

ALASKA STATE LEGISLATURE  
**SENATE LABOR & COMMERCE COMMITTEE**

March 28, 2002  
1:35 p.m.

**MEMBERS PRESENT**

Senator Ben Stevens, Chair  
Senator Alan Austerman  
Senator John Torgerson

**MEMBERS ABSENT**

Senator Loren Lemman  
Senator Bettye Davis

**COMMITTEE CALENDAR**

Confirmation Hearings:

Alaska State Board of Public Accountancy  
Marjorie J. Kaiser  
Steven R. Tarola  
Sandra R. Wilson

Alcoholic Beverage Control Board  
Ellen L. Ganley

State Board of Registration for Architects, Engineers and Land  
Surveyors  
Linda Cyra-Korsgaard  
Donald J. Iverson  
Scott McLane  
Patricia Peirsol

Board of Barbers and Hairdressers  
William R. Graf

Board of Chiropractic Examiners  
Dr. Gregory M. Culbert  
Dr. R. Clark Davis  
Dr. Carol J. Davis

Alaska Workers' Compensation Board  
Dorothy Bradshaw  
John Giuchici  
Stephen T. Hagedorn

James N. Rhodes  
Philip E. Ulmer  
CONFIRMATIONS ADVANCED

CS FOR HOUSE BILL NO. 212(L&C)

"An Act requiring a subcontractor to obtain workers' compensation insurance covering the subcontractor and the subcontractor's employees and establishing responsibility of a contractor for obtaining workers' compensation coverage for the subcontractor and the subcontractor's employees if the subcontractor fails to obtain workers' compensation coverage; and providing for an effective date."

HEARD AND HELD

**PREVIOUS COMMITTEE ACTION**

HB 212 - See Labor and Commerce minutes dated 4/28/01.

**WITNESS REGISTER**

Ms. Amy Erickson  
Staff to Senator Murkowski  
State Capitol Bldg.  
Juneau AK 99811

**POSITION STATEMENT:** Commented on HB 212 for the sponsor.

Mr. Paul Grossi, Director  
Workers' Compensation  
Department of Labor & Workforce  
Development  
PO Box 21149  
Juneau, AK 99802-1149

**POSITION STATEMENT:** Supported HB 212.

Mr. Don Ethridge  
AFL-CIO  
710 W 9th Street  
Juneau AK 99801

**POSITION STATEMENT:** Supported HB 212.

Mr. Alan Wilson  
President, Alaska Renovators  
Co Chair, Governmental Affairs, Alaska Home Builders Association  
6014 Lund Street  
Juneau AK 99801

**POSITION STATEMENT:** Supported HB 212.

Mr. Charlie Miller

Alaska National Insurance Co.  
PO Box 102286  
Anchorage AK 99510  
**POSITION STATEMENT:** Supported HB 212.

**ACTION NARRATIVE**

**TAPE 02-16, SIDE A**  
Number 001

**CHAIRMAN BEN STEVENS** called the Senate Labor & Commerce Committee meeting to order at 1:35 p.m. He asked if there were any comments from the nominees of the Alaska State Board of Public Accountancy, the Alcoholic Beverage Control Board, the State Board of Registration for Architects, the Engineers and Land Surveyors, the Board of Barbers and Hairdressers, the Board of Chiropractic Examiners and the Alaska Workers' Compensation Board. There were no comments from the nominees. There were no objections to the nominees and their names were forwarded to the full body of the Senate for confirmation.

#HB212

**HB 212-WORKERS' COMP:CONTRACTORS & SUBCONTRACTOR**

CHAIRMAN STEVENS announced HB 212 to be up for consideration.

MS. AMY ERICKSON, Staff to Representative Murkowski, sponsor of HB 212, said that it addresses a decade-long issue regarding workers' compensation insurance for sole proprietors.

