



Economic Affairs Interim Committee

63rd Montana Legislature

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June 11, 2013

DRAFT HJR 25 Workers' Compensation Study Plan

Prepared by Pat Murdo, Committee Staff
For June 25, 2013, meeting

Introduction

The HJR 25 Study Resolution, assigned to the Economic Affairs Committee, identified the following topics:

- Review subrogation as it relates to Montana Constitutional requirements and case law regarding making an injured worker "whole". *Background Information Appendix A.*
 - Review the use of subrogation in civil actions and settlements.
 - Review how other states handle subrogation.
- Examine the structure of the workers' compensation court and whether nonpolitical appointments are feasible or needed. *Background Information Appendix B.*
- Examine the structure of the State Compensation Insurance Fund as a state agency and the potential impacts if the State Fund were to no longer be a state agency. Determine what would be required for independence. *Background Information Appendix C.*
- Examine the implementation and use of medical utilization and treatment guidelines, including the guidelines related to narcotic prescriptions, and whether any cost savings are related to the use of the guidelines. *Background Information Appendix D.*
- Examine the use of stay-at-work and return-to-work forms and the interaction between medical providers and employers regarding an injured worker returning to work. *Background Information Appendix E.*
- Examine the impact on employees of benefit changes under HB 334 in the 2011 session, including the revised definition of permanent partial disability. *Background Information Appendix F.*
- Examine the actions taken or needed for improving workplace safety. *Background Information Appendix G.*

Question 1:

How does the committee want to handle each item in light of the re-establishment of the Labor-Management Advisory Council (*See Appendix H*)?

- The Labor-Management Advisory Council staff has indicated a willingness to explore requests from the Economic Affairs Committee, and these do not necessarily have to be items spelled out in the HJR 25 study.
- Similarly, the Labor-Management Advisory Council may incorporate items in the HJR 25 study and the Economic Affairs Committee can either duplicate the presentations or piggyback on that information by getting reports from LMAC members or liaisons to LMAC, if the Economic Affairs Committee decides to appoint legislative liaisons. However, early indications are that LMAC will not explore Montana State Fund independence issues.

Question 2:

Does the committee want a subcommittee, recognizing that budgetary limitations mean that each subcommittee meeting that is independent of the committee will reduce the meeting times of the committee?

Preliminary study approach:

- Determine if the committee wants a subcommittee or the full committee to explore all or some of these topics and let the Labor-Management Advisory Council report on others.
- Prepare short briefing papers on each topic that the Economic Affairs Committee wants addressed separately from LMAC, with panel discussions from stakeholders
- Subcommittee/Committee recommendations on each topic and legislation, if necessary.

Appendix A - Subrogation

The term subrogation means, according to Black's Law Dictionary:

The substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. (citation omitted) Subrogation denotes the exchange of a third person who has paid a debt in the place of the creditor to whom he has paid it, so that he may exercise against the debtor all the rights which the creditor, if unpaid, might have done. Subrogation appears commonly in construction contracts, insurance contracts, suretyship, and negotiable instrument law. Insurance companies, guarantors and bonding companies generally have the right to step into the shoes of the party who they compensate and sue any party whom the compensated party could have sued.

The right of one who has paid an obligation which another should have paid to be indemnified by the other. (citation omitted) A device adopted by equity to compel ultimate discharge of an obligation by him who in good conscience ought to pay it. (citation omitted)

Subrogation is of two kinds, either conventional or legal; the former being where the subrogation is express, by the acts of the creditor and the third person; the latter being (as in the case of sureties) where the subrogation is effected or implied by the operation of the law.

The Montana Constitution states in Article II, Section 16, that a person may not be deprived "of full legal redress for injury incurred in employment for which another person may be liable ... if such immediate employer provides coverage under the Workmen's Compensation Laws of this state". The portion of the section that has been interpreted to impact subrogation is the one referencing "full legal redress".

Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.

