Suggestions for Economic Affairs Interim Committee
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Potential Legislative Action Regarding Workers' Compensation for 2015 Session

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Level the Playing Field – Claim-Related Punitive Damage Immunity

Issue:

From a holistic standpoint, the 31,000+ of WC claims in Montana are handled by a variety of insurance Plans, each subject to the same statutory requirements, case law and general rules. These Plans are also subject to statutory and case law requirements to handle claims in a manner consistent with good faith and fair dealing. When an injured worker or their representative feel that the insurer has not been fair, they can sue the insurer for "bad faith". Bad faith suits are allowed in Montana against all three Plans, although the type and amount of damages recoverable vary greatly depending solely upon which organization handled the claim.

Plan 1 and Plan 2 insurers, their agents, TPAs and staff are subject to exposure to punitive damages if and when they are sued for bad faith claims handling. In the context of bad faith / punitive damage litigation, the exposures to the insurer are massive compared to the underlying cost of the case. A fairly recent claim of bad faith against an insurer went to a jury verdict in excess of $5 million. In addition, several bad faith suits which began as WC claims have settled for many millions of dollars each. These cases are not tried under the jurisdiction of the WCC, they are tried in either state district court or federal court.

The playing field in WC in Montana is not level. Plan 3 (Montana State Fund), which advertises itself "***Montana State Fund is the insurance carrier of choice and industry leader in service.***", has been granted immunity from any finding of punitive damages. While there may be arguments to support such an immunity for the 'insurer of last resort' portion of their operations, the situation makes for an non-level playing field. It also makes the insurance marketplace in Montana less competitive and in some documented cases shifts claims costs from one Plan to another where both have arguable exposure for a claim. The current system treats identical stakeholders (payers) in the system handling claims for Montana injured employees subject to the same rules, statutes and laws with a significant difference in financial exposure. Montana State Fund cannot be held liable for punitive damages arising out of a claim situation, while other insurance carriers and self-insured employers providing the same benefits and coverage to the same workers in Montana can be exposed to millions of dollars in a similar situation. Further, injured workers and their families are treated differently in the system.

To demonstrate, consider this hypothetical situation. Assume that an injured worker is treated in such a way that their claim is wrongly denied, causing a delay in medical treatment and a significant worsening of their physical condition. If the insurer is Plan 3, the full extent of the injured worker's remedy is payment of back benefits, a moderate percentage penalty for the wrongful denial (using the amount of benefits as the baseline amount) and possibly attorney's fees. The same worker, with the same situation taking place involving a Plan 1 or 2 insurer, would be able to make a claim (or law suit) for these same benefits, along with additional special and general damages, plus punitive damages. There is a stark difference in benefits available to the injured worker depending upon the organization that is responsible for the claim handling conduct. Whether this differential is constitutional or not is not an issue for this memo. The fact remains, organizations and injured workers in the Montana WC system are handled differently, with different rights and remedies, depending upon which organization handles the claim.

Recommendation:

The workers' compensation statutes address the system as the exclusive remedy for work-related injuries and illnesses. Enact legislation which will extend the exclusive remedy to provide statutory immunity for Plan 1 and Plan 2 insurers, their agents, staff and TPAs which is equivalent to that currently provided to Plan 3. This will level the playing field so that all payers in the state have the same law governing their conduct for claims handling, and further will encourage other insurance companies (Plan 2) to enter and compete in Montana.

Subrogation – The Right To Recover From An At-Fault Party

Issue:

As has been well documented by the Montana Self-Insurance Association and counsel representing injured workers in Montana, while documented in the statutes, subrogation is from a practical standpoint non-existent for WC payers in the state. Self-insured employers in the state are asked to pay for injuries due to the fault of others with no possibility of recovery from the at-fault party.

The Montana Constitution allows for injured Montana residents to seek full redress when they have been injured or damaged. The Supreme Court has ruled that as a matter of public policy, unless the injured person has been proven to be "made whole", there is no right of subrogation or recovery of state mandated payments made by or on behalf of the employer. For self-insured employers in Montana, though, who pay for their workers' compensation costs out of Montana-based revenue and payroll, being unable to seek recovery of state mandated benefit payments when the injury was clearly caused by a negligent third party puts them at a distinct disadvantage.

