

MONTANA SELF INSURERS' ASSOCIATION

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MEMORANDUM

TO: Economic Affairs Interim Committee

FROM: Bob Worthington, Montana Self-Insurers Association

DATE: July 1, 2014

RE: Workers Compensation Subrogation Issues

The Montana Workers Compensation Act (Act) provides that when an employee is injured or killed while performing their duties of employment as a result of the act or omission of another person or entity, in addition to receiving workers compensation benefits, the injured employee has a right to prosecute any cause of action for damages against such a person or entity. MCA § 39-71-412 (2013). The Act also provides that the workers compensation insurer is entitled to subrogation from any claim, judgment or recovery for all compensation benefits paid or to be paid arising out of such third party actions. MCA § 39-71-414 (2013). However, as a practical matter the workers compensation insurer very rarely recovers anything from the third party action as case law from the Montana Supreme Court provides that the insurer has no subrogation interest until the Claimant has been "made whole" for "claimants entire loss" *Zacher v American Ins. Co.* 243 Mont. 226, 794 P2d 335 (1990). As a result, the employer and the workers compensation insurer bear the full financial burden of an injury caused by a negligent third party.

The Montana Self Insurers Association (MSIA) believes that current law should be amended so as to allow the self-insured employer or workers compensation insurer to recover a fair portion of the benefits it is required to pay the injured worker from the wrongdoer responsible for the accident and resulting injury. At the same time the MSIA recognizes the importance of preserving the injured workers right to “full legal redress” as provided for by Article II, Section 16, of the Montana constitution. The MSIA believes that both interests can be reconciled.

HJR 25, passed by the 2013 Montana Legislature, authorized Legislative Council to direct the matter of subrogation to the appropriate committee. The Council directed the matter to Economic Affairs Interim Committee, requesting the following be considered:

- (1) subrogation in light of Montana's Constitution and court cases regarding making an injured worker "whole", including an examination of the meaning of "made whole" and the impacts of the lack of effective subrogation on workers' compensation insurers;
- (2) the use of subrogation in civil actions and in settlements and what lessons are to be learned regarding application of the law for each approach;
- (3) how other states handle subrogation for workers' compensation purposes;

At its January 28, 2014 meeting the Committee heard a presentation and panel discussion regarding subrogation. Based on comments received from the Committee during the panel discussion it appeared that Committee's primary concern was the ability of the Claimant to double recover for the same medical bills, first from the workers compensation insurer and second from the insurer for the third party responsible for the accident. It was also the understanding of the Montana Self Insurers' Association that the Committee was troubled by the fundamental unfairness of the employer and the workers compensation insurer taking full responsibility for an accident caused either in whole or in part by a third party with no hope of recovering any of the costs associated with the claim from such third party or his/her insurer.

The Committee set this time and place for consideration of options to address the subrogation matter. Attached for the Committee's consideration is a document containing bill draft language for a possible solution to the current inequity arising with the inability of a workers' compensation insurer to obtain subrogation. The document includes four possible options to address the matter.

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