

SJR 30 Briefing Paper

Additional Cost Drivers – Subrogation

In the

Montana Workers' Compensation System

Submitted to Jerry Keck, Administrator
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By

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Background

In most workers' compensation systems, the payer of benefits (either the employer or insurer) is entitled to recover a pro-rata share of the proceeds obtained from a third party who may be responsible for the injury or illness that affected a worker and their entitlement to benefits under a state's workers' compensation statute.

Montana is unique in that their Constitution requires that before an employer or insurer can recover from a responsible third party in the case of a work related injury, the worker first must be "made whole". In part, Section 16 of the Montana Constitution reads, "No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable..." This section has been interpreted in a number of cases by the Supreme Court of Montana¹. In *Zacher the* Supreme Court stated:

"This theory is not dependent upon a right of recovery of full legal redress under the Montana Constitution. It is based upon an equitable balancing of the rights of the insurer as compared to the claimant...[T]he basic conclusion is that when the amount recovered by a claimant is less than the claimant's total loss, with a result that either the claimant or the insurer must to some extent go unpaid, then it is equitable that the loss be born [sic] by the insurer which had been paid an insurance premium for the assumption of its liability for the claim, and that where the claimant has not been made whole, equity concludes that it is the insurer which should stand the loss, rather than the claimant...."

So instead of sharing the recovery of benefits paid to a worker in the case of a third party being liable for such injuries, the employer and insurer recover only after the employee recovers all their damages first. This paper makes no judgment about the appropriateness of this application of law, only identifies it as one of the reasons Montana's workers' compensation rates are higher than those of other states.

Quantifying the Impact for Montana

In an attempt to quantify what financial impact this approach has on the ultimate benefits paid under the Montana workers' compensation system, all the comparison states and a number of insurers and third party administrators who provide services to employers in all the comparative states were asked to report the total benefits they paid for the years 2003 through 2006 and to report their total subrogation recoveries for those years. Unfortunately, the insurers and all but one third party administrator declined to participate; the states of Alaska, Idaho, New Mexico, Oregon and South Dakota do not collect this data; and the states of North Dakota and Washington did not report their

¹ See *Skauge v. Mountain States Tel. & Tel.* (1977), 172 Mont. 521, 565 P.2d. 628; *Hall v. State Compensation Insurance Fund* (1985), 218 Mont. 180, 708 P.2d. 234. *Zacher v. American Ins. Co.* (1990, 243 Mont. 226, 231, 794 P.2d. 335, 338

figures. As a result, the comparison completed was actually based on the results of one TPA who pays benefits in all states except for North Dakota and Wyoming (who do not allow private insurance) and additional information from the states of Montana, and Wyoming. Using these data (which may not at all be representative of all employers and insurers in any of the states but Wyoming and maybe Montana, the results are as follows:

Percentage of Workers' Compensation Benefits Recovered in Comparator States

State	Recoveries for 2003	Recoveries for 2004	Recoveries for 2005	Recoveries for 2006	Average Annual Recoveries for 2003 thru 2006
Alaska	.22%	.09%	.24%	1.81%	.58%
Idaho	.21%	.24%	1.53%	.13%	.55%
Montana	.01%	>.00%	.01%	>.00%	>.00%
New Mexico	.93%	.05%	.20%	1.09%	.57%
North Dakota	Not Available	Not Available	Not Available	Not Available	Not Available
Oregon	1.42%	1.47%	.82%	.85%	1.14%
South Dakota	.04%	.18%	.04%	.58%	.19%
Washington	.93%	1.10%	.97%	1.19%	1.04%
Wyoming	.63%	2.81%	2.80%	2%	2.8%

Due to having much more data for Washington and Wyoming, when all recorded payments and recoveries are added for these years, we obtain an average annual subrogation recovery of all states less Montana of 1.49% of the workers' compensation benefits paid in 2003 through 2006. This is probably much more accurate than the actual shown in the table above due to significant bias in having only one data source for all states but Wyoming.

Annual Recoveries for All States Combined 2003 thru 2006 (less Montana)
(In thousands)

2003 Paid	2003 Recov.	2004 Paid	2004 Recov.	2005 Paid	2005 Recov.	2006 Paid	2006 Recov	Total Ave. Annual Paid	Total Ave. Annual Recov.	Annual Average Percentage Recovered
\$334,578	\$3,288	\$345,405	\$5,468	\$348,520	\$5,360	\$346,143	\$5,798	\$1,374,647	\$19,916	1.45%

Using this information, it would appear that the range of Montana's benefits that are going to be higher than the comparative states simply because of this limitation would be between .2% and 2.8% with an estimate based on adding all payments and recoveries for all years for comparator states being an annual average of 1.45% higher than other states.

Conclusion: Montana can expect to pay an estimated 1.45% higher benefits than comparator states due to the limitation on subrogation recoveries for employers and insurers.