Chapter Four

THE STANDARD WORKERS COMPENSATION POLICY, ENDORSEMENTS AND FEDERAL COVERAGES

The predominant means of insuring an employer's obligation against injury or disease arising out of and in the course of employment is through the medium of insurance. The standard Workers Compensation and Employers Liability Insurance Policy (hereinafter referred to as the workers compensation policy or the policy) is the basic vehicle creating a direct duty between the insurance carrier and the injured employee. (A copy of the Standard Workers Compensation Policy can be found at the end of this section.)

The workers compensation policy is designed to accomplish two purposes. The first purpose is to pay the statutory benefits specified by the compensation law of those states listed in 3 A. of the Information Page (formerly referred to as the Declaration Page). When there is statutory coverage and there has been some breach of the policy by the employer, the carrier must provide to the covered employee whatever compensation benefits are payable and then resolve the coverage issue(s) with the employer. The listing of states in item 3 A. of the Information Page delineates only those states in which coverage applies. The policy is not designed to extend coverage to every state automatically.

The second purpose of the policy is to cover the liability arising from a workplace injury when legal action is brought seeking damages other than the benefits provided under the compensation law. Part Two of the policy covers tort actions by an employee including third party claims for contribution or indemnification arising out of a claim by an employee. Oftentimes these actions will be barred by the exclusive remedy doctrine, but Part Two of the policy will, in the majority of instances, provide a defense.

The current workers compensation policy is referred to as the "standard policy" because the majority of insurance carriers use the prescribed policy language. Prior to the current form of the policy first adopted in 1954, there was a policy form that, while universally used, did not provide coverage for any specific state without modifying endorsements. Under that scenario, for an employer conducting operations in multiple states, it was necessary to attach several state laws or modifying endorsements to complete the coverage. The result was a voluminous document that was neither simple to understand nor easy to handle.

In 1954, the policy form was modified so that coverage was provided for all operations and locations of the insured within the scope of any state listed on the Declaration Page (currently referred to as the Information Page). A further simplification of the 1954 Policy was inclusion of the reference to "Manuals in use by the company" in lieu of including a series of endorsements that detailed how premiums were to be computed.

In 1984, the policy was further modified by simplifying the language and putting the policy into a "plain English" format. The essential nature and intent of the 1954 Policy was retained in the 1984 form. Under the changes adopted in 1984, the insurer is now referred to as "we" or "us," and the insured employer is referred to as "you". The policy states that the only agreements relating to this insurance are stated in this policy. Any changes to be made in the insurance contract must be in the form of an endorsement issued by the insurer and made a part of the policy. The intent of this approach is to prevent any oral agreements, or any agreements not put into the form of an endorsement, from becoming part of the insurance contract. In addition to language simplification, Part Three – Other States Insurance - was incorporated into the 1984 policy.

The most recent changes to the policy included minor technical amendments adopted in 1992. Many of the changes adopted in 1992 were designed to replace the need for certain endorsements. The 1992 policy states that it does not include any federal workers or workmen's compensation law, any federal occupational disease law or the provisions of any law that provide non-occupational disability benefits. These excluded federal coverage's include: the Longshore and Harbor Workers Compensation Act, the Black Lung Benefits Act of 1972, the Federal Employer's Compensation Act, the Federal Employer's Liability Act, the Merchant Marine Act of 1920 (known as the "Jones Act"), and the Federal Coal Mine Health and Safety Act of 1969. Any of the excluded coverage's may be added to the policy by endorsement.

With the exception of the four monopolistic fund states (**North Dakota, Ohio, Washington** and **Wyoming**) where coverage is afforded through a certificate of insurance, the standard workers compensation policy is used in every other jurisdiction. In the majority of jurisdictions, the National Council on Compensation Insurance (NCCI) files the policy for approval by the state insurance department. In a number of states with independent rating bureaus (e.g., **California, Massachusetts, New York**), the rating bureau files the policy with the state for approval. Consequently, except for the monopolistic fund states, the workers compensation policy is in use on a national basis and those subject to state workers compensation laws and insurance generally utilize this policy.

Since the policy was last revised in 1992, it has been the subject of numerous summaries designed to explain the content of the various parts of the policy. Little effort has been expended to examine the case law that has arisen concerning policy issues and interpretations of the coverage and duties under the contract. The following is designed to examine the policy in terms of both its structure and some of the case law that has arisen offering form and shape to the coverage.

It is important to remember that the Workers Compensation and Employer's Liability Insurance Policy is subject to the same rules of construction as any other form of insurance contract. For example, the policy must be considered as a whole instead of taking individual provisions and attempting to interpret their literal language. Likewise, where the policy is issued pursuant to state law, it is to be interpreted in the light of the local statute. Thus, the policy is to be read as though the exact terms of the statute were expressly incorporated into the contract.

In view of the fact that the parties to the policy may ordinarily establish terms of their own choosing, the insurer and employer are free to provide for broader coverage of employees than would otherwise be required by law. For example, there is nothing that precludes the parties from providing coverage of exempt employees in which case the insurer is liable for compensation benefits following a work related injury. The extension of benefits to those not covered under the law is strictly a matter of contract between the insurer and the employer. Consequently, the compensation law has no governing effect over such contracts, though the amount of compensation and other benefits payable are determined by statute.

The policy is composed of a General Section and six Parts. Coverage's available under the policy are set forth in the Information Page. The policy itself opens with a General Section which is really an introduction to the main points of the policy.

GENERAL SECTION

A. The Policy - The first clause identifies the policy as a contract of insurance between you (the employer named on the Information Page and us (the insurer named on the Information Page).The benefits paid under a workers compensation claim may go to an injured worker, but the insured is the employer. The first clause also specifies that the Information Page is part of the overall policy.

