Approved: 2/17/98
Date

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

The meeting was called to order by Chairman Al Lane at 9:02 a.m. on February 3, 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: Donald P. Schnacke, KIOGA
Roger Voge, Star Lumber & Supply Co., Inc.
Phil Harness, KDHR
Bill Wempe, Kansas Insurance Department
Terry Leatherman, KCCI
Janet Stubbs, Kansas Building Industry Association

Others attending: See attached list

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

Written testimony was submitted by Edwin H. Bideau, a proponent who was unable to appear last week. (See Attachment 1)

Donald P. Schnacke, Kansas Independent Oil and Gas Association (KIOGA), appeared before the committee asking for clarification of last year's law (**HB 2011**). This particularly applies to the terms "self-employed independent contractors" and "self-employed sub-contractors." (See Attachment 2)

Roger Voge, Star Lumber and Supply Company, Incorporated, appeared as an opponent of the bill. Star's goal would be that there be a level playing field. He believes that no one in the marketplace, whether it is the contractor, sub-contractor, or retailer should have a competitive advantage. In his written testimony are suggestions for ways to further improve the law. (See Attachment 3)

Philip S. Harness, Director of Workers Compensation, appeared as a representative from the Workers Compensation Advisory Council. They took up the issue at its January 21, 1998 meeting and unanimously agreed to stick by the recommendations it made last year. The council agreed it is now a pricing problem, and has referred the problem to the Insurance Department to see if they could come up with a solution. (See Attachment 4)

Bill Wempe, Kansas Insurance Department, talked with the committee for a few minutes concerning the minimum workers compensation policy, which was part of the old law. The department is now working with NCCI to have three ranges of salaries available to figure the new workers comp premiums for sub-contractors. The new law now figures premiums based on an average salary of $26,800. New ranges being considered are $22,000, $18,000, and $13,000.

Terry Leatherman, KCCI, made a few comments on **HB 2591**. KCCI did not appear on this issue last year or this summer because no policy direction had been established by their members. A proposed policy is pending decision by KCCI's Board of Directors in February. He offered some alternatives to consider instead of passing the bill and returning the law to pre-**HB 2011**. (See Attachment 5)

Janet Stubbs, Executive Director of the Kansas Building Industry Association (KBIA) and the Administrator of the Kansas Building Industry Workers Compensation Fund, appeared as the author of **SB 137**, which was amended in **HB 2011** and passed by the 1997 Legislature. The purpose of the bill was their desire to create a "no fault" workers compensation law in Kansas. It has become a very visible and highly debated issue. The problem seems to be the NCCI established annual wage level of $26,800 on which the premium is based for the sole proprietor owner. The KBIA is strongly opposed to **HB 2591**, which would repeal certain sections of **HB 2011**. They believe that the cost of the workers comp coverage is the problem rather than the coverage itself. (See Attachment 6)

The hearing on **HB 2591** will be continued at our next meeting on February 4, 1998. Chairman Lane adjourned the meeting at 9:55 a.m.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE: February 3, 1998

NAME	REPRESENTING
Terry Leatherman	KCCI
Dick Cook	KS Ins. Dept.
Bill Wempe	" " "
Debbie Smith	KBIWCF
Martha Jean Smith	KMHA
Janet Stubbs	KBIA
Scott Brown	MID-Am Lumbermens Assn
Kenyon Vang	Star Lumber & Supply Co. Inc
Pat Morris	KAIA
RANDY VALDEZ	KAIA
Wendy Harms	KS Aggregate Producers' Assn.
Steve Montgomery	CAS Construction
Susan Anderson	Heim & Weir
Hal Hudson	NFIB/KS
Teresa Hitchcock	State Farm
Kevin Davis	Am. Family Ins
Phil Bellon	Geary Co FARM Bureau
Dustin O'Mara	Custom Concrete Cutting
David Shufelt	KS Dept Human Resources

BIDEAU LAW OFFICES
Attorneys at Law

P.O. BOX 945
18 NORTH FOREST
CHANUTE, KANSAS 66720

EDWIN H. BIDEAU III
DAVID J. BIDEAU

(316) 431-2720
FAX: (316) 431-2742

January 27, 1998

Representative Al Lane, Chairman
House Business, Commerce & Labor Committee
Room 115-S
Statehouse
Topeka, Kansas 66612

Dear Chairman Lane:

It is my understanding that your committee will be holding hearings today, January 27, 1998, regarding a proposal to correct what many of us perceive as an error in the workers compensation statutory revisions passed by the last session of the Legislature. The change to restore the statutory exemption to independent contractors is in my opinion very necessary and should be restored as an emergency measure. The net effect of the statutory change is to require all contractors to procure workers compensation insurance because many of them function as primary contractors from time to time but also serve as sub-contractors. This is having a devastating effect on small businesses in our community, including small mom and pop operations, and including contract workers who work at home or telecommute for major companies.

