

Approved: February 24, 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 22, 1999 in Room 123-S of the Capitol.

All members were present except:

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

Conferees appearing before the committee:

Janet Stubbs, Executive Director, Kansas Building Industry  
Terry Leatherman, Executive Director, Kansas Chamber of Commerce and Industry  
John Ostrowski, AFL-CIO  
Thomas V. Murry, Kansas Association of Insurance Agents

Others attending: See attached list

**SB 270 - Unemployment compensation eligibility for benefits and determination of contribution rates**

Senator Donovan, Subcommittee Chairman, made the subcommittee report on **SB 270**, stating the subcommittee recommends that the bill be amended to exclude the provisions dealing with "Seasonal employer", "Seasonal determination", "Seasonal employment", and "Seasonal worker"; the provision dealing with drug testing. Senator Donovan stated that due to the volume of changes recommended, a **Substitute for 270** has been prepared. Substitute for SB 270 makes two amendments to employment security laws. 1) there shall be a showing of misconduct if the employer gave or sent written notice to the individual, at the individual's last known address, that future absence "may or" will result in discharge; and if an employee disputes being absent without good cause, the employee shall present evidence that a majority of the employee's absences were for good cause. 2) Raises the surcharge from 1% to 2% for those employers who have a negative reserve ratio.

The Chair informed the Committee action on the bill will be had when the Committee has an opportunity to review the Substitute bill.

**SB 269 Workers Compensation; self-employed subcontractors**

Janet Stubbs, Executive Director, Kansas Building Industry (KBIA), testified in support of **SB 269**, stating the proposed legislation is the result of conversations with at least 3 attorneys, representatives of the American General Contractors of Kansas, Inc., the Kansas Contractors Association, the National Federation of Independent Business, Kansas Chamber of Commerce and Industry, and the AFL-CIO. These persons, together with the Director of Workers Compensation, have reached a consensus on the intended result of the legislation. **SB 269** removes the mandate for the unincorporated owners of a business, acting in the capacity of a subcontractor and performing work for a general contractor, to purchase coverage for such owner or owners, by allowing them to file a form with the Division of Workers Compensation, similar to the one current law allows to be filed by the incorporated owner of 10% or more of the stock of that company if he chooses not to be covered under the Workers Compensation Act. **SB 269** puts everyone under the Act unless they file a form with the Division "opting out" from the Act. The intention is that a subcontracting firm owner, with no employees, would furnish the general contractor, with which he has an agreement to do a job, either a Certificate of Insurance showing that he has insurance coverage under the Act, or a copy of the form issued by the Division showing that he has "opted out" from coverage. This will leave a paper trail for a clean audit at the end of the year. (Attachment 1)

The General contractor currently is required to be responsible/liable over that for which the law

CONTINUATION SHEET

MINUTES OF THE SENATE COMMERCE COMMITTEE, Room 123-S of the Statehouse, at 8:00 a.m. on February 22, 1999.

allows him to have no control: 1) on the hours which the subcontractor works nor furnish the tools which the subcontractor uses on the job. 2) has no ability to require safe operating equipment; and yet is given all the liability.

The KBIA believes that if an injured employee is awarded benefits under the Act, it should be the responsibility of the company who hired him and is responsible for the other employee costs who bears the burden of responsibility for workers compensation.

Ms. Stubbs distributed to the Committee a letter from Representative Michael R. O'Neal, urging the Committee pass **SB 269**, (Attachment 2); and a letter from Frederick L. Haag, Foulston & Siefkin law firm, Wichita, favoring the passage of the bill. (Attachment 3)

