Approved: March 17, 1998
date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on March 16, 1998 in Room 123-S of the Capitol.

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

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

Conferees appearing before the committee:
Dick Cook, Insurance Department
Andrew Sabolic, Director, Western Region, National Council on Compensation Insurance, Inc.
Janet Stubbs, Kansas Building Industry Association
Thomas V. Murry, Kansas Association of Insurance Agents
Ron Durflinger, Durflinger, Homes, Inc., Lawrence
David M. Reynolds, Lawrence
Bobbie Flory, Executive Director, Lawrence Home Builders Association

Others attending: See attached list

Upon motion by Senator Steineger, seconded by Senator Jordan, the Minutes of the March 13, 1998 Meeting were unanimously approved.

HB 2591 - Exempting self-employed subcontractors from workers compensation

Dick Cook, Supervisor, Commercial Multi-Peril & Casualty Section, Kansas Insurance Department, testified in opposition to **New Section 4 of HB 2591** stating it appears to mandate an experience rating plan for all workers compensation policies regardless of the amount of premium, and include premium discounts for any employer which has an established safety plan or establishes a safety plan. Mr. Cook stated the Insurance Department is not sure who would file the plan as prescribed by New Section 4. Currently the experience rating plan in Kansas provides a discount to employers who have better loss experience than the average loss experience for the employer's industry. Providing another experience rating plan for employers in a certain industry could create an inadequate rate which is contrary to KSA 40-953 and duplicate factors already recognized in the otherwise applicable rate which is contrary to regulations. New Section 4 further does not establish who is to monitor employer safety plans or determine the amount to be discounted for such plans. (Attachment 1)

Andrew Sabolic, Director, Western Region, National Council on Compensation Insurance, Inc. (NCCI), testified on **New Section 4 of HB 2591** stating the experience rating plan already provides a discount to employers whose loss experience is better than those of their peers. The experience rating plan is to reward those employers who are safety conscious and have little or no losses and to penalize those employers who have higher than average losses. By requiring all employers to be experience rated, many small employers will be impacted negatively because of the need to pay a rating organization to produce additional experience modifications for all employers. One claim for a small employer will most likely cause their experience modification to become a debit modification, therefore, causing an increase in premium. Mr. Sobolic raised other questions relating to **New Section 4**: what qualifies as a safety plan, for what period of time and who is to be reviewed and approved, who determines the amount of the discount, and how is the minimum premium impacted. (Attachment 2)

Janet Stubbs, Kansas Building Industry Association (KBIA), testified in opposition to **HB 2591**. Ms. Stubbs stated the legislation passed last year was construed to have broader ramifications than was intended. The inclusion of "subcontractors" outside the construction industry was not the intent when the

legislation was introduced as SB 137 and later amended into HB 2011. The legislation was enacted last year as the result of an Appellate Court finding that a self-employed subcontractor was not an "employee" of his own business and the Workers Compensation Act did not apply, leaving the sole proprietor owner able to sue the general contractor for injuries. **HB 2591** is an attempt to correct the unintended consequence of HB 2011; however, total repeal would create problems from the standpoint of claims liability due to the period of time permitted in the reporting of incurred but not reported claims. **HB 2591** shifts a company's expense of doing business to another company, yet each are "independent contractors". The payment of a business's own expenses is one of the criteria for determination of "employee" vs. "independent contractor" status which carries with it responsibilities and expenses an individual does not have as an "employee". KBIA believes every business should be responsible for their own expenses. (Attachment 3)

The amendments Ms. Stubbs submitted as a substitute for **HB 2591** permits unincorporated contracting firms to use a form similar to that utilized for corporate owners to exempt themselves from the Act when filed with the Division of Workers Compensation; and limits the subcontracting provisions to the construction industry. (Attachment 4)

Thomas V. Murry, Kansas Association of Insurance Agents, testified in support of **HB 2591** stating the House Subcommittee studied the bill in great detail, and conferees from all segments of the various industries involved had an opportunity for input. Mr. Murry stated the proposed amendment submitted by Kansas Building Industry Association, should not be passed by the Committee without a great deal of thought and deliberation for a long term workable solution. Mr. Murry stated he was in support of **HCR 5043** creating a task force on workers compensation. (Attachment 5) The Chair requested Mr. Murry to consider the amendment submitted today and advise the Committee of his position.

Ron Durflinger, Durflinger Homes, Inc., testified in opposition to **HB 2591** stating the annual audit conducted on his business as an independent contractor involves opening his books to the auditor on both the payroll records of any employees he may have had as well as the records of any payments made to self-employed subcontractors. Any payments made to self-employed subcontractors must be supported by a certificate of insurance binding Worker's Compensation Insurance coverage to the business entity of the self-employed subcontractor. Payments not supported by binding coverage are charged as premiums to his business at the particular industry rate applicable. Mr. Durflinger stated self-employed subcontractors are individuals or partnerships who freely choose to accept the responsibility of being an employer in return for the rewards of being an employer and should be held to the same standards of responsibility as all employers. Mr. Durflinger testified in support of the amendments proposed by the Kansas Building Industry Association, inasmuch as it allows individuals to exempt themselves from workers compensation coverage if they so desire and to make other arrangements through a disability or health and casualty policy. Mr. Durflinger urged the Committee to require self-employed subcontractors to accept the responsibility of being self-employed and accountable. (Attachment 6)

