



AN ACT PROVIDING THAT A WORKERS' COMPENSATION INSURER HAS FULL SUBROGATION RIGHTS AGAINST AN AT-FAULT THIRD PARTY FOR MEDICAL CLAIMS REGARDLESS OF WHETHER DAMAGE AWARDS EXCEED A COMBINATION OF WORKERS' COMPENSATION BENEFITS AND THIRD-PARTY SETTLEMENTS; AMENDING SECTION 39-71-414, MCA; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, subrogation is a device of equity "designed to compel the ultimate payment of a debt by the one who in justice, equity and good conscience should pay it", as noted in *Skauge v. Mountain States Telephone and Telegraph Co. and Montana-Dakota Utilities Co.*, 172 Mont. 521, 524, 565 P.2d 628, 630 (1977); and

WHEREAS, in *Zacher v. American Insurance Co.*, 243 Mont. 226, 794 P.2d 335 (1990) and *Francetich v. State Compensation Mutual Insurance Fund*, 252 Mont. 215, 827 P.2d 1279 (1992), the Montana Supreme Court held that a workers' compensation insurer or self-insurer has no subrogation interest in proceeds from a third-party action allowed pursuant to 39-71-412 and 39-71-413, MCA, until the claimant has been "made whole" for the claimant's entire loss; and

WHEREAS, the "made whole" analysis includes wage loss, loss of earning capacity, loss of fringe benefits, pensions, pain and suffering, and related damages as well as past and future medical costs, meaning that workers' compensation insurers, including self-insurers, are effectively precluded from exercising a subrogation interest in the proceeds of the third-party action; and

WHEREAS, in *Zacher* and in *State Compensation Insurance Fund v. McMillan*, 2001 MT 168, 306 Mont. 155, 31 P.3d 347, the Montana Supreme Court held that the "made whole doctrine" is not dependent upon a right of recovery of full legal redress under Article II, Section 16, of the Montana Constitution; and

WHEREAS, in *Ridley v. Guaranty National Insurance Co.*, 286 Mont. 325, 951 P.2d 987 (1997), the Montana Supreme Court held that under the Unfair Trade Practices Act, an insurer has a duty to pay medical expenses (prior to final settlement) for an injured third party when liability is reasonably clear; and

WHEREAS, it is the intent of the Legislature to clearly articulate that for all medical benefits paid by the insurer, the "made whole doctrine" is not to be applied or considered in determining whether an insurer or self-insurer has a subrogation right in a third-party action as allowed for by 39-71-412 and 39-71-413, MCA.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-71-414, MCA, is amended to read:

"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~~ For all medical benefits paid, regardless of whether the claimant is able to demonstrate damages in excess of the workers' compensation benefits and third-party recovery combined, the insurer is entitled to full subrogation rights under this section; For all nonmedical compensation and benefits, 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."

Section 2. Effective date. [This act] is effective July 1, 2015.

- END -

I hereby certify that the within bill,
SB 0288, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2015.

Speaker of the House

Signed this _____ day
of _____, 2015.

SENATE BILL NO. 288

INTRODUCED BY B. TUTVEDT

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