A sole proprietor is an individual working for himself without employees. Current Alaska statutes do not require sole proprietors to carry workers' compensation insurance although they do require that general contractors carry insurance on their employees. The Workers' Comp Board has determined in certain cases that sole proprietors working as a subcontractor is actually an employee of the general contractor. Because of these determinations, insurance companies can charge general contractors additional premiums for sole proprietor subcontractors. These premium charges have often occurred after the general contractor's policy has been audited and in some cases the general has been required to pay additional premiums after the fact and those are costs that have not been anticipated nor included in his bidding costs. This has been an area of great confusion and frustration - so much so that a state wide task force was established to look into the

problem. They looked at a number of different possibilities and HB 212 is the ultimate result of the task force's discussion and compromise. Requiring sole proprietors to provide their own workers compensation coverage eliminates any gray areas so those who should be covered are covered. This gives equity to all parties. Risks and associated costs of the coverage can be anticipated and then recovered through the bidding process. There is no more guesswork or concern over litigation.

MR. PAUL GROSSI, Department of Labor, said that Ms. Erickson gave an excellent explanation of the bill. It has been a problem when someone files a claim and sometimes it's determined that they're not really subcontractors, but employees, when the relative nature of the work test is used, although it's rare.

Even if they are not found to be eligible for workers' comp, the cost to the employer and to the insurance company and the like are still extensive, because of the legal fees and the administrative costs involved in that, but the more common problem is when the insurance companies will come after the fact and audit employees and potential subcontractors. They'll come along and say there was some risk out there that you owe us some premium on...

MR. GROSSI said that the group that worked on this legislation was an incredibly wide range of people representing all facets of affected businesses. This is what everybody could support, although it didn't make anyone completely happy.

SENATOR TORGERSON gave an example -

You are a general, you're building a house and I hire you to do the carpet. If you don't have proof of insurance, are we saying automatically that means that I would cover that in my premium because of the audit?

MR. GROSSI replied: "It's not automatic, but it does happen. It depends on whether the audit occurs."

SENATOR TORGERSON asked if he didn't hide it good enough, did he get caught. "Is that what we're trying to do?"

MR. GROSSI replied:

Yes, not that anybody would try to hide it. I think these are legitimate mistakes - is what happens. When

the insurance company looks at them and says, 'Oh no, this truly wasn't a subcontractor the way the work was allocated. Maybe you paid the person by the hour, provided the tools, you allocated the hours they would be working and the various working conditions. This is an employer/employee relationship. So, that you would owe premium on that.

SENATOR TORGERSON said he understands the close association and that if you control someone's environment, he is your employee. He asked if they are requiring a sole proprietor to go get insurance, otherwise there's a fear of being back charged.

MR. GROSSI answered:

If they're a subcontractor, yes. If they're just contracting to say an individual, then they wouldn't be required. It's not for all sole proprietors. It's just when there's a subcontractor/contractor over a situation.

Professor Larson, the guru of Workers' Compensation, said the subcontracted service was either consumptive or productive. In other words, if someone has a home and wants to get a carpet laid and hires someone to do that, that is being a consumer and wouldn't be responsible for any workers' compensation.

If it was a sole proprietor, they wouldn't have to have it either, because it's not a contractor/subcontractor situation. It's just when you have a general contractor and then subs and subcontractors in that situation.

SENATOR TORGERSON said he didn't see that in the bill, which seems to open up pretty wide the application. He wouldn't be as nervous if it only affected a subcontractor of a general contractor. He asked where it said that.

MR. GROSSI replied: "Because it has the term subcontractor in there, there would have to be a contractor over."

He said there wasn't a legal definition.

SENATOR TORGERSON asked if subcontractor was defined in statute somewhere. "You don't have to be a general contractor to be a subcontractor?"

MR. GROSSI replied: "No, but you have to be a contractor over. In other words, you have to be in the line of production of that service or goods."

SENATOR TORGERSON asked if he owned the carpet store that this person ordered and he was his subcontractor, was he just a carpet store owner, not a general contractor.

MR. GROSSI said that subcontractor is not defined in Workers' Compensation statutes. He said the question would be whether they are in just the carpet sales business or the carpet laying business.

SENATOR TORGERSON said, "You lost me."

SENATOR AUSTERMAN said he wanted an answer to Senator Torgerson's question also, because a lot of stores install carpet as part of the sale.

MR. GROSSI replied: "Senator Austerman, I'm going to give you the answer I know you don't want to hear and that is it would have to be on a case by case basis..."

