated that the old law worked for them and advocated returning to that system. (See Attachment 4)

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR, Room 526-S
Statehouse, at 9:05 a.m. on January 27, 1998.

Tony Plunkett, President of Dakota Inc., appeared as a medium sized business owner and proponent of **HB 2591**. He stated the enactment of **HB 2011** would affect the price he charges new home buyers. By complying with the provisions, it would add \$2,000 to \$2,500 to the price of a home. He feels this would result in the selling of fewer houses and may crowd out the first time home buyers at the lower range of qualifying. (See Attachment 5)

Chairman Lane announced that the hearing on **HB 2591** would continue on Thursday, January 29, with the testimony of proponents followed by that of opponents. The meeting was adjourned at approximately 10:00 a.m.

The next meeting is scheduled for January 29, 1998.

MEMORANDUM

DATE: January 22, 1998

TO: Chairman Al Lane & Members of the House Business,
Commerce & Labor Committee

FROM: Phil Harness, Workers Compensation Director *PH*

SUBJECT: Request for Workers Compensation Advisory Council Minutes

On Thursday, January 15, 1998, when I appeared before the House Business, Commerce and Labor Committee, a request was made for copies of the Workers Compensation Advisory Council meeting minutes.

I attached copies of the minutes from November 13, 1997, as well as December 2, 1997, which have been approved by the advisory council. We also met on January 21, 1998, but those minutes are not yet approved.

If I may be of any further assistance, please do not hesitate to call.

Thank you.

mrs

Attachments

*House Business, Commerce
& Labor Committee
1/27/98
Att. 1*

**WORKERS COMPENSATION ADVISORY COUNCIL MEETING
NOVEMBER 13, 1997**

Present at the meeting:

Philip S. Harness	Brad Avery	David Shufelt	Wayne Maichel
Dan Messelt	Christine Davis	Terry Leatherman	Jim DeHoff
William Moore	Kip Kubin	John Ostrowski	Bill Knox
Wanda Roehl	Steve Richards		

The meeting began with Director Harness introducing the newest Councilperson, Wanda Roehl, who replaced Ray Lagpacan. The other councilpersons present introduced themselves to Ms. Roehl.

OLD BUSINESS

1. The first thing on the agenda was approval of the minutes of the March 10, 1997, meeting. Director Harness noted that on Page 6 the second full paragraph should be corrected to read "4e." Councilperson Maichel made a motion to approve the minutes as amended; seconded by Councilperson Knox. Motion was passed; minutes approved.

NEW BUSINESS

1. Director Harness indicated the statute requires the council to have an annual election of a chair and vice chair, and opened the floor for nominations. Councilperson Leatherman moved that the chair be Phil Harness; the vice chair be Dan Messelt, and that the nominations be closed. The motion was seconded by Councilperson Davis. The motion passed.

2. Self-employed subcontractors was the next item on the agenda. Robert Elwell, owner of Manhattan Striping, Manhattan, Kansas, appeared before the council to explain his dilemma regarding HB 2011. He indicated that passage of this bill has put his company into a "catch 22" situation. He indicated that 60% of the time he is an independent contractor; 40% he is a subcontractor (meaning he works for contractors). He is in the second year of business and so far this year has grossed \$18,000. The minimum premium for workers compensation insurance on his employees is \$750. Mr. Elwell indicated the insurance company would automatically charge him an additional \$2,360 because of House Bill 2011. The insurance company is saying that he is the employee/employer and that he must be covered 24 hours, 7 days a week. He indicated the insurance company has a base line of \$24,900 for independent contractors are just starting out. He indicated he understands the reason for HB 2011, but also indicated that it is "cutting the small contractors throat." Mr. Elwell indicated his business is striping parking lots. He works weekends and has one employee. He indicated he is paying unemployment insurance, social security, Medicare, etc. He knows of other individuals in his area who are not "crossing their t's and dotting their I's" which in turn forces him to keep his bids very low in order to maintain a

business. Mr. Elwell indicated he is covered for medical because he is retired military with 20 years active duty; if he is injured, he walks into the nearest veterans or military hospital. He indicated the insurance corporation gave him a suggestion -- to incorporate. That would then put his minimum payroll at \$200 a week. Mr. Elwell said he is trying to understand how the rules change, whether he is a sole proprietor or if he is incorporated under Chapter S which says he is still sole proprietor, which changes the bottom line so drastically and quickly. He indicated the rules are changing so quickly that it does not make sense. He indicated the only way he can keep up with things is because he spends about 5 hours on the Internet. Since the base premium is based on a salary of \$24,900, that means he pays himself \$12.00 per hour and grosses in the vicinity of \$180,000 per year; Mr. Elwell's opinion is that no new company "hits the road running that hard" in subcontracting.

Director Harness asked for comments from the council. Councilperson Leatherman asked Mr. Elwell what he would like to see done. Mr. Elwell indicated he did not want to see the provisions of House Bill 2011 completely stricken because it makes sense. However, the insurance industry needs to look into changing the baseline salary. He feels they should request the individual's books and base the premium on what the company is making, not what is projected he will make. His payroll to date is \$3,784; that's for him and one employee he retains all the time. He also has three or four people he is trying to train and, if his business takes off, he will have them trained. He would like to see the premium based on what his actual payroll is; not some imaginary amount. Previous to July 1, 1997, he was not required to carry workers compensation until his payroll reached \$20,000; now effective July 1, 1997, he has to carry workers compensation insurance because he hired himself. He indicated the insurance industry needs to base the premiums according to the books of individual proprietors, not on what they project he will make. It was pointed out that the \$24,900 base is a minimum salary for a self-employed individual. Mr. Elwell quoted a Mr. Evans from the insurance commission as indicating "Let me first explain why the payroll amount of \$24,900 is applied to sole proprietors and partners. This figure is based on the average weekly wage and is adjusted each year for inflation. The reason why this amount is used and not actual payroll is because there are various ways of showing individual or partner or sole proprietor on financial statement. This rule eliminates such discrepancies." Councilperson Bill Moore pointed out to Mr. Elwell that since he was in the military and, if he were injured on the job, the taxpayer would be paying the bills; what if the individual who works for him is injured, does he have insurance to cover that individual? Mr. Elwell indicated that at this time no, he does not, and that he would probably have to pay the bills. He indicated he knows the risks he is taking when he said he does not want insurance. However, his future plans, now that he knows there is a baseline premium of \$750, he plans to take out insurance after the first of the year. He is presently using the loophole of his annual payroll being less than \$20,000. He indicated he would close up that loophole for the rest of his employees because it is within his reach now. But he also indicated a new business just starting out could probably not afford this expense. He indicated that the \$750 base would cover any employees he has up to a payroll of \$20,000. Councilperson Messelt indicated that the \$750 is the minimum premium for a policy for most classifications with no employees. He indicated that the payroll is taken times the rate, and this could generate premiums in excess of \$750.

Obviously, if an individual has a payroll of \$24,900, this would make the policy rather expensive. He indicated maybe the key issue is whether the \$24,900 is appropriate. He indicated there were good reasons on both sides why the \$24,900 started, that it may be raised to \$26,800 in 1998, and that it has to do with the state's average weekly wage. Councilperson Messelt indicated this may be the core of what might need to be looked at as the council looks at House Bill 2011. Councilperson Messelt indicated the central core of discussing House Bill 2011 may be to find out what is fair to both sides. He indicated we have taken it away from the coverage issue, now it's a cost issue. Mr. Elwell asked for an explanation why he would have an additional \$1,500 premium just to cover himself, above the \$750 minimum. He indicated his insurance agent indicated he would be paying \$2,980 for a payroll of \$44,000. He is being charged a premium rate of \$2,230 for a payroll of \$24,900 for one year; but to cover all his employees, no matter how many he has, up to a payroll of \$20,000 costs only \$750. He feels this is not equitable. Messelt indicated this difference did not sound right to him. Messelt explained that to go from \$750 premium to \$2,980 by simply doubling the payroll does not make sense. Mr. Elwell said that he was told that because he is an employee/employer, he must be covered 24 hours, 7 days a week, and that this is an employer's policy, not workers compensation. Director Harness indicated that Mr. Elwell has raised some very good questions; however, the council's purpose is to advise the Legislature on different portions of the Workers Compensation Act. The Act does not deal with premiums, per se, that this is delegated to the Insurance Commissioner's office. Director Harness indicated to Mr. Elwell that this council may not be able to provide very good answers to questions relating to premium dollars. Mr. Elwell indicated that his point was that when this bill was put together someone did not look at all the variables and how it would impact on individuals trying to start a business. He feels you cannot say someone makes \$24,900 when his total payroll is \$3,000 and the total gross of the company is not \$20,000. Mr. Elwell indicated that if he had not incorporated and then as a 10% shareholder opted out of the act, he would have had to shut down the business. Councilman Leatherman asked for an explanation about the "corporation" thing, and whether this is a solution some are turning to, that if they incorporate, they are no longer a subcontractor and can then opt out of the act. Director Harness indicated House Bill 2011 did not change the statute dealing with 10% shareholders being able to elect out (K.S.A. 44-543), and that it is his understanding that some individuals are using this option. Assistant Director Avery clarified that when this happens, they are now an employee/stockholder of the corporation and have the right to opt out of the Workers Compensation Act.