Although I am unable to attend the Legislative hearing due to a bout with the flu, I am enclosing with this letter an alert which our office sent out to our clients and business associates which we believe correctly analyzes the impact of the 1997 changes regarding independent contractors.

I am not writing to you as a lobbyist for any particular interest group but simply as a concerned private citizen and a former member of your committee.

The current law is having a substantial adverse impact on our local economy, particularly small repair and contracting firms, family oil and gas ventures and contract workers for major industries. I would urge you to return us to the exemptions that existed prior to the 1997 amendments and to restore those as soon as possible.

House Business, Commerce & Labor Committee
2/3/98
Att. 1

Thank you for the opportunity to make my views on this issue known to you and thank you for your service to us as citizens of the state of Kansas.

Sincerely,

Edwin H. Bideau III

EHB:vmi
Encl.

BIDEAU LAW OFFICES
Attorneys at Law
18 NORTH FOREST
P. O. BOX 945
CHANUTE, KANSAS 66720-0945

EDWIN H. BIDEAU III
DAVID J. BIDEAU

(316) 431-2720
FAX: (316) 431-2742

WORKER'S COMPENSATION ALERT

LAW CHANGES BY 1997 KANSAS LEGISLATURE NOW MANDATE WORKER'S COMPENSATION COVERAGE FOR SELF EMPLOYED SUBCONTRACTORS NOT PREVIOUSLY COVERED EVEN IF THEY HAVE NO EMPLOYEES. LAW PROHIBITS ELECTING OUT OF COVERAGE.

House Bill No. 2011 enacted by the 1997 Kansas Legislature changes the way self employed subcontractors are treated under Kansas Worker's Compensation. The new law requires that all self employed sub contractors performing work for a contractor must have worker's compensation insurance for themselves and all of their employees. The new law repeals all of the former exemptions that previously existed for such a subcontractor. This will result in a substantial increase in insurance expense for many small contractors.

PRIOR LAW PAYROLL THRESHOLD OF $20,000 BEFORE COVERAGE REQUIRED IS NO LONGER APPLICABLE TO SUBCONTRACTORS.

Prior to the 1997 law no employer was required to carry worker's compensation insurance if their annual payroll was less than $20,000. Wages paid to a member of the employer's family, to himself or any partner were not counted toward that limit. A "mom and pop" business with no employees outside the family or with non-family annual payroll of less than $20,000 was exempt from the act and was not required to purchase coverage. Such employers were given the option of filing a voluntary election to come under the law and purchase coverage, but were not required to do so.

The new law states that any self employed sub-contractor performing work for a contractor must provide worker's compensation insurance irrespective of the $20,000 payroll limit and must provide coverage for all employees, partners and owners. Further, even if the self employed sub-contractor has no employees they must have worker's compensation coverage on themselves and any partners or owners. Failure to provide overage and keep it in force will subject the contractor to exposure for a possible fine of twice the annual premium the employer would have had to pay for the coverage or $25,000 whichever is greater.

NEW LAW APPLICABLE ONLY TO SUBCONTRACTOR.

This is a very substantial change from prior law which allowed such self employed sub-contractors to exclude themselves from coverage and required insurance only if their payroll to non-family employees exceeded $20,000. The legislature appears to have singled out the self

employed subcontractor for this particular treatment and this will result in a large increase in insurance expense for them. Under prior law many small subcontractors who had no employees other than themselves and family members were exempt from the law. Under the new law they will be required to purchase and provide insurance coverage regardless of whether they have any non-family employees.

LAW VAGUE ON WHO IS A "SELF EMPLOYED SUBCONTRACTOR".

It must be emphasized that the wording of the new law applies these requirements only to a "self employed subcontractor" who is performing work for another contractor. However, the legislature did not provide a specific answer or test for what constitutes a "subcontractor" leaving this vague in the opinion of many attorneys. There will be substantial question as to when the party purchasing the work or services from the contractor is "another contractor" so as to render the provider of the work a "sub". Does this apply to a contractor providing work or services to a homeowner engaging a number of contractors for repairs or to an individual building a new house who acts as their own "contractor"? When is a contractor a "self employed subcontractor" as opposed to an "independent contractor" or primary contractor? The problem is further complicated by the fact that many contractors provide work in both capacities at different times on different jobs, serving as independent or primary contractor on some projects and as a subcontractor on others.

Unless a contractor serves solely as an independent or primary contractor on all jobs and never works as a subcontractor, the contractor is required to have worker's compensation on all employees including himself and any partners or owners. The effect of the new law on a business that is organized as a corporation and serves as a subcontractor but where the stockholders have elected out of coverage under K.S.A. 44-543 is still unknown. There has been some discussion by some factions in Topeka of supporting a further amendment to the law in order to require these stockholders to provide coverage on themselves and to prohibit electing out.

