

MINUTES OF THE HOUSE COMMITTEE ON LABOR AND INDUSTRY.

The meeting was called to order by Chairman David Heinemann at 9:00 a.m. on March 15, 1994, in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Jim Wilson, Revisor of Statutes
Kay Scarlett, Committee Secretary

Conferees appearing before the committee:

Hoot Gibson, Builders' Association Self Insurers Fund of Kansas
Jack R. Selzer, Western Retail Implement & Hardware Association
Rich McKee, Kansas Livestock Association
Representative Robert Krehbiel
Mary E. Turkington, Kansas Motor Carriers Association
Jeffrey A. Chanay, Entz & Chanay

Others attending: See attached list

Hearing on SB 625 - Group-funded workers compensation pools, premium deposit and selection of trustees.

Chairman Heinemann opened the hearing on SB 625 by asking Jim Wilson, Revisor of Statutes, to brief the committee on the bill. He stated there were two amendments in the bill concerning group-funded workers compensation pools. The first would allow the Insurance Commissioner to approve payment of all or any portion of the excess insurance premium prior to distribution of the 70 percent to the Claims Fund Account and 30 percent to the Administrative Fund Account. The second would change the selection process for board of trustee members of the pools from election by the pool to selection according to the bylaws of the pool.

Hoot Gibson, Fund Manager for the Builders' Association Self Insurers Fund of Kansas, testified in support of SB 625. This legislation would allow pools, with regulatory approval, to pay for specific aggregate excess insurance costs before the premium is allocated into the administrative and claim accounts. The annual premium would be determined to be the net amount of premium after specific and aggregate excess insurance premium costs have been paid. SB 625 allows the Commissioner of Insurance to look at pools on a case by case basis to determine if they are in a position to pay for excess insurance net of annual premium. The Kansas Insurance Department has no opposition to this legislation. (Attachment 1)

Jack R. Selzer, attorney for the Western Retail Implement & Hardware Association, appeared in support of SB 625. This bill would give discretion to the Kansas Commissioner of Insurance to approve the expense of specific and aggregate excess insurance as a charge against the entire annual premium collected before the split into the two separate accounts. Specific and aggregate excess insurance backs up the self-insured fund guarding the fund against the one enormous claim or the one unusually bad claims year. The fund pays for this protection by purchasing from an insurance company excess insurance. This can vary from 6% to 15% of the entire premium and is dependent upon the anticipated claims experience of the fund based on its past history. Without this amendment, this excess insurance premium cost would all be allocated to the administration fund which by statute can only be 30% of premium collected. (Attachment 2)

Rich McKee, Kansas Livestock Association, testified in support of SB 625. Passage of SB 625 would allow them to spend more on loss control services. Many of the expenses paid from the administrative fund are required by statute, including excess insurance, various taxes and assessments, fidelity bond, etc. The cost of the excess insurance is by far the largest of these expenses. Loss control is one major budget item with some flexibility, if more money was available in the administrative fund, more money would likely be spent on loss

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON LABOR AND INDUSTRY, Room 526-S Statehouse, at 9:00 a.m. on March 15, 1994.

control efforts. The second amendment conforms to the statute governing the board selection of pools operated by municipalities, counties, and school districts. The amendment would allow pools some flexibility in the selection process of the board of trustees. (Attachment 3)

Representative Robert Krehbiel, co-sponsor of HB 2839 relating to the confidentiality of certain financial information in regard to group-funded workers compensation pools addressed the committee. He would like to amend the content of this bill into SB 625. All financial information submitted by an employer to qualify or maintain membership in a group-funded workers compensation pool shall be confidential and not open to the public.

Representative Krehbiel stated that he was asked by the Revisor's Office to include in Section 2 (a), Line 31, "employers' liability." which was omitted from workers compensation legislation passed last session. The same language is used in Lines 38 and 39 of Section 2 (b). This is a technical error that needs to be corrected. Therefore, he requested that the Committee amend HB 2839 into SB 625.

Chairman Heinemann closed the hearing on SB 625.

Hearing on SB 767 - Workers compensation, liability of principal for benefits of subcontractor's employees, exception for certain licensed motor carriers.

The Chairman then opened the hearing on SB 767 with the introduction of Mary Turkington, Executive Director of the Kansas Motor Carriers Association, who testified in support of the bill. The motor carriers requested SB 767 to clarify a workers compensation issue which has become increasingly difficult for their industry. The problem concerns independent owner-operators who are not employees, but are in the business of leasing truck equipment with a driver to a licensed motor carrier under a long-term contract. Currently the licensed motor carrier either asks for documentation that the owner-operator carries his own workers compensation insurance or must bring that owner-operator under the motor carrier's own coverage and charge the owner-operator the cost of such monthly premium.

