Approved: February 11, 1999
Date

MINUTES OF THE SENATE COMMERCE COMMITTEE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on February 10, 1999 in Room 123-S of the Capitol.

All members were present except:

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

Conferees appearing before the committee:
Philip S. Harness, Director, Workers Compensation Division
Terry Leatherman, Kansas Chamber of Commerce and Industry
Christine E. Davis, Workers Compensation Advisory Council Member
Tom Whitaker, Kansas Motor Carriers Association
Jolene M. Grabill, Kansas Trial Lawyers Association
Roger Aeschliman, Acting Director, Department of Human Resources
Andrew Sabolic, Director, Western Region, National Council on Compensation Insurance, Inc.

Others attending: See attached list

SB 219 - Workers Compensation Administrative Changes

Philip S. Harness, Director, Workers Compensation, briefed the Committee on **SB 219**, stating the proposed amendments are recommendations of the Workers Compensation Advisory Council and two recommendations from the Director.

New Section 1, sets forth a new procedure for post-award medical treatment requests, allowing for an evidentiary hearing, as well as dealing with attorneys fees and appeals therefrom. - Page 1.

Amend KSA 44-501(d)(2) is amended on Page 3, Lines 6 thru 22, to include certain drug levels under the conclusive presumption of employee impairment.

Amendment to KSA 1998 Supp. 44-503 is to clean up the ambiguities created in regard to subcontractors legislation enacted last year. Mr. Harness advised the Committee this amendment was conceptually approved by the Advisory Council, but the draft was not approved.

Amendment to KSA 44-510, Page 9, Line 27, deletes the word ~~utilization~~ and inserts the word *peer* in lieu thereof. The amendment will bring the statute into compliance with the regulations on peer and utilization review.

Amendment to KSA 44-519, Page 14, Lines 7-9, provides that no report of a health care provider shall be otherwise admitted into evidence without foundation testimony, except in the matters of preliminary hearings. A concern has been raised as to whether the preliminary hearings regulation (KAR 52-3-5a) conflicts with the statute. This amendment alleviates that concern and establishes an exception within the statute.

Amendment to KSA 44-510c, Page 13, lines 24 thru 27, deletes language referring to review and modification which was pre '93 language with reference to temporary total disability. Modifications to temporary total disability are presently done at the preliminary hearing stage. This amendment

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

is recommended by the Director and has not yet been submitted to the Advisory Council.

Amendment to KSA 44-527, Page 14, conforms actual practice of requiring certified mail rather than registered mail when the Director disapproves an agreement.

Amendment to KSA 44-557, Page 15, Lines 24 and 25, clarifies the statute of limitations and extends the 200 day rule to one year in the case of a failure by the employer to file an accident report. Line 30, subsection (d) strikes the word ~~knowing~~ and inserts the word *repeated*, referring to the failure of an employer to file a report. Lines 36 - 40, subsection (e) proposes the proceeding to recover the $250 penalty under the Kansas Administrative Procedures Act and not in the district court of Shawnee County.

Amendment to KSA 44-557a, Page 16, Lines 27 thru 29, allows the Division to collect hospital charges and related diagnostic procedure codes.

Amendment to KSA 44-5,120, Page 19, Lines 14 and 15, creates an exception for failure to file accident reports, under the fraud and abuse administrative section.

A section on Page 21, KSA 44-501a is repealed. The Kansas Supreme Court declared the statute unconstitutional in the *Osborne* case. The statute was an attempt to apply KSA 44-501 retroactively, which attempt failed. (Attachment 1 and Attachment 2)

Terry Leatherman, Executive Director, Kansas Industrial Council, Kansas Chamber of Commerce and Industry (KCCI) and a member of the Advisory Council, testified in support of **SB 219**, stated the KCCI specifically supports the changes to the current drug testing provision. **SB 219** includes a Department of Transportation concentration index to establish impairment due to drug use, for the first time in the law. The KCCI supports the new section on Page 1 which provides an avenue for an injured worker to pursue further medical treatment for an injury. Mr. Leatherman stated the language on Page 5 regarding the self-employed subcontractors was presented to the Advisory Council as no more than language to reconcile two bills approved in 1998. The amendment does not propose policy changes to the current subcontractor statute. (Attachment 3)

Christine E. Davis, Member, Worker Compensation Advisory Council, and Vice President, Human Resources, Sunflower Bank, Salina, testified in support of **SB 219**, specifically the reform on Page 3, expanding the impairment clause to include drugs. A recent study from the Department of Health and Human Services shows that 74% of all drug users are employed; that 14 out of every 100 employees abuse drugs on the job; that 60% of all users will sell drugs to other employees, and 40% of them will steal from their company to support their habit. Ms. Davis stated federal surveys show that substance abusers are four time more likely to be involved in on-the-job accidents; six time more likely to file a workers' compensation claim, costing an estimated $100 billion in profits and productivity for this year. Passage of **SB 219** will help alleviate some of drug abuse problems in the workplace in Kansas. (Attachment 4)

Tom Whitaker, Director of Governmental Relations, Kansas Motor Carriers Association, testified in support of **SB 219**, particularly the addition to KSA 44-501 of impairment levels for drugs. The concentrations levels, as they appear in the bill on Page 3, are the confirmatory test cutoff levels found in the United States Department of Transportation's rules and regulations (USDOT). Since 1989, USDOT has required motor carriers to implement drug-testing programs for all drivers of commercial vehicles, performing pre-employment, random and post-accident drug tests. Mr. Whitaker stated as a result of the drug-testing requirements, drug related incidents decreased from 22% to 2%. (Attachment 5)

Jolene M. Grabill, Kansas Trial Lawyers Association, testified in support of **SB 219**, with the

exception of the change regarding the definition of subcontractor, on Page 5, lines 11 and 12. (Attachment 6)

The hearing on **SB 219** was concluded.