B. Who is Insured - The second clause confirms that an employer named in the Information Page is the named insured under the policy. The insured can be an individual, a partnership, a corporation, or some other entity.

C. Workers Compensation Law - The third clause notes that the coverage and benefits paid to the injured workers are based on the workers compensation law of each state or territory named in Item 3 A of the Information Page. Where the insured is conducting operations in multiple states and faces multiple state exposures, it is important that all of the states are listed. Since the insured is charged with the responsibility of listing the appropriate state(s) or territory so that the proper benefits can be paid to injured employees, understanding and complying with this clause is crucial for the insured employer.

This clause also emphasizes the point that workers compensation coverage is applicable under and in accordance with state law, not federal compensation law. Prior to the changes adopted in 1992, the policy did not exclude coverage for maritime exposures or federal laws, but it was common for insurers to exclude maritime coverage by endorsement

when a Longshore and Harbor Workers Compensation Act coverage exclusion endorsement was added to the policy. Under the current policy, the definition of "workers compensation law" has been changed to state that *"The workers compensation law does not include any federal workers or workmen's compensation law, any federal occupational disease law, or the provisions of any law that provide non-occupational disability benefits".* Also, the "non-occupational disability benefits" phrase shows that coverage is meant for injuries arising out of and in the course of employment, not disabilities that have no connection with the employment.

D. State - The fourth clause defines "state" as *"any state of the United States of America, and the District of Columbia".* State is defined here simply to clarify other references and phrases found throughout the policy. For example, if an employee is traveling or working temporarily in a foreign country on business, benefits for injuries suffered will be based on the workers compensation law of one of the states listed on the Information Page.

E. Locations - The final clause in the General Section declares that the policy *"covers all of your workplaces listed in Items 1 or 4 of the information page; and it covers all other workplaces in Item 3.A. states unless you have other insurance or are self-insured for such workplaces".* If the insured has a single workplace or multiple workplaces, this policy can apply. Coverage exists so long as the insured lists all the states(s) where workplaces are located on the Information Page; and of course, pays the premium. This coverage would not apply if the insured has other insurance or is self-insured for such other workplace accidents.

PART ONE – WORKERS COMPENSATION INSURANCE

Part One of the policy represents the focal point of the coverage - the pledge on the part of the insurer to provide the statutory benefits available for work related bodily injury by accident or disease, including death resulting from such injury. Provisions in the policy call for the insurer to pay promptly when due all compensation and other benefits required of the employer by the workers compensation law. The term "workers compensation law" is defined to mean the workers compensation and occupational disease laws of each state or territory listed in item 3 A. on the Information Page.

Part One contains eight clauses.

A. How This Insurance Applies - Workers compensation insurance applies to bodily injury by accident or by disease. Bodily injury includes resulting death. The clause attaches stipulations to this declaration. First, bodily injury by accident must occur during the policy period. Secondly, bodily injury by disease must be caused or aggravated by conditions of the employment, with the employee's last exposure to the conditions causing or aggravating the bodily injury occurring during the policy period.

There are several items to note concerning this clause. First, the insurance applies to "bodily injury". The states, through case law, determine what constitutes a bodily injury

and the workers compensation policy responds to what the law has determined to be a bodily injury. Finally, the clause certifies that coverage is provided if the bodily injury occurs during the policy period. This makes the workers compensation policy an occurrence-type policy, similar to the commercial general liability occurrence form.

B. We Will Pay - In this clause the policy specifies that the insurer will *"pay promptly when due the benefits required ... by the workers compensation law"* - a very simple and straightforward insuring agreement. Whatever the particular state workers compensation law declares the benefit to be, that is what the insurer will pay. A complication can arise over the fact that an employee who is injured while working in a certain state can claim the compensation benefits of the state where the injury occurred regardless of the fact that the employer is based in another state. (This addresses the situation of extraterritorial coverage that was covered in a previous chapter.)

A case with an unusual result occurred in **Tennessee** where the claimant worked for a Tennessee company but was injured while on business in **Maryland.** He filed for benefits in Maryland but the claim was held to be non-compensable. He then filed a claim for benefits in Tennessee, but the court declared that the election of remedies rule barred the Tennessee claim since the employee had *"affirmatively acted*" to get benefits in another state. Just because that other state denied his claim, the employee could not then seek the benefits in Tennessee. He had made his choice (Maryland) and to allow a second choice (or a third or fourth) would be unfair to the workers compensation system and a burden to the legal system.[90] (It is to be noted that another state adjudicating the same set of facts may arrive at a different conclusion.)

It is important to recognize that due to the nature of state workers compensation laws, the dollar amount of coverage granted under Part One B is literally unlimited, both with respect to any particular accident, and with respect to any number of accidents occurring during the policy period. There is another point to consider: the insurer has agreed to pay the benefits required by the *workers compensation law,* a phrase defined in the policy as the *"workers compensation law . . . of each state or territory named in Item 3.A. of the information page".* This makes it important for the insured employer to specifically list those states in which the employer has a workers compensation exposure.

C. We Will Defend - With this clause, the insurer promises to defend, at its expense, any claim, proceeding, or suit against the insured for benefits payable by the workers compensation policy. It is important to recognize that the insurer reserves the right to settle claims or lawsuits, so the insured has no veto power over the matter. For example, if the insured does not want to pay benefits to an injured employee because the insured believes the employee faked the injury, the insurer need not obtain the permission of the insured in order to pay the claim if the insurer determines the claim to be compensable.