In 1993 Missouri adopted legislation stating that such independent owner-operator is not an employee of the leasing motor carrier. The Missouri motor carrier, therefore, does not need to include the cost of workers compensation in the operating expenses to be charged to the owner-operator. This difference in Kansas and Missouri law has established a competitive advantage for Missouri motor carriers. Missouri allows owner-operators to purchase an Occupational Accident Policy in lieu of workers compensation coverage which is much less expensive.

Thirteen states have adopted statutes which address the issues that establishes the owner-operator as an independent contractor for workers compensation purposes and provides that the motor carrier with whom the owner-operator contracts need not provide the workers compensation coverage for such non-employee. She asked for passage of SB 767 to assist Kansas motor carriers to be able to lease quality owner-operators, remain competitive with other jurisdictions in terms of workers compensation insurance, and provide jobs and transportation services for Kansas. (Attachment 4)

Jeffrey A. Chanay, Entz & Chanay, attorney for the Kansas Motor Carriers appeared in support of SB 767. This legislation is designed to remove licensed motor carriers that utilize the services of owner-operators from the subcontracting provision of the workers compensation laws. Current law creates a system of double workers compensation coverage for employees of a contractor. An injured employee of a contractor has the choice of bringing a claim against either his direct employer (the contractor) or the licensed motor carrier. If the employee chooses to bring action against the motor carrier, the motor carrier will either be wholly responsible for the loss or may bring a subrogation action against the direct employer. There are two concerns with this. First, workers compensation coverage must be purchased by the motor carrier not only for its employees, but also for all employees of its subcontractors. Second, when a claim is brought against the motor carrier, the loss and all reserves remain on the books of the carrier even if 100% subrogation is a probability. If the subrogation is not settled within a certain period of time, the claim cost is figured into the experience rating for the motor carrier. This places the motor carrier at an unfair competitive disadvantage. Passage of SB 767 would allow Kansas Motor Carriers to compete more favorably with neighboring states, such as Missouri and Oklahoma. (Attachment 5)

The hearing on SB 767 will be continued in committee tomorrow.

The meeting adjourned at 10:00 a.m. The next meeting is scheduled for March 16, 1994.

GUEST LIST

COMMITTEE: HOUSE LABOR AND INDUSTRY

DATE: 3-15-94

[illegible]



Builders' Association Self-Insurers' Fund

3801 S.W. TRAFFICWAY • P.O. BOX 32246 • KANSAS CITY, MO 64111
PHONE 816/531-2642 • FAX 816/531-2335



TESTIMONY - KANSAS SENATE BILL #625 - MARCH 15, 1994

KANSAS HOUSE LABOR AND INDUSTRY COMMITTEE

TIME: 9:00 AM

PLACE: Capital Building
Topeka, Kansas

Ladies and gentlemen of the committee:

My name is Hoot Gibson. I am the Fund Manager for the Builders' Association Self Insurers Fund of Kansas, a group self funded workers' compensation pool operating with an approved certificate of authority.

I appear today on behalf of a number of the Kansas group self funded workers' compensation pools that contribute approximately \$40 million annually in workers' compensation premiums to the state of Kansas. Group funded workers' compensation pools have proven to be a sound alternative to the traditional workers' compensation marketplace and have helped employers control their workers' compensation premiums through effective loss prevention/loss control programs. Group self funded pools have also helped depopulate the state assigned risk plan.

Senate Bill 625 would help the pools operate more effectively. The Kansas workers' compensation pooling statutes require that a minimum of 70% of the collected workers' compensation premium be placed in a claims account and must be used exclusively for the payment of workers' compensation losses. The remaining 30% is designated for paying administrative expenses for the

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pools. I have enclosed with my testimony an exhibit that illustrates the typical Kansas group self funded workers' compensation pool budget. As you can see from this illustration, pools are struggling to pay their administrative expenses within the 30% statute mandated allocation. The increase in state assessments such as the Second Injury Fund and the rising cost of workers' compensation excess insurance have squeezed a number of the pools.

This proposed legislation would allow pools, with regulatory approval, to pay for specific aggregate excess insurance costs before the premium is allocated into the administrative and claim accounts. In other words, the annual premium would be determined to be the net amount of premium after specific and aggregate excess insurance premiums costs have been paid.

