HENN LESPERANCE PLC
ATTORNEYS AT LAW

Confidential Attorney/Client Memo

To: Gayle Cummings, MCRCSIP

From: Bill Henn, Henn Lesperance PLC

Date: Tuesday, August 21, 2018

Re: CRASIF 5/2/18 Letter Re: Designating Responsible Insurer for Certain Workplace Injuries

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Legal Issue

This memo responds to CRASIF's May 2, 2018 letter to MCRCSIP—received by MCRCSIP on August 10, 2018. The subject of the letter is "[d]esignating the responsible medical care payer for injured road commission employees at an emergency medical care facility seeking immediate treatment whose injury is the result of entering, exiting or riding in a road commission vehicle insured by MCRCSIP, and, whose road commission is a member insured for worker's compensation by CRASIF." The letter offers cursory conclusions that, for a variety of reasons, an employee injured under these circumstances should designate the employee's healthcare provider as the responsible insurer, rather than CRASIF or MCRCSIP. Upon research and review, we believe CRASIF's recommendation is an "end-run" around its clearly defined legal responsibilities. Moreover, contrary to CRASIF's conclusion that no harm would befall Road Commission employees, the practical result of its recommendation would hurtle them into a morass of insurance red tape, leaving them uncertain whether medical bills or other benefits would be paid, and if so, by whom. This would inflict unnecessary harm on the people our respective Pools were created to protect. For the reasons discussed in greater detail below, we recommend that the MCRCSIP Board oppose CRASIF's position.

Analysis

This response follows our firm's June 20, 2018 memo addressing the overlap between worker's compensation law and no-fault law. In that memo, we reiterated the black letter law principle that worker's compensation benefits are primary to other forms of insurance. In other words, if an employee is injured while on the job, he or she looks first to the worker's compensation carrier, and then only to the no-fault or health insurance carriers for additional benefits that he or she may be entitled to above and beyond those provided in the Worker's Disability Compensation Act.

This is so well settled that the Supreme Court has made it clear the injured worker has no choice among insurers:

> If workers' compensation payments are available to him, he does not have a choice of seeking workers' compensation or no-fault benefits…..

Perez v State Farm Mutual Automobile Ins Co, 418 Mich 634, 646; 344 NW2d 773 (1984). Therefore, the law in Michigan regarding who steps up first to the plate to pay an injured employee's benefits is not ambiguous in any sense.

CRASIF's recommendation turns the law on its head. In the narrow circumstances addressed in CRASIF's letter—that a Road Commission employee is injured while entering, exiting, or riding in a Road Commission vehicle—the presumption should be that the employee was injured while acting within the course of employment, and is therefore entitled to worker's compensation benefits. As a practical matter, likely the majority of such injuries will prove to be exactly that: work related injuries. For those uncommon instances where the injuries sustained in a Road Commission vehicle are not work related (i.e., a frolic and detour, or where the circumstances outlined in our June 20, 2018 memo are not met), medical bills and bills for other benefits will not appear overnight. The delay between the provision of medical or other services and the billing for those services should provide ample time for all potentially liable insurers to determine whether liability exists.

To briefly address CRASIF's suggestion that it "can be a difficult and cumbersome process" for a worker's compensation insurer to recover money improvidently paid out, we submit that the same is true for any insurer attempting to assert and recover on a lien. For example, no-fault insurers are entitled to offsets for worker's compensation benefits paid for damages that are also compensable under the no-fault act. MCL 500.3109(a). If a worker's compensation insurer denies benefits and is sued as a result, the no-fault insurer remains responsible for benefits, but has the right to intervene in the worker's compensation suit to protect its interests. At the end of the day, the litigation costs and increased administrative costs of "punting" on worker's compensation coverage will have a negative effect on the no-fault insurer.

Conclusion

For these reasons, we recommend that the MCRCSIP Board oppose CRASIF's recommendation. In the circumstance where a Road Commission employee is injured while riding in, entering, or exiting a Road Commission vehicle, there is a high probability that the employee will be entitled to worker's compensation. Where that is the case, Michigan law unequivocally holds that the worker's compensation carrier is primary. For those unusual cases where an employee operating, riding in, or entering/exiting a Road Commission vehicle is not within the course of employment, the delay between the incident and when medical or other bills must be paid should provide ample opportunity for all potentially affected insurers to determine their liability. Recommending that employees report health insurers as primary in these circumstances will very likely create needless red tape between the insurers and increase litigation and administrative costs—all to the detriment of the injured employees who will inevitably be caught in the middle of a drawn out process that should not be their burden.