Terry Leatherman, Executive Director, Kansas Chamber of Commerce and Industry (KCCI), testified in support of **SB 269**, stating current law treats self-employed subcontractors as employers, and does not compel them to purchase workers compensation insurance. The bill amends KSA 44-543 to permit the self-employed subcontractor to declare his desire to not be covered by workers compensation. **SB 269** permits a contractor a legal defense, in the case of an injured employer who works for a subcontractor who opt's out of workers compensation, then assumes the risk. This legislation forces subcontractors to take some action to remove themselves from workers compensation coverage, something they do not have to do today. The core reason KCCI supports **SB 269** is that it permits legal defenses not allowed in current law. (Attachment 4)

Tomas V. Murray, Kansas Association of Insurance Agents (KAIA), testified in opposition to **SB 269**, stating the legislation has not been considered thoroughly; insurance agents concerns have not weighed in; and there are still a number of questions and issues that have not been resolved. The 1997 legislation spawned unintended consequences, and insurance agents feel a portion of our discomfort with **SB 269** is the fact that many who will be impacted by this legislation are unknown. KAIA urges the Committee to take no action on this legislation this year. (Attachment 5)

John Ostrowski, AFL-CIO, testified in support of **SB 269**, stating the Workers Compensation Advisory Board unanimously supported the concept of bringing self-employed subcontractors under the provisions of the Workers Compensation Act. **SB 269** may bring more people under the Act, particularly in the construction industry; and the bill clarifies the workers compensation issue for general contractors, solves the disputed premium issue, and raises the consciousness of those in the system by requiring an affirmative act. (Attachment 6)

Committee members raised questions as to whether the law should be changed without hearing about specific problems experienced by the subcontractors or contractors in the field; whether the auditors were trained adequately as to the law; and whether the Division of Workers Compensation has a clear understanding of the law and who it affects and how it would affect them.

Philip S. Harness, Director, Division of Workers Compensation, responded, yes, he believes the definitions set forth in **SB 269** would alleviate past problems with subcontractors being included under the Workers Compensation Act.

The Chair stated she will have **SB 269** blessed, and appointed a subcommittee of Senators Ranson, Steffes and Feleciano, to make a recommendation to the full Committee.

**SB 270**      **Unemployment compensation eligibility for benefits and determination of contribution rates**

**Senator Donovan moved, seconded by Senator Steineger, that the Subcommittee Report on SB 270 be adopted. The voice vote was unanimous in favor of the motion.**

CONTINUATION SHEET

MINUTES OF THE SENATE COMMERCE COMMITTEE, Room 123-S of the Statehouse, at 8:00 a.m. on February 22, 1999.

**Senator Donovan moved, seconded by Senator Brownlee, that Substitute for SB 270 be recommended favorable for passage. The recorded vote was in favor of the motion.**

The Chair advised the Committee the Minutes for February 19, 1999, were transcribed verbatim and would be delivered to the offices of the Members.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for February 23, 1999.

# SENATE COMMERCE COMMITTEE GUEST LIST

DATE: February 22, 1999

NAME	REPRESENTING
John M Ostrrowsky	KS AFL-CIO
George Welch	Barbee + Assoc.
Andy Brown	mid. sm. bus. assoc.
Martha Jean Smith	KMHA
Terry Leatherman	KECT
John Scarples	Kan Build Inc KBIA
JANET STUBBS	KBIA
Wayne Mauck	KS AFL-CIO
Phil Harless	KDHR - Div. of Work. Emp.
David A. Shultz	" " " " "
Paul Bicknell	1 KANSAS DEPT HUMAN RESOURCES
Bill Layton	KS Dept Human Resources
Linda Tierce	" "
Russ Vawter	" "
1 Tomas V Murry	Insurance Center E. Colorado,
Pat Morris	KANA
Bill Wempe	KS Gas Dept
JERRY WITTMAN	TOPEKA HOME BUILDERS ASSN.
Stacey Soldan	Hein & Wein





# LEGISLATIVE



# TESTIMONY



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## SENATE COMMERCE COMMITTEE FEBRUARY 22, 1999 SB 269

MADAM CHAIR & MEMBERS OF THE COMMITTEE:

My name is Janet Stubbs, Executive Director of the Kansas Building Industry. KBIA is a Kansas trade association, affiliated with the National Association of Home Builders, and comprised of approximately 1400 general and subcontractor members across Kansas. We appear in support of SB 269 which this committee introduced at our request.

