

## Suggestions for Economic Affairs Interim Committee

January 2014

Potential Legislative Action Regarding Workers' Compensation for 2015 Session

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### **Level the Playing Field – Claim-Related Punitive Damage Immunity**

#### **Issue:**

From a holistic standpoint, the 31,000+ of WC claims in Montana are handled by a variety of insurance Plans, each subject to the same statutory requirements, case law and general rules. These Plans are also subject to statutory and case law requirements to handle claims in a manner consistent with good faith and fair dealing. When an injured worker or their representative feel that the insurer has not been fair, they can sue the insurer for "bad faith". Bad faith suits are allowed in Montana against all three Plans, although the type and amount of damages recoverable vary greatly depending solely upon which organization handled the claim.

Plan 1 and Plan 2 insurers, their agents, TPAs and staff are subject to exposure to punitive damages if and when they are sued for bad faith claims handling. In the context of bad faith / punitive damage litigation, the exposures to the insurer are massive compared to the underlying cost of the case. A fairly recent claim of bad faith against an insurer went to a jury verdict in excess of \$5 million. In addition, several bad faith suits which began as WC claims have settled for many millions of dollars each. These cases are not tried under the jurisdiction of the WCC, they are tried in either state district court or federal court.

The playing field in WC in Montana is not level. Plan 3 (Montana State Fund), which advertises itself "**Montana State Fund is the insurance carrier of choice and industry leader in service.**", has been granted immunity from any finding of punitive damages. While there may be arguments to support such an immunity for the 'insurer of last resort' portion of their operations, the situation makes for a non-level playing field. It also makes the insurance marketplace in Montana less competitive and in some documented cases shifts claims costs from one Plan to another where both have arguable exposure for a claim. The current system treats identical stakeholders (payers) in the system handling claims for Montana injured employees subject to the same rules, statutes and laws with a significant difference in financial exposure. Montana State Fund cannot be held liable for punitive damages arising out of a claim situation, while other insurance carriers and self-insured employers providing the same benefits and coverage to the same workers in Montana can be exposed to millions of dollars in a similar situation. Further, injured workers and their families are treated differently in the system.

To demonstrate, consider this hypothetical situation. Assume that an injured worker is treated in such a way that their claim is wrongly denied, causing a delay in medical treatment and a significant worsening of their physical condition. If the insurer is Plan 3, the full extent of the injured worker's remedy is payment of back benefits, a moderate percentage penalty for the wrongful denial (using the amount of benefits as the baseline amount) and possibly attorney's fees. The same worker, with the same situation taking place involving a Plan 1 or 2 insurer, would be able to make a claim (or law suit) for these same benefits, along with additional special and general damages, plus punitive damages. There is a stark difference in benefits available to the injured worker depending upon the organization that is responsible for the claim handling conduct. Whether this differential is constitutional or not is not an issue for this memo. The fact remains, organizations and injured workers in the Montana WC system are handled differently, with different rights and remedies, depending upon which organization handles the claim.