A letter from Bobbie Flory, Executive Director, Lawrence Home Builders Association, stating opposition to **HB 2591** was distributed to members of the Committee. (Attachment 7)

A letter from David M. Reynolds, Lawrence, stating his opposition to **HB 2591** was distributed to members of the Committee. (Attachment 8)

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for March 17, 1998.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: March 16, 1998

NAME	REPRESENTING
Terry Leatherman	KCCI
Dawn Atwell	Sunrise Builders
Sam Crawford	Crawford + Kinden Inc
Tony [illegible]	Dakota Inc
Ron Durflinger	Durflinger Homes
Neal Ezell	Ezell-Morgan Construction
David Reynolds	Apple Tree Homes, Inc.
Hap Hedges	NFIB/KS
Andrew Kabobi	NCCI
Dick Carter, Jr	KSIA

Kathleen Sebelius
Commissioner of Insurance
Kansas Insurance Department
Fire and Casualty Division

MEMORANDUM

To: Senate Committee on Commerce

From: Dick Cook, Supervisor
Commercial Multi-Peril & Casualty Section

Re: Issues and Concerns Regarding the Amendment of Section 4 to House Bill 2591

Date: March 16, 1998

Madam Chairperson and Members of the Committee:

Thank you for the opportunity to appear before you on amended Section 4 of House Bill 2591.

Amended Section 4 of House Bill 2591 would appear to mandate an experience rating plan for all workers compensation policies regardless of the amount of premium, and include premium discounts for any employer which has an established safety plan or establishes a safety plan. We are not sure who would file a plan as prescribed by the amendment. Although not impossible, it would probably be improbable that any rating organization or insurers would want to file such a plan.

There is currently an experience rating plan in Kansas which provides a discount to employers who have better loss experience than the average loss experience for the employer's industry. This experience rating plan is applicable to those employers' policies which generate annual premium in excess of $2,250. Providing another experience rating plan for these employers could create an inadequate rate which is contrary to K.S.A. 40-953 and duplicate factors already recognized in the otherwise applicable rate which is contrary to K.A.R. 40-3-13.

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420 SW 9th Street
Topeka, Kansas 66612-1678

785 296-3071
Fax 785 296-2283

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1 80

Applying an experience rating plan to employers' policies generating less than $2,250 in annual premium could result in an increase in premium since one claim would most likely cause a debit modification for a small employer. Approximately 37% of the employers with annual premium of less than $2,250 are insured in the Kansas assigned risk plan. As of January 1, 1998, these employers in the assigned risk plan will receive a 5% credit for attending a safety seminar and an additional 5% credit for remaining loss-free throughout their annual policy term. 5 of 1.1998

A large number of insurers offer individual dividend plans and safety group dividend plans. These dividend plans are usually geared to provide larger returns to the more safety conscious employers. Therefore, this provides further evidence that would appear to indicate that additional discounts, as pursuant to the amendment, would not be warranted.

Pertaining to premium discounts being given for any employer establishing a safety plan, it is unclear who is to monitor these plans and determine what amount of discount shall be given for such plans. If the plan is for all policies, it would apply to minimum premium policies. These policies could be written on contractors who may or may not hire any employees. In this situation, who does the safety plan apply, and why should a discount be allowed?

Again, thank you for the opportunity to appear and voice the department's concerns regarding this amendment.

National Council on Compensation Insurance, Inc.

Government, Consumer and Industry Affairs
Western Region

Andrew Sabolic
Director

CONCERNS/ISSUES ON THE AMENDMENT TO HB 2591

The Experience Rating Plan already provides a discount to employers whose loss experience is better than those of their peers. One of the goals of the experience rating plan is to reward those employers who are safety conscious and have little or no losses and to penalize those employers who have higher than average losses. Also, simply adopting a safety plan does not result or guarantee lower losses.

Although we can not determine the rating impact of requiring all employers to be experience rated, many small employers will be impacted negatively. One claim for a small employer will most likely cause their experience modification to become a debit modification, thus causing an increase in premium.

If the amendment passes, who will determine what qualifies as a safety plan? Must a safety plan be reviewed and approved every year, two years, or three years, etc.? Who will determine the amount of discounts?

If a movement exists to allow greater flexibility in rating employers, the Insurance Department could revisit their opposition to schedule rating. Scheduled rating has been adopted by 19 states. Schedule rating allows an insurer to modify (up or down) an employer's premium based on certain characteristics that are not reflected in the employer's experience. (See attached)

Carrier and group self-insured's costs will increase because they will need to pay a rating organization to produce additional experience modifications for all employers. The increased cost may be absorbed by the insurers or passed along to the policyholders in another manner.

The amendment mandates that all employers who are subject to the workers compensation act receive an experience rating modification. Currently, employers in Kansas are only subject to an experience rating modification if they generate premium in excess of $2,250. All 38 states in which NCCI operates have a premium eligibility threshold for experience rating. I know of no state that requires all employers to be subject to experience rating. In fact, Kansas already has one of the lowest experience rating thresholds of any state. There are some who advocate raising the threshold which would exclude a larger number of small employers from being experience rated.

