

SIF in Montana

Governor's Labor Management Advisory Council

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Following the most recent meeting of the Labor Management Advisory Council, I was asked to provide further detail on the advocacy for not only keeping the Subsequent Injury Fund ("SIF") in place, but revising it in a way that will expand stakeholder knowledge of the system and expand usage to include our work advancing Stay At Work / Return To Work ("SAW/RTW") in the State of Montana.

A variety of people have been consulted about the information that follows. These include Plan 1 and Plan 2 representatives, Vicki Evans, LMAC member, and Peter Strauss, Executive Director of the Montana Self-Insurance Association. The opinions expressed in this paper are not representative of any organization or individual other than myself.

That said, there appears to be concurrence amongst those consulted in preparation for this writing on the basic assumption, which is:

*If SIF can be revised in such a way that a) encourages SAW/RTW, b) is a more 'automatic' system for qualification and c) spreads risk further amongst all payers, then keeping and enhancing SIF as a valid part of the Montana workers' compensation system is desirable.*

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## **Background**

Sunsetting the SIF program was presented and discussed on several occasions in 2020. Arguments for sunseting SIF appear to be centered around its low usage and financial impact when viewed in the context of the full Montana workers' compensation system. The individuals and groups consulted for this presentation agree in large part that the current system is challenged by a number of 'entry' issues, including the voluntary nature of the system, the unfunded cost(s) for an individual to obtain medical documentation to complete the SIF application, and the lack of individual incentives for all stakeholders to begin the application process.

The Department staff indicate that there will be no significant cost savings with FTE or other costs if SIF sunsets. Further, sunseting the existing program would need to include management and payment of valid claims (and resulting assessments) until those claims are closed. One SIF claim with which I am familiar will be open, absent an intervening event or death of the worker, for an estimated 20 years. Excluding reimbursements already received from SIF, the estimated payable liability to SIF on this one claim is nearly \$3,000,000. This is mentioned just to demonstrate that, even if sunseting is chosen as the path for SIF, Department staff will be working on SIF reimbursements and assessments for decades into the future.

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Let us look at the current challenges and how it is proposed to address those issues.

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### **Voluntary Application Process**

For a variety of reasons, many of which may take a psycho-social expert to explore, the voluntary process is thought to be a significant hurdle for individuals to apply to become qualified SIF designees. As you are aware, SIF only requires that a “person with a disability” to qualify must have a “medically certifiable permanent impairment”. Some have indicated to us that in their opinion the act of applying for disability (required under current SIF rules) may be objectionable to some individuals and some business owners. The ‘man up’ attitude of many in Montana may be a factor as we have seen in some circumstances with late and under reported workers’ compensation claims.

“Person with a disability” includes many non-occupational conditions too numerous for this presentation. Looking at the history of SIF both in Montana and nationally, SIFs were primarily created as an incentive in the post-World War and post-Vietnam War eras to encourage employers to hire returning, disabled veterans. While we as a society continue to have wounded/disabled veterans seeking employment. Their total count, however, a percentage of all potential employees applying for work is far less than it has been in the past. In addition, HIPAA and other national and state regulations have made consideration of a disability in the hiring process illegal and subject to significant penalties and litigation. We agree, if employers cannot ask about a disabling condition or consider it in any way during the hiring process, that portion of the SIF program is all but useless without some, perhaps significant, changes in law.

### **Unfunded Costs For Medical Opinion**

The SIF application must be completed, signed and dated by a physician. As we all know, medical services are not free. Unless an insurer or self-insured employer have a process in place to assist an individual with the medical appointment and accompanying invoice for services, it is reasonable to expect that an individual will not be motivated to begin the SIF application process. It is obvious that some have systems in place, or there would likely be no SIF designees.

We do not have any data with which to evaluate how existing SIF designees were originally medically certified. Our direct experience has been that some employers and self-insured organizations, when they learn of the existence and goals of the program, embrace it and fund the medical appointment(s) necessary to achieve a completed application. Perhaps Plan 2 and Plan 3 representatives can share additional insight upon this. Suffice it to say, if unreimbursed medical costs for the worker remain as a necessary component of the SIF system, SIF will continue to be underutilized.

### **Lack Of Incentives**

The current makeup of SIF provides no individual incentives to any party in the process. We have discussed interjecting a variety of incentive options into the system in our discussions, but have not reached a concurrence on any proposals to the level that they can be included in this presentation. We do have overall agreement that the issue of ‘disincentive’ needs to be eliminated as much as possible if SIF is to remain an active program.

### **Proposal For Consideration**

Let me first say that the most common thing heard since SIF moved into the public discussion is that “other states are eliminating SIFs”. For much of the workers’ compensation process, comparison to national averages / trends and to trends in other states can be a very positive way to consider the health of the Montana workers’ compensation system. These reviews can lead to positive changes. SAW/RTW entered into the public discussion significantly after the visit of Dr. Jennifer Christian and her 60 Summits project to Montana. The discussion of needless work disability, improving the focus and delivery of medical recovery and positive benefits of allowing recovering workers to Stay At Work included review of other states...some positive lessons, others in need of improvement. My company was a financial sponsor of 60 Summits. We believe that comparisons and metrics can serve a positive purpose for many topics.

