Medical Recovery Under Workers’ Compensation From At-Fault Parties

MT Chamber of Commerce – March 2016
Michael J. Marsh, RPA, CPIA

Background

- Legal requirement: all employers in Montana provide workers’ compensation coverage for all employees.
- Montana Code Annotated (“MCA”), REQUIRES payment of Indemnity (Lost Time and physical permanent Impairment), Medical, Vocational Rehabilitation and other benefits by workers’ compensation payers when an injury or Occupational Disease is suffered by an employee in the course and scope of their employment.
Background

- “Insurer” is used as an all inclusive term in the statutes, where all workers’ compensation payers are referred to in statute as “insurer”. Use of the term “insurer” refers to all three authorized workers’ compensation plans in Montana, Plan 1 (Self-Insured), Plan 2 (private insurance company) and Plan 3 (Montana State Fund).
- Therefore, if an employee is injured on the job, payment of workers’ compensation benefits is required of the employer, if self-insured, or their insurance provider (39-71-407 MCA).

Fault

- Workers’ Compensation is a No-Fault system
- Even when an employee’s injury or Occupational Disease is caused by the negligence or fault of a party other than the employer or co-workers, the “insurer” for the workers’ compensation claim is legally required by statute to pay the workers’ compensation benefits, including medical benefits for treatment received by the injured worker.
Fault / Other Programs

• WC “Insurer” obligation remains even if there are other medical programs available to the injured worker for the same treatment
  – health insurance: Private, Medicare, Medicaid
  – automobile liability insurance,
  – automobile medical payments insurance,
  – automobile UM/UIM insurance,
  – premises liability insurance,
  – commercial liability insurance and
  – products liability insurance

At-Fault Parties

• Beyond workers’ compensation, the injured employee can bring a claim or action against the at-fault party recover damages (39-71-412 MCA).
• Pursuit of such monetary remedies, full legal redress, is guaranteed by the Montana Constitution (Article II, Section 16).
• This right to seek full legal redress beyond the workers’ compensation benefits system has been addressed by the Montana Supreme Court in multiple cases as well as statute section 39-71-414 MCA – Subrogation.
Subrogation

- The right for an “insurer” to pursue third-party that caused a workers’ compensation injury or Occupational Disease to the employee and resulting loss to the employer and “insurer”.
- Subrogation is the commonly used term across the entire United States to describe the right and process for the “insurer” to pursue recovery of all or a portion of the amount of the claim paid on the workers’ compensation claim.

Subrogation

- Subrogation is so common that it exists in nearly every insurance contract issued in the U.S.
- Subrogation is also one of the key audit factors used by external, typically out of state, organizations when auditing the effectiveness of an insurance company or self-insured claims program.
Outlier State

• Montana is outside the mainstream.
• The Supreme Court ruled that, as a matter of public policy, **subrogation is not allowed** in Montana in workers’ compensation situations unless and until the injured worker has been “made whole” for claims made and unmade.
• “Made whole” is not in the Constitution, it is a court created concept.
• Montana is one of the only jurisdictions to effectively bar WC recovery from at-fault parties.

Outlier State

• Claims adjusters, examiners and attorneys in the workers’ compensation claims industry have correctly adopted the practice of not pursuing or participating in efforts to recover from at-fault parties.
• From a practical standpoint, it is not possible to prove that an injured worker has been “made whole” before the conclusion of the third party claim or litigation.
• In WC or with attorney representation, an individual can never be “made whole”
Circular Situation

• The circular puzzle for insurers is that 39-71-414 MCA lays out a procedure for pursuing recovery, allowing in some situations for a cost sharing agreement between the injured worker and the insurer.
• 39-71-414 remains an active statute
• Those representing injured workers assert that the “insurer” must prove that the injured person has been “made whole” before considering any agreement to pursue subrogation.