REASON FOR NEW LAW - TORT LIABILITY SHIELD FOR PRIMARY OR GENERAL CONTRACTOR.

The new law was requested by large contractors who use subcontractors in order to try to escape from possible tort liability if the subcontractor or their employees were injured. If an employee comes under worker's compensation laws the employee cannot sue the employer or primary contractor under tort liability and their sole remedy is for worker's compensation benefits. The large contractors wanted the law passed so that they could automatically force the subcontractor into the worker's compensation system, even though he may have previously been exempt from the law and thereby limit their tort liability to him or his employees.

Many large contractors and corporations previously protected themselves by requiring all subcontractors who worked for them to provide worker's compensation coverage and to provide certificates of insurance. This was done as a matter of contract negotiation and was by private agreement, not statutory requirement. Under the new law, not only will the subcontractor be required to provide insurance on their employees but on themselves and any individual partners in the business.

PROBLEM - WHO IS A SUBCONTRACTOR?

As noted above, one of the very difficult problems under the new law is determining who is a "subcontractor" and is therefore covered by it. Although this relationship occurs most often in the construction business, it frequently arises in all types of business relationships. Is a company that sells component parts to a manufacturing firm a subcontractor? If so, does this mean that the owners or partners in that company can no longer exclude themselves from coverage and that they must now pay premiums on their own salary where prior law allowed them to exempt out? In large companies across the state the use of "contract labor" or "independent contract" workers in lieu of traditional employees is becoming more popular. These are often temporary contracts with no benefits and often are positions filled by workers doing part of the work either at home or outside the business of the contracting company. These "contractors" may be "subcontractors" under the new law and may be required to provide worker's compensation coverage on themselves?

SUBCONTRACTORS REQUIRED TO ACT TO AVOID PENALTIES.

Since the new law is vague on what constitutes a "subcontractor performing work for a contractor" all contractors who previously did not carry worker's compensation coverage, since they were previously under the statutory payroll exemption, must have coverage in force on themselves and their employees when they do any subcontract work. Further, since the legislature did not provide a test or specific answer as to what constitutes a "subcontractor" all contractors performing work for another party are at risk unless it is clear that they are performing the work as the primary or general contractor and not as a subcontractor. If a contractor is later determined to be a "subcontractor" and does not have worker's compensation coverage, he will face a potential fine and penalties plus personal obligation for payment of any worker's compensation award to an injured employee. The situation is so complex that that it is possible that the only way a contractor can be absolutely sure that they have complied may be to purchase the coverage.

Every contractor should review their status and make a determination as to whether they are subject to the new law. If the contractor provides any work or services to another person or party so that the person or party could constitute "another contractor" under the new statute, they are required to purchase worker's compensation coverage.

APPLICATION OF NEW LAW NOT LIMITED TO CONSTRUCTION INDUSTRY.

It is important to understand that the new law and the new requirements for purchase of worker's compensation coverage do not apply only to subcontractors operating in the construction industry. The requirements apply to all subcontractors regardless of the industry which they operate in. Subcontractors providing management services, repair services, oilfield services, custom manufacturing, computer services, service work, business services, design services and any other labor, materials or services of any kind as a "subcontractor performing work for a contractor" are covered by the new law regardless of whether they have any employees or not and even if provided on a part time basis.

60th YEAR

KIOGA

KANSAS INDEPENDENT OIL & GAS ASSOCIATION

105 S. BROADWAY • SUITE 500 • WICHITA, KANSAS 67202-4262
(316) 263-7297 • FAX (316) 263-3021
800 S.W. JACKSON • SUITE 1400 • TOPEKA, KANSAS 66612-1216
(913) 232-7772 • FAX (913) 232-0917

Before the House Business, Commerce and Labor Committee
February 3, 1998

The Kansas Independent Oil & Gas Association (KIOGA) is a 60 year old organization representing the voice of the Independent oil and gas operators and supporting industry in Kansas. There are apparently 3,000 KCC licensed operators doing business in Kansas.

When HB 2011 (1997) was enacted we began getting many calls and complaints as to its application. We sponsor our own Workers Compensation plan within the association. Additionally, many operators choose to buy their insurance from the independent and open insurance market.

Oil and gas operators are business entities that employ many independent contractors to perform various services. When HB 2011 (1997) was passed the term "self-employed sub contractors" was emphasized as it related to workers compensation coverage.

I personally did not feel HB 2011 (1997) extended to "independent contractors", but the lay attitude was that a self-employed subcontractor, was a self employed independent contractor, and the confusion began.