The minimum premium is the lowest premium required in order to provide insurance under a standard workers compensation policy. The minimum premium is basically the insurer's cost of underwriting a policy. According to NCCI rules which are approved by the Insurance Department, the minimum premium is not subject to experience rating. However, the amendment would negate the rule. The amendment also provides for a premium discount. What if the discount produces a premium lower than the minimum premium?

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Date 3-16-98

Attachment # 2

11430 Gravois Road, P. O. Box 8530, St. Louis, MO 63126-0530
Telephone: 314-843-4001 Fax: 314-842-3188

TESTIMONY
SENATE COMMERCE COMMITTEE
HB 2591
February 17, 1998

CHAIRMAN SALISBURY AND MEMBERS OF THE COMMITTEE:

My name is Janet Stubbs appearing today in opposition to HB 2591 on behalf of the Kansas Building Industry Association, a trade association of approximately 1350 member companies statewide, the Kansas Building Industry Workers Compensation Fund, a group funded workers compensation fund started in 1993 for the benefit of the members of the residential and light commercial construction industry, and the H.B.A. of Kansas City.

We recognize that the provisions of SB 137, which was unanimously approved by this Committee and the full Senate on a vote of 38 to 1, and later amended into HB 2011, was construed to have far broader ramifications than was our intent. The inclusion of those "subcontractors" outside the construction industry was not our intent when we requested introduction of SB 137. We also understand that HB 2591 is an attempt to correct this unintended consequence. It appears this legislation has produced the use of numerous cliches' so we will use one of our choosing to express our belief that to pass HB 2591 and totally repeal, rather than amend the 1997 law, would be to "throw the baby out with the bathwater". We urge you to consider amendments which will fine tune last year's law.

On September 29, 1997, I mailed a letter to all legislators giving background information of the reasons the KBIA Board directed me to pursue the 1997 legislation and the process we followed to do so. In that letter, a copy of which is attached to my testimony, I explained that the KBIA supported protection of the injured worker under the W.C. Act, as was the intent of the Act since 1911. However, the Appellate Court, in the Mills case, found that a self-employed subcontractor was not an "employee" of his own business and was able to sue the General Contractor for injuries. Additional court cases then found that carriers could not charge the General for the liability exposure on these uninsured subcontractors. Therefore, a carrier was faced with paying for injuries to the uninsured Sub and his/her employees but unable to collect premium. It doesn't take a rocket scientist to determine this to be a "no-win" financial situation. It had always been the practice of the industry to charge this additional premium at year end audit.

A workers comp claim against a General increases the experience modifier of the General Contractor which increases the premium the G.C. business must pay, if he has insurance. If the G.C. has no employees, as is often the case, he may not carry W.C. on himself and thus has no insurance coverage to pay for such injuries of a Sub. The liability of such, prior to July 1, 1997, would then fall to the G.C.'s business or possibly the personal assets of the G.C. The provisions of SB 137, which were eventually rolled into HB 2011, prevented this liability for the General.

The KBIA Board believes that when an individual becomes a business owner, and thus an

independent contractor, he should then become responsible for his own actions and business expenses. Individuals who have testified indicate they would never file against a General for a workers comp claim. However, the law permits it and, if there is a serious injury or death, chances are very good that someone will take legal action on behalf of the injured or deceased person's family. Total repeal of last year's amendment to the law will return this liability to the General Contractor's business which, in the residential and light commercial construction world, may well be just as small a company as the company acting in the role of a Subcontractor. Do you feel this is fair when the General has no control over the Sub's business and safety practices because the Sub is not an "employee" of the General, but rather an "independent contractor"?

We believe the concerns expressed by individuals in support of HB 2591 is not a coverage issue but rather a pricing issue. The subcontractors have had the coverage without expense prior to the 1997 law. You have not heard objection to that by the subcontractors or their agents. We fully agree that the cost is a problem and addressed our concerns with Department staff last year.

Keeping in mind the concerns expressed by owners of small subcontracting companies who do not earn the annual payroll of $26,800 established by the Department of Insurance, we suggest that a 2 part solution is available. First, an amendment to permit unincorporated contracting firms to use a form similar to that utilized for corporate owners to exempt themselves from the Act when filed with the Division of Workers Compensation. The negative for the General would be the tort liability which would still be there as a remedy for the Subcontractor. Secondly, we have been told by the Division that 95% of the problems experienced have been in the construction industry. Therefore, we suggest that a second amendment should be limitation of the subcontracting provisions to the construction industry, as was intended by passage of last year's law.

Although it is not the first time that legislation has been passed and later determined to have had a broader scope and interpretation than was the intent, this issue has been exacerbated by the dissemination of inaccurate examples of circumstances which constitute a subcontracting relationship and an original interpretation of the 1997 amendment which was different from the legislative intent. I am told, the definition of "subcontractor" was not changed by last year's amendment to the Act.

Total repeal of the 1997 amendment would create problems from the standpoint of claims liability due to the period of time permitted in the reporting of incurred but not reported claims. The KBIWCF received a letter after the annual claims audit by our Excess Insurance Carrier for the Fund, CNA, questioning continued coverage if the law was in fact repealed.

