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Bill To Allow Recovery of Medical Benefits Paid And To Be Paid Under Workers' Compensation from At-Fault Parties Other Than The Employer

Background

It is legally required that all employers in Montana provide workers' compensation coverage for all employees. The statute in Montana, Montana Code Annotated ("MCA"), REQUIRES payment of Indemnity (Lost Time and physical permanent Impairment), Medical, Vocational Rehabilitation and other benefits by workers' compensation payers when an injury or Occupational Disease is suffered by an employee in the course and scope of their employment. "Insurer" is used as an all inclusive term in the statutes, where all workers' compensation payers are referred to in statute as "insurer". Use of the term "insurer" refers to all three authorized workers' compensation plans in Montana, Plan 1 (Self-Insured), Plan 2 (private insurance company) and Plan 3 (Montana State Fund). Therefore, if an employee is injured on the job, payment of workers' compensation benefits is required of the employer, if self-insured, or their insurance provider (39-71-407 MCA).

Even when an employee's injury or Occupational Disease is caused by the negligence or fault of a party other than the employer or co-workers, the "insurer" for the workers' compensation claim are legally required by statute to pay the workers' compensation benefits, including medical benefits for treatment received by the injured worker. This obligation remains even if there are other medical programs (such as health insurance, automobile liability insurance, automobile medical payments insurance, automobile UM/UIM insurance, premises liability insurance, commercial liability insurance and products liability insurance) available to the injured worker for the same treatment. In addition to the benefits provided by workers' compensation, the injured employee can bring a claim or action against the at-fault party or parties to recover damages (39-71-412 MCA). Pursuit of such monetary remedies, full legal redress, is guaranteed by the Montana Constitution (Article II, Section 16). This right to seek full legal redress beyond the workers' compensation benefits system was addressed by the Montana Supreme Court in a number of cases as well as statute section 39-71-414 MCA – Subrogation.

Subrogation is the right for an "insurer" to pursue a third-party that caused a workers' compensation injury or Occupational Disease to the employee and resulting loss to the employer and "insurer". Subrogation is the commonly used term across the entire United States to describe the right and process for the "insurer" to pursue recovery of all or a portion of the amount of the claim paid on the workers' compensation claim.

The Supreme Court ruled that, as a matter of public policy, subrogation is not allowed in Montana unless and until the injured worker has been "made whole" for claims made and unmade. Claims adjusters, examiners and attorneys in the workers' compensation claims industry have adopted the practice of not pursuing or participating in efforts to recover from at-fault parties. From a practical standpoint, it is not possible to prove that an injured worker has been "made whole" before the conclusion of the third party claim or litigation. And when the injured worker, or estate of the injured employee in the event of the injured employee's death, signs a release of claims in favor of the at-fault parties, it is binding upon the workers' compensation insurer. The circular puzzle for insurers is that 39-71-414 MCA lays out a

procedure for pursuing recovery, allowing in some situations for a cost sharing agreement between the injured worker and the insurer. However, subsequent to the Supreme Court's rulings on subrogation, those representing injured workers routinely assert that the insurer must prove that the injured person has been "made whole" before considering any agreement to pursue subrogation. The insurer cannot participate because they cannot demonstrate that the injured worker is or will be "made whole" in advance of a settlement or judgment; and after a settlement or judgment is completed, the insurer's rights are lost. Any pursuit of an insurer beyond that has met with allegations of bad faith and/or violations of the Unfair Trade Practices Act ("UTPA").

In summary, the practical impact of the Supreme Court's rulings has been to invalidate the entirety of 39-71-414 MCA. For all intents and purposes, there is no ability for a self-insured employer or insurance company providing workers' compensation coverage to workers on behalf of Montana employers, as required by statute, to seek or receive any recovery for a workers' compensation situation that was caused by the fault of other parties. This allows for a number of negative consequences to the state, higher workers' compensation costs, multiple payments on the same medical bills by multiple parties, and unnecessary increases in employers' Experience Modification factor ("ExMod"), raising their premiums and in some cases causing them to lose or not bid on contracts that have certain ExMod maximums.