SENATOR TORGERSON asked how a contractor proves that a subcontractor has insurance.

MR. GROSSI answered that they would have to show him proof of insurance.

SENATOR TORGERSON asked if he would have to get a subcontractor license first and is there such a thing.

MR. GROSSI said there wasn't such a thing as a subcontractor license.

SENATOR TORGERSON said he had been caught in some audits and wasn't sure that they were capturing all the things they needed to.

MR. GROSSI commented that was probably true, but they were trying to fix the basic problem, more or less.

SENATOR TORGERSON asked what the committee referrals were for this bill.

CHAIRMAN STEVENS said State Affairs and Judiciary.

SENATOR TORGERSON said there might be more legal questions than others.

MR. DON ETHERIDGE, AFL-CIO, supported HB 212 saying that he requested the hearing as many local businessmen have experienced problems in this area because of the unlevel playing field for some of the contractors who don't have to carry as much workers' compensation insurance as other because they hire all

subcontractors.

SENATOR TORGERSON asked if they were talking about non union workers.

MR. ETHRIDGE replied that it is mostly non union that does this sort of thing. Most union workers do it the right way and they are at a disadvantage when they do it.

SENATOR TORGERSON said he thought this would affect the sole proprietors, not that they shouldn't have insurance.

MR. ETHRIDGE said one of the examples he has seen locally is where a roofing subcontractor, a sole proprietor, fell off a roof and was killed. His estate is suing the general contractor of the project and they are having to come back through all the legal defenses to protect themselves on that.

SENATOR TORGERSON said he was sure of that.

SENATOR AUSTERMAN said if the general contractor wanted to hire people that are not insured, he should accept that liability to start with. If they hired him without knowing it, they should have known it.

MR. ETHRIDGE agreed, but the marketplace is very competitive and people are willing to take the risk hoping someone doesn't get hurt on the job.

CHAIRMAN STEVENS said that they are still subject to the audit. But it is the general's responsibility to make the determination or take the risk.

MR. ETHRIDGE reiterated that a lot of generals take the risk and leave themselves open to liability. A lot of times they will get by on it to save a few bucks on a contract.

SENATOR AUSTERMAN asked if they are saying they need to save the general contractors from themselves by requiring subcontractors to have insurance.

MR. ETHRIDGE replied that they would be creating a level playing field for everyone who is bidding on a project. If one contractor is looking out for his employees and not taking that chance, he should have the same level playing field as the one who takes the chance.

SENATOR AUSTERMAN said by the same principal if Cost Co. wants, they can borrow \$200 million to run a business with margins of 2% and he can't afford to borrow that kind of money for his business. He didn't know how they could get the same level

playing field for everybody.

MR. ALAN WILSON, President, Alaska Renovators, said this issue came before them about three years ago when two members were faced with a \$15,000 bill and a \$30,000 bill for back premium. He explained the audits take place at the expiration date of the workers compensation policy. They didn't realize that the insurance companies had the mechanism to go back three years and collect for sole proprietors.

It's important to remember when you go to get your contractor's license right on the form you can exempt yourself. If you're registering as a sole proprietor, you can check a little box saying I'm exempt from workers' compensation. We all understand that you have to cover employees, but you can exempt yourself. So, that's what we're all operating under - that understanding that that's the way things worked. Unfortunately, we found out after the fact that that wasn't the case, because we had two members with these big outstanding bills for small operators. It put them in a financial bind. Three years back is a long time to go on a small entity.

He said the problem is that across the whole state there is a shortage of manpower and qualified individuals. If he is demanding a certificate of insurance from a carpet installer, that installer can go to work for five other guys somewhere else without it. They could be added to the general's policy, but it is cheaper for a sub to get his own insurance.

The other critical thing about sole proprietors that are uninsured is that everything is fine until there is an accident. The medical bills start coming in and they file a claim to see what happens. It gets to the Workers Comp Board who says the worker is an employee. Then they look for the next policy that will cover it and it's the general contractor. What's unfair about this is that not only are they subject to an audit and this opens their books up to further scrutiny for sole proprietors, but that claim gets reflected on their experience rating.

