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ATTORNEY GENERAL OPINION NO. 90- 25

The Honorable William Buntten
State Representative, 54th District
State Capitol, Room 514-S
Topeka, Kansas 66612

Re: Roads and Bridges -- County and Township Roads --
County Road Work By or With Contract; Machinery and
Equipment; Plans and Specifications to be Filed;
"Day Labor" and County Employees

Synopsis: The meaning of the term "day labor" as used in
K.S.A. 68-520, is subject to more than one
interpretation and thus the statute is sufficiently
ambiguous to allow construction. Following rules
of statutory construction, the term must be given
its ordinary meaning; "labor hired and paid by the
day." It is our opinion that this definition of
the term does not include permanent county
employees who work as road crews, unless those
employees are hired and paid on a daily basis.
Therefore, counties using county road employees are
not required to comply with the filing requirements
set forth at K.S.A. 68-520. Cited herein: K.S.A.
68-520.

* * *

Dear Representative Buntten:

You request our interpretation of the term "day labor" as used
in K.S.A. 68-520. Specifically, you ask whether "day labor"
includes county employees, and if so, whether counties are
required to file approved plans, specifications and cost

estimates with the county clerk before proceeding with road projects using county road crew employees. Requiring such filing before county road work on a particular project commences would permit private sector contractors to propose that they could do the road work for less money.

K.S.A. 68-520 states:

"The board of county commissioners may, in constructing, surfacing, repairing or maintaining the county roads, let contracts for all or any part of such work, or said board may buy the materials and contract all or any part of the labor, or may purchase or rent machinery and other equipment, and employ labor, under the direction of the county engineer: Provided, That before beginning to construct, surface or repair any road by day labor, the approved plans and specifications and an estimate of the cost must be filed in the office of the county clerk. On all day-labor work the county engineer shall keep an accurate itemized account of the expenditures for labor, materials and work performed and file a sworn statement of the same in the office of the county clerk at the end of each month, and a final statement when the work is completed." (Emphasis added).

The statute itself does not define "day labor." Our research reveals that the term, as used in the statute, has not been previously discussed by Kansas courts. In addition, the legislature has not amended or formally commented on the statute since its passage in 1917.

The manner in which counties carry out road projects has changed considerably since 1917. In the early 1900's the state's roads were still in a primitive stage of development, and counties devoted few resources to their construction and maintenance. Road work was often performed by bands of citizens, persons working off a debt or part-time, unskilled laborers. Kansas Dept. of Transportation, Milestones: A History of the Kansas Highway Commission and the Department of Transportation, Ch. 1, pgs. 6-7, 17 (1986). With the advent of a modern highway system, many counties now employ permanent road crews. Because this practice was not common at

the time the statute was adopted, it is unclear whether the legislature intended the statute's terms to apply to such full time county employees. However, K.S.A. 68-520 does recognize that the county may "contract all or any part of the labor [or] . . . employ labor under the direction of the county engineer," thus distinguishing between employees and independent contractors.

There appear to be two possible interpretations of the term "day labor" as used in K.S.A. 68-520. One interpretation is that the legislature intended the term "day labor" to mean all county work forces, as opposed to private contractors. Under this definition the filing requirements of K.S.A. 68-520 would apply whenever the county conducts road work using labor it employs. A second possible interpretation of the term "day labor" is casual workers hired and paid on a daily basis. The filing requirements would then apply only when the county uses this class of workers, and not when it uses other classes of workers such as independent contractors or permanent employees.

Because K.S.A. 68-520 is subject to more than one interpretation, we must apply the rules of statutory construction. The fundamental rule of statutory construction is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute. State v. Adee, 241 Kan. 825, 829 (1987). If the intent is subject to different interpretations, the court is guided by certain presumptions when construing a statute. "It is presumed the legislature understood the meaning of the words it used and intended to use them; that the legislature used the words in their ordinary and common meaning; and that the legislature intended a different meaning when it used different language in the same connection in different parts of a statute." Rogers v. Shanahan, 221 Kan. 221, 223, 224 (1977). Thus, we must use the common and ordinary meaning of the term "day labor", as used by the 1917 legislature.