Senate Bill 625 allows for the Commissioner of Insurance to look at pools on a "case by case" basis to determine if the pool's loss history, types of risks participating, and financial position would lend to a position to allow the pool to pay for excess insurance net of annual premium. The pools have discussed this issue with the Kansas Insurance Department and they have no opposition to this legislation.

Despite sweeping workers' compensation reforms last year, the cost and availability of workers' compensation continues to be a problem in Kansas. Insurance carriers have been slow to reintroduce themselves to the market as they believe the problems with medical care and our country's aging work

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force will continue to make workers' compensation a difficult line of insurance to write profitably. Conversely, group self funded workers' compensation pools have continued to grow providing a service enhanced, cost savings product to Kansas employers.

We urge the committee to pass out Senate Bill 625.

TYPICAL KANSAS GROUP WORK COMP POOL BUDGET

CLAIMS FUND: 70%

ADMINISTRATION:

Claims Management/Loss Prevention 8%

Taxes and Assessments 7%

Excess Insurance 12%

Brokers Commissions 5%

Misc. (Directors & Officers Coverage,
Payroll Audits, etc.) 2%

TOTAL 34%

SHORTFALL: 4%

STATEMENT OF SUPPORT FOR SENATE BILL NO. 625
BY WESTERN ASSOCIATION
(Prepared by Jack R. Selzer, attorney for the Western Association)
March 15, 1994

The Association represents the interests of over 600 equipment dealers in the state of Kansas and Missouri and 900 hardware dealers located in the Midwest. In Kansas, there are approximately 200 hardware dealers and 340 equipment dealers who are members of the association.

The Western Association is sponsoring the Western Association Self-Insured Workers' Compensation Trust in Kansas. Soon the association will submit an application for approval to the Kansas Commissioner of Insurance for approval of the operation of the trust in Kansas on behalf of its members. The goal is to provide a worker compensation program tailored to the needs of the members and controlled by the members of the association and trust.

With this as background, the Western Association endorses Senate Bill 625. This Bill would give discretion to the Kansas Commissioner of Insurance to approve the expense of specific and aggregate excess insurance as a charge against the entire annual premium collected before the split into the two separate accounts--the claims account and the administration account.

This bill encourages a conservative self-insurance program, leading to stability for the workers' compensation fund. Specific and aggregate excess insurance backs up the self-insured fund, guarding the fund against the one enormous claim or the one unusually bad claims year. The fund pays for this protection by purchasing from an insurance company excess insurance. This insurance can cost anywhere between 6% and 15% of the entire premium collected and is dependent upon the anticipated claims experience of the fund based on past claims history.

Without this amendment, this excess insurance premium cost would all be allocated to the administration account which by statute can only be 30% of premium collected. Within this account falls safety program expenses, underwriting expenses, claims administration expenses, marketing expenses and other expenses. Without this amendment, the current statute almost forces one to seriously consider buying the cheapest excess insurance available. Such a purchase could be bad for the stability of the fund.

The affect of the Bill would be to give the Kansas Commissioner of Insurance the discretion to review the operation of the fund, its claims and expenses and permit the allocation of the excess insurance cost to the gross premium collected before the allocation to the two accounts. The Western Association believes this provides flexibility to the administration of the funds and will give all such funds in Kansas greater stability.

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6031 S.W. 37th Street • Topeka, Kansas 66614-5128 • Telephone: (913) 273-5115
FAX: (913) 273-3399

Owens and Publishes The Kansas STOCKMAN magazine and KLA News & Market Report newsletter.

March 11, 1994

STATEMENT OF THE
KANSAS LIVESTOCK ASSOCIATION
TO THE COMMITTEE OF
LABOR AND INDUSTRY
REPRESENTATIVE DAVE HEINEMANN, CHAIRPERSON
WITH RESPECT TO SENATE BILL 625

Presented by

Rich McKee

Executive Secretary, Feedlot Division

Mr. Chairman and members of the committee, I am Rich McKee, representing the Kansas Livestock Association. KLA speaks for a broad range of approximately 7,000 livestock producers. Their businesses can be found in virtually every geographic area of the state.

The Kansas Livestock Association supports Senate Bill SB 625.

In 1993 the Kansas Livestock Association formed a group-funded work comp pool and began providing coverage July 1, 1993. There are currently 36 entities in the pool, generating an annual premium of approximately \$1.1 million.