Circular Situation

• The insurer cannot demonstrate that the injured worker is or will be “made whole” in advance of a settlement or judgment,
• After a settlement or judgment is completed, the insurer’s rights are lost.
• Pursuit of an “insurer” for third party recovery has met with allegations of bad faith and/or violations of the Unfair Trade Practices Act (“UTPA”).
Where Is MT Today?

• In summary, the practical impact of the Supreme Court’s rulings has been to invalidate the entirety of 39-71-414 MCA.
• For all intents and purposes, there is no ability for a self-insured employer or insurance company providing workers’ compensation coverage to workers on behalf of Montana employers, as required by statute, to seek or receive any recovery for a workers’ compensation situation that was caused by the fault of other parties.

Public Policy

• The situation creates negative consequences in Montana:
  – higher workers’ compensation costs,
  – multiple payments for the same medical bills by multiple parties, and
  – unnecessary increases in employers’ Experience Modification factor (“ExMod”), raising their premiums and in some cases causing them to lose contracts that have certain ExMod maximums.
Last Legislative Session

Michael Mant}

Home: Raleigh, Governor@governor.nc.gov
Send: Tuesday, May 12, 2015 1:28 PM
To: Michael Mant
Subject: White House

Dear Michael Mant,

Thank you for contacting me about Senate Bill 280, an act to provide workers’ compensation insurers full subrogation rights against third parties. On April 29, 2015, I voted for this legislation.

SB 280 changes the law governing subrogation to workers’ compensation costs where the injured worker receives damages in a third party liability case. The bill would allow the workers’ compensation insurer to recover subrogation payments made on behalf of the injured worker, regardless of whether the injured worker recovers damages in excess of the workers’ compensation benefit and third party recover, if any.

The effect of SB 280 in many cases would be to amount a insurer who has paid out an injured worker’s injuries, and in cases involving loss of an employee given the low limits of our mandatory insurance liability law, an injured worker will often be left uninsured for their injuries and damages above the limits of SB 280’s changes in subrogation law.

The primary concern expressed by proponents of SB 280 is the effect that high cost of injury losses or their “cost factor”…enforce a fault factor used to calculate employees’ compensation. The fault factor may also adversely affect employers’ ability to obtain workers’ compensation insurance. While there are no resolve and additional costs, SB 280 has no impact directly address these concerns. I believe efforts by the Senate and House will continue to protect the rights of injured employees to obtain SB 280 for their injuries. Therefore, I will direct the Commissioner of Labor and Employment and other members of my administration to identify possible alternative ways for addressing the concerns underlying SB 280. For more reasons, I support SB 280.

Thank you again for reaching out about this legislation and please don’t hesitate to do so again with further questions or comments.

Sincerely,

STEVE BULLOCK
Governor

Not An Ex-Mod Issue

• To be clear, however, **this is not an ExMod issue.**

• This is specifically true for Plan 1 self-insured organizations, who typically do not use anything like an ExMod.
Not An Ex-Mod Issue

• The ExMod is used by insurance companies to modify rates charged based upon the recent years’ claims experience by individual “insureds”.
• The issue for Plan 1 self-insured entities is that they are bound by the Workers’ Compensation statutes and the responsibility to pay the statutory benefits to and on behalf of the injured worker.

Not An Ex-Mod Issue

• WC payments (including medical) come out of their gross sales and revenues, not insurance premiums.
• Some have argued that the “insurers” charge a premium and that they can or should include unrecoverable losses in the rates charged to Montana employers.
Direct Damage to Plan 1

- Self-insured organizations do not use premium.
- When an at-fault party causes injury to one of their employees, self-insured entities pay workers’ compensation benefits as required by statute out of their gross sales revenues.
- When a self-insured organization must pay WC Medical due to the fault of others, they are directly financially damaged.

Economic Impact

- When a WC case is in the hundreds of thousands or millions of dollars, Plan 1 entities unfortunately have to make difficult decisions on how to pay the claims, offsetting planned hiring of new employees, purchasing new equipment, providing training and so on.
- The inability to seek recovery for paid medical bills has a direct and significant negative financial impact upon the local and state economy.
Medical Bills Paid

• Routinely, several “insurers” pay for the same medical bills when at-fault parties are involved, those payments might be made directly to the medical providers or to the injured worker or their counsel.
• Either way, the workers’ compensation medical benefit is not payable to the injured worker, the payer is obligated to pay those bills directly to the medical providers.