First, let me thank you, Senator Salisbury, for allowing us to speak to the Committee on this issue which has been the source of so much attention and controversy and upon which we have all spent so much time and energy. However, we are back before you in 1999 because the KBIA understood the leadership of the Special Committee on Economic Development last summer to say that if a solution could be reached within the industry on which there is agreement, the Legislature should attempt to resolve the problem.

SB 269 is the product of work and conversations with at least 3 attorneys. Letters and/or written testimony from them has been distributed to you. It has been discussed with authorized representatives of the AGC, KCA, NFIB, MCAK, AFL-CIO, and KCCI, who is present to speak today. To my knowledge, we have no objections from the construction industry to this solution. I have also spoken at length with the Division Director, as has our attorney, and I believe we have consensus on the intended result. There may be some needed language to achieve clarity. I have attempted to reach the Department of Insurance staff since learning of this hearing schedule. However, they have been out of the office and I have been unable to discuss it with the individuals responsible for oversight of this at the Department.

SB 269 attempts to correct what we heard opponents criticize about the 1997 law. It removes the mandate for the unincorporated owner of a business, acting in the capacity of a subcontractor and performing work for a general contractor, to purchase coverage for such owner or owners, by allowing them to file a form with the Division of Workers Compensation, similar to the one current law allows to be filed by the incorporated owner of 10% or more of the stock of that company, **IF** he chooses not to be covered under the Workers Compensation Act.

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Attachment # 1-1 thru 1-3

Opponents of the 1997 law sighted the cost of the coverage, due to the NCCI established level of minimum payroll on which premium would be based, as the major factor in their opposition. However, there were also statements that they should be allowed to make the decision as to whether or not they should be compensable under the Act. SB 269 would put everyone under the Act unless they file the form with the Division "opting out" from the Act. It is intended that a subcontracting firm owner, with no employees, would furnish the general contractor, with which he has an agreement to do a job, either a Certificate of Insurance showing that he has insurance coverage under the Act or a copy of the form issued by the Division showing that he has "opted out" from coverage. This will leave a paper trail for a clean audit at the end of the year.

If the subcontractor has employees, then the general should receive a copy of a Certificate of Insurance which would provide coverage for any employees and notice whether the owner has opted out or is also covered.

The KBIA believes that the role of the company on the jobsite, ie general contractor vs. subcontractor, should not be the determining factor for responsibility of the expenses associated with the cost of operation of the subcontracting companies. It is anticipated that the bid given by the Sub to do the job includes all costs of doing business for that job. Why would we expect the General to pay for one type insurance for the Sub and not another?

The major complaint of the General Contractor is that he is currently required to be responsible/liable over that for which law allows him to have no control.

- An "independent contractor" is required by federal tax laws to be "independent" and must meet specific criteria, one of which relates to the lack of control which the General may have over the Subcontractor to avoid tax liability. The General cannot control the hours which the Sub works and he cannot furnish the tools which the Sub uses on the job. (These are two of the criteria.)
- The current Kansas law then requires that although the General can have no control over the subcontracting firm which he contracts to do the specific work, except the satisfactory condition of the finished product, the General must be liable for any injury to the employees of the Sub, irrespective of their compensation, the condition of their tools & equipment used on the jobsite, their drug & alcohol usage experience factor, or their level of training for the job the owner of the subcontracting company owner has assigned them to do, **IF** the subcontracting firm does not carry coverage. The point is that the General is given all the liability, but no ability to require safe operating equipment, etc.
- Under current law, an employee of a Sub may not even incur a specific injury on the General's jobsite, but rather on the job on which he worked the previous day, yet he could file a claim against another general's workers compensation policy. What happens if the General doesn't have workers compensation because he doesn't have employees? Isn't incorporated?
- It appears that, with regard to the construction industry, the perception exists that because a business owner, who acts in the capacity of a "General Contractor" on the jobsite, is a large company with