In short, the proposed amendment on lines 22 - 27 of page one would allow us to spend more on loss control services. Many of the expenses that must be paid from the "administrative fund" are required by statute. These expenses include: excess insurance, various taxes and assessments, fidelity bond, etc. The cost of the excess insurance is by far the largest of these expenses. Meanwhile, loss control is one major budget item with some flexibility in regard to how much is spent. If we had more funds available in the "administrative fund", we would likely spend more in loss control efforts. Conversely, as we approach the last quarter of the pool's fiscal year, loss control is one of the few major budget items available to cut in order to stay within the 30% "administrative fund" expenditures.

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The proposed amendment on lines 4 and 5 of page two is identical to the language found in K.S.A. 12-2627, which is the statute governing the board selection of pools operated by municipalities, counties and school districts. The amendment would allow pools some flexibility in the selection process of the board of trustees. In addition, it is highly impractical if not impossible for a new pool to meet the technical requirements of current law. It is our experience that a board of trustees must first be assembled to draft the pool's operating guidelines before there is a pool membership.

Thank you for considering the position of the Kansas Livestock Association.

STATEMENT

By The

KANSAS MOTOR CARRIERS ASSOCIATION

In support of Senate Bill 767 which clarifies any subcontractor or employee relationship of an independent owner-operator to a motor carrier for workers compensation purposes.

Presented to the House Committee On Labor And Industry, Rep. David Heinemann, Chairman; Statehouse, Topeka, Tuesday, March 15, 1994.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Mary E. Turkington, Executive Director of the Kansas Motor Carriers Association with offices in Topeka. I appear here on behalf of our members and the highway transportation industry. I am joined in this presentation by Mr. Jeff Chanay, attorney-at-law with offices in Topeka, and by several members of our industry.

Our industry requested Senate Bill 767 to clarify a workers compensation issue which has become increasingly difficult for our industry in the past several months.

Our industry has relied on quality, independent owner-operators for many years. These independent owner-operators are NOT employees but are in the business of leasing truck equipment with a driver to a licensed motor carrier under a long-term lease to transport freight.

Contract terms establish the percentage of freight revenue the owner-operator will earn and the operating expenses the owner-operator must assume.

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Currently, for workers compensation insurance coverage, the licensed motor carrier (1) either asks for documentation that the owner-operator carries his own workers compensation insurance or (2) must bring that owner-operator under the motor carrier's own workers compensation insurance coverage and charge the owner-operator the cost of such monthly premium.

Our neighboring state of Missouri, in 1993, adopted legislation clarifying that such an independent owner-operator is NOT an employee of the leasing motor carrier. The Missouri motor carrier, therefore, does not include the cost of workers compensation insurance in the operating expenses to be charged back to the owner-operator under the lease agreement.

This difference in Kansas and Missouri law has established a "competitive nightmare" for Kansas carriers and for owner-operators who would like to lease to Kansas companies.

If the Kansas carrier has to "charge back" major workers compensation premium costs to the owner-operator's freight revenue percentages -- and a Missouri motor carrier does not have to deduct such charges --the owner-operator clearly will choose to establish a contract with the Missouri carrier and take home substantially more money.

Our Kansas carriers lose out to the Missouri carrier in such instances -- and well may lose a freight customer or customers because the Missouri carrier was able to lease the owner-operator and deliver the traffic a given shipper needed to move.

Let me illustrate the difference in insurance coverage costs this Kansas and Missouri situation has created. Mr. Rick Craig of the Owner-Operator Independent Drivers Association of Grain Valley, Missouri, advised KMCA that his association offers eligible owner-operators an "Occupational Accident Policy" with an indemnification rider that protects the motor carrier up to \$1 million, has a limited non-occupational rider, is offered, where qualified, by the Reliance Insurance Co., at a cost of \$150 a month for typical coverage. Many owner-operators leasing to Missouri carriers have chosen this type of insurance coverage because of the lower cost and the benefits offered.

That cost comparison of \$150 a month available to eligible owner-operators in Missouri, is far less than a workers compensation monthly premium charge of \$429.55 which a Kansas licensed carrier would have to "charge back" to that owner-operator under the Kansas carrier's workers compensation coverage.

These figures illustrate the cost comparison that would lead the Missouri owner-operator to lease to a Missouri carrier rather than a Kansas trucking company.

The current driver shortage underscores the need for Kansas carriers to be competitive in leasing quality owner-operators. Without this additional resource of additional operating equipment the owner-operator provides, many Kansas carriers face an "involuntary" downsizing of their operations because they simply cannot otherwise locate the drivers to operate company equipment.