Mr. Tom Whitaker, Director of Governmental Relations and Membership Services of the Kansas Motor Carriers Association next spoke before the council. He presented his testimony in written form to each council member. He indicated the Motor Carriers Association is concerned about the confusion created by House Bill 2011. Mr. Whitaker indicated that presently most owner-operators in the trucking business will provide a certificate of workers compensation insurance coverage to the motor carrier or choose to be covered under the motor carrier's workers compensation coverage and have the premium billed back to that owner/operator. He further explained that owner/operators are not employees and are not paid a salary, but are paid a percentage of the freight revenue. Such owner/operators pay the costs of insurance, fuel, license

fees, federal heavy vehicle use taxes and related costs incurred. Mr. Whitaker indicated the Motor Carriers Association proposes to remove these owner/operators from the statutes governing the relationship of contractor/subcontractor and insert language in K.S.A. 44-503(h) to reflect current industry practices. The association has asked counsel to draft the proposed language and will provide copies to the council in December. Mr. Whitaker also proposes an amendment to K.S.A. 44-503(h)(2)(B) which would reflect congressional amendments to Section 211 of the Airport Improvement Bill of 1994 that deregulated most intrastate motor carrier operations throughout the United States. This change in language was overlooked when the 1996 Kansas Legislature adopted Senate Bill No. 326. The proposed amendment would add the language certificate of public service. Assistant Director Shufelt indicated that it was his understanding that the Division's interpretation currently approves the practice of owner/operators being charged back for the premium. Mr. Whitaker indicated the Division does approve this practice; the Insurance Commissioner's office is not always sure about this practice, but by moving the definition of "subcontractor" underneath "worker" there is some concern that this would put this under the fraud and abuse statutes. He indicated that in order to avoid this possibility, the association would like leasing requirements for owner/operators and motor carriers to be spelled out. Mr. Whitaker feels there are a lot of "gray" areas associated with House Bill 2011. Councilperson DeHoff asked Mr. Whitaker to explain why the buying back could be considered fraud and abuse. Mr. Whitaker explained that since "subcontractor" was put under the definition of "employee/worker" and that premiums cannot be billed back to employees, they wish to clarify this and that it is not fraud and abuse. Assistant Director Avery explained that there was debate within the Division whether that provision of House Bill 2011 actually did, and the initial assessment was that that provision made the subcontractor an employee of the contractor. The Division subsequently altered or modified that interpretation to say it is a dual persona, that the subcontractor is an employer of himself/herself, and an employee as well, and based upon case law with the caveat that the courts may interpret that differently because what that provision does say is that anyone performing contractor services for another individual is an employee. Assistant Director Avery indicated it was the Division's interpretation that House Bill 2011 removed the provision to opt out of the act by independent contractors and, given that, independent contractors and partners are linked together under the definition of "worker." Director Harness explained that there were two different interpretations by the Division; the second interpretation reversed the first in that the unique nature of the dual persona of the sub being both employer and employee, that it would not be violative of the fraud and abuse statutes to charge back for pro rata share of the premiums. Mr. Whitaker indicated the Motor Carriers Association would rather not rely on the Division's interpretation, but would like to make it very clear in the statutes.

Director Harness then asked Representative Mike O'Neal if he would like to address the council regarding the subcontractor issue. Representative O'Neal indicated he felt the latest interpretation by the Division did exactly what the intent of the legislation was to begin with. He wanted to respond to Mr. Whitaker's statement because he feels independent contractors are not covered by HB 2011, and were not affected by that bill since K.S.A. 44-503 was not amended. He indicated that if you were not a subcontractor before July 1, 1997, you are not one now and

vice versa. He indicated that if clarification on the issue of "charge back" is needed, he feels this is a stand alone type of provision. He does not feel that owner/operators are affected by this legislation and does feel the intent of bringing everyone under the act was accomplished by House Bill 2011. He indicated maybe a remedy for small independent businesses would be to allow the owner to self-insure for himself only and purchase insurance for his employees. Representative O'Neal also indicated the council may need to look at K.S.A. 44-545 as he believes it is outdated. Director Harness said he would note for everyone that the Division's self-insurance statutes set out very rigorous standards for becoming self-insured (such as being in business for at least five years, have a profit after taxes of \$1 million, etc.) O'Neal indicated those standards were for whole companies, and that the option he was speaking about would be for a single individual to have the opportunity to opt out of the act. Mr. Whitaker again indicated that the relationship between the motor carrier and owner/operators is one of contractor/subcontractor, and that House Bill 2011 moved the definition of subcontractor under worker. Representative O'Neal said there is 1996 legislation that basically removed them from subcontractor status. Mr. Whitaker pointed out that that legislation only covers those owner/operators who opt out of workers compensation and chose to use occupational accidental insurance. Director Harness again pointed out that it is the Division's interpretation that because subcontractors are employers and employees at the same time, the prohibition in the fraud statutes that an employer cannot charge an employee for workers compensation insurance, do not apply. Councilperson Messelt indicated the base salary rate of \$24,900 is something that probably needs to be looked at. He indicated insurance companies look at owner/operators as really having coverage 24 hours a day. Councilperson Messelt asked Representative O'Neal if he could suggest some other base rather than the \$24,900, but O'Neal did not really have any suggestions.

Councilperson Messelt indicated he felt the whole issue centers around the base of \$24,900 and indicated that further study needs to be done regarding this base. He said if there is something the council could do, which he is not sure, that he feels we should look into this issue. Director Harness asked Messelt where the figure \$24,900 comes from and Messelt, with input from Dick Cook of the Kansas Insurance Department, indicated it is the state's weekly average wage times 52 and then multiplied by a factor of 1.1 which ends up with \$24,900, but Mr. Cook also indicated this would be raised to \$26,800 effective January 1, 1998. Councilperson Messelt indicated that he believed the insurance industry decided to use the present method because individual audits can hide money under expenses, dividends, etc. In an effort to get a fair premium for the exposure, the insurance industry came up with the state's weekly average wage formula. Councilperson Messelt indicated maybe the council could come up with something with NCCI that would be more compatible in dealing with subcontractors. Councilperson Kubin indicated that one of the main reasons for this legislation was because of the abuse in this area, by self-employed subcontractors not covering their workers and on the other hand those who had coverage tended or found it more convenient to use their health and accident insurance as opposed to workers compensation. Michael Ashby with the Kansas Building Industry, Workers Compensation Fund, and they also have received many calls about House Bill 2011. He indicated his boss is Janet Stubbs. Mr. Ashby relayed that their office received a phone call

asking about the new law and how it applied. This individual had a friend who was a subcontractor; that the general contractor did not carry workers compensation insurance nor did the subcontractor. This individual indicated that this was okay because he (the contractor) was a friend. A couple of months later, this same individual called and said his friend had been injured, so the question came up about what to do now. Janet Stubbs again asked if either party had workers compensation insurance; neither did. As a result, this friend (the subcontractor) could file against the general contractor for the medical bills and the contractor is depending on the friendship so this individual does not file against him.

Director Harness asked if there was a motion on Mr. Whitaker's proposal. Councilperson Maichel suggested the council look at the language before making any type of motion. Councilperson Richards made a motion to table final determination or recommendation until the council can see the proposed language from the Motor Carriers Association; Councilperson Maichel seconded the motion. There was no discussion; the motion to table passed.

Councilperson Messelt suggested the council appoint a subcommittee and include NCCI to study the appropriate compensation level for proprietors and the issue of what premiums to charge. Chairperson Richards indicated he did not feel this council has authority to look at insurance rates. Director Harness agreed that the council should look at changes in the Act or recommendations about the Act, but the Act's statutes do not mention insurance rates.

Director Harness indicated this concluded the discussion regarding self-employed subcontractors. He asked that the council consider Item #8 on the agenda since Dr. Terry Tracy, Medical Administrator for the Division of Workers Compensation, was present.

