Employer's Liability (Stop Gap) Coverage

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The History

Workers Compensation was designed to be the remedy of last resort for accidents that occur to employees, in the course of their employment. It pays for medical bills, lost time, lost body parts and death as a result of an on-the-job accident. The acts are "no fault" laws and strip the employer of their common law defenses and employees of their right to bring suit under any other law, common or statutory.

There are three areas that the law doesn't cover and all of the Workers Compensation acts allow an employee or third party (in the case of death) to bring suit against the employer. They are gross negligence, forcing an employee to do a job that is more hazardous than should be anticipated or an intentional act. While all three are similar, there are some slight differences.

An intentional act could be hitting, pushing or tripping with intent and would involve the criminal act of "assault and battery" and would therefore be excluded from coverage. An example of forcing an employee to do a job more hazardous than should be anticipated would be if an employer with a truck knew the truck had bad brakes, but needed to deliver a product and told an employee to deliver the product or they would be terminated.

The landmark case in Ohio for gross negligence involved a large manufacturer that had its' plant and offices on the top of a small hill. When the maintenance man went to cut the grass, the lawn mower would catch on the curve of the hill causing uneven cuts. The maintenance man decided to modify the deck of the lawn mower by removing the side guards. He told his foreman of his intent and was told to go ahead. The man did and the first time he cut the grass afterwards, he hit a rock. The blade broke and pierced his heart and he died. His widow brought suit and won, based on the fact that the company (through the foreman) allowed the man to remove safety features from the mower. This was deemed grossly negligent on the company's part. Since all medical and death benefits were paid by Worker's Comp, the award only consisted of punitive damages, about $100,000 at the time.

In the above action the company went to its General Liability policy for indemnification since this was a third party law suit. However, since Worker's Compensation laws were enacted there has been a common clause in all General Liability policies that excludes injuries to employees. Based on this, the claim was denied. Since Ohio's Bureau of Worker's Compensation (BWC) only covers those instances specifically covered in the act, the BWC denied any coverage. It was held that since the BWC was not an insurance company it could not offer liability coverage to an employer even though the coverage was for an employee. The employer was ultimately held liable.

Had the same accident occurred in a non-monopolistic state it would have been covered by a standard Worker's Compensation policy. Part I (Section A before 1986) covers all statutory requirements of the state(s) covered by the policy. Therefore medical bills, loss of limb, lost wages and death are covered by Part I. Part II (Section B pre-1986) covers those suits brought against the company outside of the Workers Comp Act. As noted this is usually a result of gross negligence.

<u>The Coverage</u>

For those companies that operate in both Monopolistic and Non-Monopolistic states, a simple endorsement (WC 00 03 03B) to the Worker's Compensation Policy provides Employer's Liability (EL) coverage for the Monopolistic States. The Worker's Comp rates on most policies reflect a rate for EL.

The rate for a Non-Monopolistic State is

Pure WC rate + Expense Factor + Profit Factor + Part II Factor = WC Rate.

The rate for a Monopolistic State is

Pure WC rate + Expense Factor + Profit Factor = WC Rate.

Companies that operate solely in a Monopolistic State can have coverage in two ways. A Worker's Compensation Policy with a Voluntary Compensation endorsement (same as with farm employments) and a WC 00 03 03B endorsement on the policy can be issued covering the monopolistic State. This is usually avoided unless it is a really large policyholder because of the expense of issuing a policy. The other more common method would be to endorse the coverage onto the insured's General Liability policy. The endorsement will remove the exclusion against injuries to employees for EL but not for statutory Worker's Comp.

<u>The Audit</u>

It should be remembered that Employees Liability is a non-filed line in Monopolistic states. This means the coverage is not one that gets into a lot of dispute and the premium involved doesn't affect the solvency of the carrier; therefore the state doesn't feel the need to regulate it. The forms used, the limits offered, the rates charged are all up to the individual carrier offering the coverage. Often you will see various Monopolistic States treated differently by the same carrier, with the exception being that all base the premium on payroll. This commonly occurred because an underwriter or underwriting manager in each state developed the rules for coverage, not the home office. I have audited policies that separate the payroll by classification in one state, while the entire payroll for another state is charged to one class.

When endorsed to a Worker's Comp policy, classifications are the same as those used for Part 1. If the policy combines the payroll into one class, they will generally use code 8742. When endorsed to General Liability it can be one classification - usually 44444 or 99999 because these are unused classes. Also common are the use of Worker's Comp codes (8742, 8110).   Usually the rate is the same for all classes.

The audit should be made to follow the code breakdown (or no breakdown) on the policy.

Overtime

The rules for overtime and Principal Min/Max are much harder to determine. Remember, since these are credits, it is always the responsibility of the insured to provide a breakdown of these amounts. The auditor should not become a bookkeeper, adding up time cards to obtain a figure, especially on a coverage with this low of a rate. If overtime is easily obtained I would show it, deducting the premium amount and mentioning it in the Notes section of the audit. If overtime is not easily obtainable (in Ohio there is no credit for overtime on the BWC policy hence the insured's do not track it) I would not attempt to construct, but rather mention in the Notes that overtime was not obtained and why.

Employer Min/Max

There no rules covering Minimums, Maximums or Flat Amounts for Principles. Each carrier sets there own limits. It's up to the auditor to find out what these are and properly apply them.

Conclusion

There has been a cyclical importance tied to EL. At times carriers are concerned that they are getting the proper premium and at others they seem to determine it is too small to matter. Whatever the current atmosphere, we will continue to see adjustable EL coverage on Monopolistic State policies. As long as we do a good job in an efficient manner we will continue to have them to audit. When the expense outweighs the benefit they can quickly turn into a flat charge. If that happens, can other lines be far behind? I used to audit a lot of automobile policies but not any longer. It is up to each of us to write our future.