The usual rule to the effect that "*the duty to defend is broader than the duty to indemnify*," is applicable in the workers compensation policy. Unless the allegations on which a claim is

[90] *Bradshaw v. Old Republic Insurance Company,* 922 S.W.2d 503 (1996)

based clearly take it outside the scope of the coverage, the insurer has a duty to defend until such time as the remaining allegations could no longer be the basis of a covered claim. Inclusion of this language is necessary for those courts that would say that if a clear denial of the duty to defend under certain circumstances is not included in the policy language, then the insurer must defend any and all claims or lawsuits.

D. We Will Also Pay - The insurer agrees to pay certain enumerated costs as part of any claim, proceeding, or lawsuit that is defended. The listed costs are: reasonable expenses incurred at the insurer's request (but not loss of earnings); premiums for bonds to release attachments and for appeal bonds; litigation costs taxed against the insured; interest on a judgment as required by law; and expenses incurred by the insurer. These payments are in addition to the amounts payable as workers compensation benefits, so any of these costs that are paid by the insurer will not diminish the amounts available for workers compensation benefits.

E. Other Insurance - A separate provision under both Parts One and Two of the policy addresses the situation of Other Insurance. The basic purpose of this section is to provide that different insurers or self-insured's will pay losses in equal shares. This provision addresses the possibility that there may be more than one workers compensation policy applicable to a particular accident or occupational disease, or that some self-insurance may apply together with the insurance provided by the policy. The sharing is to be accomplished on an equal basis until the loss is paid. Since the benefits paid under workers compensation are set by state law and not subject to the vagaries of a jury, there is no specified limit of liability on the workers compensation policy; however, any amounts to be paid as benefits will be split equally among affected insurers and self-insured's.

F. Payments You Must Make - This clause details when the insured, instead of the insurer, has to make payments arising out of an injured worker's claim. Here the policy points out that the insured is responsible for any payments in excess of the benefits regularly provided by the workers compensation law. This excess is usually the result of the insured's violating workers compensation laws, such as: knowingly employing someone in violation of law, failure to comply with a health or safety law, or discharging or discriminating against any employee in violation of law.

G. Recovery From Others - Prior to the redrafting of the policy in 1984, the policy made reference to the right of subrogation. The 1984 Policy, applying simplified language, achieves the same result without the need to use the term subrogation. Subrogation refers to the right of the payer of compensation benefits to collect from a negligent third party an amount equivalent to the compensation it has paid and/or will be required to pay under the terms of the policy. The language adopted in 1984 reads that the insurer has the *"right and rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury"*. Furthermore, the insured is to do what is necessary to protect those rights and to help enforce them.

This clause simply describes the insurer's right to succeed to the same rights as the insured employer and the rights of those who have been the recipient of covered benefits. The policy provision also cautions the insured to do everything necessary to protect those rights. This would include taking no action that may prejudice those rights such as settling and releasing a claim against a third party from whom the insurance carrier may have been able to recover all or part of the payments made on the claim.

Under the statutory provisions found in the majority of states, the payer of compensation benefits is entitled to reimbursement for the amount of its expenditures as a first claim upon the proceeds of any third party recovery. The employee is entitled to any excess. Some states, for reasons of incentive, have varied this approach slightly. In **Massachusetts**, the employee receives only four-fifths of the excess on the theory that the subrogee will have a greater incentive to seek to recover more than the bare minimum necessary to cover the compensation expenditure.

H. Statutory Provisions - Where required by law, workers compensation insurance is subject to several statutory provisions. These clauses provide that: notice to the insured of an injury constitutes notice to the insurer ;.default, bankruptcy, or insolvency of the insured does not relieve the insurer of obligations under the policy (the insurer states that it is directly and primarily liable to any person entitled to payable benefits); and, jurisdiction over the insured is jurisdiction over the insurer for purposes of the workers compensation law - that is, the state law that decides if and what compensation is to be paid to the injured employee is the guide for both the insured and the insurer.
The statutory provisions also note that terms of the insurance coverage that conflict with the workers compensation law are changed to conform to the law. In other words, state statutes and case law takes precedence over the wording of the insurance policy. Workers compensation coverage is guided by state law.

PART TWO – EMPLOYERS LIABILITY INSURANCE

The second part of the policy is the Employers Liability insurance portion of the policy which covers the legal liability of the employer separate and apart from any legal obligation to pay workers compensation benefits because of a work related injury to a covered employee. It should be noted that many of the suits introduced under Part Two of the policy result in a defense verdict because the exclusive remedy provisions of the state law will generally prohibit any recovery. Part Two coverage protects the insured against liability imposed by law for injury to employees in the course of employment that is not compensable as an obligation imposed by the states workers compensation, occupational disease, or any similar law.

Despite the fact that workers compensation is usually considered to be the exclusive remedy for covered employees for work related injuries and occupational diseases claims, there are several reasons why employer's liability coverage is a necessary form of protection. There may be instances when an on-the-job injury or disease is not considered to be work related and therefore not compensable under the statutory coverage. Nevertheless, the employee may

still have reason to believe that the employer should be held accountable, and proceed with a direct action for damages. Additionally, the workers compensation laws of some states have been interpreted as permitting lawsuits and recovery against employers by spouses and dependents of injured workers, even though the workers are compensated for their injuries. The basis of such lawsuits is loss of consortium - loss of companionship, comfort, and affection.