3. Director Harness indicated that Councilperson Richards raised this issue regarding non-utilization of CPT codes by hospitals. Richards, basically, wanted to know why hospitals are not required to use CPT codes. Director Harness pointed out to the council that the Division has a separate committee, the Medical Fee Advisory Panel, consisting of physicians and non-physicians who look at issues of this nature. He indicated there has been extensive testimony at that committee's meetings on the differences in cost (overhead costs between hospitals and physicians) and why, not only would the CPT codes not apply to them because they were originally developed for physicians and office practices, but also the prices connected thereto would not serve the interests of hospitals. All laboratory and pathology services provided by hospitals are subject to CPT codes. Similarly, all physicians have been taken out of the hospital safety net environment and all those charges are subject to the CPT code limitations. There are certain services provided by hospitals, for instance radiology, which are paid at the usual and customary rates by the hospitals, as are other hospital facility type services. Dr. Tracy indicated the compromised situation that was developed by the committee is associated with the fact that larger hospitals take a bigger discount on services due to volume and the nature of the workers' injuries, whereas rural hospitals take a smaller discount. There are three different rates of discount, depending on the geographical location, the size and number of beds, and the type of patient volume associated with individual hospitals. Dr. Tracy indicated Medicare has been

trying since 1988 to develop a type of code to cover this situation, but this has not been accomplished yet. There has been indicated this may be accomplished on a trial run in January, 1998. Dr. Tracy indicated the committee's plan is to work with the Kansas Hospital Association to develop a new type of outpatient reimbursement with a new type of coding system, called APGs (ambulatory patient groups), which will have specific types of injury or illness with an associated code and a prospective reimbursement level. Dr. Tracy indicated there are plans for the next fee schedule to have a new type of reimbursement which may be referred to as a new CPT or an APG code. Councilperson Richards again indicated he feels it is unfair to allow hospital to not code their procedures the same as, say, a small clinic in western Kansas. He feels there is a disparity in the amount of reimbursement that would go to those two medical providers for identically the same procedure simply because the hospital has a bigger cost structure to deal with while a small clinic does not. He feels that, say, for instance, for a laceration the charge should be the same regardless of whether it was stitched in a clinic or a hospital. Dr. Tracy indicated that if a physician is involved, the reimbursement is the same. Dr. Tracy pointed out that even clinics may charge a "facility fee" which is then subject to the discounted rate. All laboratory and pathology studies done, whether in a hospital setting or a clinic, are paid the same. Any physician or other employee of a hospital, when they perform a service, are paid the same and are subject to CPT code limitations. The only thing that falls outside that would be things such as radiology, pharmacy, etc. Dr. Tracy emphasized that the committee is working on these types of problem areas and hopefully will be worked out before the next revision to the Medical Fee Schedule.

4. Stephen Durrell, Assistant Attorney General for the Division of Workers Compensation, next testified as to some changes to the fraud and abuse statutes. He has proposed changes to both the criminal and administrative statutes which was done because the legislature came up with the fraud and abuse statutes in 1993 and after working with them for 4 ½ years some problems have come to light. Mr. Durrell indicated basically what the proposed changes would do is plug some holes in the statutes. Mr. Durrell indicated he brings this before the council simply so the council can see the suggested changes and he asked for input from the council. He then went through each statute change.

K.S.A 44-5,125 - (a) is the criminal statute and the changes would indicate it would be a crime to knowingly and intentionally draw workers compensation benefits while working. The problem here came about because county and district attorneys do not feel that if a claimant simply voluntarily returns to work and does not make any false statements to that effect, there is no criminal action. The penalties under subsections (A) and (B) are the same. A Level 7 non-person felony (\$25,000, but less than \$50,000) was added to subsection (C) which makes it comparable with the theft statute. Subsections (D) and (E) were added with input from other states which make it a higher penalty for fraudulently obtaining larger sums of money.

Subsection (b) is new and deals with individuals who present a false, forged, or even expired certificate of insurance. This would be a Level 8 non-person felony which is presumptive probation.

Subsection (c) takes the language already in 44-5,125 (a), but adds language to include individuals who attempt to gain more favorable insurance rates, those who fail to notify claimants of settlement offers, or those who try to avoid payments of compensation all together. This language is added at the suggestion of county and district attorneys who feel the statute should be laid out in sections rather than lumped together. Council members felt that the phrase "knowingly and intentionally" should be added.

Subsection (d) would add medical providers who bill for medical services which were not actually provided. Mr. Durrell indicated that in some other states there are "work comp fraud rings" where medical providers, claimants, and attorneys work together to overcharge for services not actually performed.

Subsections (e), (f) and (g) would not be changed.

K.S.A. 44-5,120 - Subsection (d) would be changed to remove the phrase "but not limited to" from the preamble. This was done to avoid any constitutional problems and to remove the open-ended discretion to charge for administrative violations not specifically enumerated in the statute. The word "knowingly" would be added to the standards.

Subsection (d) (4) (B) would have the phrase "failing to disclose" added because of problems dealing with people who are less than honest on prior injuries, on the fact that they are working, etc.

Subsection (d) (21) is a new subsection being added to stem the tide of workers who return to work, but fail to inform the provider of workers compensation benefits, and thereby continue to draw temporary total or permanent total compensation.

Subsection (d) (22) is a new subsection added to attempt to deal with employers who encourage employees not to file for workers compensation in order hold down their premiums. Councilperson Leatherman suggested expanding this change to add the phrase "for the purposes of."

Subsection (d) (23) is a new subsection added to deal with employers who send injured workers for medical treatment and then refuse to abide by that provider's restrictions. In some instances, employers have threatened discharge, loss of bonuses, or even physical violence.

Subsection (d) (24) is added to attempt to prevent medical providers from billing for services not actually performed or from billing injured workers for payment of fees that were more than the fee schedule allows. Also added is an attempt to have out of state medical providers abide by the Kansas Medical Fee Schedule. Several councilpersons indicated there may be problems enforcing this provision.

Subsection (e) adds the phrase "summary order" to clear up any inconsistencies in using tools already allowed for and authorized by the Kansas Administrative Procedures Act.

Subsection (g) the phrase "summary order" was also added and the penalties were increased to be comparable with other states. Kansas has one of the lowest penalties at the present time. Mr. Durrell indicated the usual penalty is twice the amount of the fraud or \$50,000 whichever is greater. The purpose is to double the amount fraudulently obtained or the highest penalty possible.

Subsection (l) is added to give civil or criminal immunity to people reporting potential fraud under the Workers Compensation Act. This would not include immunity to a person who turns in himself/herself .

Subsection (m) is added to allow individuals damaged by a fraudulent claim to continue requests for relief independent of any penalties imposed. This would allow victims of fraudulent or abusive acts to seek restitution, penalties, or compensation not available under the fraud act.

Mr. Durrell again indicated he simply brought these changes to the council for consideration and input and did not expect a decision at this time. He also stressed the reason for the suggested changes is that some district and county attorneys feel the statutes are simply too vague and will not prosecute. He also indicated some of the changes are simply for clarification. Mr. Durrell indicated the Division has sent approximately 30 fraud cases to hearing officers, that the fraud unit has opened 900+ cases since 1993, that some cases do not pan out to any fraud, and that some cases settle before getting to the point of filing for a hearing.

5. The next item for discussion (#7 on the Agenda) is a proposed amendment requiring the Workers Compensation Fund (administered by the Kansas Insurance Department) to pay compensation to a claimant while litigating employer insolvency on appeal to the board. Director Harness introduced Bob Kennedy with the Insurance Department. Mr. Kennedy also introduced Paula Greathouse, also with the Insurance Department. Copies to the Fund's testimony was given to each councilperson. Mr. Kennedy pointed out that each case is looked at individually and decision based upon the facts of that particular case. He also pointed out that recovery of costs by the Fund from insolvent employers is not very realistic. He does not feel the Fund should be required to pay in situations where otherwise payment is not due. Therefore, as administrator of the Workers Compensation Fund, the Insurance Commissioner cannot support the proposed legislation at this time. Councilperson Ostrowski pointed out that the conversation appeared to center around "appeal," but he feels the issue is much more difficult. He indicated that the Court of Appeals has said it is not the claimant's burden of proof to show insolvency; if the respondent is truly insolvent, they are not defending the claim and the Fund is not going to prove insolvency because then they have to pay. This really becomes an issue when the claimant is in need of temporary total or medical treatment. Director Harness explained that his idea on this proposed amendment would be when the Administrative Law Judge has decided that an employer is insolvent and ordered compensation paid by the Fund, then the Fund should go

ahead and pay the compensation and then litigate against the employer (K.S.A. 44-532a), or it can appeal the Administrative Law Judge's decision to the Board. If the Fund appeals to the Board, Director Harness feels the Fund should be paying the claimant during this litigation.

Councilperson Maichel indicated he would like to see Director Harness' proposed language. Mr. Kennedy said there are other ways to solve the problem, such as requiring an expedited appeal, and that they would also like to see the proposed language. Director Harness indicated he would have some proposed language by the next meeting.