In conclusion, we believe the suggested amendments will resolve the problems about which you have heard from constituents by removing the retired citizens, who want to work as subcontractor accountants, attorneys, engineers or lawnmower repairmen for Sears, from the Act. It permits the small construction company owner to exempt himself by filing the form with the Division, thus eliminating the cost of Workers Comp insurance. This gives him the choice of providing protection for himself in some other way such as disability and health coverage.

Some supporters of repeal believe that the industry could solve the problem by simply not hiring Subs

which do not have W.C. KBIA adamantly disagrees and believes that only larger contractors such as the commercial construction industry and the highway contractors are not affected with today's workforce shortage. There is an extreme shortage of subcontractors in many areas of Kansas and, more specifically, with capable and willing workers.

To pass HB 2591, in its current form, shifts one company's expense of doing business to another company because of the role played on the construction jobsite, yet each are "independent contractors". Do you feel this should be done with other expenses? Health insurance? Vehicle insurance while on the jobsite of the General? Payment of a businesses own expenses is one of the criteria for determination of "employee" vs. "independent contractor" status. Becoming an "independent business person" carries with it responsibilities and expenses an individual does not have as an "employee". KBIA firmly believes every business should be responsible for their own expenses and urge you to support this position by amending HB 2591 as we have suggested.

Thank you for the opportunity to briefly express our concerns on this very important issue. I would be glad to attempt to answer any questions.

KANSAS
BUILDING INDUSTRY
ASSOCIATION, INC.

TO: ALL LEGISLATORS

FROM: JANET STUBBS, EXECUTIVE DIRECTOR

DATE: SEPTEMBER 29, 1997

RE: W.C. COVERAGE FOR SELF-EMPLOYED SUBCONTRACTORS

Several of you have visited with me regarding your concern and confusion on this issue since the passage of H.B. 2011, the omnibus workers compensation bill of the 1997 Session. I want to make this opportunity to furnish you with the published interpretation of the Director of the Division of Workers Compensation and, relate some opinions expressed by our attorney, in an attempt to aid you in answering questions you might receive from your constituents.

By way of background information, I was directed by the Board of Directors of the Kansas Building Industry Association to seek passage of legislation to provide protection for injured construction industry workers under the workers compensation act and to provide protection from liability for general contractors both under their general liability and workers compensation policy. We believe this was the original intent of the Workers Compensation Act. However, Appellate Court case law had found that a self-employed subcontractor was not an "employee" of his own business and the Act did not apply leaving the sole proprietor owner able to sue the general contractor for injuries.

I requested our attorney, Mike O'Neal, to appear before the Advisory Council and seek approval for proposed legislation to cure a major problem of liability exposure for general contractors. The Council was presented with two(2) options from which to choose. Plan A would have required the general contractor to assume liability for workers comp coverage for the subcontractor employees and owner. Plan B would require the subcontractors to provide coverage for everyone in their company, including the owner of the company. The Council voted unanimously for Plan B which was introduced as S.B. 137 and passed the Senate 38-1 before it was amended into HB 2011 by the House. This was not a "last minute" amendment added to HB 2011.

After the July 1 effective date of HB 2011, the Division of Workers Compensation issued a very different interpretation of the amendments pertaining to subcontractors coverage than had been agreed to during the committee hearings of the Session. This caused extreme confusion and problems throughout the State. First, the Division interpreted the bill to require a subcontractor to cover all of the employees of the company, but to have the general contractor responsible for the subcontractor owner's coverage. This would have been very difficult to administer.

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2300 S.W. 29th St., Suite 121 • Topeka, Ks, 66611 • (913) 267-2936 • FAX (913) 267-2959

I inv. the legal counsel and assistant deputy director of the Division of Workers Compensation (the Director on vacation) to attend a meeting in my office to discuss the issue and the confusion. Also in attendance were 2 staff members of the Department of Insurance, the legal counsel for the Independent Insurance Agents Association, House Committee Chair Al Lane, and KBIA's legal counsel Mike O'Neal and I. On August 22, the Director of the Division of Workers Compensation issued a revised interpretation which is enclosed. The revised interpretation is in agreement with the intent of the legislation--to make everyone in business responsible for their own workers compensation insurance, just as they are for their own car or health insurance. The subcontractors which have not been carrying WC on the owner of the business are now required to do so. Problems have existed within the industry due to uninsured subcontractors filing a claim against the insurance of the general contractor.

The bottom line is:
--Do you feel everyone should be covered under the Workers Compensation Act for work related injuries, disabilities or deaths? If the answer to that is in the affirmative, then you must ask yourself,

--Who should pay for the expense of the insurance premium to cover the subcontractor employer/owner and employees, the general or the subcontractor?

--Should the sole proprietor owner of a subcontracting company be permitted to exempt out from under the W.C. Act to avoid the expense of insurance?

--If you feel that the sole proprietor owner of a subcontracting company should be able to exempt from coverage under the W.C.Act, then shouldn't changes be made to prevent the general from being held liable for his injuries?