Roger Aeschliman, Acting Director, Department of Human Resources, in response to the Committee's request, submitted an amendment imposing a penalty on insurance companies for noncompliance in the current data reporting law as found in KSA 44-557a. The amendment provides authority to the commissioner of insurance to impose a fine on insurance carriers or group-funded workers compensation pools who fail to supply information required; and further provides a penalty on self-insured employers or vocational rehabilitation providers failing to provide information in compliance with this statute. The penalty levied is up to a maximum of $5,000 for each violation but not to exceed $25,000 for the same violation occurring within any six consecutive months. (Attachment 7)

Andrew Sabolic, Western Director, National Council on Compensation Insurance (NCCI), stated they do collect the information and did supply information for the Kansas Closed Claims Study in 1992. NCCI's cost is assessed to the insurance companies.

Upon motion by Senator Umbarger, seconded by Senator Jordan, the Minutes of the February 9, 1999 Meeting were unanimously approved.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for February 11, 1999.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: February 10, 1999

NAME	REPRESENTING
Bill Sauvel	BOEING
Janet Stubbs	KBIA
Bill Curtis	Ks Assoc of School Bds
Joseph Lawhon	Post Audit
Sharon Dwell	Planned Health Ser
Kevin Davis	Am Family Ins
Jamell Murdie	LPA
Randy Williams	KDHR
William Sanders	KDHR
Bill Wempe	KS Ins Dept
Dick Cook	" " "
Leon Schmidt	Ks. Ins. Dept.
Pat Morris	KAIA
Paul Davis	KID
Rudy Leutzinger	KDHR
Phil Harness	KDHR-Work. Comp.
David Shufelt	" " "
Terry Leatherman	KCCI
Christine E. Davis	Sunflower Bank, N.A.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: ______________________

NAME	REPRESENTING
Tom Whitaker	Ks Motor Carriers Assn
Martha Neu Smith	KMHA
Stephen Durrell	KDHR
Andrew Sabolic	NCCI
Jolene Grabill	KTLA

TESTIMONY BEFORE THE SENATE COMMERCE COMMITTEE ON SENATE BILL 219

BY PHILIP S. HARNESS
FEBRUARY 9, 1999

The Workers Compensation Advisory Council has met three (3) times since the last legislative session (September 15, 1998, January 8, and January 25, 1999). The following several items have been recommended by the advisory council and two (2) items recommended by the Director:

1. **New section on post-award medical proceedings** setting forth a new procedure for post-award medical treatment requests allowing for an evidentiary hearing as well as dealing with attorneys fees and appeals therefrom. Should there be a post-award application for additional medical expenses, there would be a separate opportunity for hearing and such request would move to a second priority position, following preliminary hearings (which are at the top of the trial docket).

2. **Proposed amendment to K.S.A. 44-501 (d)(2)** to include certain drug levels under the conclusive presumption of employee impairment.

3. **The necessity to clean up ambiguities created by K.S.A. 1998 Supp. 44-503; 44-503b; 44-503c in regard to subcontractors**. Besides the interesting public policy issues, House Bills No. 2591 (effective April 30, 1998) and 2831 (effective April 16, 1998) created a conflict in K.S.A. 44-503. Specifically, House Bill 2831 (signed by the Governor on April 7, 1998) contained no amendments to K.S.A. 44-503 (a) whereas House Bill 2591 (signed by the Governor April 20, 1998) contained an amendment to K.S.A. 44-503 (a) at the end of that section as follows: "For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor." Further, House Bill No. 2831 struck K.S.A. 44-503 (h) and inserted "New section 2"; whereas, House Bill 2591 put the old wording of K.S.A. 44-503 (h) back in but did not include the new Section 2 of House Bill 2831. It is recommended by the Director to place the aforementioned sentence in K.S.A. 44-503 and repeal 44-503b.

4. **Proposed amendment to K.S.A. 44-510** to harmonize with the regulations on peer and utilization review.

5. **Proposed amendment to K.S.A. 44-510c**. Modifications to temporary total disability are done at the preliminary hearing stage after the 1993 amendments. This proposed deletion of language referring to review and modification would keep it consistent. This is recommended by the Director, not yet voted on by the advisory council.

Senate Commerce Committee

Date: 2-10-99

Attachment # 1-1 thru 1-3

6. **Proposed amendment K.S.A. 44-519** to allow that, except in the matters of preliminary hearings (under K.S.A. 44-534a), no report of a health care provider shall be otherwise admitted into evidence without foundation testimony. This has long been the practice in preliminary hearings by virtue of K.A.R. 51-3-5a, which has allowed medical reports without foundation testimony. A concern was raised as to whether the regulation conflicted with the statute; in order to alleviate that concern, there would be an exception made within the statute.

7. **Proposed amendment to K.S.A. 44-527** to conform to actual practice by requiring certified mail rather than registered mail if the Director disapproves an agreement.

