FAIR CLAIM
WORK COMP ATTORNEYS

OUR FILE LE085-001

March 27, 2014

Economic Affairs Interim Committee Members and Staff
P.O. Box 201706
Helena, MT
59620-1706

Re: Workers' Compensation Treating Physician Selection by Insurers

Dear Economic Affairs Interim Committee Members and Staff:

My name is Michele Reinhart Levine. I am an Associate Attorney at Fair Claim Law Firm in Great Falls, Montana. Our firm represents injured workers across Montana in worker's compensation claim disputes with insurers.

I understood the reasons behind House Bill 334 (2011) workers' compensation reforms, which were passed at a time when Montana's workers' compensation insurance rates were the highest in the nation. Unfortunately, some of those reforms are having harmful effects on injured workers. In particular, changes to Mont. Code Ann. §39-71-1101, allow insurance companies to select the treating physicians for insured workers. In the past, injured workers could choose their own doctors.

Treating physicians have great power in the work comp systems. A treating physician can determine the following for an injured worker, including:

1. The medical diagnosis;
2. Need for treatment;
3. Causation and whether the worker's medical problem is related to the claimant's industrial injury or occupational disease;
4. When the worker is at maximum medical improvement or as good as he or she is likely to get;
5. When the worker can return to work;
6. Whether the worker has permanent physical restrictions due to the industrial injury or occupational disease;
7. Whether the injured worker can return to the time-of-injury job or an alternative job, which impacts the worker's potential wage loss; and
8. Whether the injured worker will need additional medical treatment or not.

When a treating physician determines that the worker is able to return to work with the same employer and does not have wage loss, the insurer will terminate wage loss benefits. Insurers may have financial incentives to find insurance friendly doctors who:

1. Opine the worker's medical condition is either not related to the worker's work-related injury or occupational disease;
2. Ignore objective medical findings establishing the causation/connection between the injured worker's medical condition and work related injury/OD claim;
3. Deny or delay necessary medical treatment;
4. Fail to accurately and timely diagnose the medical condition;
5. Opine that the injured worker can return to the time of injury job or a modified job prematurely, causing further injury or aggravation to the worker;

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6. Opine that the worker does not have any restrictions when restrictions could prevent the injured worker from further injury;
7. Opine that the injured worker lacks impairment, further interfering with the injured worker's ability to obtain wage loss benefits; and
8. Opine that the injured worker does not need further medical treatment, interfering with the injured worker's ability to obtain further necessary treatment.

In spite of possible retaliation by the employer and/or the insurer, several workers were willing to share their stories. See the attached testimony from injured workers' Christopher Carter and Gary Stroop, who have experienced substantial setbacks in their medical care due to this law. Another claimant, Chrissy Burkstrand, has had a similar experience. Chrissy works for a temp agency. She was delivering large jugs of Culligan water to a bank's break room in the basement, when she slipped on the stairs and bounced on her rear down the stairs, fracturing her tailbone. The insurer selected a medical provider who ignored her x-rays and evidence of a likely tailbone fracture and returned her to her time of injury job and who ignored her ongoing radiating pain and numbness. Her employer asked her to consider doing a heavy lifting job which involved moving hotel furniture, which made Chrissy very nervous that she would cause further injury to herself and asked her employer if they would consider waiting until she got her MRI results. Luckily for her the employer agreed, because the MRI showed she did indeed have a fractured tailbone and needed lifting restrictions. This is one more example of an insurance selected medical provider prematurely releasing a worker to a job without restrictions and before receiving proper diagnostic tests. Several other workers, who were not yet comfortable providing their names, have had similar experiences.

This statute is also likely unconstitutional as an invasion of an injured worker's right to privacy and personal autonomy. See the attached white paper regarding treating physician selection. Choosing a doctor is a very personal decision, especially when that doctor may examine a patient with or without clothing and may perform surgery on one's body. One injured worker that I know of is a victim of sexual assault and she is not comfortable with a male doctor. None-the-less, the insurer chose a male doctor as her treating physician. She reported that this doctor pulled down her pants to perform a spinal injection and kept her pants down for nearly 30 minutes, for a procedure that should not take that long. This made her feel violated, unsafe, and very uncomfortable. The insurer will not let her see any other medical provider and she is faced with either going to see another doctor that she has to pay for out of pocket for her work injury, or going to see a doctor that she feels unsafe and uncomfortable with. This is an unfair and expensive dilemma for injured workers, many of whom cannot afford to get a second opinion or pay for a different doctor.

In contrast, if an insurer does not like a treating physician's opinion, including a physician that the insurer selected, the insurer can pay for an independent medical examination (IME). Typically IME doctors will opine that the worker's injury is not job related and that the worker can go back to work with minimal or no restrictions. Now the insurers can basically have two doctors' opinions against an injured worker to suspend, delay, or deny work comp benefits. This can be very hard for the worker to overcome.

When injured workers are returned to the work force prematurely, without proper healing, or to jobs that they should not be doing, they are likely to incur another work related injury and the process repeats itself.

The best way to fix this unconstitutional and harmful statute is to let injured workers choose their own treating physicians.

Thank you for your consideration and for the opportunity to comment today.

Sincerely,

Michele R Levine

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MRL/
Enc: As stated