For an experience rating, everyone starts out at a one. If they get one claim, that as a general contractor they had no control over an individual, now he has to pay for the next three years and his experience "mod" has been adjusted upwards.

MR. WILSON said one of his members had this scenario happen to him. Prior to his audit, he had seven years of no claims and a sole proprietor roofer fell off the roof, broke his back and it was determined that he was an employee. This person's experience

mod went from .85 to 1.85 overnight. He had already bid jobs, the house was in the process of being constructed.

2:12

SENATOR AUSTERMAN said he remembered this case and asked if the person was originally hired as a solo subcontractor.

MR. WILSON said that was correct.

SENATOR AUSTERMAN asked how the determination was made that he was an employee of the general.

MR. WILSON replied that the Board applied the nature of the work test, which is a good test in most instances, until you get into his industry. "If you're working on a house - I have a custom home under construction - I'm the general contractor - I have the keys to the building - My cabinet man comes in when I open the doors at 8 o'clock and leaves at 5. Maybe I supply the cabinets or in this case, the roofer supplied the roofing material, hired the roofer to come over and install the material. He violated two of the principals right there of the nature of the work test. He supplied the material and set his hours. He's an employee - regardless if this individual is out doing work for 10 or 20 other contractors, that doesn't really come into play.

SENATOR AUSTERMAN asked if part of the problem is that there is no real definition of subcontractor.

MR. WILSON said it very well could be, but the task force looked at some sort of waiver, which didn't fly for legal reasons. They looked at trying to create a policy that would cover sole proprietors and the insurance industry could figure out how to set a rate.

He said that HB 212 removes the uncertainty about who needs to be covered and when they need to be covered.

It's important to remember that the carpet installer, if he's working for me as a subcontractor, would be required to have a policy. If he's working for you, the homeowner, he's not required to have a policy.

The other thing it does is taking away the advantage that some bidders may have on a project by not having workers comp insurance to cover. Another benefit of this requirement is that most sole proprietors do not carry health insurance, let alone insurance that covers them when they're on the job. The tile installer is

\$1,299 per year; a plumber is about \$1,080; a carpet installer is \$1,387.

He said the average carpet installation job is about \$5,000 and his installer does about 10 of them a year. To spread out \$1,300 over those 10 jobs is \$130 a job, it's not a major impact. Then if you consider the benefits that individual has, he is covered on the job regardless of what happens, he gets rehabilitated if it's a serious accident. "It's pretty cheap insurance in that regard."

Another critical thing to keep in mind about the rates is that it's based on the amount of payroll; but for a sole proprietor, the statute says that they are going to be charged on \$20,100 of payroll, regardless of what they make in the year. That is why the rates are pretty predictable each year.

MR. WILSON added that HB 212 provides added security to consumers, primarily owner/builders and do-it-yourselfers who hire sole proprietor subcontractors thinking that they are truly subcontractors, when in fact they are probably employees of the homeowner. This gets back to the consumer protection and level playing field issues.

He concluded saying that the problem is with the uncertainty that exists with the sole proprietor subcontractors when the claims arise and that the general contractors are being charged for premiums that they don't necessarily feel are fair. HB 212 requires all sole proprietor subcontractors to carry workers compensation policies, which makes them accountable for their actions and puts the expense where it should have been all along.

CHAIRMAN STEVENS said he couldn't find a definition of subcontractor in the bill.

SENATOR TORGERSON read: "It is a person who contracts, sublet or contact, or sublets all or part of the initial undertaking."

He added that there was a court decision mentioned - Thurston versus State, 1970 that set a lot of that out. He asked Mr. Grossi if he was familiar with it.

MR. GROSSI said he had read it.

CHAIRMAN STEVENS asked if the working group considered the definition of subcontractor at all.

MR. WILSON said they did to some degree, but the issue is that it covers a lot of different industries and in many instances, the subcontractor is actually a prime contractor. Other states are struggling with the same issue.

SENATOR AUSTERMAN asked if he had discussed it with Senator Leman who had worked with this definition issue.