8. **Proposed amendment to K.S.A. 44-557.** The Workers Compensation Act contains two (2) conditions precedent for an employee to meet prior to the ability to litigate a claim. The first one is a notice of the accident to the employer within ten (10) days (may be extended to 75 days for just cause); the second is an employee must make a written claim upon the employer for benefits within 200 days. Prior to 1993, the statute allowed an extension of the 200-day rule of up to one (1) year if the employer had failed to file an accident report. A revision in 1993 clouded that one-year extension language by stating that if an accident report was not filed by the employer (within 28 days), then a proceeding for compensation must be commenced by filing an **application** with the Director within one (1) year. An **application** has been considered to be the filing of a Form E-1 (application for regular hearing). The statute would seemingly say that instead of having the written claim requirement extended to one (1) year, a claimant must now file a Form E-1 within one (1) year. That would put the statute in direct conflict with K.S.A. 44-534 (the general workers compensation statute of limitations) which says one must file an **application** with the Director within two (2) years of the last payment of compensation or three (3) years from the date of accident. Under a literal reading, if an employer does not do what is required by statute (timely file an accident report), the claimant is penalized by having to file the Form E-1 within one (1) year. The Workers Compensation Board has issued at least two (2) opinions in this area noting the mistake and indicating that surely this is not what the Legislature intended to do, and so held. The proposed amendment would insert the language back to its pre-1993 meaning and extend the 200-day rule to one year in the case of a failure by the employer to file an accident report.

   There is a proposal to amend subsection (d) to prosecute the repeated failure of any employer to file an accident report (present language is the "knowing failure."). Further, the penalty against a workers compensation insurance carrier was stricken since the duty to file an accident report under subsection (a) is solely upon the employer.

   Also, subsection (e) is proposed to be amended so that the proceeding to recover the $250 penalty is pursuant to the Kansas Administrative Procedures Act (KAPA) and not in the district court of Shawnee County.

9. **Proposed amendment to K.S.A. 44-557a**. This proposed amendment would allow the Division of Workers Compensation to collect not only the medical information it now collects, but also hospital charges and related diagnostic procedure codes. As an aside, the Division will be amending its maximum medical fee schedule this year (1999) and a new prospective payment system for hospitals, for the purposes of cost containment, will be proposed. A task force of various business interests and hospital interests have met over the prior year to examine a prospective payment system for hospitals under the diagnosis related group method (DRG's). In so doing, it was discovered that the Division really had no data, nor any way to collect data, concerning hospital charges; this proposed amendment would do so.

10. **Proposed amendment to K.S.A. 44-5,120**. There is a proposed amendment made to K.S.A. 44-5,120 (d)(20), the fraud and abuse administrative statute which section deals with the failure to file required documents and reports, to make an exception for failure to file accident reports, which will be prosecuted pursuant to the K.S.A. 44-557 proceeding.

11. **Repeal of K.S.A. 44-501a**. The Kansas Supreme Court declared the statute unconstitutional in the *Osborne* case. The statute was an attempt to apply K.S.A. 44-501 retroactively, which attempt failed.

Cas. v. Americas Truckway Systems, Inc., 23 K.A.2d 315, 317, 929 P.2d 803 (1997).

554. Rights under subsection (c) cannot be destroyed by retroactive legislation imposing liability not previously existing. Osborn v. Electric Corp. of Kansas City, 23 K.A.2d 868, 936 P.2d 297 (1997).

555. Undisputed testimony that primary injury worsened by aging and time sufficient to award benefits for increased injury under 44-528. Nance v. Harvey County, 23 K.A.2d 899, 902, 931 P.2d 1245 (1997).

556. Workers compensation board's offset of claimant's retirement insurance paid by employer from workers compensation benefits upheld. Bohanan v. U.S.D. No. 260, 24 K.A.2d 362, 372, 947 P.2d 440 (1997).

557. Exclusive remedy provision of worker's compensation act barred injured employee's negligence claim. Kiser v. Building Erection Services, Inc., 973 F.Supp. 1269, 1273 (1997).

558. Fact issue concerning type of work done by plaintiff awarded workers compensation precluded negligence summary judgment. Ascanio v. Allied Signal, Inc., 992 F.Supp. 1280, 1282 (1998).

44-501a. Application of 44-501. The provisions of K.S.A. 44-501, as amended by section 1 of this act, shall apply to any claim brought under the Kansas workers compensation act for an injury which occurred prior to the effective date of this act, unless the claim has been fully adjudicated.

History: L. 1996, ch. 79, § 2; Apr. 4.

CASE ANNOTATIONS

1. Rights under 44-501(c) cannot be destroyed by retroactive legislation imposing liability not previously existing. Osborn v. Electric Corp. of Kansas City, 23 K.A.2d 868, 936 P.2d 297 (1997).

44-503. Subcontracting. [See Revisor's Note] (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed.

(b) Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

(c) Nothing in this section shall be construed as preventing a worker from recovering compensation under the workers compensation act from the contractor instead of the principal.

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

(e) A principal contractor, when sued by a worker of a subcontractor, shall have the right to implead the subcontractor.

(f) The principal contractor who pays compensation to a worker of a subcontractor shall have the right to recover over against the subcontractor in the action under the workers compensation act if the subcontractor has been impleaded.