6. This item deals with deleting about four regulations presently in the act which contain methods for computing functional impairments of ears, hearing, and other scheduled disabilities. Assistant Director Shufelt indicated the current statutes read that if the method of providing functional impairments are contained the AMA guides, those guides control. There seems to be a legal conflict between the statute saying to use the AMA guides and then the regulations stating you compute the percentage of hearing loss, etc., using this method. They are not the same. The Division feels the regulations should be deleted. A medical practitioner brought this problem to Dr. Tracy's attention. Councilperson Kubin made a motion that the regulations be eliminated; Councilperson Richards seconded the motion. Councilperson Maichel asked that this item be tabled. Councilperson Ostrowski made a priority motion to table; Leatherman seconded. Motion to table this item was passed.

7. The next item deals with an increase in weekly benefits for injured workers. This item was proposed by Councilperson DeHoff. He feels the council should look into the possibility of increasing temporary total benefits. It is his understanding that Kansas presently pays \$351 while Missouri pays \$550 per week. Councilperson DeHoff indicated there has been a savings of approximately 29.2% in workers compensation premiums in the past couple of years. Councilperson DeHoff made a motion to appoint a subcommittee to report back at the next meeting on the feasibility of increasing the temporary total benefit; this motion was seconded by Councilperson Maichel. Councilperson Leatherman agreed that Kansas is lower in weekly benefits, but may be higher in other areas. He suggested broadening the subject matter to a review of where Kansas law is compared to other states. The motion passed. Subcommittee members appointed were DeHoff, Leatherman, and Messelt. Councilperson Ostrowski also asked the subcommittee to look at the possibility of raising death benefits. Councilperson Leatherman reiterated that the review should be broadened.

Director Harness then asked to set a meeting for December. The date December 2, 1997, beginning at 9:00 a.m. was agreed upon.

8. The last item on the agenda was Councilperson's DeHoff's suggestion to raise the salaries of the Director and the Assistant Directors. Director Harness and Assistant Directors Shufelt and Avery excused themselves from this portion of the meeting. Vice Chairperson Messelt took over conducting the meeting. Councilperson DeHoff asked if a subcommittee could be appointed to look into this issue. Councilperson Leatherman indicated he would rather

not get into this issue again. He said he would be willing to sign a letter addressed to Secretary of Human Resources Wayne Franklin recommending a salary increase. Councilperson Richards pointed out that he did not feel the council has jurisdiction over this issue, but it was pointed out that language could be added to the statute about the Director's salary. Councilperson Ostrowski asked industry if they are sure they don't want some control over the salary since their salaries are paid through fee assessed to carriers and self-insureds. Councilperson Leatherman pointed out that, before when this issue came up and the Administrative Law Judges were included, it was brought about because it was felt better candidates would be attracted; however, Leatherman pointed out that we have no problem filling the Director or Assistant Director positions. Councilperson DeHoff pointed out that he feels these particular individuals have been totally fair to both sides and he feels they should be rewarded. Councilperson Maichel pointed out that when the Division of Workers Compensation was combined with the Department of Human Resources, the salary of the Director was not raised to a level comparable to what other division directors in Human Resources is. He feels there are other division directors who make a lot more than the Director of Workers Compensation. Councilperson DeHoff made a motion that a subcommittee be appointed to look into the issue; seconded by Maichel. The motion was passed with one nay vote. Vice Chairperson Messelt appointed Councilpersons Maichel and Leatherman as the subcommittee.

Motion to adjourn was made; meeting was adjourned.

**WORKERS COMPENSATION ADVISORY COUNCIL MEETING
DECEMBER 2, 1997**

Present at the meeting:

Philip S. Harness	David Shufelt	Wayne Maichel	Jim DeHoff
Dan Messelt	Stephen Richards	Wanda Roehl	Christine Davis
Terry Leatherman	Kip Kubin	John Ostrowski	
William Moore (appeared late)			

As there was not a quorum present when the meeting began, Director Harness began the meeting with open discussion regarding New Business.

NEW BUSINESS

1. Director Harness introduced Gary Korte, who is the past Chair of the Workers Compensation Board. Mr. Korte indicated the Board would like to see amendments made to K.S.A. 44-534a to add the words "pre-award and post-award" when dealing with medical treatment. Mr. Korte explained problems the Board has encountered with regard to reviewing post-award preliminary orders regarding medical treatment. If post-award medical treatment is requested on a Form E-3 (preliminary hearing application) and a party wants to appeal to the Board, the Board is limited to the jurisdictional bases in K.S.A. 44-534a. The amendment would allow the Board to review issues relating to medical treatment on both pre-award and post-award preliminary orders. It was also suggested that perhaps an entirely new procedure should be instituted to deal with post-award medical treatment and temporary total compensation to include an expedited hearing and possibly a new form to file. Councilperson Ostrowski expressed concern that if a new procedure is developed, he wants to be sure there would still exist the right to a further or regular hearing on the issues raised at the post-award hearing. Councilperson Kubin indicated he felt that temporary total, medical treatment, and nature and extent issues should be reviewable by the board. Both Kubin and Ostrowski agreed that some changes need to be made regarding post-award procedures, and also agreed that some definition of "post-award" may also need be clarified (such as final award being defined as award by administrative law judge). It was suggested that when a quorum is present, a subcommittee should be appointed to look into this.
2. The next item reported on is self-employed subcontractors. Director Harness indicated he appeared before the Joint Committee on Economic Development and presented testimony and answered questions. It would appear as though there are several legislators who are interested in repealing Sections 2 and 3 of 1997 House Bill 2011. Director Harness indicated the council may want to keep this in mind for the next meeting. He expects a bill to be presented. Councilperson Leatherman indicated that committee did vote to repeal those two sections and replace them with language similar to that for motor

carriers, i.e. have occupational insurance in place. There was further discussion as to what may take place, but nothing is certain at this time. Councilperson Ostrowski suggested the council may wish to consider amending the language dealing with the \$20,000 payroll and the change the word "current" to "calendar" year in order to pick up some employers who may not reach the \$20,000 threshold in the "current" year, but would meet it in a "calendar" year.

3. The next item is the proposed changes to the Fraud and Abuse statutes. Director Harness asked if any of the council members had questions for Stephen Durrell, Assistant Attorney General with the Division. Councilperson Ostrowski indicated he has concern about K.S.A. 44-5,120 (d)(4)(B) and adding the language "or failing to disclose." Durrell explained that this was added to put some responsibility on claimants so that they do not receive medical benefits clearly beyond treatment for the injury. Ostrowski indicated he feels the language is too broad and all encompassing. There was further discussion about the words "willfully, knowingly, or intentionally" and "concealing, or failing to disclose." Ostrowski indicated that if a claimant signs a check for temporary total, he is in essence agreeing that he cannot work; therefore, if that claimant is actually working and cashing a check for temporary total, that is a clear "misrepresentation" and could be charged under the fraud statutes.

Councilperson Ostrowski also has a problem with Subsection (21) with the wording that a claimant must inform the provider of benefits "in writing, within 15 days" when they return to work. He said there may be people who do not know how to write. Councilperson Ostrowski indicated he feels Subsection (21) could be totally eliminated. Durrell pointed out that 98% of county attorneys will not prosecute fraudulent acts under workers compensation because the statutes are too broad and this is the reason he is asking for these amendments.

Councilperson Ostrowski asked the council to consider some type of language dealing with settlements wherein respondents cannot ask claimants to signify the settlement releases the respondent from "all other claims." He believes this should be considered under fraud and/or abuse.

Councilperson Davis suggested changing or deleting the word "encouraging" in proposed K.S.A. 44-5,120 (a) (22). She suggested perhaps a stronger word should be used, such as "enticing."

Councilperson Leatherman indicated that Subsection (24)(A) should probably be omitted. He feels that if carriers are willing to refer claimants to health care providers out of state, those providers should not be restricted to the Kansas fee schedule. Leatherman indicated there are other provisions in the act to alleviate a provider trying to collect the excess from claimants. Councilperson Kubin indicated he also does not feel this amendment is necessary because if a carrier authorizes treatment in another state, they are in essence

authorizing treatment at the other fee. He does not feel that Kansas can enforce this. There was a discussion with Bill Wempe from the Kansas Insurance Department who indicated the Insurance Department has considered "other states coverage" endorsements to cover employees who are temporarily working in another state.