MR. WILSON said he had and the Senator raised the question of what it would cost him as a potential subcontractor and they found that the rate would be \$225 per year, pretty cheap insurance.

SENATOR AUSTERMAN said that they are really trying to touch on one aspect of the business, but are ending up affecting everyone who is a subcontractor.

MR. WILSON agreed.

2:18 - 2:20 - AT EASE

SENATOR TORGERSON said he still didn't like the bill.

MR. CHARLIE MILLER, Alaska National Insurance Co., said he participated in the work group and they looked at two fixes. One was if they took advantage of the sole proprietor status and did not have workers comp coverage, the attempt was to craft legislation that would make it clear there was no source of appeal, no recourse whatsoever and that was the preferred fix by some of the members, but it was eventually discredited by everyone. A safety valve was needed in too many areas. The option in front of them is what was left and even though it might need some work, the general concept is the best fix.

He thought the process for audit was misunderstood and the work test needed a better understanding. A National Council of Compensation Insurance memo said that what should be considered is the extent to which a person can be expected to carry their own accident burden. "This consideration focuses on the person who is unable to meet the costs of industrial accidents out of their own resources."

**TAPE 02-16, SIDE B**

Quite a few claims make it to the Board because they can't afford the costs of falling of the scaffolding. If they go before the Board and the claim is denied, it still costs tens of thousands of dollars that the employer through their carrier have to shoulder to defend what they consider an invalid claim. The work test lends an unpredictability and flies in the face of what insurance is about.

We don't sell the payment of claims. What our product sells is the management of risk and lends predictability to that aspect of a companies' financial

outlook...When we go back and perform audits on payroll for companies that have unpredictable payroll, all we're doing is assigning premium to risk. So, if you have a scenario here with something as wide open as this, there's the possibility of additional risk that no one has collected premium for, someone is getting access to your product without paying for it. That's why the insurance industry feels that these audits are very legitimate.

MR. MILLER said he discussed this with Pat Henderson who runs the Alaska National portion of their business, but he feels that this would cover the feelings of his other carriers as well.

Every policy we have has audit provisions on the front page of the policy. The nature of every business has a certain amount of flexibility. If you own a sporting goods store and have three employees, we still have an exit audit at the end of the policy term in case you've had to hire temporary help part time or full time or lay off an employee because of a lack of business. You find out how many hours you actually covered under the policy and the premium is adjusted up or down to reflect an accurate number of hours and an accurate amount of risk and then assign the agreed upon premium to it. I'm actually a little surprised that people refer to these audits as if it's some sort of an ambush that's waiting for them at the end of the policy term. It's the first thing you read when you look at your policy - is that this is a provision that everyone has and you have it in every single policy.

As far as contractors go, most contractors file payroll without a monthly basis because of the unpredictable nature of how they do their work. If a local contractor here has a rain problem and they wind up normally doing so many days a week outside because it rains too much, and they have a particularly clear month, they could put in twice as many hours in that period of time doing this particular brand of work as they would have normally. Their payroll will reflect that. We look at it; their premium will reflect that. If they get additional work midway through the season and they hire a bunch more carpenters and get another 1,000 carpenter hours in, their premium will reflect that. If they anticipate spending another 1,000 carpenter hours on this season and they don't, the payroll audit will reflect that and their premium will be adjusted

downward. So, it's the only way you can accurately assess premium to risk and so it's a part of every policy. It really shouldn't surprise anyone.

What does surprise me a little bit is the three-year back audit. Ms. Anderson has been doing this in the state before she went to work for Alaska National for decades and it's a complete surprise to her. She's never heard of anything like that. We do back audits for term of policy and you know that when you buy the policy. The tension that exists between the carriers and the policy holders that we hope to have addressed in this bill is the indeterminate factor of employee/employer relationships with the sole proprietor subcontractors and there is a legitimate difference of opinion on how valid our audit request for premiums are. This bill actually does clear it up real easily from our perspective, although I recognize Senator Torgerson's reluctance to accept an ill-defined category and perhaps we could work on that to satisfy his unease with that. But, once we know how much risk we have and the contractor has a very easy way to get his hands around that, the tension that exists on these audits, I think, will evaporate. Our only difference on these things is the risk involved. Under this work test I read to you before, I think you can understand how concerned we are that we're assuming risk and then we're not collecting premium for it. And so we do have a real problem with the way the situation has been in the past and is currently and we're hoping we can clear up these issues that we have in some of the definitions and move this bill forward.