(g) Notwithstanding any other provision of this section, in any case where the contractor (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the director to accept the provisions of the workers compensation act pursuant to subsection (b) of K.S.A. 44-505, and amendments thereto, to the extent of such election, and (2) has secured the payment of compensation as required by K.S.A. 44-532, and amendments thereto, for all persons for whom the contractor is required to or elects to secure such compensation, as evidenced by a current certificate of workers compensation insurance, by a certification from the director that the contractor is currently qualified as a self-insurer under that statute, or by a certification from the commissioner of insurance that the contractor is maintaining a membership in a qualified group-funded workers compensation pool, then, the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall

Senate Commerce Committee

Date 2-10-99

Attachment # 2-1 thru 2-4

have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act. In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation. No insurance company shall charge a principal a premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation.

History: L. 1927, ch. 232, § 3; L. 1974, ch. 203, §2; L. 1993, ch. 286, § 25; L. 1994, ch. 288, § 1; L. 1996, ch. 1, § 1; L. 1998, ch. 75, § 1; Apr. 16.

Revisor's Note:

Section was amended twice in 1998 session, see also 44-503b.

Law Review and Bar Journal References:

"Workers Compensation Review," J.K.T.L.A. Vol. XXI, No. 3, Review Section, 25 (1998).

CASE ANNOTATIONS

107. Personal injury negligence claim in workers compensation setting, effect of remand and settlement agreements examined. Bright v. LSI Corp., 254 K. 853, 854, 858, 869 P.2d 686 (1994).

108. Issue of manufacturer's involvement in furnace rebuilding precluded summary judgment on statutory employer exclusivity grounds. Dixon v. Certainteed Corp., 903 F.Supp. 1434, 1435 (1995).

109. Enforcement of indemnity contract not barred by exclusive remedy provision of workers compensation act (44-501 et seq.). Estate of Bryant v. All Temperature Insulation, Inc., 22 K.A.2d 387, 394, 916 P.2d 1294 (1996).

110. Employee working for principal employer may not include wages paid by employer's contractors in determination of act's application under 44-505 (a)(2). Myers v. Indian Creek Woods Townhomes Ass'n, 22 K.A. 2d 627, 920 P.2d 472 (1996).

111. SRS assistance recipient participating in work program's wrongful death action dismissed where administrative remedies not exhausted. Gamblian v. City of Parsons, 261 K. 541, 545, 931 P.2d 1238 (1997).

112. Self-employed person is not covered by workers compensation act unless valid election is in effect. Aetna Life and Cas. v. Americas Truckway Systems, Inc., 23 K.A.2d 315, 320, 323, 929 P.2d 803 (1997).

113. Exclusive remedy provision of workers compensation act barred injured employee's negligence claim. Kiser v. Building Erection Services, Inc., 973 F.Supp. 1269, 1272 (1997).

44-503b. Subcontracting. [See Revisor's Note] (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

(b) Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

(c) Nothing in this section shall be construed as preventing a worker from recovering compensation under the workers compensation act from the contractor instead of the principal.

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

(e) A principal contractor, when sued by a worker of a subcontractor, shall have the right to implead the subcontractor.

(f) The principal contractor who pays compensation to a worker of a subcontractor shall have the right to recover over against the subcontractor in the action under the workers compensation act if the subcontractor has been impleaded.

(g) Notwithstanding any other provision of this section, in any case where the contractor (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the director to accept the provisions of the workers compensation act pursuant to subsection (b) of

2-2

K.S.A. 44-505, and amendments thereto, to the extent of such election, and (2) has secured the payment of compensation as required by K.S.A. 44-532, and amendments thereto, for all persons for whom the contractor is required to or elects to secure such compensation, as evidenced by a current certificate of workers compensation insurance, by a certification from the director that the contractor is currently qualified as a self-insurer under that statute, or by a certification from the commissioner of insurance that the contractor is maintaining a membership in a qualified group-funded workers compensation pool, then, the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act. In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation. No insurance company shall charge a principal a premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation.

(h) (1) For purposes of this section, any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor within the meaning of this section or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of this section or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. §3101 et seq., the federal social security act, 42 U.S.C. §301 et seq., the federal unemployment tax act, 26 U.S.C. §3301 et seq., and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. §3401 et seq.

(2) As used in this subsection:

(A) "Motor vehicle" means any automobile, truck trailer, semitrailer, tractor, motor bus or any other self-propelled or motor-driven vehicle used upon any of the public highways of Kansas for the purpose of transporting persons or property;

(B) "licensed motor carrier" means any person, firm, corporation or other business entity that holds a certificate of convenience and necessity, a contract carrier permit, or an interstate license as a common, contract or exempt carrier from the state corporation commission or is required to register motor carrier equipment pursuant to 49 U.S.C. §11506; and

(C) "owner-operator" means an individual who is the owner of a single motor vehicle that is driven exclusively by the owner under a lease agreement or contract with a licensed motor carrier.

History: L. 1927, ch. 232, § 3; L. 1974, ch. 203, §2; L. 1993, ch. 286, § 25; L. 1994, ch. 288, § 1; L. 1996, ch. 1, § 1; L. 1998, ch. 120, § 1; Apr. 30.

Revisor's Note:

Section was amended twice in 1998 session, see also 44-503.