matching payroll, deep pockets and is incorporated. In the residential construction industry, that is not always accurate. The climate, within this segment of the industry, finds too few workers available which makes it more beneficial for the "builder-developer general contractor" to hire specialized crews (independent companies) of framers, plumbers, electricians, concrete workers, finish carpenters, etc. This means they can be kept busy by working for numerous "builder-developer general contractors" because the small builder-developer could not keep the specialized workers busy as employees. This type "general contractor" will probably not have any employees, may or may not be incorporated and, because he does not do the actual hands on craft work, does not carry workers compensation on himself.

Senator Salisbury, in the magazine section of Sunday's paper, I read the article about Bill Murray, the actor/comedian, and the statement attributed to him in the first paragraph of that article states the philosophy and position of the Kansas Building Industry Association on this issue.

He was quoted as saying, ".....I can't blame anybody. You're completely responsible for what you do. And the struggle with that responsibility is the whole challenge in life."

The KBIA leadership feel strongly that each and every company should bear the responsibility of their own expenses of doing business rather than expecting someone else to pay for it. We believe that a company with one or more employees, or part time employee, which doesn't earn \$20,000 per year does not mean that worker is not entitled to, and would not receive compensation under the Act. He would if the Subcontractor/employer was working for a General Contractor because it would be the liability of the General. However, under current law, if he was employed by a company who is doing work for a homeowner, rather than another contractor acting as a General, his employer becomes the General. If the employer is insolvent and cannot pay the amount provided under the Act for the injury or death, who pays?

The KBIA believes that if an injured employee is awarded benefits under the Act, it should be the responsibility of the company who hired him and is responsible for the other employee costs who bears the burden of responsibility for workers compensation as well. We do not believe it should be charged to the group health insurance coverage of the spouse's employer. This costs another business for the work related injury of someone else's employee over which he had no control or received no profit from the work which was performed.

Madam Chair and members of the Committee, we ask your favorable recommendation for passage of SB 269 to the full Senate for their consideration. Thank you for your time and attention. I will attempt to answer questions.



STATE OF KANSAS  
HOUSE OF REPRESENTATIVES

**MICHAEL R. (MIKE) O'NEAL**

104TH DISTRICT  
HUTCHINSON/NORTHEAST RENO COUNTY

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**CHAIRMAN:**  
**JUDICIARY COMMITTEE**

**MEMBER:**  
FISCAL OVERSIGHT  
STATE GAMING COMPACTS  
UNIFORM LAW COMMISSION  
KANSAS SENTENCING COMMISSION  
KANSAS JUDICIAL COUNCIL

TESTIMONY ON S.B. 269  
SENATE COMMERCE COMMITTEE

February 22, 1999  
Rep. Michael R. O'Neal

Madame Chairman and members of the Committee. I guess it's *deja vu* all over again! Once again we're addressing the difficult issue of how to deal with sub-contractors under the Kansas Workers Compensation Act. You are well aware of the issue and the need for a solution. Last year's repeal of the 1997 amendments, everyone agrees, did not solve the problem but did attempt to address concerns over administration of the law as it relates to sub-contractors. We are, as a result of last year's repeal, back to "square one" on the issue. Additionally, there is a need to correct the problem created in the statute last year when different versions of the statute were passed and not reconciled.

S.B. 269 is an effort to reconcile the statute and at the same time address the sub-contractor issue in a way that is satisfactory to both contractors and sub-contractors. While the 1997 changes addressed the problems encountered by contractors and satisfied the public policy desire of having all employees protected by the Workers Compensation Act, objections were raised by subs who didn't want to pay to be covered and by insurance

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agents who apparently were confused by how the changes would be administered in the insurance marketplace.