MR. MILLER said the goals of this legislation are clear, but there is a little more work to do on clarifying the actual language.

CHAIRMAN STEVENS asked on an average how long are workers compensation policies for.

MR. MILLER replied, "We can do a workers comp policy the term of an actual contract, but normally for a year period."

CHAIRMAN STEVENS asked him to explain the process that an audit can go back to three years prior.

MR. MILLER explained:

It wouldn't take place with Alaska National, sir. She had no recollection of that ever happening in anything that she's been involved with in the insurance industry.

CHAIRMAN STEVENS asked if it would only go back 12 months.

MR. MILLER said according to Ms. Anderson, that's true, but he couldn't speak for other companies.

CHAIRMAN STEVENS asked, "Does it say in the workers' comp agreement with the general how he's to have a relationship with the subcontractor?"

MR. MILLER said he didn't know, but he could find out pretty quickly.

I know from my conversation with Pat that we expect that the general contractor will see a certificate or a proof of insurance from every person that works on their job that may be ruled as an employee under this work test and if they don't we'll ask for premium for them. But, whether or not there's a specific contractual piece in the contract, I can't answer that.

CHAIRMAN STEVENS asked if the work test is internal.

MR. MILLER replied:

If the sole proprietor does work in a context that we feel they may be, if they were placed under the relative nature of work test, that they may be considered an employee, then we would expect premium for their work performed, yes. That is the rub. The general contractors that disagree with us have a valid argument as well...We don't feel that we should give our product to someone, which is managing their risk, assuming their risk for premium. We don't want our product used without paying it and they don't want to pay for something they don't feel they're getting, because they don't feel there's a need for them to have their carrier assume that risk. The reason why it's so difficult to solve is that both sides have a very valid point of view.

CHAIRMAN STEVENS asked how many audits take place where the premium is actually increased for his company.

MR. MILLER replied, "I'd say there would probably be a higher

number of cases where premiums went up."

CHAIRMAN STEVENS asked, "I'm specifically saying if the audit took place and they went in and said we found a general that has X number of subcontractors..."

MR. MILLER said if he was talking about sole proprietor contractors, he couldn't answer, but would find out for him.

CHAIRMAN STEVENS asked how many claims had gone back against the general's insurance policy to where the roofer was the sole proprietor.

2:37 p.m.

MR. MILLER thought Mr. Grossi would have a better handle on those numbers.

MR. GROSSI said it would happen every couple of years.

MR. MILLER said his family had some experience when an employee, after about a decade of working as a contractor owning her own business:

...decided that working for Alex Miller had caused her such mental stress that she needed to file a workers comp claim. They were retroactively declared an employee and it was a significant six-figure plus settlement and Alex never did quite recover from that one.

SENATOR TORGERSON asked if premiums weren't a function of total payroll. "Your assigned risk rate doesn't change throughout a year."

MR. MILLER replied, "No, it's a function of an agreed upon figure and then times a number of hours."

SENATOR TORGERSON asked if it was hours or payroll.

MR. MILLER replied that it was a little more complicated than that, but payroll and hours are interchangeable as part of the formula. "If you get paid so much per hour, then you times the payroll times the hours."

SENATOR TORGERSON said there's probably never a premium written in the state that's isn't either adjusted up or down at the end of the audit time.

MR. MILLER agreed and added:

Also, in the contracting business, if I was a contractor and if I was negotiating a contract or a policy, if you will, with a carrier through my broker and I thought the possibility exists that I would have 10,000 hours to 20,000 hours in a season, I would prefer to start at 10,000 and then pay later for everything between that and 20,000. I don't think I would give them a high number and ask to pay that premium and then later ask for the money back. I'm not saying they would low ball, but I'm saying you want to take a number that you're pretty sure you're going to hit, and then if it goes up, if you get a little more work, you pay that premium later as it goes to front loading.