For a short period, one of the primary coverage's available under Part Two was for suits against the employer by third parties who have paid damages to an employee of the insured and are seeking to recover all or a portion of that payment in a contribution or indemnification action. These types of suits are referred to as "third party action-over". A fairly common basis for the third party action over against the employer arises from product liability cases. For example, an employee may sustain a work place injury when caught in a machine, and bring an action for damages against the manufacturer for designing or selling a defective product. The manufacturer may then bring a third party action (action-over) against the employer alleging that the employer's negligence in some way (e.g. machine maintenance or alteration) was the cause of the employee's injuries.

Probably the most significant ruling falling within the category of action-over cases involved the **New York** decision in *Dole v. Dow*[91]. The worker (Dole) died after being exposed to the poison methyl bromide when he was ordered by his employer (Dow) to clean a storage bin. Following Dole's death, his wife sued the manufacturers of the substance for negligently causing the death of her husband. The manufacturer sued the employer alleging that the employer was primarily negligent. Following a number of lower court reversals, the New York Court of Appeals held that where a third party was found to be responsible for part, but not all, of the negligence, the responsibility for that part was recoverable by the prime defendant (the manufacturer of the substance) against the third party (the employer). The court held that an apportionment of responsibility between those parties had to take place.

The case confirmed that an employee could not directly sue his/her employer, but did expand the liability of the employer by permitting a defendant in an action by the employee to implead the employer to share in the third party's liability based upon the alleged negligence of the employer. In 1996, after many proposals before the New York legislature, the liability of an employer for contribution or indemnity created by the *Dole* decision was limited to apply only where the suit against the third party was for a "grave injury" thereby significantly reducing that type of exposure under Part Two of the policy.

Since Part Two of the policy specifically provides coverage for civil actions seeking damages for bodily injuries by accident or disease caused by or aggravated by the conditions of the employment, it is a reasonable assumption that this coverage will be triggered in an employee's discrimination case. More specifically, when an employee pleads intentional tort in conjunction with a claim of discrimination, then that pleading will avoid the exclusivity of workers compensation and trigger Part Two coverage.

In 1984, two additions to the policy were adopted in response to evolving case law. The first addition was coverage for *"consequential bodily injury to a spouse, child, parent, brother or*

[91] *Dole v. Dow Chemical Company*, 30 N.Y.2d 143 (1972)

sister of the injured employee" or loss of consortium, provided that the damages were the direct result of the bodily injury that arose out of and in the course of employment. To illustrate, this provision would at least afford a defense to the employer where a wife alleged bodily injury as a result of viewing the husband's work related injury.

Loss of consortium cases had their genesis with a **Massachusetts** decision.[92] Following a compensable injury to a covered worker, his wife and children sued to recover from the employer under the negligence theory for loss of consortium and for negligent infliction of emotional distress. The court held that the children's claim for loss of consortium was a claim upon which relief could be granted. The previous recovery of the injured worker did not serve to bar the claims of the wife and children. It is to be noted that loss of consortium claims where virtually eliminated in Massachusetts through the passage of legislation in 1985.

The second policy addition addressed claims brought against an employer "*claimed against you in a capacity other than as employer"*. These types of claims are frequently referred to as "dual capacity" claims. Under the doctrine of dual capacity, the employer is the party who employs the employee but is also alleged to be another party - for example, the manufacturer of the product that injured the employee. The dual capacity doctrine had its genesis in **California** with the *Duprey* decision when a nurse, following a work related injury, was permitted to sue her employer (a doctor) who treated her for her work injury, but in so doing, aggravated her original injury.[93] In holding for the employee, the court noted that the doctor had a "dual legal personality," that of a doctor and that of an employer. Where the claim alleges a dual capacity exposure, Part Two of the policy is available to respond.

Part Two of the policy contains nine clauses.

> **A. How This Insurance Applies -** Employers Liability insurance applies to bodily injury by accident or by disease. The bodily injury must arise out of and in the course of employment, and the employment must be necessary or incidental to the named insured's work in a state or territory listed in Item 3.A. of the Information Page. The same issues regarding the naming of states in 3.A. that were described in Part One of the policy are applicable here.
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> **B. We Will Pay –** Under Part Two of the policy, the insurer promises to pay all sums that the insured legally must pay as damages because of bodily injury to employees. The covered damages, where recovery is permitted by law, include: (1) the insured's liability for damages claimed against a third party by one of the insured's employees (third party-over actions); (2) damages assessed for care and loss of services (loss of consortium); and (3) consequential bodily injury to a spouse, child, parent, or sibling of the injured employee. In addition, the employer's liability insurance applies to damages assessed against the insured in a capacity other than as an employer (e.g., a dual capacity action).

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92 *Ferriter v. Daniel O'Connell's Sons, Inc*., 413 N.E.2d 690 (1980)
93 *Duprey v. Shane,* 241 P.2d 78 (1951)

C. Exclusions – Employers liability coverage is subject to twelve exclusions that highlight the nature of this coverage. As found in most policies of insurance, Part Two excludes coverage for any action based upon the insured's contractual promise to be liable for damages. A common assumption of liability by contract is an indemnification contract or hold-harmless agreement. Whereas express indemnity contracts are excluded from coverage, implied indemnification (indemnity by operation of law) or warranty that work will be performed properly are covered in the majority of states. An exception is **California** which specifically excludes coverage for an implied warranty.[94] In other states, this warranty of workmanlike performance is a contractual obligation that is covered because it is an exception to the exclusion. Whether the insured is liable on this basis, where the exclusive remedy provision does not bar recovery, is a question of liability and not of coverage.

There is also a specific exclusion under Part Two for coverage of punitive damages. The exclusion is restricted to claims based on illegal employment. Many jurisdictions do not permit insurance to cover punitive damages inasmuch as the purpose of awarding punitive damages is to punish the wrongdoer. If insurance allowed for the payment of punitive damages, the employer who performed the illegal action would suffer no financial punishment.