Councilperson Leatherman suggested that perhaps all of the fraud and abuse statutes need more work. Councilperson Maichel suggested taking Subsections (4) (B), (21), (22), (23), and (24) back to the drawing board, and adopt the remainder of the amendments. It was pointed out that there may be other wording problems in other sections also. Councilperson Leatherman asked about the penalty contained in 44-5,120 (g). Durrell indicated the present penalty maximum is \$1,000 per act and \$2,500 fine in a six-month period. The increase would change those amounts to \$2,000 and \$20,000 in a year period. It was pointed out this may further discourage fraud if the penalties were higher. Councilperson Leatherman indicated he is still opposed to the change of penalty since the Division has not actually assessed that many penalties.

4. The next item is amendments to K.S.A. 44-510. The amendments are proposed by the Medical Services Section of the Division. Director Harness introduced Ron Innes who is a hearing officer with the Medical Services Section. Mr. Innes indicated the statutory amendments were intended to make the forum provided by the Medical Services Section more user friendly and the information developed by the Medical Services Section through the utilization and peer review determinations and findings and recommendations resulting from the proposed appeal and review procedures more accessible to employers, insurance carriers and employees. He indicated that most people do not readily make the distinction between utilization and peer review processes or recognize that the utilization or peer review processes may be predicates to further procedures established by K.S.A. 44-510 or K.S.A. 44-534a.

K.S.A. 44-510(a)(7) would be amended to add language referring to a hearing procedure which is in the process of being adopted by regulation. The statute presently precludes the receipt of payment and requires the repayment of excessive amounts received by a provider or facility only upon a finding by the director after utilization and peer review. The proposed regulations would enable the director to find throughout the stages established by the hearing procedure that receipt of payment is precluded or repayment is required without a requiring both utilization and peer review.

The amendment to K.S.A. 44-510(a)(11) as proposed would allow the release of the results of the utilization and peer review documents to employees, employers, insurance carriers and/or the Workers Compensation Fund. The present statute only allows the release of the documents to the medical provider or facility. By allowing disclosure to the employee of a utilization or peer review determination which is adverse to the employee, an employee is put on notice of the possibility of the termination of the treatment or services presently provided or proposed. The employee may then want to employ the

preliminary hearing procedures to assure that adequate medical benefits are provided notwithstanding an adverse determination made by the utilization and peer review process and/or review procedures. Disclosure of utilization and peer review documents to the employer, insurance carrier or the Fund during the appeal and review procedures of the Medical Services Section may be permitted by the original language of the statute by reference to "proceedings authorized by this section", but is added for clarification. Documents could also be released to and upon order of an Administrative Law Judge to facilitate a proceedings under K.S.A. 44-534a.

K.S.A. 44-510(a) would be amended by adding new paragraphs (15) and (16) which would reaffirm the jurisdiction of the Administrative Law Judges to entertain applications for the termination or modification of the medical care provided an employee following a utilization determination which is adverse to a party.

Paragraph (17) would be added to K.S.A. 44-510(a) so as to provide that determinations made by utilization and peer reviews and the findings and recommendations of the hearing officers would be deemed to be "prima facie" evidence of the medical benefits to which an employee is entitled under a proceeding brought under K.S.A. 44-534 or 44-534a, subject, however, to the provision that any party could offer evidence to rebut or contradict the "prima facie" evidence. Any party to a proceedings before an Administrative Law Judge could apply for an order permitting the inspection and copying of the records of the Medical Services Section, subject to the continuing confidentiality requirements of K.S.A. 44-510(a)(11).

Councilperson Leatherman asked whether the law had been changed previously with regard to allowing the Administrative Law Judges access to the utilization and peer review documents. It was explained that, under HB 2011, there was an amendment which allows the release of these documents to providers and facilities, but not beyond that.

5. The next item for discussion is the request of the Workers Compensation Fund. Director Harness introduced Paula Greathouse of the Kansas Insurance Department. The first amendment would add the words "Kansas workers compensation fund" to K.S.A. 44-534(a). This amendment was recommended by the revisor's office and would simply add the fund a second time in the first sentence when referring to the parties in a claim.

The second amendment would be to K.S.A. 44-556(e) to clarify the existing statute and would require the liable party in a case to reimburse the party who actually paid the compensation. For example, if there are two (2) carriers and one carrier pays the benefits and then after a full hearing the second carrier is found liable, the second carrier would reimburse the first carrier, rather than the Workers Compensation Fund reimbursing.

The third amendment is to K.S.A. 44-534a(b) and would allow the fund, by hearing, to contest certification issues where there has been negligence or fault on the part of the respondent and/or carrier for overpaying a claim. Ms. Greathouse feels this would help avert any potential abuse of the statute. She indicated she has had respondents call indicating they are willing to settle a claim with the injured employee on the stipulation that it is a non-compensable claim, then requesting reimbursement from the Workers Compensation Fund. Director Harness asked Ms. Greathouse how many hearings she would anticipate with this amendment, and she indicated perhaps two (2) per year.

Director Harness suggested adding "Supreme Court" to the amendment to K.S.A. 44-556(e). Councilperson Ostrowski feels this proposed legislation may discourage carriers from voluntarily paying unless there is an order from an administrative law judge, and that maybe this amendment should be under the fraud and abuse statutes. Councilperson Kubin feels the fund should not be able to protest whether the money should have been paid and agreed this amendment may discourage voluntary payments.

6. The next item is an amendment to K.S.A. 44-513a to raise the conservatorship amount when a minor is entitled to compensation. Director Harness indicated he had proposed to raise the amount contained in the statute from \$2,000 to \$5,000; then he decided that the amendment should be in conformity with K.S.A. 59-3001 et seq. (which sets up conservatorships). By conforming to that statute, this would get the Division out of the conservatorship business altogether and the administrative law judges would then follow K.S.A. 59-3001. Councilperson Kubin indicated he did not see anything wrong with this amendment.
7. The next item deals with repealing regulations which are now covered by the AMA guides. This item was discussed at the November 10, 1997, meeting and was tabled. Councilperson Ostrowski indicated that since there are statutes referring to the AMA guides, the statutes would control and the regulations could be revoked.
8. The next item refers to K.S.A. 44-532a and 44-551. Director Harness indicated this item was also discussed at the last meeting, and the council requested the amendment language. The amendment would require, in the case of an insolvent employer, the Workers Compensation Fund to pay temporary total and medical expenses, pending review, when compensability is not an issue in the claim. It was then clarified that this would refer to cases where compensability is not an issue and the solvency issue is in the appeal stage.

William Moore arrived at the meeting, and the requirement for a quorum was met. Director Harness then began the voting portion of the meeting with the following:

OLD BUSINESS

Councilperson DeHoff made a motion that the minutes of the November 10, 1997, meeting be approved; seconded by Councilperson Richards. This motion passed unanimously.

NEW BUSINESS

The first issue was the Board's proposed amendment to K.S.A. 44-534a concerning post-award medical applications. Councilperson Maichel made a motion to appoint a subcommittee consisting of Kip Kubin and John Ostrowski to work with Gary Korte on K.S.A. 44-534a, and then report to the council. This motion was seconded by Councilperson Richards (and Davis). Motion passed unanimously. Director Harness appointed Kip Kubin and John Ostrowski as the subcommittee.

Next were the proposed changes to the fraud and abuse statutes. Councilperson Leatherman made a motion to table this item; Councilperson Ostrowski indicated he did not believe tabling this item would help. Ostrowski suggested removing the phrase "concealing, or failing to disclose" from the proposed change in K.S.A. 44-5,120 (4) (B). Councilperson Kubin suggested instead of piecemealing this, the subcommittee should review all the changes. Councilperson Leatherman then moved that the council adopt the proposed amendments to the fraud and abuse statutes as follows: to K.S.A. 44-5,125 (a) (penalty changes) and Subsection (b); to K.S.A. 44-5,120, the addition of the word "knowingly" in subsection (d); the elimination of the phrase "but not limited to in (4)(B);" the summary order language in subsections (e) and (g); and the language in subsections (l) and (m); and that a subcommittee further review the other proposed changes to the fraud and abuse changes. The motion was seconded by Councilperson Ostrowski. This motion was passed unanimously. The subcommittee will consist of Councilpersons Kubin and Ostrowski.

Next was reconsideration of the repeal of the regulations now covered by the AMA guides. Councilperson Leatherman made a motion to repeal those regulations; seconded by Councilperson Kubin. The motion was passed unanimously.

Next was the proposal to amend K.S.A. 44-513a change the language and make reference to K.S.A. 59-3001 et.seq., and repeal K.A.R. 51-10-6. Councilperson Maichel moved to adopt this proposal; seconded by Councilperson Richards. Motion passed unanimously.

The next item was consideration of the five (5) proposed changes to K.S.A. 44-510. Councilperson Maichel made a motion to table this issue due to the amount of new language; seconded by Leatherman. Motion to table passed unanimously.