SENATOR TORGERSON said he believed that they do have the authority to go back farther than one year, but maybe his company chooses not to. He asked if they found a company that they missed the work test on, that had for five or six years been treated as a subcontractor, but they finally came to the realization that the person or the firm wasn't - that is was more of an employee, because they failed the work test, how far back could they go and collect the premium. He knew of a couple cases where they did back up, but he didn't know how many years.

But, the risk that you're talking about that you had on the books for free because of the classification, the employee was not caught or not reported or whatever, but wasn't in the total payroll. Once that error is discovered and that person was being reimbursed as a subcontractor, but in fact wasn't, I'm sure you'd back up more than one year.

MR. MILLER said he may have confused him and explained:

When a carrier performs an audit and determines there's risk and they want premium, there hasn't been a relative nature of work test done. That is the carrier's determination that they have risk. To actually have that test done and that declaration made, that is only done by the Board or some other body. We don't official make that test. That ruling as far as I can tell only comes about when there's been a claim. So I think I misinformed you.

SENATOR TORGERSON asked, "What do you audit for then?"

MR. MILLER answered: "We audit to see what we think our risk is."

SENATOR TORGERSON said his point is the audit finds errors where an employee or a subcontractor wasn't treated properly and they believe that should have run through payroll. He knew they could go back.

MR. MILLER said he would check on that.

SENATOR AUSTERMAN said he understood that part of the test was where the contractor actually checks that he is a sole proprietor and doesn't need workers comp and asked if there was a test that takes place at that point in time. Is the question ever asked, "Can you carry the burden?"

MR. GROSSI said:

I believe when you're talking about the check, that is not with the Workers' Compensation Board. That is when they are licensing those. No, if they put a check on there, there is no real audit, so to speak, or any real thorough examination of that situation. So, the examination is always after the fact...It usually happens after there is an injury, there's large medical bills, some time loss, dire financial straights, and then they'll file the claim. The Board has to look at it - the relative nature of the work test is in regulation, but it actually comes from a supreme court case. The Supreme Court has defined it in that way.

SENATOR AUSTERMAN said there appears to be a conflict that allows a sole proprietor to go out in to the bliss of this world without knowing this is waiting there for him.

MR. GROSSI responded that the problem does not lie with the sole proprietor, but the contractor over that can be held liable for the injury of the subcontractor/sole provider. "If it's determined that they're really not in this particular instance, according to this injury, a subcontractor, but an employee."

SENATOR AUSTERMAN said, "What you're saying is that it's the general contractor's responsibility to read this and say to the sole proprietor, 'can you carry the risk?'"

MR. GROSSI said he thought that defined the problem, in that there's an uncertainty there on the part of the general contractor.

SENATOR AUSTERMAN asked, "It's uncertain whether he has the responsibility to ask that question?"

MR. GROSSI said he knew what he was saying, but he didn't have an

answer. "There is no real burden on them. This is a test that the Board has to apply if those cases come before them where there's a question of whether this person is an employee or a contractor."

SENATOR AUSTERMAN asked when he comes in to get his general contractor's license, is he told that or does he have to research the issue to know what he's doing.

MR. GROSSI said he didn't know what the licensing division provided, but they do give them information on workers' compensation.

CHAIRMAN STEVENS said the problem might be that some general contractors are doing it and some aren't. He asked if there was a financial advantage to not doing it.

MR. GROSSI said he probably wasn't the right person to answer that question. Some of the generals require a subcontractor to have a policy, even if they are a sole proprietor and even though they are not required by law to deal with the risk and liability. "However, it's a competitive world out there...and they may have to do what they have to do to get the job done..."

SENATOR AUSTERMAN asked if he was reroofing his own house and decided to hire a subcontractor to help him and he falls off and hurts himself, who is liable.

MR. GROSSI replied:

As far as Workers' Comp is concerned, Senator Austerman, through the Chair, you would never be determined an employer in that situation, because you are a consumer of that product or service. It's consumptive as opposed to productive..."

CHAIRMAN STEVENS said he wasn't comfortable moving the bill at this point and asked the sponsor and concerned parties to work further on it. He adjourned the meeting at 2:50 p.m.