44-503c. Employment status of an owner-operator of a motor vehicle; definitions. (a) (1) Any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor or an employee of the licensed motor carrier within the meaning of K.S.A. 44-503, and amendments thereto, or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of K.S.A. 44-503, and amendments thereto, or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 *et seq.*, the federal social security act, 42 U.S.C. § 301 *et seq.*, the federal unemployment tax act, 26 U.S.C. § 3301 *et seq.*, and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 *et seq.*

(2) As used in this subsection:

(A) "Motor vehicle" means any automobile, truck-trailer, semitrailer, tractor, motor bus or any other self-propelled or motor-driven vehicle used upon any of the public highways of Kansas for the purpose of transporting persons or property;

(B) "licensed motor carrier" means any person, firm, corporation or other business entity that holds a certificate of convenience and necessity, a certificate of public service, a contract carrier permit, or an interstate license as a common, contract or exempt carrier from the state corporation commission or is required to register motor carrier equipment pursuant to 49 U.S.C. § 11506; and

(C) "owner-operator" means an individual who is the owner of a single motor vehicle that is driven exclusively by the owner under a lease agreement or contract with a licensed motor carrier.

(b) Notwithstanding any other provision of this act, a licensed motor carrier may by lease agreement or contract secure workers compensation insurance for an owner-operator, otherwise subject to the act by statute or election, and may charge-back to the owner-operator the premium for such workers compensation insurance, and by doing so does not create an employer-employee relationship between the licensed motor carrier and the owner-operator, or subject the licensed motor carrier to liability under subsection (d)(1) of K.S.A. 44-5,120 and amendments thereto.

(c) For purposes of subsection (b) of this section only, "owner-operator" means a person, firm, corporation or other business entity that is the owner of one or more motor vehicles that are driven exclusively by the owner or the owner's employees or agents under a lease agreement or contract with a licensed motor carrier; provided that neither the owner-operator nor the owner's employees are treated under the term of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 *et seq.*, the federal social security act, 42 U.S.C. § 301 *et seq.*, the federal unemployment tax act, 26 U.S.C. § 3301 *et seq.*, and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 *et seq.*

History: L. 1998, ch. 75, § 2; Apr. 16.

44-504.

Law Review and Bar Journal References:

"Uninsured/Underinsured Motorist Insurance: A Sleeping Giant," Gerald W. Scott, 63 J.K.B.A. No. 4, 28, 39 (1994).

"Practitioner's Guide To Subrogation Liens And Reimbursement Rights," Gary D. White, Jr., J.K.T.L.A. Vol. XVIII, No. 4, 5, 7 (1995).

"Workers Compensation Review," J.K.T.L.A. Vol. XXI, No. 3, Review Section, 22 (1998).

"Workers Compensation Review," J.K.T.L.A. Vol. XXI, No. 4, Review Section, 27, 28 (1998).

CASE ANNOTATIONS

123. Limitation on remedies examined when employee has no spouse, children or dependents. Karhoff v. National Mills, Inc., 18 K.A.2d 302, 306, 851 P.2d 1021 (1993).

124. Whether vocational rehabilitation vendor costs are compensation and recoverable by claimant in employer subrogation cases examined. Varner v. Gulf Ins. Co., 18 K.A.2d 801, 802, 803, 804, 859 P.2d 414 (1993).

125. Whether mutual mistake issue regarding agreement to release all unknown claims precluded summary judgment examined. Ferguson v. Schneider Nat. Carriers, Inc., 826 F.Supp. 398, 399 (1993).

126. Whether inherently dangerous exception to nonliability of landowner applies to independent contractor's employees covered by workers compensation examined. Dillard v. Strecker, 255 K. 704, 709, 877 P.2d 371 (1994).

127. Whether workers compensation insurer should be dismissed from action because not real party in interest examined. Sherlock v. BPS Guard Services, Inc., 849 F.Supp. 37, 38 (1994).

128. Assignment of employee's third-party action did not violate Missouri public policy; section applied in Missouri. Langston v. Hayden, 886 S.W.2d 82 (Mo.App.W.D.1994).

129. Issue concerning whether contractor's employee had implied contract with subcontractor precluded summary judgment on employee's negligence claim. Sac and Fox Nation of Missouri v. LaFever, 905 F.Supp. 904, 929 (1995).

130. Nonparticipant third-party tortfeasor in settlement agreement may have subrogation lien by percentage of fault attributed by trial court. Maas v. Huxtable and Assocs., Inc., 23 K.A.2d 236, 237, 244, 929 P.2d 780 (1996).

131. Damages for consortium or loss of services are not compensable or subject to subrogation under workers compensation statutes. Fisher v. State Farm Mut. Auto. Ins. Co., 264 K. 111, 117, 955 P.2d 622 (1998).

44-505. Application of act. (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 em-

LEGISLATIVE TESTIMONY

835 SW Topeka Blvd. • Topeka, KS 66612-1671 • 785-357-6321 • Fax: 785-357-4732 • E-mail: kcci@kansaschamber.org • www.kansaschamber.org

SB 219

February 9, 1999

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Commerce

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Madam Chairperson and members of the Committee:

I am Terry Leatherman. I am Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. I am also a member of the Kansas Workers Compensation Advisory Council. Thank you for the opportunity to present KCCI's support for SB 219, the work product of the Workers Compensation Advisory Council for 1999. Joining me today to respond to any Committee questions on the details of the legislation is Mr. Kip Kubin, a Kansas City attorney who specializes in workers compensation law and an employer representative on the Advisory Council.

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 47% 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.