The common theme during the sub-contractor debate, though, was that contractors deserved the protection and that sub-contractors should have a way of “electing out”. S.B. 269 comes as close as possible to accomplishing these goals. I say “as close as possible” because the amendments, in addressing the sub-contractors’ request for a procedure to “opt out”, leave the contractors with a limited amount of potential tort liability.

Specifically, S.B. 269 reinstates the amendments of 1997, i.e., the provision in K.S.A. 44-508 that removes the exemption under the act for self-employed sub-contractors performing work for a contractor. That amendment has the effect of bringing this class of worker under the act. (Section 2.) The bill also reinstates language in K.S.A. 44-505 to provide that an employee of a sub is covered under the act notwithstanding the payroll amount stated in the statute. (Section 1) This protects the employee of a small sub-contractor.

The major change from the 1997 legislation is the addition of a procedure under K.S.A. 44-543 to allow sub-contractors, now that they are covered by the act, to “opt out” in the same manner that we allow corporate employees owning 10% or more of the outstanding stock of the employer to opt out. (Section 4)

So what is accomplished when sub-contractors are brought under the Act and then allowed to opt out? By having them under the Act, like we do with the corporate employee stockholders, and allowing them to “opt out”, we provide the contractors with the statutory defenses available in current law pursuant to K.S.A. 44-545. (See attached) While a contractor would still be at some risk of exposure to suit by a sub who “opted out”, that exposure is

greatly reduced or limited by the statutory defenses provided in K.S.A. 44-545. This trade-off is acceptable to the contractors and successfully addresses the sub-contractors' call for a process whereby they can "opt out" of mandatory coverage. In addition, a satisfactory "paper trail" is created with the forms that will be used to evidence the "opt out" election. This will alert contractors to potential exposure *before* a loss, allowing them to make a decision regarding use of a sub, and will facilitate the premium audit process at year end. This will also benefit insurance agents, who will have a simple form from the Division to work with, virtually identical to one already in use.

**NOTE: K.S.A.1998 SUPP. 44-503b SHOULD BE REPEALED TO RECONCILE THE REVISORS' CONFLICT AND THE PROVISIONS OF K.S.A. 1998 SUPP. 44-503c SHOULD BE WORKED INTO 44-503 (Motor Carrier amendment).**

One suggestion I have heard about to address the problem of contractors being forced to pay for losses incurred by sub-contractors and their employees is a simple repeal of K.S.A. 44-503, the sub-contracting statute. The problem with such a proposal is that it would hurt employees of sub-contractors by depriving them of a potential source for payment of benefits. Where the sub-contractor is insolvent the employee would be forced to access the Fund under K.S.A. 44-532a and assessments to employers statewide would need to be increased. In other words, ALL employers, not just contractors, would end up paying more.

Thanks again for your consideration of this important issue.

**FOULSTON & SIEFKIN L.L.P.**

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February 19, 1999

The Honorable Alicia Salisbury, Chairperson  
 Senate Committee on Commerce  
 Statehouse, Room 120-S  
 Topeka, KS 66612

Re: SB269 by Senate Committee on Commerce

Dear Senator Salisbury:

In 1997 legislation was enacted that expanded workers compensation coverage to self-employed subcontractors performing work for a contractor. That legislation was subsequently repealed because of concerns that arose over cost and coverage issues.

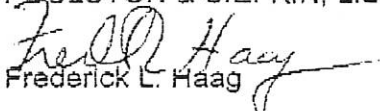
SB269 brings subcontractors performing work for a contractor within the coverage of the Workers Compensation Act. Thus, all of the benefits of the Workers Compensation Act are now extended to this class of worker. However, the current proposal also allows for the self-employed subcontractor/owner(s) who truly cannot afford workers compensation insurance coverage to elect out of coverage by the filing of an election with the Workers Compensation Director. Thus, this coverage is extended to those workers who would benefit from coming under the Act but is not mandatory to the entire class of workers. The proposal also allows the self-employed subcontractor to change his election to come under the Act at his discretion. Thus, as the worker's needs change, he can elect to come within or elect out of coverage by filing the appropriate election with the Director.