Case law often has been referenced regarding making an injured worker "whole". Among the relevant cases are:

- State Compensation Insurance Fund v. McMillan, 2001 MT 168, 306 Mont. 166, P. 3d 347;
- Francetich v. State Compensation Mutual Insurance Fund, 252 M 215, 827 P. 2d, 49 St. Rep. 222 (1992).
- Skauge v. Mountain States Telephone & Telegraph, 172 M 521, 565 P2d 628 (1977) - This was not a workers' compensation case but related to insurance and "made whole" issues.
- Thayer v. Uninsured Employers' Fund, 1999 MT 304, 297 M 179, 991 P. 2d 447.
- Shattuck v. Kalispell Regional Medical Center, Inc. 2011 MT 229, 362 M 100, P.3d 1021. This was not a workers' compensation case but related to insurance and "made whole"

issues.

- *Oberson v. Federated Mutual Insurance Co.*, 2005 MT 329, 330 M 1, 126 P. 3d 459. This case allowed Montana's "made whole" principle to apply rather than Michigan law for a Michigan employee injured while working in Montana and that the "made whole" doctrine proscribes subrogation in this case.

Review the use of subrogation in civil actions and settlements in Montana, if possible. For example, how does a workers' compensation case differ from other insurance cases related to subrogation? Have there been successful subrogation lawsuits under 39-71-414, MCA, and, if so, what were the successful elements? The workers' compensation subrogation statute says:

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.

Review how other states handle subrogation. A quick Internet search provided an article by Gary Wickert, author of "Workers' Compensation Subrogation in All 50 States", who noted that in 2001 the Ohio Supreme Court struck down on state constitutional grounds Ohio's subrogation statute. This may have been revised since then. Mr. Wickert does not single out Montana's situation from that of other states.

Other possible activities under the subrogation portion of HJR 25 would be to hear from self-insured employers, in particular, and from employees who have relied on the "made whole" doctrine to fill in gaps from workers' compensation coverage. For example, self-insured employers may be required to have motor vehicle insurance but pay for any employee's automotive claims that involve personal injury under workers' compensation insurance; any motor vehicle insurance money goes toward making the worker whole. As a result, the employer's workers' compensation premiums increase even though other insurance may have been available to offset the increase in costs to the employer. From the worker's perspective, workers' compensation benefits do not make up for pain and suffering or fully compensate for lost wages in most cases. For that reason, employee representatives argue to retain the "made whole" emphasis of Montana's current workers' compensation law. From this perspective, does the application of Montana's "made whole" doctrine affect self-insured employers more than employers covered by private insurers or the Montana State Fund?

Subrogation is a likely topic for the Labor-Management Advisory Council, and if LMAC decides to study subrogation, staff recommends this topic be handled by LMAC.

Appendix B - Workers' compensation court and whether nonpolitical appointments are feasible or needed.

Montana's workers' compensation judge is selected by the governor from a list provided by the Judicial Nomination Commission and serves a 6-year term. Although not specifically a political appointment, there is an argument that, because the workers' compensation judge is not elected as are other judges subsequent to their appointment to fill a vacancy, there may be an indication of the judge being politically attuned as far as the governor is concerned. However, an argument could also be made that the 6-year term removes a judge from the same election cycle as the governor. Each nomination must be confirmed by the Senate, according to 3-1-1013, MCA.

3-1-1010. Lists submitted to governor and chief justice -- report on proceedings. (1) If a supreme court justice, a district court judge, the workers' compensation judge, the associate water judge, or the chief water judge gives notice of the judge's resignation to take effect on a specific date, the commission shall meet as soon as possible after the justice's or judge's proposed resignation date has been verified by the chief justice of the supreme court. If notice is not given, the commission shall meet as soon as possible after a vacancy occurs. The meeting must be held in compliance with 3-1-1007. The commission shall submit to the governor or chief justice, within the time period established under 3-1-1007, a list of not less than three or more than five nominees for appointment to the vacant position.