We examined the Division of Workers Compensation bulletin on this subject as well as that of the Commissioner of Insurance. Confusion in our industry continued. We asked for clarification and none was delivered. We called Insurance Management Association of Wichita (IMA) who is handling our plan, and they confessed the subject was confused.

We finally began telling oil and gas operators that HB 2011 (1997) does not disturb the Independent Contractor relationship, and that those contractors must cover their own workers compensation insurance.

We hope you clarify last year's law. In the alternative a clarifying statement indicating independent contractors are not to look to those with whom they do business to cover their own insurance.
Thank you,

Donald P. Schnacke

DPS:sm

House Business, Commerce & Labor Committee
2/3/98
Att. 2

February 2, 1998

To: Business and Commerce Committee

From: Roger Voge, Star Lumber & Supply Co., Inc.

Re: Workers Compensation and Self-employed Subcontractors

We have actively sought an understanding of the 1997 legislative changes involving Workers Compensation and self-employed contractors. This represents a significant area for our company as we annually pay over $2 million to floor covering subcontractors, besides the potential effects that any changes in this area has on managing insurance costs of our 600 employees. Our contractor customers are also significantly affected by these changes and often look to us for an understanding on such issues. In essence, the financial stakes are very large for Star and our customers.

Whatever course this committee or the legislature pursues in this area, Star's goal would be that there be a level playing field. By this I mean that no one in the marketplace, whether contractor, subcontractor or retailer, has a competitive advantage. The law must also be administratively feasible for insurance providers and employers to work with.

From Star's perspective, the basic issue is, do you want everyone, including the self-employed, covered by Workers Compensation? There are pros and cons to this but I believe the reality is that the Division of Workers Compensation and the administrative law judges have always wanted everyone covered. This philosophy has led to many strange interpretations and unusual administration of the law, from our perspective. One of these types of "unusual" cases appears to have fueled legislative action in 1997.

The benefits of having self-employed covered is to eliminate the question of who pays the medical bills and provides for the families of the self-employed contractor or their uninsured employees. Pre-1997 law allowed the self-employed to exempt themselves from coverage, and in the case of small employers, their employees. The problem has been plaintiff attorneys for injured self-employed people or their uninsured employees have been aggressive at seeking benefits from someone, even in situations where their client elected not to obtain coverage.

These attacks come in various forms, such as arguing that the injured party was not really a subcontractor, but an employee. Since whether someone is an employee or a subcontractor is a very ambiguous fact and circumstances test this has been fertile ground. Other approaches are also used and, as previously noted, all have received a receptive audience with the Division of Workers Compensation and administrative judges.

In essence, while the old law allowed for exemptions from coverage, the reality was that there was a search for a "pocket" to pay for costs when injuries occurred. This exposure was taken on by both the insurance carriers and business, often unknowingly. As a result, costs for uninsured subcontractors have been paid which necessitates building them into the cost structure somewhere.

House Business, Commerce & Labor Committee
2/3/98
Att. 3

As a result, under the old law, Star has been required to battle insurance carriers to accept the subcontractor's exemption from coverage for themselves and their employees. The insurance companies want to collect premiums because, based on experience, they have exposure for uninsured subcontractors and their employees, regardless of what the law says about exemptions. If Star's insurance carrier takes a hard line on this issue and our competitors' carrier doesn't, we incur a disadvantage. This occurs because Star must either pay the premiums or the installer goes to one of our competitors who will recognize their exemption. Either way, we lose and suffer from an uneven playing field due to higher insurance costs or loss of an extremely scarce resource.

We believe that removing the ability for the self-employed subcontractor to exempt himself or their employees from coverage, as provided for in the 97 law changes, is an improvement from prior law. While the new law still has problems, we believe that this law, as now interpreted by the Division of Workers Compensation, is an improvement over the previous law. There is now more clarity as to who is to provide coverage. The subcontractor can build the costs of their Workers Compensation coverage into their pricing like they do for all other costs. As noted, costs for uninsured contractors now must be built into the cost structures anyway. We might just as well do it up front so everyone pays their share and we can keep more situations out of the legal system.

In summary, we believe that the current law, as now interpreted, is better than the old law. The options that should be pursued from Star's perspective are to leave the law alone or further improve it. Repealing the 97 law only brings us back to the old mess.

We believe the law could be improved in the following ways:

1. Any actions necessary to insure that the present interpretation of the law is the one utilized. The original interpretation of the law provided by the Division of Workers Compensation was a disaster!! It was unworkable for the insurance industry, contractors and subcontractors.

2. Eliminate exemptions for 10% stockholder/employees. It is my understanding that 10% owners of a corporation can still exempt themselves from coverage. This gives those with this exemption a competitive advantage over other subcontractors who are not eligible for this. Again, the playing field should be level for all involved.

