

## **MONT CODE ANN § 39-71-105 : Montana Code - Section 39-71-105: Declaration of public policy**

For the purposes of interpreting and applying this chapter, the following is the public policy of this state:

(1) An objective of the Montana workers' compensation system is to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole but are intended to provide assistance to a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

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### **§ 11.27 Montana**

#### **§ 11.27[1] Statutory Subrogation Rights**

Workers' compensation subrogation in the State of Montana is governed under a series of statutes.

#### **§ 39-71-405 Liability of Employer Who Contracts Work Out.**

#### **§ 39-71-411 Exclusive Remedy.**

#### **§ 39-71-412 Liability of Third Party Other Than Employer -- Additional Cause of Action.**

#### **§ 39-71-413 Liability of Employer and Fellow Employee for Intentional Acts.**

#### **§ 39-71-414 Subrogation.**

#### **§ 39-71-415 Disputes regarding Independent Contractor Status.**

#### **§ 39-71-416 Benefit Reduction for Third-Party Recovery.**

An injured worker may receive compensation and medical benefits under the Workers' Compensation Act and simultaneously pursue a third-party action where the injury, occupational disease or death is caused by "the negligence of a third party other than the employer or the servants or employees of the employer."<sup>1</sup> Whenever an action is prosecuted under § 39-71-412 or § 39-71-413, the compensation carrier is entitled to subrogation for all compensation and benefits paid to or to be paid under the Workers' Compensation Act.<sup>2</sup> If the injured employee intends to institute the third-party action, the employee shall give the carrier reasonable notice of the intention to do so.<sup>3</sup> If an injured employee refuses or fails to institute the third party action within one year from the date of the injury, the carrier may institute the action in the name of the employee and for the employee's benefit.<sup>4</sup> Section 39-71-412 provides as follows:

§ 39-71-412. Liability of third party other than employer or fellow employee--additional cause of action. The right to compensation and medical benefits as provided by this chapter is not affected by the fact that the injury, occupational disease, or death is caused by the negligence of a third party other than the employer or the servants or employees of the employer. Whenever such event occurs to an employee while performing the duties of his employment and such event is caused by the act or omission of some persons or corporations other than his employer or the

servants or employees of his employer, the employee or in case of his death his heirs or personal representative shall, in addition to the right to receive compensation under this chapter, have a right to prosecute any cause of action he may have for damages against such persons or corporations.

## **MONT CODE ANN § 39-71-414 : Montana Code - Section 39-71-414: Subrogation**

(1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the claim, judgment, or recovery.

(2) (a) If the injured employee intends to institute the third-party action, the employee shall give the insurer reasonable notice of the intention to institute the action.

(b) The injured employee may request that the insurer pay a proportionate share of the reasonable cost of the action, including attorney fees.

(c) The insurer may elect not to participate in the cost of the action. If this election is made, the insurer waives 50% of its subrogation rights granted by this section.

(d) If the injured employee or the employee's personal representative institutes the action, the employee is entitled to at least one-third of the amount recovered by judgment or settlement less a proportionate share of reasonable costs, including attorney fees, if the amount of recovery is insufficient to provide the employee with that amount after payment of subrogation.

(3) If an injured employee refuses or fails to institute the third-party action within 1 year from the date of injury, the insurer may institute the action in the name of the employee and for the employee's benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to the employee any amount received by judgment or settlement that is in excess of the amounts paid or to be paid under the Workers' Compensation Act after the insurer's reasonable costs, including attorney fees for prosecuting the action, have been deducted from the recovery.

(4) An insurer may enter into compromise agreements in settlement of subrogation rights.

(5) Regardless of whether the amount of compensation and other benefits payable under the Workers' Compensation Act have been fully determined, the insurer and the claimant's heirs or personal representative may stipulate the proportion of the third-party settlement to be allocated under subrogation. Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation. A dispute between the insurer and claimant concerning subrogation is a dispute subject to the mediation requirements of 39-71-2401.

(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.

(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.

(7) Regardless of whether the amount of compensation and other benefits payable have been fully determined, the insurer and the claimant may stipulate the proportion of the third-party settlement to be allocated under subrogation. Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation. A dispute between the insurer and claimant concerning subrogation is a dispute subject to the mediation requirements of 39-71-2401.