The next item was consideration of the Workers Compensation Fund request. Councilperson Maichel moved to adopt the proposed change to K.S.A. 44-534a and 44-556, and reject the proposed changes to K.S.A. 44-534a(b); seconded by Ostrowski. Councilperson Leatherman asked if the problem was with the proposed language contained in K.S.A. 44-534a(b), or if there a problem with the whole concept. He feels that perhaps the idea of

reimbursing a respondent/carrier for mistakes made on their behalf is a good idea. Ostrowski indicated his problem with the proposed language is that the proposed language would require hearings on all requests. Councilperson Maichel amended his motion to pass the first and second amendments, and appoint a subcommittee of Kubin and Ostrowski to look at the third amendment; seconded by Ostrowski. Motion passed unanimously.

The last item to be voted on was the proposed changes to K.S.A. 44-532a and 44-551 regarding conservatorship. Councilperson Ostrowski made a motion to adopt; seconded by Davis. Motion passed unanimously.

Director Harness indicated he would like to set another meeting in January, 1998, but after the legislative session opens. He indicated he would call members to set up the next meeting. Meeting was adjourned.



Testimony on House Bill 2591

Presented by Thomas V. Murry

Kansas Association of Insurance Agents

January 27, 1998 - House Committee on Business, Commerce, and Labor

Thank you Mr. Chairman and members of this committee for the opportunity to appear as a proponent at today's hearing on House Bill 2591. I am Tom Murry, and I am currently a member of the Executive Committee of the Kansas Association of Insurance Agents. Our association represents over 600 independent agency members across Kansas, who represent Kansas consumers with workers compensation premiums of over \$400 million per year, and whose agencies employ nearly 3,500 people, most of whom are licensed agents. I am one of those independent agents from El Dorado, and also have offices in El Dorado, Emporia, Augusta, and Derby. We employ approximately twenty-five people and represent thousands of Kansas consumers.

One of the matters that has consumed a great deal of time for our association since the end of the legislative session has been House Bill 2011 and the issue of workers compensation and the changes for self-employed subcontractors. The KAIA, its committees, the Board of Directors, and the staff have been working feverishly since the end of the legislative session to get some precise answers to the multitude of questions that have arisen since the passage of this bill. Since this law was passed, we have encountered a daily barrage of frustration, confusion, and questions concerning the changes to self-employed subs in this bill. It has become a huge issue and there are thousands of Kansans looking for answers and clarity. We have been "leading the charge" on this issue by attempting to broker answers from the many parties involved. We have taken the lead in getting information and interpretations out and

*House Business, Commerce
& Labor Committee
1/27/98
Att. 2*

into the hands of our membership and Kansas insurance consumers - issuing four separate Technical Advisories and sponsoring a meeting at our Topeka office in July with many of the parties involved in the interpretation of this matter to try and get some answers. These advisories have changed depending on the interpretation of the Division of Workers Compensation and the Insurance Department, but our Board felt that it was of paramount importance to get the information out while we continued to pursue answers to the questions that remain.

I would like to give you an agent's perspective as to what has been happening in the marketplace since the passage and implementation of this "subcontractor" language. I would also like to share with you some specific examples of the confusion that has been running rampant since this legislation was passed; and would ask "How large of a problem did we really have to begin with, and how much more of a problem has been created?" Finally, I would like you to consider the questions that are still unanswered since this new law took effect.

Our insurance companies are as confused as the agents and the business people it affects. There's a concern that companies are now providing the equivalent of 24 hours of coverage to owners/subcontractors, and there is a concern over which insurance company is to provide coverage. Is it for the general or the sub? This also causes confusion as to who to charge the premium to.

Previous to HB 2011, self-employed owners (sole proprietors, partners, and LLCs) had to sign an election form to secure coverage. HB 2011 now states that these owners are automatically covered when they are subcontractors. They don't have to sign an election form. Therefore, you may have owners who are insured, who do not know they are insured, and will receive a premium billing at the end of the policy term.

According to information we have been given from the Division of Workers Compensation language in HB 2011 for partners and LLC's is not specific, and should be addressed. I think the use of election forms should be clarified, and required. Our workplace and our insurance industry needs a clear "paper trail" to determine who is covered, and when. I also feel we should more clearly define who is a sub-contractor. It's fairly clear in the building trades. It is very "foggy" in the rest of the business arena. Additionally, the fact that corporations are exempt from the effects of this new law has added to the confusion.

Finally, since the Joint Committee on Economic Development met in November and passed this repealing language, our association has met and decided that House Bill 2591 is the best alternative proposed at this point to help clean up the confusion created by last year's action. We have felt frustrated at every turn in attempting to receive clarification and clear direction from those who regulate these matters within the insurance community, and we cannot wait for some body of case law in the future to clarify the legislature's intention in passing this law. Without action on this issue, small businesses will continue to absorb the effects of this without relief. There have been huge unforeseen consequences in the passage of HB 2011,

and repealing the “self-employed subcontractor” language that was in that bill appears to our association to be the clearest and cleanest way to deal with this matter. Mr. Chairman, we continue to have concerns about the manner in which this law has been implemented to date and the scores of unanswered questions that remain. It is our hope that your hearings will illuminate some of the problems that we have been attempting to address since the last session, and that by passing this bill, your action will lead to a reduction in the confusion and complexity that now surround this issue.

We believe that it is in the best interest of the insurance consumers of Kansas to clear up this confusion and have all involved understand what is expected of them, whether they be subcontractors, general contractors, regulators, insurance companies, or insurance agents. Passing HB 2591 is a consumer-oriented action that will reduce costs to insurance consumers, especially small business owners (many of whom have no interest in covering themselves under the workers compensation system). I would ask for your support for this measure, and also ask that you consider amending the effective date to “upon publication in the Kansas Register.”

Thank you, and I will attempt to answer any questions that you may have.

Examples Of Expenses Incurred As The Result Of HB 2011

- Carpenter \$3,241
- Electrician \$2,023
- Plumber \$1,779
- Excavator \$1,398
- Cabinet maker \$1,831

ATTENTION! All Kansas Employers

New Workers Compensation Law

Effective July 1, 1997

The Kansas Legislature passed House Bill 2011 which will require "self-employed sub-contractors" to purchase Workers Compensation coverage on themselves.

Prior to this new law, *self-employed sub-contractors* did not have to insure themselves. However, if payroll to employees (not owners) was \$20,000 or more, the owner was required to provide workers compensation protection to their employees.

The new law will require the "self-employed sub-contractor" to purchase work comp insurance. The "sub" must now purchase coverage for employees, even if your payroll for employees is less than \$20,000.

You are a *self-employed sub-contractor* when you perform work for someone who has a *trade or business* * and sub-contracts part of their work to you. The penalty for not providing Workers Compensation coverage where the law requires is **two-times the annual premium or \$25,000, whichever is greater!**

Please contact us immediately if this applies to your business.

* If you have a *trade or business* that sub-contracts part of your work, you should require the self-employed sub-contractor/owner to purchase work comp coverage on the owner and their employees. See attached examples.

November 13, 1997

INSURANCE CENTER, INC.
PROVIDING PEACE OF MIND SINCE 1882

2-6

Enclosure 1

"Self-Employed Subcontractors" Examples

1. Aircraft manufacturer subcontracts to a welder. Subcontractor/owner must purchase coverage on owner and employees (2011 applies).
2. Boeing hires a plumber to fix a sink. 2011 does NOT apply
3. Bob and Gary (a partnership or LLC), home-framers for general. Subcontractor/owner must purchase coverage on owner and employees (2011 applies)
4. Excavator or contract worker for Rural Water District? Subcontractor/owner must purchase coverage on owner and employees (2011 applies)
5. Plumber to Homeowner? 2011 does NOT apply
6. Nursing Home provides Physical Therapist or Beautician? Does not apply unless nursing home has contract to provide service.
7. Banker hires painter to paint apartments that banker privately owns? Does NOT apply
8. Oil Lease Operator hires a pumper? Subcontractor/owner must purchase coverage on owner and employees.
9. Oil Lease Operator hires a well service operator? Subcontractor/owner must purchase coverage on owner and employees.

Special note: Owners/subs must provide coverage for employees, regardless of annual payroll.

Any questions as to whether a relationship exists between a "contractor" and self-employed sub-contractor will depend upon the specific facts of the case. For further clarification, contact the Division of Workers Compensation at 800-332-0353.

November 13, 1997

INSURANCE CENTER, INC.
PROVIDING PEACE OF MIND SINCE 1911

2-7

Enclosure 2

State of Kansas
Department of Human Resources
DIVISION OF WORKERS COMPENSATION
800 S.W. Jackson Street, Suite 600
Topeka, Kansas 66612-1227

ELECTION OF INDIVIDUAL, PARTNER, OR SELF-EMPLOYED INDIVIDUAL TO COME WITHIN THE PROVISIONS OF THE KANSAS WORKERS COMPENSATION ACT.