Senate Commerce Committee

Date: 2-10-99

Attachment # 3-1 thru 3-2

The principal reason for the Kansas Chamber's support of SB 219 is its change to the ent drug testing provision in the law, found on page 3 of the bill. One of the important changes in the Legislature's 1993 reform of the Act was the declaration that a workers compensation injury would not be compensated, if the employee contributed to the injury by using alcohol or drugs. Since the reform became law, cases alleging alcohol use have been sustainable, principally because the reform included a declaration that a .04 alcohol concentration creates an impairment presumption. SB 219 would include a Department of Transportation concentration index to establish impairment, due to drug use, for the first time in the law.

Another important change is found on page 1 of the bill. This section creates an avenue for an injured worker to pursue further medical treatment for their injury. The right given in this "post award medical application" is not a new right. It is instead an attempt to allow an existing right to be exercised in a more straightforward manner.

Other changes proposed in SB 219 are largely clarifying in nature. I would like to point out a change on page 5 of the bill, involving the very controversial issue of self employed subcontractors. This recommendation was presented to the Advisory Council as no more than language to reconcile two bills approved in this area in 1998. This Council recommendation does not propose changes to the current subcontractor statute.

On behalf of the employer representatives on the Advisory Council, please permit me a moment to publicly thank the employee representatives on the Council for their willingness to work with us to reach the agreements in SB 219 and to work together to address other concerns involving workers compensation. Finally, thank you for this opportunity to present the reasons why KCCI supports passage of SB 219.

Mr. Kubin and I would be happy to answer any questions.

LEGISLATIVE TESTIMONY:

Testimony Before the
Senate Committee on Commerce
By

Christine E. Davis, PHR
Worker's Compensation Advisory Council Member
V.P., Human Resources, Sunflower Bank, N.A., Salina, Kansas

Madam Chairperson and members of the Committee:

INTRODUCTION:

Thank you for allowing me to testify before you in support of Senate Bill No. 219, specifically the reform of 44-501(d)(2). I think I speak for a number of Kansas employers when I say this subject is near and dear to our hearts, as well as our pocket books. Drug use in today's society, as well as in the workplace, is a problem no one can afford to ignore. All one has to do is open the daily newspaper, turn on the tube, or listen to the radio for discovery of a recent dramatic crime scene-drug related violence and death; record breaking murder rates; or striking examples of drug-related workplace disasters.

Business owners and legislators must face these facts:

- The United States consumes 60% of all the world's drugs on a daily basis.
- Six million people in the U.S. have a serious drug problem.
- There are 20 million regular marijuana users.
- The U.S. has 10 million cocaine addicts and 500,000 Americans who are hooked on heroin.
- Each day 5, 000 new Americans will try cocaine for the first time.
- The United States has fifteen million alcoholics.
- A recent study shows that 74% of all drug users are employed. (*Department of Health and Human Services)*
- 14 out of every 100 employees abuse drugs on the job.
- 60% of all users will sell drugs to other employees and 40% of them will steal from their company to support their habit.
- Drug abuse on the job takes many forms: illegal drugs, "designer drugs", legal prescription drugs and alcohol. All are subject to abuse by even the best of employees.
- Substance abusers are absent from work three weeks more per year than the average worker.

Senate Commerce Committee

Date: 2-10-99

Attachment # 4-1 thru 4-6

- Substance abusers use 2.5 times more medical benefits than nonabusing employees do.
- Substance abusers are four times more likely to be involved in on-the-job accidents.
- Substance abusers are six times more likely than non-abusers to file a workers' compensation claim. (*National Institute on Drug Abuse*)
- It costs over $7,000 to replace a salaried employee, over $10,000 to replace a mid-level employee, and $40,000 to replace a senior executive.
- An estimated $100 billion in profits and productivity will be lost this year due to substance abuse.

No industry is spared these mounting statistics. There are no social or economic boundaries. Real dollar costs are spent in absenteeism, sick leave, overtime pay, workplace theft and crime, insurance claims and premium hikes, tardiness, lost productivity, and of course, worker's compensation liability. Hidden costs include diverted supervisory and managerial time, friction among workers, damage to equipment, poor judgment, and decision-making, damage to the company's public image, turnover and lowered morale of employees (U. S. Government, 1990). That is why I believe the compensation of benefits to substance-abusing employees involved in work-related injuries through the State of Kansas Worker's Compensation Law is a sociological and economic tragedy.

STATEMENT AND SETTING OF THE PROBLEM:

In the State of Kansas, some drug offenders who attend work under the influence of drugs, cause or contribute to a work-related accident, and then fail a federally approved drug testing procedure, can and do in fact receive workers' compensation benefits for the relief of their injuries. And not only do the individuals receive medical benefits, but time-loss and disability benefits as well, despite their subsequent conviction for drug offenses by state law enforcement agencies. As ludicrous and unbelievable as it sounds, thus is the reality of the workers' compensation system currently in the State of Kansas.

Twice in a matter of years, I've personally had to stand by while employees who clearly

contributed to their work-related injuries and were subsequently convicted of drug trafficking and abuse by the criminal justice system, were issued workers' compensation benefits while in incarceration. I've visited their homes to drop off worker's compensation checks, only to witness the purchase of new furniture and décor, newly built decks and whirlpools, and brand name clothing while neither spouse worked. I have been privy to their bragging and "I showed them" mentality, directed, of course, at their ex-coworkers. And despite the fraud and deception enacted by both, and presumption of evidence presented to presiding judges, their entitlement under the workers' compensation system was not diminished in the least.