--You should be aware that owners of incorporated businesses may exempt themselves from coverage under the Act if they own 10% or more of the stock of the business.

--During the 1997 Session, we explored many possible solutions. S.B. 137, eventually H.B. 2011, was the final product.

You may be receiving calls from small subcontractors complaining that the expense will put them out of business. The most common class code for residential construction is the carpentry code with a rate which would amount to approximately $250 per month for coverage for the sole proprietor owner. That is based upon the insurance requirement that $24,900 be the payroll figure used to calculate the premium for a sole proprietor. If injured or disabled and unable to support a family, workers compensation insurance would be a very inexpensive investment to provide unlimited medical coverage, including rehabilitation, and reimbursement of lost wages.

You may also receive calls questioning the definition of subcontractor. The 1997 amendment to the law did not change the definition of a subcontractor. Many of the general contractors are requiring workers compensation coverage by the subcontractor on all employees, including the owner, as a condition of contract to work on a job. The 1997 amendment to K.S.A. 44-508(b) only addresses work done by a "self-employed subcontractor performing work for a contractor".

The decision by the KBIA Board of Directors to support this change in the W.C. law was based on their view that every company owner should be responsible for that company's own cost of doing business. It is a change from the way the industry has operated in the past. However, the Board believes it is no different than being required to carry vehicle insurance to provide coverage in the event of an accident.

OTICE: 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.

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316-266-6258 IMA

INSURANCE MANAGEMENT ASSOCIATES INC IMA

301 P02 FEB 24 '98 1-

600 IMA Plaza, 250 North Water
P.O. Box 2992, Wichita, KS 67201-2992
(316) 267-9221 FAX (316) 266-6254
AFFILIATIONS: Assurex, Intersure

February 24, 1998

John Samples
Kan Build, Inc.
PO Box 259
Osage City KS 66523

Dear John:

You have asked for our opinion on the current Self-Employed Subcontractor Workers Compensation law and the possible repeal. As you know, IMA insures several manufacturers, general contractors and numerous subcontractors across Kansas. We feel that it is every business's responsibility to provide workers compensation benefits for each of its employees as required by the Kansas statutes. The current Self-Employed Subcontractor Workers Compensation law effective July 1, 1997 went a long way towards achieving that goal.

We feel that an owner of a business (a sole proprietor, partner or member of a limited liability company) should still have the option of electing out of coverage under the workers compensation system as before July 1, 1997. However, it is also our belief that individuals who voluntarily elect out of the workers compensation system should not be allowed to seek damages from the owner of the project or the general contractor.

We do not favor the repeal of last year's self employed subcontractor law. We would suggest that the current law be amended (1) to allow for the election out of the system by owners of businesses (described above), (2) a subcontractor which has any employees whatsoever, should be required to purchase a workers compensation policy before it is able to perform work as a subcontractor to a general contractor, (3) that the $25,000 penalty be reduced and in the absence of workers compensation coverage, the owner of the subcontractor shall be responsible for the workers compensation benefits for the injured employee, and (4) the premium should be based on actual subcontract related payroll subject to a minimum premium of $750 annually.

The July 1, 1997 law has been misinterpreted and has drawn many businesses in to the requirements unintentionally. The intention initially was to control problems within the construction industry. The new law should be revised to be industry specific to the construction industry, similar to the exception for owner-operator truckers. This one revision could make many of the other revisions unnecessary. Please let us know if you have any questions.

Sincerely,

Ronald V. Srajer, CIC
Vice President

David P. Hawkins, CPCU
Account Executive

3-7

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1998

HOUSE BILL No. 2591

By Joint Committee on Economic Development

12-17

AN ACT concerning workers compensation; relating to the coverage of self-employed contractors; amending K.S.A. **[44-559 and K.S.A.]** 1997 Supp. 44-505 ~~and~~ , 44-508 and **44-532 and** repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1997 Supp. 44-505 is hereby amended to read as follows: 44-505. (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

(1) Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state;

(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection~~; except where the employer is a self-employed subcontractor under circumstances wherein K.S.A. 44-503, and amendments thereto, would otherwise apply~~;

, except where the employer is a self-employed subcontractor, engaged in one of the contracting trades as defined by the approved rating organization, under circumstances wherein K.S.A. 44-503, and amendments thereto, would otherwise apply

(3) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer has not had a payroll for a calendar year and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee

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an election has been filed an election to extend coverage to such persons. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator. Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a and amendments thereto, such terms shall not include individual employers, limited or general partners or self-employed persons~~; except a self-employed subcontractor performing work for a contractor~~, except where the employer is a self-employed subcontractor, engaged in one of the contracting trades as defined by the approved rating organization, performing work for a contractor

(c) (1) "Dependents" means such members of the employee's family as were wholly or in part dependent upon the employee at the time of the accident.

(2) "Members of a family" means only surviving legal spouse and children; or if no surviving legal spouse or children, then parents or grandparents; or if no parents or grandparents, then grandchildren; or if no grandchildren, then brothers and sisters. In the meaning of this section, parents include stepparents, children include stepchildren, grandchildren include stepgrandchildren, brothers and sisters include stepbrothers and stepsisters, and children and parents include that relation by legal adoption. In the meaning of this section, a surviving spouse shall not be regarded as a dependent of a deceased employee or as a member of the family, if the surviving spouse shall have for more than six months willfully or voluntarily deserted or abandoned the employee prior to the date of the employee's death.