   The same question still exists when someone exempts themselves and has an accident. Who is going to pay for costs if they don't have health and disability insurance coverage? Whose pocket will they attempt to get into? If we are going to mandate benefits for some, then why not everyone?

3. Under the current interpretation of the law, our competitors who have chosen not to provide installation themselves, but to only sell products while "referring" customers to installers have a significant advantage. Since the floor covering installer doesn't have to have coverage when working for a consumer, based on the current interpretation, they have lower costs than either the employee or subcontractor installers that we utilize to install products. Again, if we are going to mandate benefits for some, then why not everyone?

   This also now prohibits us from utilizing such a contractor for one or two days a week. The contractor can't buy the coverage for only 1 or 2 days a week. We can't afford to take this

exposure on under our policy on those days they do work for Star. This is due to the fact that under much of their employment they are outside our control. We take safety very seriously and make investments in prevention and awareness programs to minimize accidents. This has consistently resulted in a mod factor that has been significantly below 1.00. If we can't effectively manage one group, this will adversely affect costs for all classes through negative changes in our mod factor.

We are also very concerned about the potential for fraud in this type of situation as well as legitimate problems where it might be difficult to ascertain during whose employment the injury actually occurred. Carpal tunnel injuries that occur over time represent one good example. However, we are relatively assured that the injury won't be associated with the time when they had no coverage while working for an individual. Rather, the bad back will more likely occur on the one day a week they worked for us and had coverage. After all, you can get a major back injury by bending over to pick up your briefcase and easily have a problem when performing construction work.

There has been a long-term shortage of skilled installers. This has only gotten worse with the strong economy and low unemployment rate. Consequently, if they don't want the coverage on themselves, they can seek work from retailers that will refer customers to them. Unfortunately, the better installers will always have the most flexibility regarding how they want to approach this.

In summary, the existing laws give a competitive advantage to floor covering retailers who have chosen a marketing strategy to only "refer" installers. Giving advantage to this strategy only encourages conversion to this approach which potentially results in even more people being without coverage. This seems to be inconsistent with the intent of the law. It is certainly inconsistent with the administrative agency's approach over the years.

You consideration of these issues and concerns would be sincerely appreciated. The opportunity to present our perspectives is appreciated.

TESTIMONY BEFORE THE HOUSE BUSINESS, COMMERCE, AND LABOR COMMITTEE

By Philip S. Harness, Director of Workers Compensation

January 27, 1998

RE: House Bill 2591

Much has been said and written about the provisions of 1997 House Bill 2011 (Chapter 125, 1997 Session Laws) dealing with workers compensation insurance coverage for subcontractors. Both the concept and the language was recommended by the Workers Compensation Advisory Council, which felt that better public policy supported the inclusion of subcontractors within the Workers Compensation Act. The wording of 1998 House Bill 2591 would reverse that public policy position, and repeal the language inserted by the 1997 Legislature.

The Workers Compensation Advisory Council took up this issue at its meeting on January 21, 1998, and unanimously agreed to stick by the recommendations it made last year. The council also agreed that it is now a pricing problem, especially with the arbitrary level at which the self-employed subcontractors are purchasing insurance, and referred that issue to the Kansas Insurance Department to see if it could come up with some type of solution, working with the National Council on Compensation Insurance (NCCI) or whomever. There was testimony which indicated that an annual salary of $26,800 is imputed to the subcontractor, which is based on an average weekly wage of employees throughout the state, which is then multiplied by a certain risk factor, and a premium is then calculated thereon. This particular figure does not reflect actual earnings by a subcontractor, nor does it reflect the fact that some self-employed individuals may be considered to be independent contractors for part of the work week and subcontractors performing work for contractors during the other part of the work week.

House Business, Commerce & Labor Committee
2/3/98
Att. 4

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

835 SW Topeka Blvd. Topeka, KS 66612-1671 (785) 357-6321 FAX (785) 357-4732 e-mail: kcci@kspress.com

HB 2591

January 29, 1998

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Business, Commerce and Labor

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Mr. Chairman and members of the Committee:

I am Terry Leatherman with the Kansas Chamber of Commerce and Industry. Thank you for this opportunity to comment on HB 2591, and on the broader question of who should fall under the umbrella of workers compensation coverage in Kansas.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 46% of KCCI's members having less than 25 employees, and 77% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

KCCI presents testimony on this issue today with the following disclaimer. KCCI did not appear on this issue last year or this summer because no policy direction had been established by our members. In fact, KCCI does not have a policy on this question today. However, a proposed policy is pending decision by KCCI's Board of Directors in February which: a) supports the broad

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Att. 5

a[illegible]cation of workers compensation as the appropriate protection of individuals in a work place; and, b) opposition to deflecting workers compensation responsibilities to businesses when a clear employer/employee relationship does not exist. In anticipation of approval of this policy direction, KCCI has the following comments on HB 2591.