*Employees of self-employed subcontractors will be brought under the Act irrespective of their earnings. The cost of this coverage will be borne by the self-insured subcontractor.*

This legislation should meet the needs of all self-employed subcontractors working for a contractor. Such subcontractors will be brought within the beneficial coverage of the Workers Compensation Act but allow those who do not want this coverage to elect out.

Very truly yours,

FOULSTON & SIEFKIN, L.L.P.

  
 Frederick L. Haag

FLH:mkp

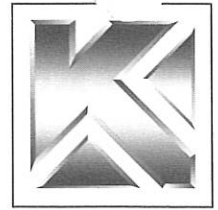
Senate Commerce Committee

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02/19/99 16:27

Attachment # 3

# LEGISLATIVE TESTIMONY



Kansas Chamber of Commerce and Industry

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SB 269

February 22, 1999

## KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the  
Senate Committee Commerce

by

Terry Leatherman  
Executive Director  
Kansas Industrial Council

Madam Chairperson and members of the Committee:

I am Terry Leatherman, with the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to explain why the Kansas Chamber supports SB 269.

Current Kansas law treats self-employed subcontractors as employers, and does not compel them to purchase workers compensation insurance. However, K.S.A. 44-542(a) permits a self-employed person, such as a subcontractor, the option of coming under the workers compensation umbrella and purchasing workers compensation insurance. In a phrase, current law is an "opt-in" approach.

SB 269 gets us to the same place, but takes a different path. This bill would define the self-employed subcontractor as an employee, compelling them to purchase workers compensation insurance on themselves and any individuals they employ. However, the bill amends K.S.A. 44-543 (on page 10 of the bill), to permit the self-employed subcontractor to declare their desire to not be covered by workers compensation. In a phrase, SB 269 proposes an "opt-out" approach.

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Attachment # 4-1 thru 4-2



Under current law and SB 269, the self-employed subcontractor arrives at the same place. They get to decide if they want into the act, or if they want out. Here's why KCCI recommends the SB 269 approach. If a subcontractor decides to be outside workers compensation, and they get hurt, their recourse against a general contractor will be a lawsuit, not workers compensation. If we arrive at the lawsuit after a subcontractor has chosen to "opt-out" of workers compensation, as proposed in SB 269, the contractor can defend themselves in the lawsuit by invoking K.S.A. 44-545. That statute permits the contractor defense that the subcontractor has assumed risk by opting out of workers compensation. This defense is not permitted if the subcontractor has chosen not to "opt-in," under current law.

This Committee certainly understands that there is nothing simple about the workers compensation subcontractors' issue. SB 269 will force subcontractors to take action to remove themselves from workers compensation coverage, something they do not have to do today. In addition, it appears the bill will require subcontractors to buy workers compensation insurance on all employees, regardless of their payroll size. On the other hand, this process might make coverage issues more clearly understood. However, the core reason that it permits legal defenses not allowed in current law prompts KCCI to support SB 269.

Thank you for this opportunity to comment on the legislation. I would be happy to answer any questions.



## Testimony on Senate Bill 269

Presented by Thomas V. Murry

Kansas Association of Insurance Agents

February 22, 1999 - Senate Commerce Committee

Thank you Madam Chair and members of the committee for the opportunity to appear at today's hearing on Senate Bill 269. 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 Emporia, Augusta, and Derby. We employ approximately twenty-five people and represent thousands of Kansas consumers.