Other exclusions apply to intentional acts and violations of laws showing that this coverage is meant for accidental incidents. Employers Liability insurance does not cover liability assumed under a contract (note that liability assumed by the insured under an insured contract is covered by the Comprehensive General Liability (CGL) policy form—another example of one coverage form complementing the other).

Employers Liability insurance does not cover fines or penalties imposed for violation of federal or state law. It does not cover punitive or exemplary damages because of bodily injury to an employee who is employed in violation of law. Most insurance policies exclude coverage for intentional acts, as does Part Two of the policy.

A further exclusion added to the 1984 Policy was the exclusion of coverage for suits arising out of certain illegal actions. With the growing number of discrimination lawsuits filed in the preceding decades, many insurers attempted to insert a specific exclusion for an insured employer's personnel policies and practices including discrimination and harassment. Developed as part of the 1992 Policy revision, this standard policy exclusion provides that there is no coverage for *"damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against termination of any employee, or any personnel practices, policies, acts or omissions".*

[94] California 3864. "*If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury."*

Finally, the policy contains an exclusion for bodily injury occurring outside the United States, its territories or possessions, and Canada. This exclusion could pose a huge problem in today's business world since many companies do business on an international scale. However, the exclusion has an exception for bodily injury to a citizen or resident of the United States or Canada who is temporarily outside these countries. For example, if an employee of the named insured company is in Japan on a business trip and is injured, Employers Liability insurance is available to the insured if needed.

D. We Will Defend - The policy gives the insurer the right and duty to defend the insured against any claim, proceeding, or lawsuit for damages payable by the Employers Liability insurance. Part One of the standard policy includes a section addressing the insurer's duty to defend. Under Part One, the provision reads that *"We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits. We have no duty to defend a claim, proceeding or suit that is not covered by this insurance".*

Part Two includes the same language and adds a final sentence stating that – *"We have no duty to defend or continue defending after we have paid our applicable limit of liability under this Policy".* This provision is added in light of the policy limits applicable under Part Two coverage in the majority of states. Recall that there are no policy limits under Part One of the policy.

These provisions clearly indicate that there is no intent to defend a suit that is not covered by the policy. In a liability case, the standard measure of the insurer's obligation to defend is whether the allegations in the complaint state a claim for relief under the provisions of the policy. If they do, there is an obligation to defend – if they do not, there is no obligation to defend.

E. We Will Also Pay - This provision is the same as that found under Part One as described previously. The payments promised here by the insurer are similar to the supplementary payments that are offered under the Commercial General Liability (CGL) coverage form, and do not diminish the limits of liability as shown on the Information Page.

F. Other Insurance - This provision is again similar to the Other Insurance clause found under Part One. Other insurance addresses the possibility that there may be more than one workers compensation policy applicable to a particular accident or occupational disease, or that some self-insurance may apply together with the insurance provided by the policy. The fact that Part Two coverage has limits that are applicable in some states also may serve to raise this provision. In either case, each participant pays its equal share of the loss until its policy limits are exhausted.

G. Limits of Liability – In the majority of states, the insurer's liability to pay for damages is limited. The limits of liability are shown on the Information Page and are broken down as follows:

- a dollar limit for bodily injury per accident
- a dollar limit for bodily injury by disease for any single employee, and
- a dollar limit for bodily injury by disease for the entire policy

The ″per accident" limit is based on each accident so that the insurer will pay no more than the listed amount in any one accident regardless of how many employees are injured. For example, if three employees are injured in the same accident and the bodily injury by accident limit is $100,000, then that is the total amount payable by the insurer. This is not to say that all three employees will receive equal amounts - that is to be decided by the facts of the case—but, in total, they will divide a total of $100,000.

The "by disease" limit has an aggregate limit and an "each employee" limit. The aggregate limit shown on the Information Page is the total amount payable by the insurer for all bodily injuries arising out of a disease, regardless of the number of employees who suffer from the disease. So, for example, if thirty employees suffer injury from a disease for which the employer is legally liable, the total amount available for all the injured employees is the amount listed as the policy limit for bodily injury by disease. How the amount is split up is again decided by the facts of the case. The disease limit is also subject to an "each employee" limit in that, regardless of the aggregate limit, each employee injured by disease can collect only an amount up to the dollar limit listed on the Information Page.

Part Two benefits are generally limited to $100,000 for each accident or disease, with a disease aggregate of $500,000. These limits may be increased for an extra charge. Additional or "excess" Employers Liability insurance may also be provided under an excess or umbrella policy, separate from the Workers Compensation and Employer's Liability policy.

Two states, Massachusetts and New York, require unlimited Employers Liability insurance. For these states, special endorsement forms are mandatory. Payments under Part One are guided by the state workers compensation law and not the policy itself. In this respect, Part Two coverage is more like a Commercial General Liability policy.

H. Recovery from Others - This is the subrogation clause for Part Two coverage and is again similar to, but more limited than, the clause found in Part One. Unlike Part One, coverage under Part Two of the policy does not give the insurer the injured employee's rights, but only the rights of the employer against third parties. This difference is necessary because contractually the insurer can only acquire rights from the employer with whom it is in "*privity of contract*" (A doctrine of contract law that prevents any person from seeking the enforcement of a contract or suing on its terms, unless they are a party to that contract.) Under Part Two coverage, the employer and not the injured worker are a party to the contract.