(3) "Wholly dependent child or children" means:

(A) A birth child or adopted child of the employee except such a child whose relationship to the employee has been severed by adoption;

(B) a stepchild of the employee who lives in the employee's household;

(C) any other child who is actually dependent in whole or in part on the employee and who is related to the employee by marriage or consanguinity; or

(D) any child as defined in subsections (3)(A), (3)(B) or (3)(C) who is less than 23 years of age and who is not physically or mentally capable of earning wages in any type of substantial and gainful employment or who is a full-time student attending an accredited institution of higher education or vocational education.

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury

A-8

8. Election by certain employees.

(a) As used in this section:

(1) "Nonprofit organization" means those nonprofit organizations exempt from federal income tax pursuant to section 501(c) of the internal revenue code of 1986, as in effect on the effective date of this act.

(2) "Compensation" does not include actual and necessary expenses that are incurred by a volunteer officer, director or trustee in connection with the services that the volunteer performs for a nonprofit organization and that are reimbursed to the volunteer or otherwise paid.

(3) "Volunteer officer, director or trustee" means an officer, director or trustee who performs services for a nonprofit organization but does not receive compensation, either directly or indirectly, for those services.

(b) Any employee of a corporate employer who owns 10% or more of the outstanding stock of such employer, may file with the director, prior to injury, a written declaration that the employee elects not to accept the provisions of the workers compensation act, and at the same time, the employee shall file a duplicate of such election with the employer. Such election shall be valid only during the employee's term of employment with such employer. Any employee so electing and thereafter desiring to change the employee's election may do so by filing a written declaration to that effect with the director and a duplicate of such election with the employer. Any contract in which an employer requires of an employee as a condition of employment that the employee elect not to come within the provisions of the workers compensation act, shall be void. Any written declarations filed pursuant to this section shall be in such form as may be required by regulation of the director.

(c) Any noncompensated volunteer officer, director or trustee of a nonprofit corporation as defined in clause 3 of subsection (a) may elect to be covered by the provisions of the workers compensation act by filing with the director, prior to injury, a written declaration that the officer, director or trustee elects to accept the provisions of the workers compensation act, and at the same time, the person shall file a duplicate of such election with the employer and the employer's insurance company or qualified group-funded workers compensation pool.

(d) Any individual employer, self-employed person, or any general or limited partner engaged in one of the contracting trades, as defined by the approved rating organization, may file with the director, prior to injury, a written declaration that such person, employer or partner elects not to accept the provisions of the workers compensation act. Any person, employer or partner so electing and thereafter desiring to change the employer's, person's or partner's election may do so by filing a written declaration to that effect with the director.

Testimony on House Bill 2591

Presented by Thomas V. Murry
Kansas Association of Insurance Agents
March 16, 1998 - Senate Commerce Committee

Thank you Madam Chair and members of the committee for the opportunity to appear as a proponent at today's hearing on House Bill 2591. I am Tom Murry, and I am 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.

I, as well as other members of our association, was very involved in the House Committee and Subcommittee's ten days of deliberations on House Bill 2591, and I am here to report to you that we support the actions contained in this bill --- the repeal of the "self-employed subcontractor" language, the moratorium on penalty enforcement, and the change of effective date to publication in the Kansas Register. We are generally ambivalent on the floor amendment that was added during floor debate (concerning a workplace safety plan), and understand the objections of our company partners to this disruption to the delicate industry/regulatory rating mechanism involved in workers compensation.

Senate Commerce Committee
Date 3-16-98
Attachment # 5-1 thru 5-7

Madam chair, four separate legislative bodies (the interim Joint Committee on Economic Development, the House Business, Commerce, and Labor committee and appointed subcommittee, and the full House of Representatives) have heard the arguments, reviewed the facts, listened to the proposed solutions from opponents to this measure, and have concluded the same thing --- the "self-employed subcontractor" language that was inserted into House Bill 2011 last session ought to be repealed. In fact, the House voted 107-13 to support HB 2591 and 123-0 to support the establishment of the task force. Have they stated that there exists no solution? No, they have concluded; as I trust you will, that this is a complex issue and an easy, quick solution is not possible without a deliberative process that involves all of the necessary parties --- members of the Legislature, state regulators, insurance industry representatives, general contractors, subcontractors, and representatives of business and organized labor. The task force recommendation from the House is a good, practical solution to this problem that has caused a year worth of confusion to Kansas consumers, and I would urge you to support the task force and let them take the time to deal with proposed solutions in a calm, deliberative manner. There were a number of insurance-related solutions that were proposed as hostile amendments to this bill on the House floor, and they were wisely rejected by the members of the House --- both Democrats and Republicans. In rejecting the amendments, a number of speakers suggested that the best place for these solutions to be debated is the task force established by HCR 5043. We agree with those Democrats and Republicans. In our view, the most prudent course that you could take would be to support House Bill 2591 and support the task force. The unintended consequences of last year's House Bill 2011 gave birth to the repeal language contained in the bill you consider today, and I would urge you to reject amendments to this bill and provide relief to the thousands of

Kansas consumers who have been adversely affected by House Bill 2011 and its subsequent interpretations and re-interpretations.