To be clear, however, ***this is not an ExMod issue***. This is specifically true for Plan 1 self-insured organizations, who typically do not use anything like an ExMod. The ExMod is used by insurance companies to modify rates charged based upon the recent years' claims experience by individual "insureds". The issue for Plan 1 self-insured entities is that they are bound by the Workers' Compensation statutues and the responsibility to pay the statutory benefits to and on behalf of the injured worker. These payments come out of their gross sales and revenues, not insurance premiums. Some have argued when the issue of subrogation is discussed that the "insurers" charge a premium and that they can or should include in those rates the lack of the right of subrogation in Montana. While this may be a persuasive argument for insurance companies, the same is not true for self-insured organizations. When an at-fault party causes injury to one of their employees, self-insured entities pay workers' compensation benefits out of their gross sales revenues. And when such a case is in the hundreds of thousands or millions of dollars, these Plan 1 entities unfortunately have to make difficult decisions on how to pay the claims, offsetting planned hiring of new employees, purchasing new equipment, and so on. For self-insured organizations, the inability to seek recovery for paid medical bills can be significantly negative financially, impacting upon the local and state economy. This is even more challenging when there are several parties paying for the same medical bills when at-fault parties are involved in the causation of the workers' compensation injury, those payments might be made directly to the medical providers or to the injured worker or their counsel. Either way, the workers' compensation payer is obligated to pay those bills directly to the medical providers under Montana statute.

This bill is necessary to rebalance the system, allowing for the "insurer" to have a right to recovery of a portion of the amounts paid under workers' compensation when the claim arises due to the fault of a person or organization other than the employer or co-workers, within certain conditions. The bill isolates coverage within the Workers' Compensation Act to the Medical line, exempting all other

coverages such as Indemnity (Lost Time and Impairment), Expenses (Travel) and Vocational Rehabilitation from potential third-party recovery.

Medical benefits under the Workers' Compensation Act are not payable to the injured worker. Therefore, there is no potential financial impact upon the injured worker seeking full legal redress, medical benefits will be provided by the workers' compensation "insurer" on accepted claims even if other insurances are available. The intent of this bill is to allow for the maximum recovery by the injured worker from the at-fault party or parties, and if specific insurance or actionable assets are available, provide a direct and separate right of action for recovery to the workers' compensation "insurer" for the medical benefits paid and to be paid on whole and partially accepted claims.

PROPOSED CHANGES

Summary

In summary, the proposed bill below:

1. Eliminates from statute the Subrogation section in its entirety;
2. Specifies that the only Workers' Compensation payments made or to be made that are potentially recoverable are Medical, other benefit types are excluded;
3. Sets a floor of collectible assets (including insurance) of $200,000, no right to recover will exist if the collectible assets are less than the floor;
4. Gives the "insurer" a direct cause of action to pursue recovery of WC Medical benefits paid or to be paid from at-fault parties;
5. The "insurer" and the injured worker are free to independently negotiation their claims against at-fault parties, although allowance is made for agreements to be made between the parties;
6. The "insurer" is limited to the MT Workers' Compensation fee schedule amounts for Medical benefits paid and to be paid, no such limitation is placed upon the injured worker when presenting their claim(s) to the at-fault parties to allow consistency with Montana case law; and
7. Procedure for acknowledgement of "full legal redress" with respect to paid and to be paid Workers' Compensation Medical benefits.

PROPOSED LEGISLATION

Removal of 39-71-414 MCA

Delete 39-71-414 in its entirety.

Rename Chapter 71 Part 4

Part 4 Coverage, Liability and ~~Subrogation~~ Recovery of Medical Benefits

Replace 39-71-414 MCA

39-71-414. Recovery of Medical Benefits.

(1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and as otherwise provided in this section, the insurer is entitled to recovery of medical benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of medical recovery is a separate and distinct right of the insurer and also a first lien on the injured worker's, or estate's in the event of the death of the injured worker, third-party claim, judgment, and recovery.

(2) Immunity – An insurer cannot be claimed against, prosecuted, sued or an action instituted by any party for any cause of action, including but not limited to "bad faith" or violation of the Unfair Trade Practices Act for any claim or action instituted or pursued under this section.

(3) Limitation – Claims by insurer under this section against any third-parties for negligence are limited to paid medical and amounts to be paid for medical under the Workers' Compensation Act, plus attorney fees, costs and costs of handling, investigation and prosecution of the claim or action against the third-party or parties or any other costs and fees negotiated among the parties and awarded by the court responsible for the third-party action.