However, SIF in the context of this proposal / discussion is not one that will benefit the State of Montana by doing overly simplistic “other states have done” comparisons. Let’s be blunt, Montana is a challenging workers’ compensation jurisdiction from a number of perspectives. Notably, we are a tiny jurisdiction, which must be taken into account when doing comparisons. Be mindful. For example, Montana has fewer residents in the entire state than those that live just in Sacramento County California. We are smaller than one county. What may be systemically or politically desirable in a more populous state may not be comparable to what we need in Montana. It is a given that SIF has been eliminated from some states, while others such as CA, have expanded their programs into a behemoth systems unto themselves.

This presentation is not about creating a new, huge government program. The current system is working, and is actually quite efficient. We encourage everyone to recognize the unique, positive aspects of the program, acknowledge what is working and if possible make statutory/regulatory changes to enhance the program. A byproduct of these changes will be to set an example for other jurisdictions in these times of rising costs and employment challenges. We don’t always have to follow, **we can lead**.

### **Changes For Consideration**

#### **Amend 39-71-901 (3)**

Suggest adding language to the definition of Person with a disability to include SAW/RTW

(3) "Person with a disability" means a person who has a medically certifiable permanent impairment that is a substantial obstacle to obtaining employment, **continuing with employment** or to obtaining reemployment if the person should become unemployed, considering such factors as the person's age, education, training, experience, and employment rejection.

#### **Automate Application Process**

It was clear in our stakeholder discussions that this proposal / discussion needs to “stick to our knitting”. We looked at the SIF application, which validly can include both occupational and non-occ disabilities certified by a physician. There are numerous issues when considering non-occ issues. It was suggested and we agree that if we are going to make changes to SIF, our need is to focus upon only issues with which we have a measure of control, ie: workers’ compensation issues. “Sticking to our knitting”, we therefore consider for this discussion only workers’ compensation permanent impairments.

To remove the disincentive(s) and friction of the application process, we propose to automate the application process as follows:

All claims where Indemnity (lost time wage replacement benefits and/or permanent impairment benefits) payments are made, it is required in Montana that the insurer provide a SROI report. SROI reports are submitted on six (6) month intervals from the date of injury following any payment of Indemnity. Prior to closure, SROI reports are designated as "SA" (semi-annual). When claims are resolved, the reporting code changes to "FN" (final).

If there is a permanent impairment on the claim as determined by a physician, the insurer is to include the percentage of whole person impairment in the SROI filing. Therefore, the Department already has data on occupationally related permanent impairment. For SIF, it is irrelevant if any payment was due to the impairment. Class 1 or Class 2 or other, which under current construction of the statutory framework of workers' compensation in Montana contributes to the determination of an impairment award being payable or not, is not a factor.

We know that the individual has a permanent impairment. It is proposed that this impairment percentage be used to automatically qualify individuals over a designated threshold percentage into SIF. Single claims with more than 25% of impairment will move the individual automatically to be approved for SIF, with all future Montana workers' compensation claims considered for potential insurer reimbursement after 104 weeks. Individuals with more than one claim will be considered by adding the percentages in SROIs on file for all claims. With the filing of each SROI, an electronic process can be run, merging all SROIs filed for the individual and totaling the permanent whole person impairment figures into one SIF permanent impairment number. An individual person with more than 25% of impairment across their lifetime will automatically be approved for SIF, with all future Montana workers' compensation claims considered for potential insurer reimbursement after 104 weeks.

Impairments awarded in other states, preexisting non-occupational conditions, diseases, and so on will remain to be handled just as they are today, through the voluntary application process.

## **Summary**

The SIF system and process is fundamentally sound, albeit underutilized. From the application to ERD notification to insurers to the reimbursement process are sound and can remain unchanged. The structure of SIF is simple yet robust. In fact, in comparison to other states, SIF in Montana is actually far more effective than others.

Even with an automatic qualification process as proposed, we would expect that few claims as a percentage of total claims filed in Montana will reach the threshold of 104 weeks. However, those claims that do are typically significant high dollar claims. This proposal is to enhance SAW/RTW in Montana and create a system that allows for further spreading of the cost of high dollar qualifying claims amongst insurers. This is a new safety layer of risk finance for insurers beyond the required reinsurance / excess workers' compensation insurance layer.

It is not possible with any elemental review to project what financial impact this may have on the system. We think it will be *more than trivial*, which is why it is presented for your consideration. This change will definitely add significant numbers deserving of individuals to the SIF program. It will take

some years, however, to measure if these changes lead directly to additional SIF reimbursements and assessments.

What we think will happen in the near term is an enhanced view by insurers, employers and workers: Montana is doing something positive to make the workers' compensation system better for all stakeholders. The positive impression through outreach and public service announcements will lead to more employers considering Montana as a location for their business, insurers becoming more competitive for workers' compensation business, and peace of mind of injured workers as the entire system is modified to help them Stay At Work and Return To Work.

Even with the proposed changes, SIF will likely remain a financially small part of the full cost of the Montana workers' compensation system. We have the opportunity at this point in time to decide on an important issue: Do we abandon the SIF system (following other states), or do we as a state move to set a new, higher standard by implementing a system that will provide additional help to workers, employers and insurers?