Rebalance

• Proposal to rebalance the system:

• Allow the “insurer” to have a right to recovery of a portion of the amounts paid under workers’ compensation when the claim arises due to the fault of a person or organization other than the employer or co-workers, within certain conditions.
Rebalance

• The proposal isolates coverage within the Workers’ Compensation Act to the Medical line
  
  – Excludes from potential third party recovery all other coverages such as Indemnity (Lost Time and Impairment), Expenses (Travel) and Vocational Rehabilitation

“Made Whole” Impact

• Medical benefits under the Workers’ Compensation Act are not payable to the injured worker.
• There is no direct financial impact upon the injured worker seeking full legal redress
• Medical benefits will continue to be provided and paid for by the workers’ compensation “insurer” on accepted claims in addition to other insurances are available.
Proposed Solution

• The intent of our proposal is to allow for the maximum recovery by the injured worker from the at-fault party or parties, and if specific insurance or actionable assets are available, provide a direct and separate right of action for recovery to the workers’ compensation “insurer” for the medical benefits paid and to be paid on whole and partially accepted claims.

Proposed Solution

• Eliminates from statute the Subrogation section in its entirety;
• Specifies that the only Workers’ Compensation payments made or to be made that are potentially recoverable are Medical, other benefit types are excluded;
• Sets a floor of collectible assets (including insurance) of $200,000, no right to recover will exist if the collectible assets are less than the floor;
Proposed Solution

- Gives the “insurer” a direct cause of action to pursue recovery of WC Medical benefits paid or to be paid from at-fault parties;

- The “insurer” and the injured worker are free to independently negotiate their claims against at-fault parties, although allowance is made for agreements to be made between the parties;

Proposed Solution

- The “insurer” recovery is limited to the MT Workers’ Compensation fee schedule amounts for Medical benefits paid and to be paid, no such limitation is placed upon the injured worker when presenting their claim(s) to the at-fault parties to allow consistency with Montana case law; and

- Proof of “made whole” shifts to the most knowledgeable stakeholder in the process, the worker.
Summary

• Currently Montana is an outlier, no realistic ability for “insurers” to pursue recovery from at-fault parties, contributing to the high cost of WC in Montana.
• 3% and 9%.
• Lack of potential recovery from at-fault parties provides disincentive to new WC insurers to enter the state.
• WC Medical is not payable to the injured worker, remove Medical from the “made whole” discussion.
• Where at-fault parties are involved, medical bills are routinely paid for multiple times (ie: Ridley).
• Frame a workable process for “made whole” determination

Take Action

• Public Policy questions
  – Do we continue with current system, disallowing at-fault party recovery by WC payers, accepting the resulting higher than necessary WC costs and premiums, placing MT in a less competitive position with surrounding states?
  or
  – Do we slightly modify the system to allow for an “insurer” the right to recover for paid/to be paid WC Medical from at-fault parties?
    • floor of attachable assets/insurance, ensuring that grievously injured workers attain full legal redress where policy limits are low
Medical Recovery Under Workers’ Compensation From At-Fault Parties

Questions and Discussion

Midland Claims Service, Inc. and Industrial Injury Claims®
PO BOX 20151  Billings, MT  59104 (406) 656-9960
www.midlandclaims.com

Medical Recovery Under Workers’ Compensation From At-Fault Parties

Presented by:
Michael J. Marsh, RPA, CPIA
President
Midland Claims Service, Inc.
Industrial Injury Claims®
PO Box 20151
Billings, MT 59104-0151
(406) 656-9960
www.midlandclaims.com
Redefining Best Practices®

Third Party Claims Administrator exclusively for Montana employers
INVESTIGATION.COMMUNICATION.RESOLUTION.®