

**SJR 30 Briefing Paper**

**Claim Closure, Reopening and Settlements**

**In**

**Workers' Compensation Cases**

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By

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## Claim Closure, Reopening and Settlements In Workers' Compensation Cases

### Background

Workers' Compensation costs are very difficult and complex to estimate and the costs to employers is based to a great extent on payments for benefits to workers. The law regarding the time period in which employees have to make a claim; when a closed claim can be reopened; and when and how claims can be settled "full and final" impacts the ultimate costs of workers' compensation cases. Each state struggles to find a balance between what is fair to workers and still ensure reasonable costs to employers<sup>1</sup>. Since these laws are state-specific, each state decides how to strike this balance between appropriate benefits for injured workers and reasonable costs to employers.

The fact that the employee gave up their right to sue their employer in exchange for the prompt payment of specific benefits itemized under the workers' compensation law generally means that workers' compensation benefits must be paid at a rate and for long enough to make this "exclusive remedy" a reasonable alternative to suing the employer for liability under the "common law" doctrine.

### Public Policy Issue(s) In Case Closure, Reopening and Settlement

The primary areas of concern to employers and insurers on this issue are: (1) How long workers' compensation cases can remain open; (2) Under what conditions they can be reopened; (3) how long medical benefits should remain open; (4) whether future medical benefits can be settled on a full and final basis; and (5) under what conditions medical benefits can be re-opened after they have been closed.

Montana's current statute does not provide for a specific closing action for any benefit other than medical. Medical benefits may remain open for up to 60 months from the date of last medical treatment. For employers and insurers, this creates potentially a lifetime of eligibility for workers' compensation benefits from an injury making the coverage very unpredictable to price. If you combine that with their inability to settle future medicals, claims can remain open indefinitely in Montana. This creates a situation where the natural progression of aging creates an obligation for employers in Montana to have to pay for aggravations and other

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<sup>1</sup> See MCA 39-71-105(1) Declaration of Public Policy –“Wage-loss benefits are not intended to make an injured worker whole but are intended to assist a worker at a reasonable cost to employers.”

physical problems that most other states do not pay for as related to the original work injury. Lastly, Montana's unique case law which has sometimes required retroactive payment of benefits to all workers<sup>2</sup> creates administrative problems when there are no clear closing criteria for workers' compensation claims.

Worker advocates claim that work related injuries should remain open for as long as the injured worker may suffer from any disability or need for treatment related to such injury. They also believe that conditions developed later in life caused in part from a work related traumatic injury are a related expense since the work's injury likely created a faster deterioration of the workers' physical condition in spite of the aging process.

Most (but not all) states have specific statutes that limit the ability for a worker to claim additional benefits after a specific time period. The public policy intent is to define the employer's liability and the workers' entitlement so it the act can be to a great extent self-executing and predictable. The exact terms of this limit are often negotiated between labor and business.

The public policy related to whether or not future medical costs can be settled on a full, final and complete basis depends a great deal on the general philosophy within a state. Some states believe it is not in the injured worker's best interest to settle medical treatment into the future since it is so difficult to foresee what treatment may be necessary and also to predict the cost of new technology and treatments that maybe developed. Additionally, in numerous cases where states allow the settlement of future medical treatment, employees sometimes spend the money allocated for the payment of medical expenses on other things and this has created cost shifting onto state Medicaid and the federal Medicare programs<sup>3</sup>. In other states, they believe it is not government's right or responsibility to make these decisions for their citizens and allow their citizens to make these decisions themselves with some specific guidance from the workers' compensation agency or court to protect those not able to make such decisions.

Hence, in many states where they allow settlement of future medical benefits, if the employee is not represented (and in some cases even when they are), the settlement agreement has to be approved by the agency or the workers' compensation judge to ensure it is in the "best interests" of the worker or both the parties.