I. Actions Against Us - This provision spells out a bit of the contractual relationship between the insured and the insurer. The insured has agreed not to exercise a right of action (file a lawsuit) against the insurer unless certain things have occurred. Basically, the insured agrees not to sue the insurer unless a claim has been filed against the insured, all the provisions of the policy have been followed by the insured, a definite amount of liability has been assessed against the insured, and then, the insurer has, for whatever reason, refused to pay the amount due.

This clause makes the point that the policy is a contractual agreement between the insured and the insurer and so, no outside party (one not a party to the contract) has the right under the policy to sue the insurer to enforce the provisions of the policy. The insurer agrees through this provision not to abandon its contractual commitments under the policy to the insured even if the insured goes bankrupt or becomes insolvent. Existing claims will still be paid even if the insured is no longer in business.

PART THREE – OTHER STATES INSURANCE

Coverage under Parts One and Two of the policy are applicable only to claims made under the compensation laws of the states listed under 3.A. on the Information Page. Part Two coverage applies to operations in the same designated states and also covers operations in other states, but only to the extent such operations are "*necessary and incidental*" to operations in the designated states.

Because of the potential for gaps in coverage, Other States Insurance is provided through Part Three. This coverage is intended to provide only temporary coverage for new exposures. The conditions of the policy require the employer to notify the insurance carrier if work is begun in any state to which the Other States Insurance coverage applies. Once notified of this new exposure, the insurer can make the necessary filings required by the state regulatory authorities in order to provide permanent coverage.

A key point in this part of the policy is the importance of giving notice to the insurer. The policy emphasizes that if the insured already has ongoing work on the effective date of the policy in any state not listed in Item 3.A. of the Information Page, *"Coverage will not be afforded for that state unless we (the insurer) are notified within thirty days"*. For example, if the insured has employees working in **Wisconsin** at the time the workers compensation policy renews, and Wisconsin is not listed under Item 3.A. on the Information Page, the insured must notify the insurer of the Wisconsin exposure within thirty days or there is no coverage for claims that may arise after that time period expires.

Note that this thirty day time period is, presumably, thirty days after policy inception, but the policy's wording is not clear on that point. In order for the insured to be safe, the insurer should be notified of work begun in states other than those listed in Item 3.A. as soon as such work begins, and not wait for any thirty day time period to go by. In support of this immediate notice requirement, the policy has another paragraph that reminds the insured to, *"Tell us (the insurer) at once if you begin work in any state listed in Item 3.C. of the Information Page"*.

Through these measures, the insurer is simply trying to exercise a degree of control over their loss exposure.

PART FOUR - YOUR DUTIES IF INJURY OCCURS

This part of the policy sets forth the duties that the named insured must perform if an injury occurs lest the insured breach contractual obligations, thereby making the insurance contract voidable. Part Four lists seven duties that the insured is to undertake in the event of an injury occurring to an employee.

- First and foremost is the duty of the insurer to notify the insurer if an injury that may be covered by the policy occurs. The obvious reason for this is so that the insurer can process an injury claim promptly. Such promptness can aid the insured, the insurer, and the injured employee.

- Following notification of the injury to the insurer, the next listed duty of the insured is to provide for immediate medical and other services required by the workers compensation law.

- The insured is to give the insurer or the agent the names and addresses of the injured persons and of witnesses, and other information needed by the insurer.
- The insured is to promptly provide the insurer with all notices, demands, and legal papers related to the injury, claim, or lawsuit. This helps the insurer to process the claim as soon as possible, and to plan for any future legal action on behalf of or against the insured.

- The insured is to cooperate with the insurer and to assist in the investigation, settlement, or defense of any claim, proceeding, or lawsuit.

- The next duty deals with the insurer's right of subrogation. The insured must do nothing after an injury occurs that would interfere with the insurer's right to recover from others.

- The final duty of the insured is to refrain from making any voluntary payments, assume any obligations, or incur any expenses associated with the claim. These are the responsibilities of the insurer and any action on the part of the insured may interfere with the proper claims-handling process.

PART FIVE - PREMIUM

Part Five of the policy is an important part of the policy for the insured and agent inasmuch as it describes how premiums are determined. To assist the insurer in arriving at accurate information, the employer is obligated to maintain necessary records and the insurer has the right to audit records of the employer that relate to the policy. Similarly, even when accurate

information is furnished timely by the insured, the final premium determination is not made until the end of the policy period. The estimated premium already paid to the insurer will be adjusted up or down and the insured will owe the insurer the difference if the final premium is an increase over the estimate, or the insurer will refund any difference where the final premium is lower.

Certain workers compensation policies provide for the retroactive computing of premiums. The NCCI rating plan manual requires an employer to have an estimated standard annual premium in excess of $25,000 to qualify for retrospective rating. In those cases, an estimated premium is made at the time the policy is issued with the final computation of premium based upon the actual claims experience during the policy period. Disputes between the insured and insurer may arise relative to the claims process inasmuch as an improperly handled claim may result in a higher final premium.

In a 2003 decision from the **New York** Supreme Court, the ruling addressed the situation where the carrier sought premium reimbursement long after the policy had expired. The court found the claim for reimbursement not to be time-barred.[95]

State insurance commissioners have administrative authority to approve or disapprove filed rates. In states such as **California**, where rates are subject to "file and use," the insurance commissioner does not approve rates, but may disapprove rates only if they are *"inadequate, unfairly discriminatory, tend to create a monopoly, or threaten the solvency of the insurer*".