(4) An insurer's separate and distinct right of recovery for medical paid and to be paid under the Workers' Compensation Act arises against third-parties when:

(a) The injured worker's workers' compensation claim is accepted in whole or in part by the insurer and;

(b) The amount of liability insurance available to the at-fault parties plus the amount of actionable assets is at least $200,000.

(c) This section authorizes and requires parties to claims and actions brought by an insurer or the injured worker, or estate of the injured employee in the event of the injured employee's death, to disclose the amounts of insurances available plus actionable assets upon demand from the insurer, the injured worker, or estate of the injured employee in the event of the injured employee's death, or the Department.

(5) Notice To Parties, Costs and Fees

(a) If the injured employee, or estate in the event of the death of the injured employee, intends to institute a third-party claim or law suit, notice must be given to the insurer in a reasonable time frame but, in the event of a litigation action, no less than 30 days prior to the filing of the suit. Both notices are to be given to the insurer if a third-party claim is made but is not resolved by settlement prior to the running of the statute of limitations for filing of an action

(b) If the insurer intends to institute a third-party claim or law suit, notice must be given to the injured employee, or estate in the event of the death of the injured employee, in a reasonable time frame but no less than 30 days prior to the filing of the claim or law suit, or both if the claim is made but is not resolved by settlement prior to the running of the statute of limitations for filing of an action.

(c) Regardless if a third-party claim or action is instituted by either the insurer or injured employee, or estate in the event of the injured employee's death, each is fully and separately responsible for their own costs of the claim or action, including attorney's fees.

(d) Nothing in this section 39-71-414 prohibits an insurer and injured employee, or estate of the injured employee in the event of the injured employee's death, from an agreement to share costs or negotiating a compromise as to the costs of prosecution of any third-party claim or action.

(6) Participation – Nothing in this section requires that an insurer or injured employee, or estate of the injured employee in the event of the injured employee's death, pursue or prosecute a third-party claim or action. Both insurer and injured employee, or estate of the injured employee in the event of the injured employee's death, are free to waive their rights to pursue recovery from any or all at-fault third party or parties.

(7) Third-Party Settlement, Disclosure and Notice – An insurer and an injured worker, or estate of the injured worker in the event of the death of the injured worker, may enter into compromise agreements in settlement of the workers' compensation paid medical or medical yet to be paid with third-party individuals, companies or insurance companies. However, neither has the right to bind the other to a compromise agreement. Each party is responsible for such full disclosure to the third-party representatives and for providing reasonable and timely notice of intent to settle to the other workers' compensation party.

(8) Negotiation of Loss and Recovery – Regardless of whether the amount of medical paid or to be paid under the Workers' Compensation Act have been fully determined, the insurer and the injured worker, or estate of the injured worker in the event of the death of the injured worker, may agree upon an amount of medical reimbursement to be made to the insurer or the percentage of paid and to be paid medical. Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of medical reimbursement. Any dispute between the insurer and injured worker, or the estate of the injured worker in the event of the injured workers' death, concerning workers' compensation paid medical or medical yet to be paid is a dispute subject to the mediation requirements of 39-71-2401.

(9) Limitation of Recovery – The insurer's recovery of medical paid or to be paid under the Workers' Compensation Act is limited to the fee schedule adjusted amounts for such medical. No such limitation is placed upon the injured employee or their estate in presentation of their third-party claim or action.

(10) Comparative Fault – The insurer and the injured employee or their estate are free to separately negotiate their respective claims and actions against at-fault third parties including offsets made for comparative fault. Reductions may be taken in negotiation of settlements which include comparative fault or as may be assigned by the court of competent jurisdiction through trial.

(11) Full Legal Redress – With respect to medical paid or to be paid under the Workers' Compensation Act, the injured worker, or estate of the injured employee in the event of the injured employee's death, is deemed to have received fulfillment of their right of full legal redress when

pursuing claims or actions against third parties when they have been provided medical benefits by the insurer under the Workers' Compensation Act and either negotiated settlements and signed releases of the at-fault parties or received a verdict from trial by the court of competent jurisdiction. Any claim or allegation that the injured worker, or estate of the injured employee in the event of the injured employee's death, has not received full legal redress is the responsibility for them to prove. The insurer has no duty or responsibility to show evidence or prove that the injured worker, or estate of the injured employee in the event of the injured employee's death, has received the benefits of their right to full legal redress before or after a settlement or verdict of a trial to maintain their direct right to recover medical paid and to be paid under the Workers' Compensation Act.