Lastly, most states that allow the settlement of future medical benefits also establish some criteria for the parties to use in the case of a needed reopening of medical benefits. These may be very narrow, such as only in cases of fraud or a

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<sup>2</sup> See *Murer v. State Compensation Mutual Insurance Fund*, 1997, 283 Mont. 210, 942 P.2<sup>nd</sup> 69 for example.

<sup>3</sup> As a result of this, Medicare has taken significant steps to protect their interests in the settlement of future medical costs in workers' compensation cases in what is generally referred to as the "Medicare Set Aside" regulations.

mistake of fact, or they can be based on a change in medical condition that was not foreseen at the time of the settlement. This is a direct response to the issue of not being able to see the future and anticipate all that may occur. However, how tightly or liberally reopening criteria are drafted will determine how predictable the closing and reopening of claims will be for insurers and employers who are striving in part for some predictable costs. A few states have established “reopening funds” to alleviate the possibility of insurers having to pay for expenses they had not anticipated or built into the rates once claims re-open in the future. This, however, is simply a cost shift from one employer or insurer to all employers and insurers and is not highly favored by most states.

### Current Practice in Other States

What is often helpful to policymakers is knowing what other states have decided on this issue. The attached table entitled *Comparison of States’ Claim Closure and Settlement Provisions – 2009* provides this information with the comparator states highlighted in light orange. It also provides at the same time the 2008 Oregon Premium Rate rankings. An additional table entitled *Summary of Closing, Reopening and Settlement Provisions* provides the same information with less detail and is faster and easier to read.

An analysis of this information demonstrates that once a workers’ compensation claim is accepted and paid, the timeframe when the employee is no longer entitled to additional indemnity or medical benefits varies tremendously across states; from one year from the last payment of compensation<sup>4</sup> to no limitation at all. Most of the states set a limitation of one year (10 states), two years (14 states) or three years (three states) from the last payment of compensation or medical treatment. A few states allow up to eight years (Hawaii), 10 years (Rhode Island), or 12 years (Wisconsin) after the last payment of compensation or medical treatment and seven states apparently have no limitation at all other than being related to the initial injury. Montana is one of six states that set their limitation at five years from the date of last medical treatment but this applies only to medical costs.

According to the ALFA Workers’ Compensation Law survey, 38 states allow the settlement of future medical benefits; five only allow them to be settled when there is a genuine dispute about whether they are owed; one rarely allows future medical benefits to be settled; and six states do not allow future medical benefits to be settled at all.

The most common basis for a reopening of a previously closed medical claim is for a change in physical condition, but other reasons appear to be fraud, a mistake of fact, undue influence and coercion. In many cases, the change in

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<sup>4</sup> “Compensation” may be defined as any benefits paid under the workers’ compensation statute or just indemnity benefits. This is state specific.

physical condition must also meet the test of not being able to be foreseen at the time of settlement or award.

#### Recommendation

I recommend that Montana adopt in statute a specific closing criteria of 2 years from the date of injury in cases where no benefits have been paid and 2 years from the date of last indemnity or medical payment when liability has been accepted **provided the employer or insurer sends a notice to the employee informing them that their workers' compensation claim will close and they will not longer be entitled to further payment after two years from their last medical or cash benefit payment.** I also recommend that they reopening criteria be the same as the current criteria for settlements, that being only in the case of fraud coercion or mistake of fact.

It seems inconsistent that Montana does not allow the settlement of future medical claims since they value individual independence and freedom so highly. In an effort to reduce premium costs by making future medical costs more predictable, I recommend **allowing the settlement of future medical benefits after the employee has reached maximum medical improvement**, at which time future medical expenses may be estimated with greater accuracy than during acute treatment; and that such **settlements must be approved by the Department as in the best interest of the parties**. In addition, I would suggest **the time frame for the closing of medical benefits be changed from 60 months to two years from the date of last payment as provided in the previous paragraph provided the employer/insurer sends a notice to the employee informing them that their workers' compensation claim for medical benefits will cease two years after the last payment of medical or cash benefits and that the same criteria as above be adopted for reopening.**