To preclude a long delay in the establishment of new rates, states may require action by the commissioner within a specified period of time. The factors taken into consideration for purposes of setting the rates for a particular industry or type of employment include the estimated payouts to workers engaged in such work, the expenses of the insurer, and the profit to be made by the insurer in writing such policies. In addition, a particular employer's premium may be reduced or increased according to that employer's past experience of compensable workplace injuries. An insurer who increases an insured's premiums due to the settlement of a claim must demonstrate that the settlement was reasonable and entered into in good faith.[96]

In accordance with the general rule that no premium is due unless risk attaches, an insurer cannot recover premiums based upon compensation paid to employees for which it was not liable under its contract. An insurer may, however, recover from an insured amounts representing the difference between premiums paid by the insured and premiums actually earned by the insurer, due to its exposure to greater risk then it had contemplated when estimating the premiums the insured was to pay, where the policy stated that the premium charged was an estimated premium only, that upon termination a final earned premium would be computed, and that the insured would be liable for any excess of the final premium over the estimated premium.[97]

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[95] *Commissioners of State Insurance Fund v. Photocircuits Corp*., N.Y. Misc. LEXIS 1388 (2003)
[96] *Deerfield Plastics Co. v. Hartford Insurance Co.,* 536 N.E.2d 322 (1989)
[97] *Nationwide Mutual Insurance Co. v. Ed Soules Construction Co*., 397 So.2d 775 (1981)

Judicial review of rate-making is limited because rate-making – a technical and complex function requiring much expertise – is not a judicial function.[98] As a general rule, the courts will not set aside compensation premium rates fixed by an administrative body unless the rates do not comport with applicable standards and are "excessive, inadequate, or unfairly discriminatory".

There are seven clauses under Part Five of the policy.

A. Our Manuals - The first clause notes that the premium for the policy is determined by the insurer's manuals of rules, rates, rating plans, and classifications. The insurer claims the role as guide for determining premiums that will be paid by the insured. The insured can affect the premium by risk management efforts, loss claims history, deductibles, and other methods; but it is the insurer that ultimately determines the premium charged for the policy exposures presented by the insured.

B. Classifications - The second clause establishes that classifications are categories into which the insurer puts the insured to properly gauge the risks of workers compensation losses that the insured will face over the policy period. The classification is based on information supplied mainly by the insured. This clause tells the insured how the insurer classifies the business of the insured, and how that classification leads to the premium charge.

C. Remuneration - The remuneration clause tells the insured what the basis is for the premium charge. The premium is determined by multiplying a rate times a premium basis, which is remuneration. This term includes payroll and all other remuneration paid or payable during the policy period for the services of all the officers and employees engaged in the work of the insured that is covered by the policy and all other persons engaged in work that could make the insurer liable under the policy. The rate is charged per $100 of remuneration.

D. Premium Payments - The premium payments clause notes that the insured named in Item 1 of the Information Page is required to pay all premium when due. In the event of multiple named insured's, the first named insured has the responsibility for the payment.

E Final Premium - The fifth clause addresses final premium**.** The premium shown on the Information Page is an estimate. The final premium is determined after the policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the work covered by the policy. This clause also determines the amount of premium in case the policy is cancelled. If the insurer cancels the policy, the final premium is calculated on a pro rata basis, based on the time the policy was in force. If the insured cancels the policy, the final premium is based on the time the policy was in force plus the short-rate cancellation table and internal procedures of the insurer. Note that a final premium figured on the basis of an insured-cancelled policy will be more than one figured on an insurer-cancelled basis.

[98] *Attorney General v. Insurance Commissioner of Michigan,* 323 N.W.2d 645 [Footnote 3]

F. Records - The sixth clause relates to the responsibility of the insured to maintain records. The insurer needs certain information concerning the risk in order to charge a proper premium, and the insured is required to help in this endeavor. This clause requires the insured not only to keep records, but also to provide copies of those records to the insurer upon request.

G. Audit - The final clause deals with the right of the insurer to conduct audits. The insurer is given the right to examine and audit all the records of the insured that relate to the policy. Such records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data.

PART SIX - CONDITIONS

There are five conditions listed in the workers compensation policy that address the issues of administration. These issues include: dealing with inspections, long term policies, the transfer of the named insured's rights, cancellation of the policy, and just who acts as the sole representative on behalf of all the insured's.

A. Inspection - The inspections clause gives the insurer the right to make an inspection of the workplace *"at any time"*. This condition has given rise to a theory that would allow the injured employee to maintain an action for negligence against the workers compensation insurer. However, the current policy contains a specific disclaimer about the inspection of the workplace and the duty such an inspection places on the insurer. In the inspection condition of the policy, the insurer declares that inspections it may carry out are not safety inspections; they relate only to the insurability of the workplaces and the premiums to be charged. Furthermore, the insurer states that it does not undertake to perform the duty of any person to provide for the health or safety of the employees, and does not warrant that the workplace is safe or healthful, or that they comply with laws, codes, or standards. Thus, the insurer strives to intentionally limit its duty under the workers compensation policy to both the insured and any of the insured's employees.

B. Long Term Policy - The long term policy clause notes that, if a policy is written for longer than one year and sixteen days - for example, a two or three year policies - then all the provisions in the existing policy apply as if under a brand new policy. In other words, the annual renewal is treated as an automatic rewrite of the existing policy, though both the insured and the insurer should reexamine the exposures in order to get proper premium for proper coverage.

C. Transfer of Your Rights and Duties - The transfer of rights clause acts to prevent the insured from transferring his or her rights or duties to another party without the written consent of the insurer. This is meant to protect the insurer from insuring an employer that it neither contracted for nor would want to insure in any instance. An exception is made, of

course, for the legal representative of the insured in case the insured dies - notice must be given to the insurer within thirty days after the insured's death.