It is critical to Kansas companies who have the loads to move for Kansas shippers to be able to compete with other jurisdictions on leasing owner-operator lessors. Kansas jobs and Kansas businesses are what this bill is all about.

Thirteen states - Alabama, Florida, Georgia, Indiana, Iowa, Maryland, Missouri, Oklahoma, Oregon, Texas, Tennessee, Washington and Wyoming have adopted statutes which specifically address the issues that establishes the owner-operator as an independent contractor for workers compensation purposes and provides that the motor carrier with whom the owner-operator contracts need not provide the workers compensation coverage for such a non-employee.

This proposal is NOT anti-labor in any way. In fact, it is a way to keep jobs in Kansas and to keep Kansas independent businessmen (owner-operators) competitive with those in other jurisdictions.

There are no reliable estimates on how many owner-operators serve the trucking industry as independent contractors. Based on the Census Bureau's 1987 Truck Inventory and Use Survey and other sources, American Trucking Associations, Inc. estimates there are some 100,000 to 150,000 owner-operators of truck tractors used to haul trailers, generally long distance. This trend is growing.

Owner-operators are trucking entrepreneurs clearly by choice. Such owner-operators can enter into a contract with a given carrier, can cancel such a contract subject to cancellation conditions, and can enter into a contract with a different carrier if such owner-operator so chooses. The owner-operator is an independent contractor.

Senate Bill 767 clearly would establish that an owner-operator shall not be construed to be either a contractor or an employee of the licensed motor carrier. The licensed motor carrier would not be construed to be either a principal or an employer of the owner-operator of the leased motor vehicle.

Further, section g(2), of Senate Bill 767, provides the guidelines under which an owner-operator shall be construed to be a contractor and the licensed motor carrier shall be construed to be the principal.

The balance of the proposed revision simply would define, for purposes of subsection (g), the terms "motor vehicle" and "licensed motor carrier."

We respectfully ask this committee to recommend this bill for passage to assist Kansas motor carriers to be able to lease quality owner-operators, remain competitive with other jurisdictions in terms of applicable workers compensation premiums, and continue to provide jobs and transportation services in this state.

Our carriers urgently need this legislation. We ask your help to solve this problem which now has become acute for our industry.

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MEMORANDUM

To: House Labor and Industry Committee
From: Jeffrey A. Chanay, Entz & Chanay
Date: March 15, 1994
Subject: Senate Bill 767

Mr. Chairman and Members of the Committee:

My name is Jeff Chanay and I am an attorney in private practice with the Topeka law firm of Entz & Chanay. I appear today as an attorney for the Kansas Motor Carriers Association and in support of Senate Bill 767.

Senate Bill 767 is designed to remove licensed motor carriers that utilize the services of owner-operators from the subcontracting provision of the Kansas Workers Compensation Act as found in K.S.A. 44-503. Other conferees have or will address the competitive reasons for this bill. I testify separately only as to certain practical aspects of the bill.

K.S.A. 44-503 creates a system of double workers compensation coverage for the employees of a "contractor." Under the provisions of K.S.A. 44-503, an injured employee of a contractor has the choice of bringing the workers compensation claim against either his direct employer (the contractor) or the principal. If the employee chooses to bring the action against the principal, the principal will either be wholly responsible for the loss, or may bring a subrogation action against the direct employer.

The problem with this result is two-fold: First, workers compensation coverage must be purchased by the principal not only for its employees, but also for all employees of its subcontractors. This has the result of artificially raising the workers compensation costs of the principal. Second, when a workers compensation claim is brought against the principal, the loss and all reserves remain on the books of the principal even if 100% subrogation is a probability. Under NCCI rating rules, if the subrogation is not effectuated within a certain period of time, the claim costs of the contractor's employee is figured into the experience mod for the principal. This result, it is submitted, places the principal at an unfair competitive disadvantage.

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Senate Bill 767 is narrowly tailored to provide relief to Kansas licensed motor carriers who utilize the services of owner-operators. Passage of Senate Bill 767 will allow Kansas Motor Carriers to compete on a more favorable basis with states such as Missouri and Oklahoma that have laws that clearly provide that licensed motor carriers are not responsible for the workers compensation claims the employees of owner-operators.

Thank you for your consideration of this matter, and I would respectfully request that the Committee recommend Senate Bill 767 favorably for passage.