You may recall that I was before this committee 11 months ago, when you were debating the passage of House Bill 2591. House Bill 2591 repealed the "self-employed subcontractor" language that had caused our industry and the Kansas Insurance Department and Workers Compensation Division so much anguish and so many phone calls from scores of confused insurance consumers since the passage of the language the year prior. We at KAIA applauded your action in repealing the "subcontractor" language, and I am here to report to you today that the phone calls and anguish have subsided, almost completely stopped, and life in our arena is relatively back to normal. We also recognized the need for a long-term solution last year, and have taken action to get all parties affected to the table to help develop a solution.

However, we are forced to testify in opposition to the measure proposed today in Senate Bill 269 because it is not fully developed, has not received the endorsement

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and; in our view, will cause some of the same problems that occurred two years ago that forced last year's repeal. I would like to recite some of our concerns for you to consider this morning.

First, the proposed language on page 1 and page 4 is remarkably similar to the language that you passed in House Bill 2011 in 1997 and repealed in House Bill 2591 last year. In fact, it is the same language with the exception of the word "as" in "as in a contractor" being substituted in the place of "for" from 1997's bill as in "for a contractor." We could not tell, in our review, if this was intentional or an oversight. The fact remains, that these two sentences caused a firestorm of controversy over the last two years, and we are very reluctant to endorse their being reinserted into the law. We remember the confusion that this language engendered, and would urge you to be cautious before "unrepealing" the repealed language. Also, the new processes proposed on page 10 will require a new written declaration to the Workers Compensation Division on "such form as may be required by regulation of the director." We have received no details of how this new form process would work, what the form would require, no indication if this will add an additional workload burden to the Director's office, nor any sense of where the liability will lie under this scenario if there is non-compliance. Finally, are we going to re-enter the definition debates that we were engaged in over the last two years: things such as "how is self-employed, or subcontractor working for a contractor, or prior to injury" going to be defined and to whom do they apply?

Our review of Senate Bill 269 has raised a number of questions that we believe need to be fully answered before you decide to proceed. For instance:

- As a result of the new elimination of the \$20,000 payroll threshold for self-employed subcontractors, we are assuming from our review that if the self-employed sub has employees, he is required to provide workers compensation coverage for those employees regardless of his payroll. There is then the assumption that the opt-out provisions would apply only to the self-employed subcontractor himself and not to his employees. As a result of this, a self-employed subcontractor with a payroll of less than \$20,000 would have to buy workers compensation whereas in the past they weren't required to do so. This, in our opinion, would create a situation that would be almost as bad as the situation that created such an uproar last year.
- We would also question whether the folks who chose to opt-out would still have tort liability. If an employer opted out of the statutory employer section of the act, would they have tort or statutory employer liability? We believe that this is still unclear.

Our second concern in the timing of this proposal and the time required for due diligence on a measure that could have a wide-ranging effect on insurance policyholders across the state. We sponsored a meeting at our office in early December to discuss this issue, as well as to search for a larger solution. The meeting involved not only today's conferees, but other interested groups such as workers compensation attorneys, the general contractors associations, insurance company representatives, as well as representatives from the Insurance Department and the Workers Compensation Division. While discussed in general, we did not see today's proposal until the concept was faxed in a letter to our office on January 29, and did not see the actual language until the bill was printed after its introduction on February 9. Madam chair, our association alone had two committees, two Board meetings, and hundreds of hours of

discussions and meeting with our membership over the past two years regarding the 1997 and 1998 proposals, and a two week window is not nearly long enough to elicit the broad base of support necessary for a long-term solution to work and be understood. And this same due diligence and support process should be going on in all of the other organizations that are affected by a proposal such as this, including all of our insurance companies that write workers compensation coverage. The solution proposed two years ago in House Bill 2011 had a huge impact on the workings of the insurance industry (and you may recall that there were a number of proposals that would have affected it further --- such as the amendments on the House floor regarding insurance company and agent liability for certificates of insurance); and it is our opinion that any solution needs to be researched, evaluated, and supported by the insurance industry that is forced to carry it out. That has not occurred with this proposal, and this is important enough that we cannot support a hasty proposal without a calm, deliberate, and thorough review of our legal counsel, Board of Directors, general membership, and insurance company partners.