History: En. 92-204.2 by Sec. 3, Ch. 550, L. 1977; R.C.M. 1947, 92-204.2; amd. Sec. 12, Ch. 464, L. 1987; amd. Sec. 64, Ch. 613, L. 1989; amd. Sec. 4, Ch. 323, L. 1991; amd. Sec. 2, Ch. 574, L. 1991; amd. Sec. 1, Ch. 459, L. 1993; amd. Sec. 5, Ch. 172, L. 1997.

### **Issues**

## Right of Full Redress – Made Whole Interpretation

Is there a viable solution to allow for payers to recover damages from “at fault” parties with sufficient insurance and / or assets so as to not limit injured workers’ rights? YES.

### What is “Made Whole”

How is the term defined and what constitutes a condition where an individual is “made whole”? We have been told that if an injured person seeks assistance from counsel in prosecuting their WC and/or third party claim, due to the attorney fees and costs, the individual can *never* be “made whole”.

### Decision to Settle and/or Court Judgment

We need to create a workable system. This begins by ‘defining’ the what the common phrase “made whole” means in the state of Montana. Proposed to create a presumption in statute that defines “made whole”. Set that a judgment in a court of competent jurisdiction defines the first presumption of “made whole”. Set that a worker’s decision to settle a third party claim (or claims) which involves a workers’ compensation component defines the second presumption of “made whole”. Lastly, specify in statute that a worker or an estate that retains an attorney to aid and assist them in presenting their claim do so with intent and knowledge that a portion of their judgment or settlement proceeds will be given to the attorney, presumption three is that the full amount of settlement or judgment is the amount of money used for the “made whole” test, with no reduction for attorney’s fees and costs.

Having a reasonable ‘test’ to determine if an individual is or can be “made whole” is in need in Montana as a first step.

### Constitutional Right to Seek Full Legal Redress

The Montana Constitution is stronger than most states for the rights of the individual. “No person shall be deprived of this full legal redress for injury...” As with many legal concepts, the issue of what constitutes “full legal redress” has not been defined sufficiently...and when left open for interpretation has left employers without the equal protection that should be afforded to them. “Full legal redress” in context included workers’ compensation subrogation in the statutes, with a full method laid out for injured workers to pursue their third party claims while allowing for the workers’ compensation payers to potentially receive some recovery for funds paid to and on behalf of the injured worker. This included a formula for attorney fees in

prosecution of the third party action and gave the payers a first lien on any judgment, settlement or recovery.

With a more finite definition of “made whole” injured workers’ full rights to recovery will be maintained while allowing for some recovery for payers in certain circumstances.

### Recovery Under Certain Circumstances

In workers’ compensation, Medical is a mandatory benefit for accepted claims, limited only by fee schedule, appropriateness of care and the U & T Guidelines. Consider recovery for Medical paid for under workers’ compensation only. **Medical is a benefit not payable to an injured worker**, the medical care is provided and the payer reimburses the provider at the state mandated fee schedule. A worker is not ‘paid’ for medical under WC and is therefore not something that should be included in the “made whole” evaluation/determination.

### Revise the Statutes to Eliminate Subrogation and Insert Medical Recovery from At Fault Parties

Revise the Statutes to include ONLY PAST, CURRENT AND FUTURE MEDICAL, exclude from recovery against a third party in all cases except death all other benefits outlined in the statutes and law.

### Medical recovery for payments made under workers’ compensation by at-fault third parties:

- a. Remove and delete all reference to WC Subrogation from the statutes, refer only to Medical Recovery For Payments Made Under Workers’ Compensation.
- b. Add a direct cause of action in statute for the workers’ compensation payer (allows them to sue independently from the injured worker or estate),
- c. Reiterates that any past, present and future Medical paid under workers’ compensation will take a first position lien against any settlement or judgment obtained by the worker or their estate, IF and ONLY IF
- d. The at fault party or parties have a minimum of insurance limits available and/or actionable assets of \$200,000 (the per claim paid medical limitation current used for funding of payer assessments in Montana).
- e. This will require possibly a new statute in Montana to require, when WC is involved as a party to District Court litigation, that the defendants in third party tort litigation disclose insurance coverage limits and assets.