

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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Subrogation Options for Consideration

“A Bill Clarifying a Workers Compensation Insurer’s

Subrogation Interest in Third-Party Claims”

Whereas, subrogation is a device of equity which is designed to compel the ultimate payment of a debt by the one who in justice, equity and good conscience should pay it.

Whereas, in *Zacher v. American Ins. Co.*, 243 Mont. 226, 794 P.2d 335 (1990) and *Francetich v. State Compensation Mutual Ins. Fund*, 225 Mont. 215, 827 P.2d 1279 (1992), the Montana Supreme Court held that a workers compensation insurer or self-insurer has no subrogation interest in proceeds from a third-party action allowed for pursuant to MCA § 39-71-412 and MCA § 39-71-413 until the claimant has been “made whole” for his/her entire loss.

Whereas, later decisions of the Montana Supreme Court and the Montana Workers’ Compensation Court have determined that the “made whole” calculation must be made without regard to the negligence of the claimant and other factors that may have impacted the third-party claim including policy limits and the claimant’s desire to end the litigation.

Whereas, the “made whole” analysis includes wage loss, loss of earning capacity, loss of fringe benefits, pensions, pain and suffering, and related damages as well as past and future medical costs, workers compensation insurers and self-insurers are effectively precluded from exercising a subrogation interest in the proceeds of the third-party action.

Whereas, in *Zacher v. American Ins. Co.*, 243 Mont. 226, 794 P.2d 335 (1990) and *State Compensation Insurance Fund v. McMillan*, 306 Mont. 155, 31 P.3d 347 (2001), the Montana Supreme Court held that the “made whole doctrine” is not dependent upon a right of recovery of full legal redress under the Montana Constitution, Article II, Section 16; and

Whereas, in *Swanson v. Hartford Insurance Co.*, 309 Mont. 269, 46 P.3d 584 (2002), the Montana Supreme Court recognized the “made whole doctrine” is an equitable theory and that the Legislature had the authority to enact statutes limiting the “made whole doctrine.”

Whereas, in *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 951 P.2d 937 (1997), the Montana Supreme Court held that under the Unfair Trade Practices Act, an insurer has a duty to pay medical expenses for an injured third-party where liability is reasonably clear.

Whereas, in *Dubrey v. Farmer’s Insurance Exchange*, 307 Mont. 134, 36 P.3d 897 (2001), the Montana Supreme Court held that an insurer has a duty to pay lost wages for an injured third-party where liability is reasonably clear.

Whereas, it is the intent of this Legislature to clearly articulate that the “made whole doctrine” is not to be applied or considered in determining whether an insurer or self-insurer has a subrogation right in a third-party action as allowed for by MCA §§ 39-71-412 and 413. Be It Enacted by the Legislature of the State of Montana:

Option 1

MCA § 39-71-414 (2013) is amended as follows:

(6)(a) The insurer is entitled to full subrogation rights under this section for all medical benefits paid regardless of whether the claimant is able to demonstrate damages in excess of the workers' compensation and third-party recovery combined. For all other benefits . . .

WHAT ACTUAL EDITS LOOK LIKE:

(6) (a) The insurer is entitled to full subrogation rights under this section, unless for all medical benefits paid regardless of whether the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. ~~If the insurer is entitled to subrogation under this section,~~ For all other benefits the insurer may subrogate against the entire settlement or award of a third-party claim brought by the claimant or the claimant's personal representative without regard to the nature of the damages.

(This Option will allow an insurer to assert a subrogation interest in a third-party judgment or settlement even in circumstances where the injured worker has not been "made whole" as that term has come to be defined by the courts. However, the subrogation interest would be limited to medical benefits and would be subject to the other limitations found in MCA § 39-71-414(2). This Option is intended to prevent a double recovery by the claimant for medical expenses, first from the workers compensation insurer and second from the liability insurer.)

Option 2

In the event of a compensable workers compensation claim arising out of an accident caused by a third party for which there is other applicable insurance, payments for medical care and treatment arising out of the accident must be made in the following order of priority:

(a) To the extent of the third party's policy's coverage limits for medical pay, bodily injury, sickness, death or disease.

(b) By the workers compensation insurer for the employer.

This order of priority shall control regardless of whether the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. In the event the third-party insurer contests liability for the payment of medical expenses, the workers compensation insurer shall pay those medical benefits to which the claimant is entitled under the Montana Workers Compensation Act. When liability becomes reasonably clear, or there is a finding or admission of liability, the third-party insurer shall be required to reimburse the workers compensation insurer for all medical benefits paid.

