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LINNELL, NEWHALL,  
MARTIN & SCHULKE,  
P.C.

House Business and Labor Committee Members and Staff  
P.O. Box 201706  
Helena, MT  
59620-1706

*Norman L. Newhall*  
*Richard J. Martin*  
*J. Kim Schulke*  
*Stacy Tempel-St. John*  
*Michele Reinhart Levine*

Re: *HB 500, Workers' Compensation Treating Physician Selection by Insurers*

Dear House Business and Labor Committee Members and Staff:

*Office Manager:*  
*Tammy Turner*

My name is Michele Reinhart Levine. I am an Associate Attorney at Fair Claim Law Firm in Great Falls, Montana. Our firm represents injured workers across Montana. We receive many calls from workers who are very angry about workers' compensation insurers choosing their doctors. If you want to reduce attorney involvement in the workers' compensation system, let workers choose their own doctors.

*Paralegal Staff:*

House Bill 334 (2011) workers' compensation was passed at a time when Montana's workers' compensation insurance rates were the highest in the nation. The legislature passed HB 334 nearly unanimously and former Governor Schweitzer signed it into law. Since 2011, Montana's work comp insurance costs have come down and insurers have given dividends back to employers. However, it is hard to say how much cost savings is from allowing work comp insurers to choose their doctors. NCCI said it could not price how much a bill like HB 500 would cost. See the NCCI Preliminary Cost Impact Analysis, Montana Treating Physician Proposal, dated 6/19/2014.

*Dan Bennett*  
*Brenda Bedenbender*  
*Megan Miller*  
*Wendy Fisher*  
*Kristi Natalie*

Like many of you, I also voted for HB 334 when I was a House Representative, but I wish I knew then what I know now. Unfortunately, HB 334 is harming injured workers. HB 500 is one small way you start to undo some of the damage done. HB 500 would let injured workers choose their own doctors again. I am going to give you an overview of three points: 1) the power treating physicians have in the system; 2) examples of injured workers who have been harmed by insurers choosing their doctors; and 3) why Mont. Code Ann. § 39-71-1101 (as amended by HB 334) is probably unconstitutional.

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**I. Treating physicians are the gate keepers in Montana's workers' compensation system.**

Treating physicians have great power in the work comp system. A treating physician can determine the following for an injured worker, including but not limited to:

1. Medical diagnosis;
2. Need for treatment;
3. Causation and whether the worker's medical problem is related to the claimant's industrial injury or occupational disease or not;

4. Maximum medical improvement (MMI), or whether the worker would benefit from additional treatment;
5. Physical restrictions due to the industrial injury or occupational disease;
6. Approval of the time-of-injury job or an alternative job, which impacts the worker's potential wage loss; and
7. Future medical treatment.

When a treating physician determines that the worker is able to return to work with the same employer and does not have wage loss, the insurer will typically terminate wage loss benefits. Insurers may have financial incentives to find insurance friendly doctors who:

1. Opine the worker's medical condition is not related to the worker's work-related injury or occupational disease;
2. Ignore objective medical findings establishing the causation/connection between the injured worker's medical condition and work related injury/OD claim;
3. Deny or delay necessary medical treatment;
4. Fail to accurately and timely diagnose the medical condition;
5. Opine that the injured worker can return to the time of injury job or a modified job prematurely, causing further injury or aggravation to the worker;
6. Opine that the worker does not have any restrictions when restrictions could prevent the injured worker from further injury;
7. Opine that the injured worker lacks impairment, further interfering with the injured worker's ability to obtain wage loss benefits; and
8. Opine that the injured worker does not need further medical treatment, interfering with the injured worker's ability to obtain further necessary treatment.

There are already other checks and balances on treating physicians to control costs and medical care. If an insurer does not like a treating physician's opinion, including a physician that the insurer selected, the insurer can pay for an independent medical examination (IME) at any time while adjusting the claim. Sometimes, IME doctors will opine that the worker's injury is not job related and that the worker can go back to work with minimal or no restrictions. Now the insurers can basically have two doctors' opinions against an injured worker to suspend, delay, or deny work comp benefits. This can be very hard for the worker to overcome. The insurer can also assign a nurse case manager to expedite the injured worker's medical treatment. Further, the insurer can use the Utilization and Treatment Guidelines to deny care that is not within the guidelines and to limit medical treatment and costs. With the use of the nurse case manager, the independent medical exam, and the Utilization and Treatment Guidelines, the insurer has many tools to keep costs down. This makes the insurer's selection of the treating physician all the more unfair. When injured workers are returned to the work force prematurely, without proper healing, or to jobs that they should not be doing, they are likely to incur another work related injury and the process repeats itself. Now, I'll share with you some stories from injured workers.