Third, our reason for calling interested parties together in December was to explore comprehensive solutions beyond the specific proposal of the homebuilders related to self-employed subcontractors. We have discussed, and much is left to be discovered regarding the ideas of treating all business owners equally --- whether they be incorporated, sole proprietors, partners, and LLCs. We would like to see a more expansive use of any proposed opt-out for business owners of all structures, would like to clear up the lingering questions of whether businesses should be charged a premium for workers compensation claims for folks who would rather have tort liability than statutory employer liability, and would like to see some



clarity in the definitions of contractors, subcontractors, and self-employed. Most importantly, the discussion should be focused on a more comprehensive solutions such as whether and when self-employed subcontractors should be brought under the act, whether there should be a reduction or elimination in the minimum payroll and the potential coverage of all employees by the act, possible options for those self-employed to personally opt out, and options for contractors being able to opt out as statutory employers under KSA 44-503, thus individually choosing between the tort liability or work comp liability. These and other areas need to be further explored and a consensus built around a comprehensive solution, in our opinion, before the Kansas Legislature is asked to dive into these dangerous and uncertain waters.

We would like to see the process continued where all of the parties who may be affected by changes to this legislation attempt to work out a full solution prior to it being proposed to the legislature. Most importantly, any solution must involve the two regulators who are responsible for oversight in this area --- the Insurance Commissioner and the Director of the Division of Workers Compensation. Without their active involvement and support, the effects and implementation of any law passed will be unclear. The bill of 1997 spawned a new definition of "unintended consequences," and a good portion of our discomfort with this year's proposal is the fact that many of those who will be impacted, and especially the regulators, are on the sidelines watching. We would urge you to not pass anything in this area until all parties involved are comfortable and willing to come forth to state their involvement and support. For these reasons, we would respectfully ask that you not pass Senate Bill 269.

Thank you, and I would be happy to attempt to answer any questions that you may have.

**TESTIMONY OF KANSAS AFL-CIO**  
**SB 269**  
**JOHN M. OSTROWSKI**  
**February 22, 1999**

The Kansas AFL-CIO supports the provisions of SB 269.

As this Committee will recall, the Workers Compensation Advisory Board previously gave unanimous support to the concept of bringing self-employed subcontractors under the provisions of the Kansas Workers Compensation Act. This seemed to be the position of the Advisory Board for several reasons. Among other things, the legislation would promote:

- 1) Consistency of remedies for workers on a given job site;
- 2) Uniformity in premium coverage, avoiding the problems of "double coverage" or having covered employees for which no premium was being charged;
- 3) The concept of true "insurance" by spreading the risk of workplace accidents to more participants in the workplace (and preventing other social programs from having to pay for workplace accidents); and
- 4) The growth of more responsible and stable employe4s who are at a disadvantage in competing against those without insurance.

The legislation bringing self-employed subcontractors under the Workers Compensation Act was repealed last year. It was apparently the position of some that the legislation was too far reaching, and created confusion in the law. The Kansas AFL-CIO opposed the simple repeal of the previous legislation.

Senate Bill 269 would at least have the potential of partially accomplishing some of the goals set forth above. That is, it may bring more people under the Act, particularly in the construction industry, where most of the problems admittedly arise. Simultaneously, the bill will allow opting out, with no threshold for doing so. Even if all self-employed subcontractors opt out, the bill will still have the positive effects of a) clarifying the situation for the general contractors, b) solving the disputed premium issues, and c) raising the consciousness of those in the system by requiring an affirmative act.

For these reasons, the Kansas AFL-CIO supports SB 269.

Senate Commerce Committee

Date: 2-22-99

Attachment # 6