Covered medical expenses must be paid

WHAT OPTION 2 WOULD LOOK LIKE:

NEW SECTION. Section

1. Medical claim priorities in subrogation. (1) If a compensable workers' compensation claim arises out of an accident caused by a third party for which there is insurance, payments for medical care and treatment arising out of the accident must be made in the following order of priority:

(a) first to the extent of the limits of the third party's policy coverage for medical pay, bodily injury, sickness, death, or disease;

(b) then by the workers' compensation insurer for the employer.

(2) This order of priority controls regardless of whether the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. If the third-party insurer contests liability for the payment of medical expenses, the workers' compensation insurer shall pay those medical benefits to which the claimant is entitled under this chapter. When liability becomes reasonably clear, or there is a finding or admission of liability, the third-party insurer shall reimburse the workers' compensation insurer for all medical benefits paid by the workers' compensation insurer.

(3) Covered medical expenses must be paid according to the terms of the applicable policy or in accordance with any written agreement or contract existing between the provider and the insurer or a person contractually engaged by the insurer to perform services.

according to the terms of the applicable policy or in accordance with any written agreement or contract existing between the provider and the insurer or a person contractually engaged by the insurer to perform services.

(This Option is intended to make the insurer for the negligent third-party the primary payor of medical bills.

This would be consistent with the insurer's obligations as articulated in Ridley. The statute could also be amended to make the third-party insurer primarily responsible for payment of lost wages pursuant to Dubrey.

The definition of TTD would have to be amended to reflect that there is no entitlement to TTD while receiving payments from the third-party insurer that are at least equal to the TTD benefit amount.)

Option 3

MCA § 39-71-414 (2013) is amended as follows:

(6)(a) In determining whether the Claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third party recovery combined, the extent to which the injured worker was contributorily negligent must be considered in the analysis and

NOT SURE WHAT OPTION 3 WOULD LOOK LIKE. ALL NEW LANGUAGE?

(6) (a) The insurer is entitled to full subrogation rights under this section, unless the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. If the insurer is entitled to subrogation under this section, the insurer may subrogate against the entire settlement or award of a third-party claim brought by the claimant or the claimant's personal representative without regard to the nature of the damages. In determining whether the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined, the extent to which the injured worker was contributorily negligent must be considered in the analysis and computation of damages and the total amount of damages must be diminished in the proportion to the percentage of fault attributable to the claimant.

(b) If a survival action does not exist and the parties reach a settlement of a wrongful death claim without apportionment of damages by a court or jury, the insurer may subrogate against the entire settlement amount, without regard to the parties' apportionment of the damages, unless the insurer is a party to the settlement agreement.

computation of damages and the total amount of damages must be diminished in the proportion to the percentage of fault attributable to the claimant.

(This Option is intended to redefine “made whole” to be more in line with “full legal redress.” “Full legal redress” should mean those damages that the injured worker can recover by settlement or judgment consistent with Montana law as established by the Legislature. In negotiating a settlement or in presenting a case to a jury, contributory negligence almost always plays a role in reducing the amount of the settlement or judgment. As such, a claimant may receive all the damages to which he is entitled under Montana law, but not be “made whole” for his injuries as defined by the courts.)

Option 4

MCA § 39-71-414 (2013) is amended as follows:

(6) In determining whether the Claimant is able to demonstrate damages in excess of the workers’ compensation benefits and the third party recovery combined, the amount of the third party recovery creates a rebuttable presumption that such third-party recovery equals the total amount of damages. The extent to which the

Again, NOT SURE WHAT OPTION 4 WOULD LOOK LIKE. ALL NEW LANGUAGE?

(6) (a) The insurer is entitled to full subrogation rights under this section, unless the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. If the insurer is entitled to subrogation under this section, the insurer may subrogate against the entire settlement or award of a third-party claim brought by the claimant or the claimant's personal representative without regard to the nature of the damages. In determining whether the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined, the amount of the third-party recovery creates a rebuttable presumption that the third-party recovery equals the total amount of damages. The extent to which the injured worker was contributorily negligent must be considered in the analysis of damages and the total amount of damages must be diminished in the proportion to the percentage of fault attributable to the claimant.

(b) If a survival action does not exist and the parties reach a settlement of a wrongful death claim without apportionment of damages by a court or jury, the insurer may subrogate against the entire settlement amount, without regard to the parties' apportionment of the damages, unless the insurer is a party to the settlement agreement.

injured worker was contributorily negligent must be considered in the analysis of damages and the total amount of damages must be diminished in the proportion to the percentage of fault attributable to the claimant.

(This Option is intended to establish a rebuttable presumption that the amount of the recovery is the amount of the total damages. Language could also be added stating “the rebuttable presumption cannot be overcome by evidence of policy limits or by the claimant’s desire to settle the claim.” This Option does not directly challenge what it means to be “made whole” other than the fact contributory negligence is to be considered. It does place a heavier burden of proof on the claimant.)