## **II. Insurer selection of treating physicians harms injured workers.**

Chris Carter and Gary Stroop, who have experienced substantial setbacks in their medical care due to their work comp insurers changing their treating physicians and denying and delaying their medical care.

In Chris Carter's case, Mr. Carter's foot and ankle were crushed in a conveyor belt head role when his co-worker negligently turned on the conveyor belt. The insurer, MCCF arbitrarily switched the injured worker's treating physician from Dr. Fisher (a podiatrist specializing in the foot/ankle injury the client had) to Dr. Pike (an orthopedic surgeon, not a Podiatrist) who did not want to be the injured worker's treating physician. Dr. Pike just wanted to provide "second opinions". Then Dr. Fisher refused to see the client because of MCCF's change of the treating physician, denial of authorizations for the client to see Dr. Fisher, denial of Dr. Fisher's

recommendations for care, and denials of Dr. Fisher's medical bills. IME Doctors Singer and Heid agreed with Dr. Fisher's treatment recommendations. However, MCCF refused to let Dr. Fisher treat Mr. Carter. This caused substantial delay in Mr. Carter's medical care and his ability to heal and return to work.

Gary Stroop had a similar experience with Montana State Fund, where the insurer refused to let Dr. Galvas be his treating physician, even though IME Dr. Schumpert agreed with Dr. Galvas treatment recommendations. MSF's refusal to let Mr. Stroop see Dr. Galvas and receive the recommended treatment also caused Mr. Stroop's condition to further deteriorate and may have caused him permanent health damage. This is unacceptable.

Let me tell you the story of Chrissy Burkstrand. Chrissy worked for a temp agency delivering large jugs of Culligan water to a bank's break room in the basement, when she slipped on the slippery stairs and bounced on her rear down the stairs, fracturing her tailbone. The insurer selected a medical provider who ignored her x-rays and evidence of a likely tailbone fracture and returned her to her time of injury job without restrictions. This physician assistant in Great Falls ignored her ongoing radiating pain and numbness. Her employer asked her to consider doing a heavy lifting job which involved moving hotel furniture, which made Chrissy very nervous that she would cause further injury to herself and asked her employer if they would consider waiting until she got her MRI results. Luckily for her the employer agreed, because the MRI showed she did indeed have a fractured tailbone and needed lifting restrictions which precluded her from moving heavy furniture. This is one more example of an insurance selected medical provider prematurely releasing a worker to a job without restrictions and without proper diagnostic testing. Several other workers, who were not yet comfortable providing their names, have had similar experiences.

One injured worker that I know of is a victim of sexual assault and she is not comfortable with a male doctor. None-the-less, the insurer chose a male doctor as her treating physician. She reported that this doctor pulled down her pants to perform a spinal injection and kept her pants down for nearly 30 minutes, for a procedure that should not take that long. This made her feel violated, unsafe, and very uncomfortable. The insurer did not let her see any other medical provider and she was faced with either going to see another doctor that she has to pay for out of pocket for her work injury, or going to see a doctor that she felt unsafe and uncomfortable with. This is an unfair and expensive dilemma for injured workers, many of whom cannot afford to get a second opinion or pay for a different doctor.

Don't allow insurers to have this power. Undo the damage. Let injured workers choose their doctors.

### **III. Insurer selection of treating physicians is likely unconstitutional.**

Mont. Code Ann. § 39-71-1101, is likely unconstitutional as an invasion of an injured worker's right to privacy and personal autonomy. Prior to HB 334, in Montana, injured workers have always been allowed to choose their treating physician for obvious reasons. Selection of a physician who will touch their body, examine them with or without clothing, and perhaps even perform surgery, is a very personal decision. Moreover, Montana's broad right of individual privacy is a testament to Montanans' continuous and zealous protection of personal autonomy and dignity.<sup>1</sup> Montana's right to privacy broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider, free from government interference.<sup>2</sup>

This statute, Mont. Code Ann. § 39-71-1101, runs afoul of the Montana Constitution and the right to privacy Montanans' value. The Montana Supreme Court noted:

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<sup>1</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 374-75, 989 P.2d 364, 374.