Obviously, significant problems have resulted from last year's amendment regarding the workers compensation responsibilities of self-employed subcontractors. However, KCCI would caution against following the course charted by HB 2591 as the solution, and instead look to other alternatives.

HB 2591 returns Kansas to its pre-HB 2011 treatment of subcontractors. That will also return the old questions HB 2011 proposed to resolve. When a self-employer subcontractor is hurt, will they have a workers compensation claim against a general contractor? Do they instead have a civil case they could file? When an uninsured subcontractor is hired, should the general contractor be required to cover the subcontractor on the general's policy?

Rather than just returning to the way things were a year ago, KCCI would respectfully suggest the following alternative.

STEP ONE: KSA 44-505 establishes that employers with payrolls below $20,000 are not subject to the workers compensation act. HB 2591 reverses the current exclusion of self-employed subcontractors from being permitted to utilize the $20,000 payroll rule.

KSA 44-505 could instead be amended to require the self-employed subcontractor to apply their salary in determining whether it is under the $20,000 threshold. This would lead to the subcontractor earning less than $20,000 minimum from being required to acquire workers compensation coverage.

STEP TWO: KSA 44-503 concerns the workers compensation responsibilities of contractors and subcontractors, and establishes a contractor as ultimately liable for a workers compensation injury to a subcontractor's employees.

5-2

The law could be further amended to, first of all, make clear that workers compensation is t exclusive remedy for a self-employed subcontractor who suffers a work-related injury. Second, KSA 44-503 should make clear that the general contractor's "statutory employer" liability does not extend to self-employed subcontractors.

This change would preserve the HB 2011 attempt to avoid scenarios where two individuals who are injured side-by-side in a workplace have different legal remedies (workers compensation for an employee and civil litigation for the self-employed). It would also charge the subcontractor with the ultimate responsibility to secure insurance protection against injury.

STEP THREE: The law should be further amended to provide the opportunity for the subcontractor to obtain workers compensation insurance from the general contractor. This amendment should first make clear that this coverage is at the option of the general contractor. Second, it should permit the general to be reimbursed for the workers compensation insurance costs by the subcontractor without the general being in violation of laws which bar an employer from requiring employees to financially participate in the cost of workers compensation insurance.

This change would permit the part-time or independent contract worker, who will be working for a short period of time for a general contractor, to latch onto their policy rather than purchasing a policy on their own. Since this coverage could negatively affect the general contractor's policy experience, leaving the coverage at the option of the general and their insurance provider is very important. One final note. This amendment is consistent with the current opinion of the Division of Workers Compensation towards this practice.

These changes would address the major complaint from last year's change that the subcontractor making less than $20,000 would have to purchase workers compensation insurance which takes a large portion of their subcontracting income. However, unlike HB 2591, it would clarify that workers compensation is the exclusive remedy for the subcontractor and that the workers compensation insurance purchase rests on the subcontractor's shoulders.

5-3

While KCCI's ideas might address a majority of today's and last year's complaints, it will nc make all the problems go away. Under the KCCI approach, there will be a subcontractor making less than $20,000 who opts not to buy workers compensation insurance and gets hurt. When that happens, it is very likely there will be no one there to pay their hospital bills or supplement their lost income due to their injury. However, solving this problem sends you back to the vicious cycle of mandating subcontractors cover themselves for workers compensation.

In conclusion, there are unavoidable facts.

* In the best of all worlds, everyone on a work site would have workers compensation. However, workers compensation, because it is effective coverage, is not cheap.

* If you mandate the insurance be bought, the expense will cripple some subcontractors and put others out of business.

* If you don't mandate coverage, people will get hurt and bills will go unpaid.

* Easy answers (such as mandating an insurance alternative to workers compensation, mandating the general contractor provide coverage, socializing the cost through some state created fund) will not alter the unavoidable facts above.

Thank you for permitting KCCI to comment on HB 2591 and to present some alternatives for your consideration. I would be happy to answer any questions.

5-4

TESTIMONY BEFORE THE HOUSE COMMITTEE ON BUSINESS, COMMERCE AND LABOR

by
Janet J. Stubbs

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Janet Stubbs and I am appearing today in opposition to HB 2591 wearing two hats, that of Executive Director of the Kansas Building Industry Association, a trade association of approximately 1300 members of the residential and light commercial construction industry, and the Administrator of the Kansas Building Industry Workers Compensation Fund, a 5 year old group funded pool.