For example, a middle aged woman traveling on business on behalf of the employer is in a taxi in Southern California riding from the airport to her hotel. It is an authorized business trip and clearly in the course and scope. The taxi she is riding in is traveling too fast for conditions, spins sideways on the 8 lane freeway and crashes into the center median guardrail. Liability is obviously adverse to the taxi driver and the taxi company for the innocent passenger (our worker). She turns in a workers' compensation claim and makes a liability injury claim against the taxi company. She chooses to not retain an attorney, and handles the claim on her own with the taxi company. Ultimately, after about a year, she settles her liability claim against the taxi company for $30,000.00. The payer seeks advice of counsel regarding giving notice to the taxi company that any amounts paid on the WC claim should be reimbursed above the amount of the settlement, but well within the $11,000,000 liability limits in place for the taxi company. Counsel advises that the payer cannot make a claim for reimbursement: 1) there is no proof that the injured worker has been made whole; 2) a letter of subrogation demand to the taxi company was tantamount to bad faith claims handling in view of the lack of proof of the "made whole" status of the injured person; and 3) the taxi company would not consider the claim for reimbursement because the injured person signed a Release of All Claims and the workers' compensation payer (self-insured employer) has no separate standing to sue nor a sustainable cause of action. Because the settlement terms and condition were stipulated as confidential, it is unknown if the settlement paid for general damages only or paid for medical care at non-fee schedule rates in addition to general and compensatory damages. In this example, the self-insured employer paid tens of thousands of dollars of medical bills, wage loss benefits and permanent partial impairment caused simply and solely by the fault of another company who had sufficient insurance limits to pay both the injured worker's claim AND a claim for reimbursement and have $10,900,000 left. Unfortunately, the employer in this example (a hospital) had to divert funds from buying a new lifting machine or other safety devices for their workers and patients to fund the workers' compensation claim with no chance for reimbursement.

In a letter to this body, Richard Martin correctly points out that *"It's impossible to determine which damages are*

being compensated in a third party settlement or jury verdict" to support the idea that. It is equally impossible to get any type of determination that an injured party has been "made whole". Mr. Martin's note is a bit misleading, at least in some of the examples that we have seen regarding counsel pursuing recovery for some aspects of the injured party's claim. Specifically we have seen or been involved in stances where attempts to seek payment of medical bills, the same medical bills, under the Auto Liability coverage, Auto Med Pay coverage and Workers' Compensation coverage (usually three different payers).

Further, Mr. Martin in arguing equity quotes the court *"... 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.* The assumption here is that "either the claimant or the insurer must to some extent go unpaid" is as Mr. Martin points out that no injured worker making a workers' compensation claim in Montana can ever be made whole, particularly if they hire an attorney to advocate for them. The concept that one being injured by definition can never be "made whole" or receive full legal redress is the root of the existing situation in Montana. The conclusion is inequitable to Plan 1 self-insured employers in Montana.

The premise of paying an insurance company and that company willingly taking the risk simply does not apply to self-insured entities. These organizations willingly assume the risk of their workers' compensation exposures, and most put forth great efforts to ensure a safe working environment. There are no safety efforts or education that can keep a worker in a speeding taxi safe, a passenger in a car going through a green light struck in the side by a driver who ran a red light under the influence, a worker who undergoes surgery to fuse back vertebrae and due to physician's mistake loses use of her leg (for a claim that started out as a back strain) or a worker sitting in her car on the highway, stopped next to the flag person as she was instructed, when her car us run over by a front end loader smashing the passenger compartment of the car. These claims may be few in frequency, but they can cost into the hundreds of thousands of dollars...money that with sufficient underlying insurance liability limits should be available for reimbursement once the injured worker's claim has been settled or tried.

Recommendation:

Establish a statutory formula and process for determining if and when a workers' compensation injured worker has been "made whole", looking at the full amount of the settlement or judgment, taking into account the likelihood that many of these individuals will make the decision to hire an attorney on contingency plus costs and not using the contingency fee as an argument against the person being "made whole".

For self-insured employers, provide a separate cause of action in the law that would allow for them sue the at fault party for recovery directly or to participate in the third party litigation, discover policy limits, attend depositions, etc. with a well defined right to recover amounts paid to and on behalf the injured worker over and above any settlement or judgment awarded to the injured worker if the third party liability policy limits and assets are sufficient.