<sup>2</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 376, 989 P.2d 364, 375. Const. Art. 2, § 10.

Indeed, medical treatment decisions are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease. It is the individual making the decision, and no one else, who must undergo or forego the treatment. And it is the individual making the decision, and no one else, who, if he or she survives, must live with the results of that decision. One's health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature.

... The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one's economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death.<sup>3</sup>

Further support for this principle is found in U.S. Supreme Court's observation from over 120 years ago, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."<sup>4</sup> Nearly 100 years ago, Justice Cardozo declared that, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."<sup>5</sup> Within the last 25 years, the U.S. Supreme Court reaffirmed that the right to control fundamental medical decisions is an aspect of the right of self-determination and personal autonomy that is "deeply rooted in this Nation's history and tradition."<sup>6</sup>

The courts note, "The legislature has neither a legitimate presence nor voice in the patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement by the state."<sup>7</sup>

In Montana, the newly altered law permitting insurance companies to select an injured worker's treating physician has yet to be challenged. However, based on Montana's historical reverence for personal autonomy and the deeply imbedded right to privacy specifically delineated in the Montana Constitution, it is likely the law will be struck down as unconstitutional.

Allowing the insurer to select an injured worker's treating physician violates the Montana Constitution's right to privacy. Article II, Section 10, protects the autonomy of the individual to make personal medical decisions and to seek medical care in partnership with a chosen health care provider free of government interference. *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364.

Mont. Code Ann. § 39-71-1101, unconstitutionally delegates absolute discretion regarding the approval or designation of a treating physician to insurers without any guidance or standards. The statute allows insurers to approve or disapprove treating physicians at will, without any restrictions, limitations, or guidance whatsoever. We have heard the comment from workers' compensation adjusters that that they do not have to provide any reasons or rationale to approve, deny, or switch an injured worker's treating physician. This is exactly the "absolute discretion" that the legislature must *not* give to private parties as noted in *Ingraham v. Champion International* (1990), 243 Mont. 42, 793 P.2d 769. Rather, the legislature is "required to lay down the policy or reasons behind the statute and to prescribe standards and guides for the grant of the power" that it gives to a private entity just as it would to an administrative agency. *Id.*, 243 Mont. at 48, 793 P.2d at 772. When the legislature gives absolute discretion to a private party or an administrative agency, without guidance

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<sup>3</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 381-82, 989 P.2d 364, 378-79, citing *Andrews v. Ballard* (D.C.S.D.Tex.1980), 498 F.Supp. 1038, 1047.

<sup>4</sup> *Id.* citing *Union Pacific Railway Co. v. Botsford* (1891), 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734. *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 382-83, 989 P.2d 364, 379-80.

<sup>5</sup> *Id.* citing *Schloendorff v. Society of New York Hosp.* (1914), 211 N.Y. 125, 105 N.E. 92, 93, overruled in part by *Bing v. Thunig*, (1957), 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3.

<sup>6</sup> *Id.* citing *Moore v. City of East \*380 Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531.

<sup>7</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 384, 989 P.2d 364, 380.

and limitation, such delegation of power is unconstitutional. *Id*; See also *State v. Mathis*, 2003 MT 112, 315 Mont. 378, 385, 68 P.3d 756, 762.

Giving the insurer the right to choose the treating physician is offensive. Opinion 9.06 of the American Medical Association's Code of Ethics states:

Free choice of physicians is the right of every individual. One may select and change at will one's physicians, or one may choose a medical care plan such as that provided by a closed panel or group practice or health maintenance or service organization. The individual's freedom to select a preferred system of health care and free competition among physicians and alternative systems of care are prerequisites of ethical practice and optimal patient care.

No person in need of medical care wants an insurance company to choose their doctor. Allowing the insurer to select an injured worker's treating physician violates the Montana widely held belief of self-autonomy. Ask yourself, "Would I allow my insurance company to choose my doctor?" If your answer is "no", this law must be changed.

The best way to fix this unconstitutional and harmful statute, Mont. Code Ann. § 39-71-1101, is to let injured workers choose their own treating physicians.

Thank you for your consideration and for the opportunity to comment today.

Sincerely,

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MRL/

Enc: As stated