The one issue has consumed a great deal of time for our association since the end of last year's 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 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, when the Joint Committee on Economic Development met in November and passed this repealing language, our association 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. That perception has not changed in the debate that we participated in when this bill was considered by the House. In the absence of a workable solution to this complex issue (and there were numerous solutions proposed in the House debate for the insurance industry that were downright alarming to us and the workers compensation companies that we represent), we have regrettably concluded that the best thing that could be done at this point would be to repeal last year's well-intentioned but disastrous language and let the task force find a solution that is agreeable and workable for all involved.

Prior to the start of the legislative session, we have encountered frustration 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. Madam Chair, 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 continue to 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 respectfully ask for your support for this measure without additional amendments.

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

March 16, 1998

Chairwoman Salisbury and Members of the Senate Commerce Committee, thank you for the opportunity to speak to you today.

My name is Ron Durflinger, and I am a homebuilder doing business in Lawrence, Ks. During this hearing I will do my best to suppress the agony I'm sure we all share over the heartbreaking defeat of the University of Kansas basketball team yesterday. It is with great sadness that we watched the life of the Jayhawk's season end under the unconscious three point shooting of Rhode Island. That said I would like to address the issue at hand.

I speak to you confessing that I have no mastery of the legal complexities of this issue. I can only speak from my experience as both a former self employed subcontractor and currently as an independent contractor. Historically, the annual audit conducted on my business as an independent contractor involved opening my books to the auditor on both the payroll records of any employees I may have had as well as the records of any payments I made to self employed subcontractors. Any payments made to self employed subcontractors must have been supported by a certificate of insurance binding Worker's Compensation Insurance coverage to the business entity of the self employed subcontractor. Any payments not supported by such binding coverage were then charged as premiums to my business at the particular industry rate applicable. For instance, payments made to an uninsured roofer were charged at the industry premium rates for roofers. Payments made to framing carpenters were charged at the industry premium rates for carpenters, and so on. This responsibility, both financial and legal is neither wanted nor justifiable.

I argue today that these self employed subcontractors are individuals or partnerships who freely choose to accept the responsibilities of being an employer *in return for the rewards of being an employer.* They are free to do business with whomever they choose. Those who hire them, whether they are an independent contractor, a homeowner, or an unrelated business have no control over their actions other than limiting the scope of their agreement with each other for a particular job. In the sense that these self employed subcontractors are employers they should be held to the same standards of responsibility as all employers. They represent themselves as being professional in their particular area of expertise. They are responsible for directing their employees in the course of their work. They are responsible for the safety of their employees in the course of their work. They are responsible for compensating their employees for their labors. They are responsible for their employees' payroll taxes, and they must be responsible for Worker's Compensation insurance for their employees. These are not responsibilities to be passed on to others. None of them! These are responsibilities *inherent* to being an employer.

Durflinger Homes, Inc.
P.O. Box 1286 • Lawrence, KS • 66
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This leads us to the subject of those self employed subcontractors who do not have employees or who do not desire Worker's Compensation coverage for themselves as individuals. What responsibilities does the Contractor have to these people? None. Once again, these are individuals who have freely chosen to call themselves independent businessmen or women *in return for the rewards of being in business.* As such it is their responsibility to protect themselves and make themselves aware of the liabilities they may face in business. It is not the responsibility of those who contract with them for a service they, by the very nature of being in business, imply in being proficient, professional, and self reliant. If they *choose* to exempt themselves from the coverage provided by Worker's Compensation insurance it is a conscious decision. However it is a decision they should have the right to make. It is possible for them to protect themselves more efficiently and at less expense through other products in the market. In many cases it is in fact unfair to charge owners at the same industry rate because they may or may not engage in the actual work activity upon which that premium rate is based.

As a contractor I ask this Committee to require those people who have chosen to represent themselves as self employed subcontractors to accept the responsibilities that come with the territory. They must be held accountable to their own employees, and not be allowed to throw this responsibility on the shoulders of others. I would also ask that this Committee give those same individuals who claim self employment the opportunity to make rational decisions as to how best protect themselves in the most cost efficient manner available. Do not hold contractors responsible for an " employer/employee" relationship that simply doesn't exist.

Thank you

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Lawrence Home Builders Association

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March 13, 1998

Senate Commerce Committee
Chairwoman Senator Salisbury
State Capital
Topeka, KS 66612

Dear Chairwoman Senator Salisbury,

In the interest of the building industry, I request that you reject the repeal of HB 2591.

Currently, the law requires sole-proprietors to be responsible for their own workers compensation insurance rather than the general contractor. This is appropriate and should continue. This law clearly has some problems that need to be addressed and those problems should be addressed by amendments and not repeal.

An amendment should be made addressing sole-proprietors who feel that having workers compensation insurance on himself/herself is a hardship. They should be given a fair and affordable alternative: opting out of workers compensation coverage on themselves for some other method of coverage they may choose. This allows the sole-proprietor to not become incumbered with insurance premiums he can't afford and at the same time eliminates the general contractor's liability for that individual.