(2) The list must be accompanied by a written report indicating the vote on each nominee, the content of the application submitted by each nominee, letters and public comments received regarding each nominee, and the commission's reasons for recommending each nominee for appointment. The report must give specific reasons for recommending each nominee.

39-71-2901. Location of office -- court powers -- withdrawal -- substitution. (1) The principal office of the workers' compensation judge must be in the city of Helena.

(2) The workers' compensation court has power to:

- (a) preserve and enforce order in its immediate presence;
- (b) provide for the orderly conduct of proceedings before it and its officers;
- (c) compel obedience to its judgments, orders, and process in the same manner and by the same procedures as in civil actions in district court;
- (d) compel the attendance of persons to testify; and
- (e) punish for contempt in the same manner and by the same procedures as in district court.

(3) The workers' compensation judge shall withdraw from all or part of any matter if the judge believes the circumstances make disqualification appropriate. In the case of a withdrawal, the workers' compensation judge shall designate and contract for a substitute workers' compensation judge to preside over the proceeding from the list provided for in subsection (4). The substitute judge must be compensated at the same hourly rate charged by the department of justice agency legal services bureau for the provision of legal services to state agencies. The substitute judge must be reimbursed for travel expenses as provided for in 2-18-501 through 2-18-503. When the substitute judge has

accepted jurisdiction, the clerk of the workers' compensation court shall mail a copy of the assumption of jurisdiction to each attorney or party of record. The certificate of service must be attached to the assumption of jurisdiction form in the court file.

(4) The workers' compensation judge shall maintain a list of persons who are interested in serving as a substitute workers' compensation judge in the event of a recusal by the judge and who prior to being put on the list of potential substitutes have been admitted to the practice of law in Montana for at least 5 years, currently reside in Montana, and have resided in the state for 2 years.

Staff recommends that this section be explored by the Labor-Management Advisory Council, but also be separately explored by the Economic Affairs Committee because of the political overtones.

Appendix C - The structure of the State Compensation Insurance Fund as a state agency and the potential impacts if the State Fund were to no longer be a state agency.

- Review the history of the State Compensation Insurance Fund, including the problems that arose with political rate-setting directives in the mid-1980s and the concerns that arose when initially the State Compensation Mutual Insurance Fund was regulated under Title 33 along with all other workers' compensation insurers. Possible presentation or white paper.
- Determine what would be required for independence:
 - Would a guaranteed market still work (and, if so, how) or would an assigned-risk pool requiring the participation of all private insurers (but not self-insured entities) be feasible without driving out other workers' compensation insurers?
 - What would be the actuarially established cost of requiring the Montana State Fund, instead of the state's general fund, to cover claims under the Old Fund for injuries or occupational disease that occurred before July 1, 1990, if that were to be a condition of the Montana State Fund being made independent?
 - Alternatively, what would the cost be to Montana State Fund to continue as an independent private insurer to handle Old Fund claims with the money to pay the claims still coming from the general fund? Or should this service be better placed out for bid?
 - What have other states done prior to making their state compensation funds into private entities?
 - What exclusions or alterations would be necessary for regulating the Montana State Fund under Title 33 if the Montana State Fund remained a work comp provider of last resort?
 - How would an open market affect the state of Montana's workers' compensation insurance premiums and what would be required if the state of Montana no longer was required to purchase workers' compensation insurance from the Montana State Fund? What impacts on the market would occur if the state were to self-insure for workers' compensation?
- Obtain input from private insurers to determine if competition would improve or decrease without the state's guaranteed market basically provided by the Montana State Fund.

The Labor-Management Advisory Council does not plan to include any reviews of Montana State Fund and its future, so this portion of the study falls directly on the Economic Affairs Committee. Given the complexity of the subject, several presentations or white papers could be expected at 3 to 5 meetings.

