



OUR FILE MI051-002

To: The Economic Affairs Interim Committee (EAIC)

From: Richard Martin, Fair Claim Law Firm

Re: Workers' Compensation Subrogation Issues

Date: January 24, 2014

"Subrogation": to substitute one entity in place of another person in pursuing a legal right.

When any citizen of Montana is injured from some other person's fault, the citizen has a right of "full legal redress" which is specifically stated in Article II, Section 16 of the Montana Constitution. This means that the injured worker has a right to be compensated from the person at fault for all damages which flow from the injury which can include: medical expenses, lost wages, loss of fringe benefits, pain and suffering, loss of earning capacity, loss of enjoyment of life, loss of consortium of the spouse, loss of household services. This right to full legal redress cannot be taken away by the legislature except when the injured person is working when injured and then only with respect to fault of the direct employer and/or a co-employee, in which case workers' compensation benefits provide the exclusive remedy to the injured worker.

The injured worker gets some workers' compensation payments for medical expenses, but only if the expenses are incurred within 5 years of the injury and only if they comply with the Utilization and Treatment Guidelines. Thus, the worker is not fully compensated for medical expenses by workers' compensation.

The injured worker gets some workers' compensation benefits for lost wages, but only 2/3 of the average weekly wage at the time of the injury, only until maximum medical healing, and some future lost wages but only for about 2 years if PPD, or only until retirement age if PTD. Thus the worker is not fully compensated for wage loss by workers' compensation.

The injured worker get no workers' compensation for the remainder of the medical expenses, the remainder of the wage loss, for any loss of fringe benefits, for any

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of the loss of earning capacity, for any of the loss of enjoyment of life, for any of the loss of consortium, for any of the loss of household services.

Conventional wisdom is that workers' compensation benefits compensate a worker for only 10% of total damages, leaving the worker 90% short of full legal redress.

Rarely, maybe 1% of the time, is there a viable "third party" case in a workers' compensation claim. Usually the party at fault is the employer or a co-employee, who are protected by exclusive remedy immunity, again under Article II Section 16. Only in a very few cases is the a third party against whom a claim can be made, it may be a motor vehicle case, or a defective product, or a general contractor or owner of a work project that has duties of safety to all workers. The "third party" claims are vigorously defended, require lengthy litigation, in State or Federal Court, require a Plaintiff's attorney to work for years, on a 1/3 contingency fee and incur tens or hundreds of thousands of dollars in out-of-pocket costs. Third party cases are tough cases to pursue.

Usually, "third party" cases are settled out of court. Nowadays, District Courts require litigants to engage in a settlement conference in hopes of avoiding the time and resource consuming jury trials and appeals. There is great pressure on litigants to settle cases out of court, which can only happen if the litigants significantly compromise their claims. Thus, an injured worker almost never is fully compensated for damages in a third party action, agreeing to take less than full damages to avoid the costs and risks and delays of trials and appeals or because of finite policy limits of the third party. Out of a settlement or judgment, the worker has to pay the handling attorney a 1/3 fee, plus the tens or hundreds of thousands of dollars of costs. All the while, the workers' compensation insurer sits quietly on the sidelines, incurring no expenses, suffering no angst, incurring no attorney fees, frankly, not even expecting to recover any of the proceeds of the third party action.

When a third party case gets settled, or when a jury verdict is returned, there is no way to determine how and why the third party or the jury arrived at the settlement amount. The amount may or may not include payment for some medical expenses. Often third party defendants dispute the reasonableness and necessity of medical expenses incurred. Often the third party demands a reduction of the settlement demanded by the injured worker for the medical expenses and wage loss benefits already paid by the workers' compensation insurer, and only compensates the injured worker for the damages which are above and beyond what the workers' compensation insurer paid. The thought processes of both the third party insurer or the jury are unascertainable and confidential. It cannot be assumed that every medical expense incurred by the injured worker is fully accepted and fully paid / awarded by the third party insurer or jury. Thus it cannot be assumed that there is double recovery for any element of damage.

The state of the law in Montana on subrogation by an insurer of an injured person's right of full legal redress has been clearly established, through decades of exhaustive litigation. Despite insurers' unwillingness to accept the Constitutional mandate of full legal redress, despite insurers' clever attempts to circumvent the Constitution, the "made whole" doctrine has remained inviolate. See:

- *Skauge v. Mountain States Telephone v Mont Dakota Utilities* 172 Mont 521 (1977)
- *Zacher v. American Insurance Company* 243 Mont 226 (1990)
- *Francetich v. State Comp Fund* 252 Mont 215 (1992)
- *Ness v. Anaconda Minerals* 279 Mont 472 (1996)
- *State comp Ins. Fund v. McMillan* 306 Mont 155 (2001)
- *Swanson v. Hartford Ins Co.* 309 Mont 269 (2002)

The proposed legislative change in the workers' compensation subrogation law is based on a flawed legal analysis that somehow the legislature can circumvent Article II Sec. 16 of the Montana Constitution which guarantees full legal redress for all injuries. Although some cases, such as *Zacher*, base the decision on the principle of equity, those cases do not conclude that there is not an additional basis in the Constitution. The *Zacher* decision merely states that, just considering equitable principles alone, the equities are clearly with the injured worker.

"... the basic conclusion is that when the amount recovered by a claimant is less than the claimant's total loss, with a result that either the claimant or the insurer must to some extent go unpaid, then it is equitable that the loss be born by the insurer which had been paid an insurance premium for the assumption of liability ... The key aspect is that the insurer has been paid for the assumption of liability for the claim and that where the claimant has not been made whole, equity concludes that it is the insurer which should stand the loss, rather than the claimant. " (emphasis added) 243 Mont at 231.

In conclusion, the present state of the law on subrogation in workers' compensation cases in Montana should not be modified because:

1. It's the law. The people of Montana have written it into the Constitution. Any attempt to change will not withstand judicial check and balance on the power of the legislature, and will foster unnecessary expensive and acrimonious litigation.
2. It's equitable. Fairness demands that the injured worker be favored in pursuing full legal redress, not an insurer which has collected an insurance premium and voluntarily accepted the risk.
3. It's not a problem. There are so few workers' compensation cases with a viable third party recovery that its not significant in relation to the volume of workers' compensation business in Montana.
4. There is no double recovery. It's impossible to determine which damages are being compensated in a third party settlement or jury verdict.