NOTICE: To be processed, all entries on this form must be completed. All entries, except signatures, must be typed.

To the Kansas Division of Workers Compensation, you are hereby notified that:

Name of Individual to be Covered under Act: _____
Name of Business (DBA): _____
Social Security Number of Electing Individual: _____
Address of Electing Individual: _____

being a sole owner of a business, partner or self-employed individual does hereby elect, pursuant to K.S.A. 44-542a, to cover himself/herself as an individual under the coverage of the Kansas Workers Compensation Act.

Valid Signature of Individual Electing to be covered under the Act

THIS FORM IS NOT VALID UNLESS INSURANCE CARRIER COMPLETES THE BELOW PORTION. (NOTE: Cannot be completed by insurance agent. Must be completed by representative of carrier issuing policy.)

The _____ hereby agrees to provide
(Name of Insurance Carrier)
coverage for the above electing individual as of _____, 19____
(first date of coverage)

Signature of Representative of Insurance Carrier issuing policy

Title of Representative Signing above

Address of Insurance Carrier

Federal Privacy Act Disclosure Section 7(a)(2)(B)

The mandatory requirement that social security numbers be included on forms filed with the Division of Workers Compensation is permitted by Section 7(a)(2)(B) of the Federal Privacy Act of 1974, since our regulations which require its disclosure were in existence before January 1, 1975. The number is used as a means of identifying all the various records in the Division of Workers Compensation pertaining to an individual.

The use of social security numbers is made necessary because of the large number of applicants who have similar names and birth dates, and whose identities can only be distinguished by the social security number. _____ 2-8

State of Kansas
Department of Human Resources
DIVISION OF WORKERS COMPENSATION
800 S.W. Jackson Street, Suite 600
Topeka, Kansas 66612-1227

CANCELLATION OF ELECTION NOT TO ACCEPT COVERAGE UNDER THE KANSAS WORKERS COMPENSATION ACT BY EMPLOYEE WHO OWNS 10% OR MORE OF CORPORATE STOCK OF CORPORATE EMPLOYER.

NOTICE: To be processed, all entries on this form must be completed. All entries, except signatures, must be typed.

NOTE: This Cancellation of Election is effective upon receipt by the Kansas Division of Workers Compensation.

To the Kansas Division of Workers Compensation, you are hereby notified that:

Name of Employee Cancelling Election: _____

Social Security Number of Employee: _____

Corporate Employer's Name and Address: _____

Telephone Number: _____

Type of Business: _____

hereby cancels his/her election made pursuant to K.S.A. 44-543 to elect not to accept coverage under the Kansas Workers Compensation Act. The above named employee recognizes that by signing this form he/she will now be covered under the Kansas Workers Compensation Act.

Valid Signature of Employee Cancelling Election

Date Signed by Employee

Federal Privacy Act Disclosure Section 7(a)(2)(B)

The mandatory requirement that social security numbers be included on forms filed with the Division of Workers Compensation is permitted by Section 7(a)(2)(B) of the Federal Privacy Act of 1974, since our regulations which require its disclosure were in existence before January 1, 1975. The number is used as a means of identifying all the various records in the Division of Workers Compensation pertaining to an individual.

The use of social security numbers is made necessary because of the large number of applicants who have similar names and birth dates, and whose identities can only be distinguished by the social security number.

NOTICE: To be processed, all entries on this form must be completed. All entries, except signatures, must be typed.

NOTE: This Election is effective upon receipt by the Kansas Division of Workers Compensation.

State of Kansas
Department of Human Resources
DIVISION OF WORKERS COMPENSATION
800 S.W. Jackson Street, Suite 600
Topeka, Kansas 66612-1227

ELECTION NOT TO ACCEPT COVERAGE UNDER KANSAS WORKERS COMPENSATION ACT BY
EMPLOYEE WHO OWNS 10% OR MORE OF CORPORATE STOCK OF CORPORATE EMPLOYER.

To the Kansas Division of Workers Compensation, you are hereby notified that:

Name of Employee Electing Out of Act: _____
Social Security Number of Employee: _____
Corporate Employer's Name and Address: _____

Telephone Number: (____) _____ Type of Business _____

The above named employee states that he/she owns 10% or more of the corporate stock of the above corporation and elects, pursuant to K.S.A. 44-543, not to accept coverage under the Kansas Workers Compensation Act. The above named employee recognizes that by signing this form he/she is not covered under the Kansas Workers Compensation Act.

Valid Signature of Employee Electing Out of Act

Date Signed by Employee

Federal Privacy Act Disclosure Section 7(a)(2)(B)

The mandatory requirement that social security numbers be included on forms filed with the Division of Workers Compensation is permitted by Section 7(a)(2)(B) of the Federal Privacy Act of 1974, since our regulations which require its disclosure were in existence before January 1, 1975. The number is used as a means of identifying all the various records in the Division of Workers Compensation pertaining to an individual.

The use of social security numbers is made necessary because of the large number of applicants who have similar names and birth dates, and whose identities can only be distinguished by the social security number.

KARIN BROWNLEE
 SENATOR, 23RD DISTRICT
 JOHNSON & MIAMI COUNTIES
 1232 S. LINDENWOOD DR.
 OLATHE, KANSAS 66062
 913-782-4796

DURING SESSION

STATE CAPITOL—143-N
 TOPEKA, KANSAS 66612-1504
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Testimony before the Joint Committee on Economic Development

November 18, 1997

Senator Karin Brownlee

Worker's Compensation and the Independent Contractor

During the 1997 session, I introduced SB285 on behalf of an independent contractor who lives in my district. The Senate Commerce Committee held hearings on the bill but we did not reach a conclusion as to whether or not it solved the problem for which it had been introduced. Namely, that an independent contractor without employees should not have to pay worker's compensation insurance premiums on himself to then opt himself out of the coverage.

Also heard by the Commerce Committee was SB137 which addressed the same issue but in quite a different manner. This bill eventually was rolled into the omnibus worker's compensation bill and became law, much to the chagrin of small contracting companies. The ramifications of this bill are huge increases in worker's compensation premiums for small companies who may have previously opted the owner out of coverage. At the time we were considering the content of SB137, I recognized that it most likely was the opposite direction of where my bill proposed to go but I could not have guessed that it would have caused the premiums to skyrocket.

Today, I would advocate the content of SB285 as being more the direction we should go on this issue. I very much appreciate my friends from Olathe coming to testify today and indicating to you how they have been affected by the implementation of SB137. I unfortunately do not have clear cut answers but would offer you several guidelines which could become the criteria for any additional legislation we may pass in this area.

General objectives for independent contractors:

1. A general contractor (in SB285 - the principal) should not have to pay insurance premiums on an employee which he did not hire.
2. The rights of the (injured) worker must be protected and carefully balanced with the rights of the employer (be that the general contractor or the sub-contractor).
3. The general contractor may need some legal protection from a sub-contractor who exempts himself from coverage and is subsequently injured. (Possibly an affidavit stating as much would suffice.)
4. An employee may need additional protection or recourse against an unscrupulous employer. The penalties could be increased in this area although the employer sitting in jail does not pay the medical bills of the injured (uninsured) worker.
5. The overall objective would be proper insurance coverage at a reasonable price so as to avoid litigation for compensation of losses.

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 & Labor Committee
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Possible solutions:

1. Allow sub-contractors to purchase occupational accident insurance policies as we do for truckers. In Texas, these policies are utilized as this state does not mandate worker's comp coverage as we do in Kansas. Usually, these policies are much less expensive than typical worker's comp coverage. Additionally, these policies may have arbitration agreements which would help to avoid litigation.
2. Do not require a minimum purchase of insurance (based on a payroll of) \$24,900 for non-corporations as compared to a lower amount for incorporated individuals (who may opt out if they own 10% or more of the stock in their corporation).
3. If #2 is considered, possibly a true-up/true-down mechanism could be considered whereby a blanket/minimum policy is purchased by the sub-contractor and the premiums are finalized on a quarterly or semi-annual basis as the employer reports the hours worked by employees. This would be analogous to quarterly tax filings by non-corporations. This may encourage some honesty and prevent some employers from going to a cash system.