HISTORY:

The Workers' Compensation System in the State of Kansas was initially designed as an exclusive remedy for workers injured on the job. In order for it to operate effectively and efficiently to promote good will between an employer and injured worker, however, the trade-off between "no-fault" and "no liability" must be mutually beneficial. The system must not burden either party financially to an extreme nor allow fraudulent misrepresentations or actions by either party to alter the intentions of the system.

In the State of Kansas, extensive legislative reform was instituted in 1993 to combat the rising costs of workers' compensation insurance premiums. One reason given for escalating premiums was substance-abusing workers who negligently caused or were involved in work-related accidents. Under the old law, employers were forced to provide workers' compensation benefits to workers under the influence of drugs unless the employer could convincingly prove contribution to the accident.

Although current statutes allow substance abuse as a defense against a claim of workers' compensation benefits, employers are still asked to hurdle evidence barriers too tall for the leaping.

Current law allows substance abuse as a defense against workers' compensation benefits if the employer meets certain conditions, including a proclivity of contribution. In order for employers to submit chemical tests as admissible evidence to prove impairment, however, employers must prove "there was probable cause to believe the employee used, had possession of, or was impaired by the drug or alcohol while working." This alternative is not in the least satisfactory, since most employers, even if trained, are not medical personnel and unable to diagnose if an employee is impaired by mere observance. Therefore, showing probable cause is not always easily managed. The impaired individual is subsequently able to receive workers' compensation benefits despite his impairment and probable fault, thereby increasing costs to the workers' compensation system and ultimately employer premiums. The status quo is therefore an inadequate problem resolution.

SCOPE OF THE PROBLEM:

Although the 1993 reform is considered a step in the right direction, the issue is not resolved. Urine drug testing programs are currently used to demonstrate the presence of certain drugs or drug metabolites in urine. Although results do not necessarily determine dosage, the time of drug ingestion, or the extent of any drug effects in the individual, they certainly can indicate drug use and presumptive evidence that certain behavioral changes in performance observed may be associated with the use of drugs. When a Gas Chromatography-Mass Spectrometry, or confirmation urine screen, is performed on an initially positive sample, a confirmation of that positive is only prescribed if the level of concentration exceeds a cutoff or abusive level. Legislative reform to allow current forms of technically advanced substance abuse testing as a clear and substantial defense for denial of workers' compensation benefits for those employees who chose to imbibe, would be a definite improvement over current law and become a cost-reducing factor in the

calculation of workers' compensation premiums on a state-wide basis. In the present Kansas workers' compensation system, alcohol testing at a level of .04 is presumed to be abusive, and therefore is a clear defense against any claim of workers' compensation benefits. Subsequently, abusive levels of drug intoxication, the proof of which is the laboratory-certified confirmation drug screen, should be considered a presumed impairment in and of itself without further convincing evidence of contribution. Senate Bill 219 addresses the impairment issue by including confirmation positive drug testing cut-off levels as conclusive presumption of impairment for illegal or illicit drugs.

IMPORTANCE OF THE PROPOSED CHANGE:

"Zero tolerance" in the workplace may be what Kansas employers want to proclaim, but current legislative constraints inhibit effective enforcement. What kind of message is given to substance abusers if they know they can knowingly and willingly violate the law, knowingly and willingly place themselves and others in harm's way, knowingly and willfully solicit financial rewards for their illicit behavior without punitive or deterring consequences? Proactive employers may provide comprehensive substance abuse, education, medical, and employee assistance programs, but without the law as a backup, the ultimate results are minimized. Drug abusing employees who recognize Kansas employers as committed to drug-free environments, reinforced with "no benefits for perpetrators" laws will be less likely to look for employment where they may not only get caught, but face extreme medical as well as financial reprisal. For the State of Kansas to remain competitive in attracting business, industry, and a qualified and productive workforce, they must recognize and encourage a cost-enhancing business environment. If potential businesses view Kansas's workers' compensation laws as archaic and cost prohibitive, they will look elsewhere to "set up shop." Reducing the recovery of benefits for ineligible workers will not only improve business and employee morale, but enhance the economic climate of the state.

In order to eradicate drug and substance abuse from the workplace, government and businesses must band together to reinforce the consistent message that on-the-job drug and alcohol use presents a substantial risk to the safety and financial security of employees and employers and will not be tolerated. Legislature must allow employers to enforce their drug testing programs with qualified, qualitative drug testing procedures without proof of impairment. Substance abusers must know they have the right to choose, but if they chose to imbibe, the consequences of their choice will be no jobs, no unemployment benefits, and no workers' compensation benefits.

Thank you for allowing me to address and support the passage of Senate Bill 219!

STATEMENT

BY KANSAS MOTOR CARRIERS ASSOCIATION
P.O. Box 1673 ▪ Topeka, Kansas 66601
Telephone: 785-267-1641 ▪ FAX: 785-266-6551 ▪ www.kmca.org

Supporting Senate Bill No. 219

Appearing before the Senate Commerce Committee
Senator Alicia Salisbury, Chairman
Tuesday, February 9, 1999
State Capitol, Topeka, Kansas

MADAM CHAIRMAN AND MEMBERS
OF THE SENATE COMMERCE COMMITTEE:

My name is Tom Whitaker, director of governmental relations and membership services for the Kansas Motor Carriers Association. I appear here this morning representing our 1,400 member firms and the highway transportation industry.