Appendix D - Medical utilization and treatment guidelines, implementation and use

- including the guidelines related to narcotic prescriptions;
- any cost savings related to the use of the guidelines.

Staff recommends that this section be explored by the Labor-Management Advisory Council. The information related to this section is likely to be developed by the Department of Labor and Industry and reports can be made available to the Economic Affairs Committee.

Appendix E - Stay-at-work and return-to-work forms

Includes interaction between medical providers and employers regarding an injured worker returning to work.

Staff recommends that this section be explored by the Labor-Management Advisory Council. The information related to this section is likely to be developed by the Department of Labor and Industry and reports can be made available to the Economic Affairs Committee.

Appendix F - Impact on employees of benefit changes under HB 334 in the 2011 session

- Including the revised definition of permanent partial disability.

Staff recommends that this section be explored by the Labor-Management Advisory Council. The information related to this section is likely to be developed by the Department of Labor and Industry and reports can be made available to the Economic Affairs Committee.

Appendix G - Actions taken or needed for improving workplace safety.

More workers are injured in Montana than the countrywide average or regionally, according to data compiled from 2010 claims by the National Council on Compensation Insurance, Inc. NCCI's information, presented in early June to insurers, regulators, and interested parties, showed the regional average in 2010 was 4,793 claims per 100,000 workers, while the countrywide average was 3,633 claims, and the Montana average was 5,832 claims. Since WorkSafeMT was still getting off the ground in 2010, the organization's training efforts, along with those of the Department of Labor and Industry's Safety Bureau may put downward pressure on those numbers in future claim years.

Staff recommends that this section be explored by the Labor-Management Advisory Council. The information related to this section is likely to be developed by the Department of Labor and Industry and reports can be made available to the Economic Affairs Committee.

Appendix H - Labor Management Advisory Council

The Commissioner of Labor and Industry, Pam Bucy, created a Labor-Management Advisory Council within the Department of Labor and Industry on May 14, 2013, with endorsement by Gov. Steve Bullock on May 17.

The purpose of the LMAC is:

- to monitor the effectiveness of the reforms generated by House Bill No. 334 in the 2011 legislative session;
- to continue to improve Montana's workers' compensation system; and
- to recommend solutions to the Commissioner in order to facilitate education, promote mutual cooperation between labor and management, and improve the workers' compensation system in Montana.

Membership consists of:

- 5 representatives of employers, including one representing self-insurers and one representing the Montana Chamber of Commerce;
- 5 representatives of employees, one of whom is to be chosen by the Montana Trial Lawyers' Association.
- Lt. Gov. John Walsh as chair; and
- Diana Ferriter, Employment Relations Division Administrator, a non-voting member.

A subcommittee consists of:

- 1 representative of the Montana Medical Association;
- 1 member of the Montana Hospital Association;
- 1 member of the Montana State Fund;
- 1 member representing private work comp insurers; and
- 1 member representing the Rehabilitation Association of Montana.

Additional subcommittee members may be added upon a favorable vote of the advisory council.

Procedures:

- The advisory council will meet at least quarterly and terminates on Dec. 31, 2015..
- Approval of a position or recommendation requires a favorable vote of at least a majority of the representatives of employers and of employees and the Lt. Governor's vote.

LMAC Members:

Representing Employees

Doug Buman Laborers' International Union of N. America	Al Ekblad Montana AFL-CIO	Jim Larson Teamsters Local 190
	Don Judge Injured Workers' Resource Council	Al Smith Montana Trial Lawyers Assn.

Representing Employers

Bill Dahlgren Sun Mountain Sports	Annette Hoffman St. Vincent's Healthcare	Riley Johnson Nat'l Federation of Independent Business
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Bob Worthington
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Subcommittee Members

Bob Olsen
Montana Hospital Assn.

Kevin Braun
Montana State Fund

Jackie Lenmark
American Insurance Assn.

Jean Branscum
Montana Medical Assn.

Lisa Kozeluh
Vocational Management Services