Repealing the law will once again make general contractors liable for the sole-proprietor subcontractor who may become injured while on the job-site. Fundamentally speaking, it is unfair to hold one self-employed individual liable for another self-employed individuals' cost of doing business.

Thank you in advance for your careful consideration of this request. **Please support an amendment to HB 2591 making it a fair law.**

Sincerely,

Bobbie Flory

Bobbie Flory
Executive Director

member NAHB

3-16-98
Attachment 7

Good Morning! Thank you for letting me appear before you today. March 16, 1998

Sen I respectfully request you vote "NO" on repeal of HB-2591 which would totally repeal the law of 1997 requiring all subcontractors to be responsible for carrying their own workers compensation coverage.

The legislation overwhelmingly passed by the legislature last year produced a "no fault" system in which all contractors working for another contractor must be covered by workers compensation & required the sole proprietor to buy coverage. As you know, this has caused a furor among the sole proprietor subcontractors saying they cannot afford the coverage.

I WOULD SAY THEY CAN'T AFFORD TO NOT PURCHASE THEIR OWN WORKERS COMPENSATION COVERAGE!

Shifting the responsibility for the cost of insurance does not solve the problem of costs associated with coverage. Small Sub-contractors, who do not currently carry insurance, and allege they are being "put out of business" by the existing law will not be helped by repealing the law. In fact they could be hurt by repealing the law. Let me explain:

1. If the General Contractor is responsible for all Workers Compensation Insurance then Sub-Contractors with GOOD "Overall Experience Ratings (I.E.; "0" or "negative" = "get credits") will be penalized and have their costs increased because they will be charged based on the "Experience Rating" and a compounding "Assigned Risk" surcharge assigned to the General Contractor. This impact will vary between each General Contractor they work for.

2. Sub-Contractors will be further penalized because their "TOTAL INVOICE" will be assessed at the rate of 33-1/3%, 50%, or 90% by each General Contractor they work for. Most Sub-Contractors would end up loosing money because accumulated invoices, per General Contractor, could easily exceed today's individual limit of $26,800.00 on premiums. Thus they could end up paying some multiple exceeding today's limits because there is no way to manage payments, let alone between General Contractors. Additionally, General Contractors (especially "Small" ones) cannot keep track of "payrolls" for each subcontractor & their employees.

3. By not purchasing insurance and renegotiating their contracts the Sub-contractor could loose income and will loose a business deduction which would help them.

Repealing HB-2591 Can lead to increased abuse:
1. Sub-contractors work for many different General Contractors. If a Sub-contractor gets hurt they could file a claim against any of their General Contractors. There is nothing to keep a person from getting hurt at home and claiming they got hurt on a job as well. There are many small General Contractors that could easily be put out of business thru fraud of this nature. Keeping the Sub-contractor responsible for their own insurance helps control this problem.
2. There is no incentive for a Sub-contractor to help manage their own safety because their own costs are not directly impacted by their behavior.
3. Sub-contractors have the incentive to help manage fraud & abuse of the system if they are responsible for their own insurance. This will help lower costs.

Repealing HB-2591 negatively impacts the attractiveness of doing business in Kansas.
1. Repeal changes the definition of an "Employee". From my personal experience other implied responsibilities could accrue to the General Contractor. An example is responsibility for state and federal taxes if they are not paid by the Sub-contractor. I have also heard of a case where a General Contractor was held partially responsible for the wages of a Sub-Contractor when that Sub-Contractor did not did not pay his employees and the General had documented evidence of full invoice payments.
2. A mechanism to help keep loss ratios & thus premiums from rising will be lost.
3. Affordable housing in Kansas would also be impacted by increased costs of insurance.

Repealing HB-2591 creates significant problems at date of effect.
1. What happens with and who is financially responsible for "Incurred" but not reported claims as of the date of repeal?
2. What happens to "Client" contracts existing before or contracts signed on the day of repeal? Many contracts can last for a year or longer.

Rather than shifting responsibility for premiums we must find viable options for a sole proprietor owner of a sub-contracting company to provide their own economical insurance. An option to consider is the amendment offered by the Kansas Building Industry Association. Some key points of that amendment are:
1. Limits the subcontractor coverage to the construction industry as defined by NCCI.
2. Permits the owners of a sole proprietorship, LLC or partnership to opt out of coverage by filing the proper form with the Division of Workers Compensation. This is the same authority an owner of a corporation has currently. Any employees of the owner would be required to be covered by Workers Compensation.
3. Tort action against the General contractor would still be allowed in limited circumstances, but would remove the liability for the General Contractor for Workers Compensation coverage and premiums.

We must fully evaluate this matter before we rush to change the law. We cannot accept the position "we don't have time". The stakes are too high.

Even the Workers Compensation Advisory Council recommends leaving the current law in place.
Again, I respectfully request vote "NO" on HB-2591. Thank you for your time.

DAVID M. REYNOLDS, 1017 Wildwood Dr., Lawrence, Kansas (785) 832-1414

Senate Commerce Committee
Date 3-16-98
Attachment # 8