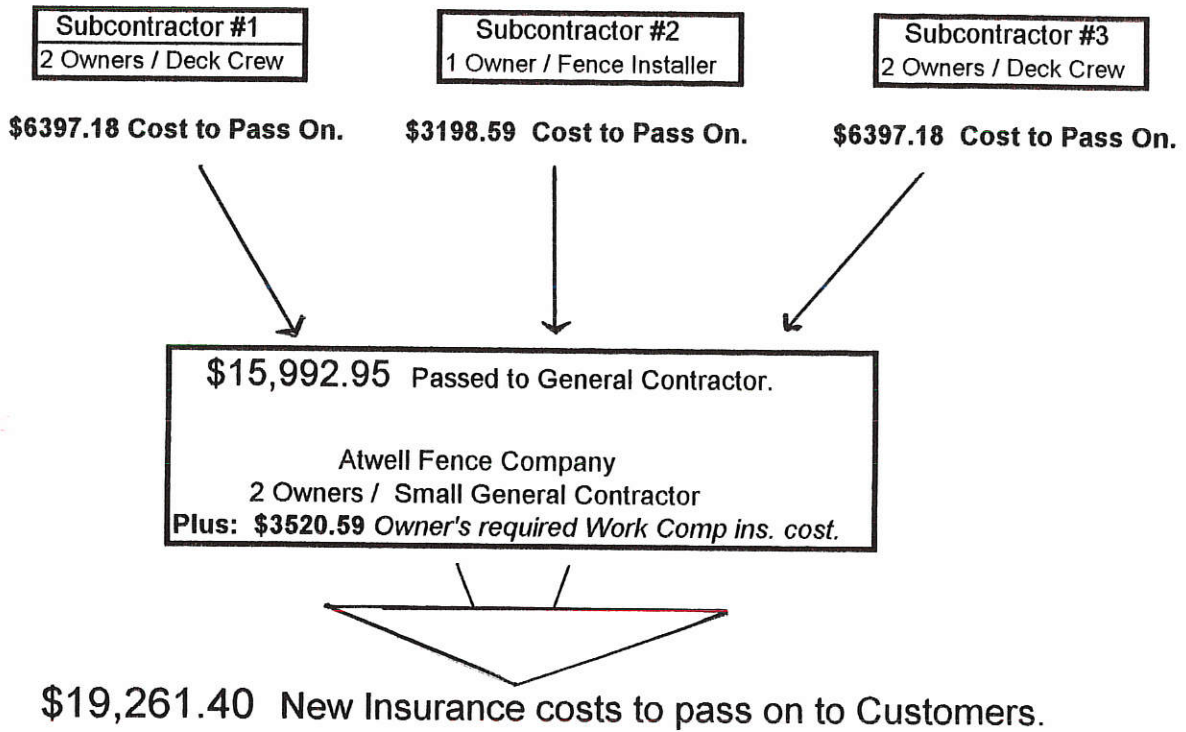
Finally, we do not have an adequate definition for "independent contractor". At this point, we realize this problem is bigger than the building industry and encompasses many employment fields. A lobbyist expressed to me that her "employer" forces her to cover herself with worker's compensation insurance. Please note the NY Times^{*} article which tells of many companies utilizing independent contractors. We need to take definitive action to clarify the many uncertainties which currently exist and hopefully do so in a manner which does not cause further pain for small business owners.

Thank you for the opportunity to testify before you today.

** Item in Tax Bill Poses
a Threat to Job Benefits
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Testimony of: Dawn Atwell

Cost and Effect of Workman's Comp on Small Businessmen.



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Business, Commerce & Labor Committee
Hearing Date: January 26, 1998
Testimony by: Dawn Atwell

Sub Contractor's Classifications
and Rate Increase per \$100.

Classification:	Ins. Code	Rate /\$100	x \$24950.	x .01=	Increase
Owner / Operator	5645	12.82	\$24,950	0.01	\$3,198.59
Secretary	8810	0.28	\$24,950	0.01	\$69.86
Superintendent	5606	2.72	\$24,950	0.01	\$678.64
Excavation	6217	4.97	\$24,950	0.01	\$1,240.02
Foundation Installation	5213	13.98	\$24,950	0.01	\$3,488.01
Water Proofing	5474	8.45	\$24,950	0.01	\$2,108.28
Flat Work/ Concrete Labor	5221	7.68	\$24,950	0.01	\$1,916.16
Framers	5645	12.82	\$24,950	0.01	\$3,198.59
Roofers	5551	31.37	\$24,950	0.01	\$7,826.82
Electrician	5190	4.88	\$24,950	0.01	\$1,217.56
Plumber	5183	6.50	\$24,950	0.01	\$1,621.75
Drywall	5445	6.41	\$24,950	0.01	\$1,599.30
Phone/Cable wiring	5190	4.88	\$24,950	0.01	\$1,217.56
Heat/AC Installation	5538	6.66	\$24,950	0.01	\$1,661.67
Trim Carpenter	5437	6.71	\$24,950	0.01	\$1,674.15
Painter	8474	8.45	\$24,950	0.01	\$2,108.28
Insulation Installer	5479	14.41	\$24,950	0.01	\$3,595.30
Cabinet Maker/installer	5437	6.71	\$24,950	0.01	\$1,674.15
Tile Installer	5348	4.70	\$24,950	0.01	\$1,172.65
Marble Craftsman	5348	4.70	\$24,950	0.01	\$1,172.65
Window Scraper	5474	8.45	\$24,950	0.01	\$2,108.28
Carpet Installer	9521	5.78	\$24,950	0.01	\$1,442.11
Hardwood Installer	9521	6.71	\$24,950	0.01	\$1,674.15
Construction Clean Up	5610	8.28	\$24,950	0.01	\$2,065.86
Stone/Brick Mason	5022	13.25	\$24,950	0.01	\$3,305.88
Landscaper	0042	9.17	\$24,950	0.01	\$2,287.92
Garage door Installer	5645	12.82	\$24,950	0.01	\$3,198.59
Gutter Installer	5538	6.66	\$24,950	0.01	\$1,661.67
Locksmith	8010	1.85	\$24,950	0.01	\$461.58
Deck /Fence Construction	5645	12.82	\$24,950	0.01	\$3,198.59
Sign Maker/ advertising	9545	7.18	\$24,950	0.01	\$1,791.41
Final Clean Up	9014	4.70	\$24,950	0.01	\$1,172.65
Wallpaper hanger		8.45	\$24,950	0.01	\$2,108.28
Decorator	9521	5.78	\$24,950	0.01	\$1,442.11
Total Workman's Comp Increase among Sub Contractors.					\$70,359.00

MR. CHAIRMAN AND COMMITTEE MEMBERS
BUSINESS COMMERCE AND LABOR COMMITTEE

HOUSE BILL 2011 PASSED IN MARCH, 1997, HAS HAD AN ADVERSE EFFECT ON SMALL BUSINESS OWNERS. OWNERS OF SUBCONTRACTOR FIRMS CAN NO LONGER ELECT OUT AND MUST COVER THEMSELVES ON WORKMAN'S COMPENSATION COVERAGE. HB 2011 ALLOWS THE BUSINESS OWNER TO ELECT OUT IF HE IS INCORPORATED. THIS DISCRIMINATES AGAINST THE SMALL BUSINESS OWNERS WHO ARE NOT INCORPORATED.

THE WORKMAN'S COMPENSATION REQUIREMENTS FOR SUB-CONTRACTOR BUSINESS OWNERS ON HB 2011 HAS HAD AN ADVERSE EFFECT ON MY BUSINESS OF BUILDING NEW HOMES AND THE EFFECT COULD RAISE THE PRICE OF NEW HOMES \$2,000 TO \$2,500 FOR A \$150,000 HOME. THIS COULD MEAN FEWER HOMES SOLD AND THAT MORE PEOPLE WILL NOT BE ABLE TO AFFORD THE AMERICAN DREAM OF HOME OWNERSHIP.

SMALL BUSINESS OWNERS, WHETHER WE ARE SOLE PROPRIETORSHIP, PARTNERSHIP, OR INCORPORATED, SHOULD HAVE THEIR CHOICE AS BUSINESS OWNERS TO ELECT IN OR OUT ON WHETHER WE PROVIDE WORKMAN'S COMPENSATION ON OURSELVES.

THIS IS AN UNNECESSARY COST TO THE BUSINESS OWNER THAT ADVERSELY AFFECTS HOME PRICES AND ONLY BECAUSE INTEREST RATES HAVE FALLEN SINCE THIS LAW HAS BEEN IN EFFECT; WE HAVEN'T FELT THE NEGATIVE IMPACT OF THESE UNINTENDED CONSEQUENCES OF INCREASED COSTS.

I ASK THAT YOU CONSIDER REPEALING, AS RECOMMENDED BY THE JOINT INTERIM COMMITTEE, HB 2011, THAT REQUIRES THE SUB-CONTRACTOR BUSINESS OWNER TO PROVIDE WORKMAN'S COMPENSATION ON HIS OR HER SELF.

TONY PLUNKETT, PRESIDENT
DAKOTA, INC.

*House Business, Commerce
& Labor Committee
1/27/98
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