We are here today in support of Senate Bill No. 219. In particular, the addition to K.S.A. 44-501of impairment levels for drugs. The concentration levels, which appear on page 3 of the bill, are the confirmatory test cutoff levels found in the United States Department of Transportation's (USDOT) rules and regulations.

Since December 21,1989, USDOT has required motor carriers to implement drug-testing programs for all drivers of commercial vehicles. Motor carriers must perform pre-employment, random and post-accident drug tests. In January of 1995, motor carriers were required to annually perform random drug tests on 50 percent of their drivers. The Kansas Motor Carriers Association supports this mandated testing in order to eliminate those drivers abusing drugs from operating commercial vehicles.

The inclusion of the confirmatory test cutoff levels in K.S.A. 44-501 was recently approved by the Workers Compensation Advisory Council. We support the Council's recommendation and ask for your favorable consideration of Senate Bill No. 219.

We thank you for the opportunity to appear before you today. I would be pleased to respond to any questions you may have.

Senate Commerce Committee
Date: 2-10-99
Attachment # 5

Senate Commerce Committee

Wednesday, February 10, 1999

Testimony of Jolene M. Grabill
Kansas Trial Lawyers Association
Senate Bill 219

Thank you for this opportunity to testify before you this morning in support of Senate Bill 219. My name is Jolene Grabill. I am appearing before you today on behalf of the Kansas Trial Lawyers Association, which is a statewide, nonprofit organization of attorneys who advocate for the safety of Kansas families. Many KTLA members practice exclusively in the area of workers compensation law and see daily how injured workers and their families are affected by dependence on the workers compensation laws of our state.

The Workers Compensation System is designed to balance the interests of employers and workers. As long as these competing interests remain balanced, the system is workable.

Senate Bill 219 contains a package of proposals which, with one exception, have been thoroughly reviewed and massaged for over a year by these competing interests. The suggested change regarding the definition of subcontractor which can be found on lines 11 and 12 at the top of page 5 is that one exception. With that exception, Senate Bill 219 is a balanced work product from the Advisory Council which KTLA is pleased to support. KTLA takes no official position on the change in the subcontractor definition.

KTLA wants to express our appreciation to the Workers Compensation Advisory Council, and to thank both the management and labor representatives for their work. We appreciate their contributions of time and talent to receive input on the problems that arise from time to time in the system and to fine tune the Workers Compensation Act in a balanced fashion. In so-doing, their efforts protect the integrity of the system. The council's endorsement shows this bill has been considered from all sides and the product of that consideration is fairness.

Again, thank you for this opportunity to appear before you. I would be happy to answer any questions you might have.

Senate Commerce Committee

Date: 2-10-99

Attachment # 6

44-557a. Compilation and publication of statistics; database of information; submission of data; contracts for actuarial or statistical services. (a) The director shall: (1) Compile and publish statistics to determine the causation of compensable disabilities in the state of Kansas and (2) compile and maintain a database of information on claim characteristics and costs related to open and closed claims, in order to determine the effectiveness of the workers compensation act to provide adequate indemnity, medical and vocational rehabilitation compensation to injured workers and to return injured workers to remunerative employment. The commissioner of insurance shall cooperate with the director and shall make available any information which will assist the director in compiling such information and statistics and may contract with the director and the secretary of the department of health and environment to collect such information as the director deems necessary.

(b) Each self-insured employer, group-funded workers compensation pool, insurance carrier and vocational rehabilitation provider shall submit to the director the disposition of a statistically significant sample of open and closed claims under the act and, in connection with the closing of each claim in which payments were made, the following: (1) The dates, time intervals, amounts and types of weekly disability payments made, (2) the dates and gross amounts of payments made to each type of medical compensation provider, (3) the dates and type of service for which payment was made and the gross amounts paid to each vocational rehabilitation provider, and (4) the dates and types of fees paid as claim costs. Each self-insured employer, group-funded workers compensation pool, insurance carrier, vocational rehabilitation provider, health care provider, or health care facility shall submit medical information, by procedure, charge and zip code of the provider in order to set the maximum medical fee schedule. The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of this section.

(c) The director may contract for professional actuarial or statistical services to provide assistance in determining the types of information and the methods of selecting and analyzing information as may be necessary for the director to conduct studies of open and closed claims under the workers compensation act and to enable the director to make valid statistical conclusions as to the distribution of costs of workers compensation benefits.

(d) The director shall obtain such office and computer equipment and employ such additional clerical help as the director deems necessary to gather such information and prepare such statistics.

(e) If an insurance carrier or a group-funded workers compensation pool fails to supply the information required by this section, the director of workers compensation shall notify the commissioner of insurance. Upon receiving such notification, the commissioner of insurance shall presume the insurance company or group-funded self-insurance plan knew or reasonably should have known of the violation and shall assess the penalty prescribed therefore pursuant to K.S.A. 40-2,125 and amendments thereto.

(f) If a self-insured employer or a vocational rehabilitation provider fails to supply the information required by this section, the assistant attorney general upon information received from the director shall issue and serve upon such person a summary order or statement of the charges with respect thereto and a hearing shall be conducted thereon in accordance with the provisions of the Kansas administrative procedure act. An administrative penalty up to a maximum of $5,000 for each violation but not to exceed $25,000 for the same violation occurring within any six consecutive months may be imposed.

Senate Commerce Committee

Date: 2-10-99

Attachment # 7