As I am sure you are all aware by now, SB 137 which this Committee heard during the 1997 Session and which was later incorporated into HB 2011 by the full House, was introduced by the Senate Commerce Committee at the request of the KBIA. In the 20 years I have represented the Association, I have not had a more visible and highly debated issue.

The decision to introduce the 1997 legislation was made by the Board of Directors of the KBIA due to their desire to create a "no fault" workers compensation law in Kansas. We believe the 1997 amendments we requested, and you passed, indeed achieved this and carried out the public policy decision supported by the Advisory Council prior to the introduction of SB 137. The Council has since considered this issue on two occasions and maintains strong support for the current law as you have seen in the minutes furnished this Committee. My understanding of the discussion by the Council is that they are comfortable with the public policy made last year but were not comfortable with the NCCI established annual wage level of $26,800 on which premium is based for the sole proprietor owner.

During the Interim, I sent each of you a letter which attempted to explain the KBIA position on this issue and correct some erroneous information regarding what constitutes a subcontractor/contractor relationship as contained in some Bulletins mailed out across the State. I would like to take the opportunity to perhaps refresh your memory regarding portions of this very complex issue.

We recognize the public policy of Kansas since 1911 has been to have the Workers Compensation Act cover cases where individuals are injured under circumstances arising out of, and in the course of, their employment. It is our understanding that the need for the amendments last year came because of two Appellate Court decisions, Aetna Life & Casualty v. America's Truckway Systems, Docket No. 74,721, and Allen v. Mills, 11 Kan.App.2d 415. The Aetna case told Aetna they could not collect premium on the uninsured drivers which Aetna claimed were "employees" under the ruling of Allen v. Mills. In the Mills case, the injuries were found to be the responsibility of the contractor. The KBIWCF also lost a case on charging premium for uninsured subcontractors at time the field audit was conducted on the General's payroll. So we found ourselves in the uncomfortable position of not being able to collect premium for the risk but being required to pay for the injuries of the

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uninsured Subcontractor. While our members were the victim of the domino effect which caused the experience mod of the General to go up and resulted in a higher premium for the General who had no control over the safety practices of the Subcontractor and no guarantee that the Subcontractor was injured on his jobsite vs. another job he may have worked on approximately the same date.

The main purpose of last year's legislation was to make sure that all workers performing work for a contractor would be placed under the Act. That was accomplished by amending K.S.A. 44-508. I am told by the legal minds that this amendment brings self-employed subcontractors, performing work for a contractor, within the definition of "workmen" or "employee" or "worker". However, we do recognize that the corporate subcontractor who owns 10% or more of the corporate stock may elect not to come under the Act and could file a tort action against the contractor.

The second issue we took to the Advisory Council last year was where to place the responsibility for the coverage and they determined that it should be on the self-employed Subcontractor himself rather than making it the responsibility of the General contractor. This caused considerable confusion and debate by the Division on how to interpret/administer this but it was eventually ruled the way we believe is the least problematic for determining the cost of the coverage.

The Association firmly believes that the coverage issue passed last Session achieved the goal of protection of all "workers" with liability placed on the owner of the business which receives the award of any benefits resulting from an injury, just as is the case with health insurance or vehicle insurance. Do you believe the general should provide the Sub's health insurance for the days he works on his jobsite or provide his vehicle insurance during the same time period?

My major concern which carries over from last Session, and one which I spoke to Department of Insurance staff about at that time, is the NCCI established figure for sole proprietor's annual payroll used in conjunction with class codes and experience mods to calculate the premium for his company. As you have heard, this figure increased from $24,900 to $26,800 for the sole proprietors on January 1, while the owner of a corporation is able to pay on $10,400 minimum payroll with actual payroll up to over $80,000 maximum. I believe this is an area which should be addressed because some of the small subs do not earn the $26,800 figure. However, I also believe you have to approach this with caution to ascertain the actuarially sound figure for the carriers. By that I mean, an individual earning $10,400 can receive just as severe an accident resulting in medical expense just as great as the person earning $60,000. The lesser expense for a lower income person would be the weekly rate for calculating benefits for lost time and body parts. However, we also have those sole proprietors earning more than the $26,800 figure who do not want it to be based on actual income.

There was discussion last year regarding the Oklahoma law. I called my counterpart in Oklahoma and obtained some information then and have attempted to add to that in the past week. Last year we were told that individuals could register for a $10 fee and exempt themselves out. However, I learned then that their first case was about to go to Court. Yesterday I learned that it is currently in the Supreme Court but have no additional information. It will be a case to watch.

I was faxed information on the current regulations for the law which was amended because of the "abuse" or "overuse". However, I was not faxed the law which would tell me what is required for

a Subcontractor to qualify for a Certificate of Non-Compliance in Oklahoma. We were told the cost has been raised to $25 and must be renewed annually.