At the time the statute was enacted, a laborer was often regarded as one who performs physical toil. See Abbot, Dictionary of Terms and Phrases (1879); Byrne, Dictionary of English Law 513 (1923); Wharton's Law Lexicon 487 (1925); Blacks Law Dictionary 1014 (4th ed. 1951). "The precise line between what is commonly called 'labor' and other employment cannot be drawn with absolute precision." Pope, Legal Definitions 850 (1920). The statute draws a distinction between "day labor" and other types of labor. The first clause of K.S.A. 68-520 authorizes the county to "employ

labor under the direction of the county engineer", the second clause then requires that plans, specifications and cost estimates be filed "before beginning to construct, surface or repair any road by day labor" (emphasis added). The rules of statutory construction require us to presume that the legislature did not use the terms "labor" and "day labor" interchangeably. The common definition of day labor in 1930 was "a person employed by the day to perform manual labor". Ballentine Law Dictionary 329 (2d ed. 1930). The American Heritage Dictionary, (New College Edition, 1981), defines "day labor" as "labor hired and paid by the day." According to McQuillan, Elections, Officers and Employees, §§ 12.36 (1982), "day laborers constitute a class of municipal employees who cannot be designated as officers, deputies or assistants, clerks, agents, etc. Ordinarily, those referred to as 'employees', as mentioned herein, are not included within the term of day laborers. . . ." Thus, it appears that regular county road crews, if employed and paid other than on a daily basis, would be laborers but would not fall within the common meaning of the term "day labor."

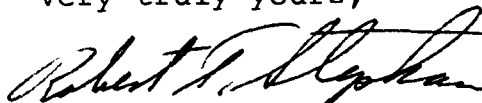
It could be argued that the 1917 legislature used the term "day labor" inadvertently, because it did not contemplate that another alternative to competitive bidding (i.e. the use of regular county employees) would some day become widespread. If so, the true intent of the legislature may have been to require prior public filing of road plans and cost estimates any time competitive bidding was not used, regardless of the class or designation of workers employed. It is possible the Kansas courts would accept this construction of K.S.A. 68-520. Other jurisdictions with similar statutes have imputed such an intent. For example, Ronken v. Board of County Comm'rs of Snohomish County, 572 P.2d 1, 7-8 (Wash. 1977), held that "day labor" applied to regular county employees, and that the county was required to follow statutory notice and reporting requirements when using such employees. Copeland v. Kern County, 234 P.2d 314, 317 (Cal. Ct. App. 1951), held that "day labor", as used in a county road work statute, could include work done by regular county road crews and county prisoners as well as casual laborers. Hamar Construction Co. v. Union County, 248 N.W. 2d 65, 67 (S.D. 1976), held that "day labor", as used in a county bridge construction statute, contemplated "construction by the county with county labor and county owned equipment." These courts implied legislative intent in order to validate a public procedure involving filing estimated county costs prior to commencement of work by anyone other than a competitive bidder. In supplying such legislative

intent the courts recognized that subsequent enactments generally provided such procedures. We are unwilling to construe K.S.A. 68-520 this liberally. "The function of liberal construction is called into use where there is ambiguity in the language of the statute. . . . But the court cannot delete vital provisions or supply vital omissions in a statute. No matter what the legislature may have intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct." Russell v. Cogswell, 151 Kan. 793, 795 (1940).

Following the rules of statutory construction, we must presume the 1917 legislature used the term "day labor" in its ordinary sense and that it did so advisedly. If the legislature had intended the filing requirements of K.S.A. 68-520 to apply to use of all county labor rather than letting it out for bids, it could have used language more explicitly suited to this purpose.

It is our opinion that the 1917 legislature used "day labor" in K.S.A. 68-520 to refer to those laborers employed and paid by the county on a daily basis. Counties that use such workers on their county road crews must comply with the statutory filing requirements before undertaking projects with those crews. However, counties that carry out projects using county employees are not employing "day laborers" as the term was defined in 1917 and, thus, are not required to follow the filing provisions. While we appreciate policy argument to the contrary, it is our opinion that the 1917 legislature did not provide for the applicability of filing requirements when county road crews were used, perhaps because such permanent county road crews were not commonly utilized in 1917. A legislative change could appropriately reflect the changed nature of county road work and clarify filing requirements.

Very truly yours,



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ATTORNEY GENERAL OF KANSAS



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