The $750 minimum policy was being used by some subs and provided no coverage when the owner exempted himself out. It was only used to have the company issue Certificates of Insurance to the General. At the end of the policy period, without losses to be filed, the Sub received a return of $500.

I would like to address some of the issues raised by the proponents of HB 2591.

Rep. Mason questioned how big a problem was addressed by last year's legislation. I think you can tell how many people have been without coverage by the number of calls you have received. If you are asking how many claims have been paid on uninsured subs, I can only speak to our Fund's experience. I asked our claims person if she had any records without pulling all the closed claims files. Her memory is of 8 claims in recent times. We denied one which was upheld and we have another pending which is costing us legal. The ones which we have paid on, plus the reserve totals, equal approximately $303,000. This is a large sum for a small Fund and considering that no premium will ever be collected.

Certificates of Insurance have always been requested by the contractors. They have often been misleading, however, because some of the older forms did not have a space to mark whether or not the owner was covered with W.C. and as long as the General had a Certificate it was thought they were protected. I believe my members are much more cognizant of the issue now and require the agent to complete the information. However, there is still room for problems for the General because insurance carriers are issuing Certificates to Generals as requested by the Subs but failing to notify the Generals who hold these Certificates when they cancel the policy of the Sub. This leaves the General believing he has protection until he has a loss. Our Fund notifies all Certificate holders in these circumstances and I believe it is irresponsible to do otherwise.

It was mentioned that the contractors did not know about the requirements of HB 2011 and are just learning of it. I cannot understand why this would happen. The Association newsletter and membership meetings discussed it. The KBIWCF sent out notice to all of the agents who are under contract with the Fund, as well as all of our insureds, before the effective date of the change. Commissioner Sebelius sent out Bulletin 10 on June 30, 1997, advising all carriers to begin collecting the additional premium as of July 1, 1997. The Fund has a monthly self reporting form and our sole proprietor insureds were requested to begin paying premium for their class code on $2,075 of payroll each month in order to avoid an amount owed at field audit time.

It was stated by conferees that Generals have the ability to require a Certificate of Insurance showing proof of coverage as a condition of working on the General's jobs. This is true. However, in today's market, with the shortage of the workforce, the Generals can be held hostage in order to get the work done if the Sub refuses to provide coverage. I can tell you this is being done now.

There has been a lot of confusion about what constitutes a contractor-subcontractor relationship. Much confusion and bad information continues to abound on this subject. The example of the carpet

layer working for a carpet sales store was given by a conferee. If the carpet installer was paid by the retail store, and that was a part of the same bill to the customer, then the installer would be a subcontractor. However, if the retail store gave the customer a list of installers from which to choose, or recommended the installer for the property owner to call, and the installer selected billed separately, then W.C. would not be required and there would be no additional cost to the property owner as alleged by the conferee. I believe the carpet installer would be an "independent contractor" under these circumstances.

In cases where there are retired attorneys or engineers who accept a "contract" from a firm which is in the same business or profession, then I believe they would be subcontractors. However, the Director has ruled that a contractor can allow the subcontractor to come under his policy. The class code by which this would be rated would generate little expense for premium but would provide coverage for the unexpected accident.

We have all heard the question as to why an individual should be required to buy WC coverage when they have health coverage somewhere and have purchased a disability policy. The KBIA does not object to an individual being given the ability by law to provide other coverage as a substitute to WC IF it legally removes the liability of the General their injuries. However, I would like to relate an example of what can happen without WC coverage.

A small General Contractor here in Topeka with no employees called me shortly after the law went into effect. A friend of the GC was working as a Subcontractor and they were considering whether to make the friend an employee, buy WC to cover him, or require him to obtain his own. Since the Sub was working for other contractors, I suggested the Sub should obtain his own coverage. A few weeks later the GC called me and asked what to do because his Subcontractor friend had been injured on his job and neither had obtained WC coverage. I was told they thought the Sub's wife's health insurance through her employer would pay for hospital and medical. They thought he would be able to return to work and they didn't think he would sue the GC. I talked with the GC about 10 days ago and the Sub is back working some but had had no coverage to provide income for the time he was off work or any permanent disability rating, if needed. Also, under the old law, the GC would have been liable and without coverage.

Although we question the wisdom of it, we would see the ability to include the smaller businesses in the self insurance statutes as a possible compromise. We believe workers compensation insurance is a good buy for the coverage it provides and believe the protection for the worker and his family is important. However, this would be an option for those who choose to remove themselves from the WC Act.

We strongly oppose HB 2195. We urge you to give careful consideration to the ramifications of repeal due to losses which may have occurred but have not been reported, etc. We believe cost of the coverage is the concern rather than the coverage itself.

Thank you for the opportunity to appear.