D. Cancelation - The clause details how the insured or the insurer can cancel the policy. The clause allows the insured to cancel the policy at any time, even with only one day notice, as long as written notice is mailed to the insurer in advance of the cancellation date. The conditions for cancellation are frequently quite explicit in terms of statutory requirements. For example, in a number of states the Workers Compensation Act provides that cancellation is not effective absent notice to the state agency charged with administering the compensation law, or, the statute may require notification of the employer by registered mail rather than ordinary mail.

E. Sole Representative - The final policy condition makes the first named insured the sole representative to the insurer, so that important items such as changing the policy provisions or cancelling the policy can be dealt with without having the insurer sort through possibly conflicting statements or wishes from the various insured's. This is simply a common sense business practice.

INFORMATION PAGE

In addition to the contents of the standard workers compensation policy, the employer is provided with an Information Page which describes the scope of the contractual agreement between the insured and the insurer. The Information Page includes the name of the insurer and the name and address of the insured along with the period of time covered by the policy. Employers Liability Limits as regards coverage under the policy are defined in Item 3B. along with a listing of the states where the policy is applicable in 3A. Any policy endorsements are also listed under Item 3D.

Because the standard policy does not provide blanket coverage for all states in which the insured may have operations, it is important to fully understand how the policy affords coverage for various states. The two items which reference what states are covered are 3 A. and 3 C. Item 3 A. is fairly straight-forward and simply has the insurer list the states the insured operates in or expects to operate in at the inception of the policy. If an insured has work or employees residing (since an employee may be able to choose his state of residence when claiming benefits) on the effective date of the policy in any state not listed in Item 3 A. of the Information Page, coverage will not be afforded for that state unless the insurer is notified within thirty days.

Item 3C. represents a safety net. In Item 3C., states are listed where an insured expects it may have employees working in but the work in those states will begin after the effective date or renewal date of the policy, with some exception noted below. The policy requires that the insured notify the insurer at once if the insured begins any work in any state listed in Item 3 C.

Part Three Other States Insurance A 4. states that notice of work in the other state is required within 30 days. The following suggested wording should be used in 3 C., whenever possible: "*All states, U S territories and possessions except Washington, Wyoming, North Dakota, Ohio, Puerto Rico and the U.S. Virgin Islands and states designated in Item 3A of this Information Page"*. However, this approach is only applicable if the insurer is licensed to write workers compensation coverage in "all states" with the exception of the four monopolistic fund states.

This broad wording denoted above assures coverage in most jurisdictions even in unforeseen circumstances. In addition to those situations noted above, other exceptions to the general rule include the following:

- The employer is insured with a state fund that only writes in their state and is precluded by law from extending coverage to other states. Many state funds have made arrangements with other insurance carriers to address this situation.

- The insurer is not licensed in all states. Many regional insurers are licensed in a handful of states while other insurers may be licensed in only a single state for strategic reasons. Insurers are precluded from writing insurance in a state where they are not licensed.

- A number of insurers are not willing to provide the broad wording denoted above because the insurer may want to ensure that they know those locations where their insured is operating. This may be because the insurer does not want to provide coverage in certain states where they feel that rates may be inadequate or where they may be hesitant to write because rates in a particular classification are perceived inadequate for the exposure. Another reason may be that the insurer wants certain states of operation specifically listed as a "red flag" for their auditor to look for potential payroll in those states at audit.

The final item found on the Information Page is Item 4. This item contains a listing of class code classifications used in the computation of the employer's premium. A rate per $100 of remuneration is included along with the estimated annual premium. As described in Part Five of the policy, the final premium will be determined following the conclusion of the policy period using the actual premium basis and the proper classifications and rates that lawfully apply to the work covered by the policy. The minimum premium for the policy is also included in Item 4.

BINDERS, RENEWALS AND CANCELLATIONS

A binder may be issued for workers compensation insurance. Generally, a binder is issued for a short period (e.g., 15, 20, 30, or 60 days) in order to provide the insurer with an opportunity to determine the characteristics of the risk and exercise its underwriting judgment. The binder is subject to the same rules and premium charges as policies. Every binder must show clearly the term for which the risk is covered and indicate that it is subject to the standard provisions

contained in the policy. A binder is also subject to the same cancellation provisions and rules that pertain to the policy.

When a policy expires, it may be renewed by a new policy or by a renewal agreement. This renewal agreement refers specifically to a designated policy. The term of the renewal agreement may be one year or three years, at the option of the insurance carrier. A renewal agreement must be issued prior to the stated expiration date in the policy or in the latest renewal agreement which it renews.

The use of a renewal agreement eliminates the necessity for issuing a complete new policy. However, a renewal agreement is regarded as a separate policy subject to the rules applicable to the type of policy being renewed, (e.g., one-year, three-year fixed-rate, and three-year variable rate.)

Every policy or renewal agreement must afford coverage for a continuous period. If a policy has been terminated by cancellation, it may not be reinstated after the effective date of cancellation. Subsequent coverage must be afforded under a new policy. However, it is permissible to reinstate a policy prior to the effective date of cancellation. In all cases after a policy has expired, a renewal may be obtained only by means of a new policy.

The method of policy cancellation is set forth in the policy. A workers compensation policy may be canceled by either the insurance carrier or the insured. All cancellations, regardless of the reason, whether initiated at the request of the insured or initiated by the insurance carrier, must be effected by the insurer in accordance with the laws and regulations of each state. The period required for notice of cancellation differs by state, but the most common period for cancellation is 30 days.

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

In return for the payment of the premium and subject to all terms of this Policy, we agree with you as follows:

GENERAL SECTION

A. The Policy

This Policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this Policy. The terms of this Policy may not be changed or waived except by endorsement issued by us to be part of this Policy.

B. Who is Insured

You are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

C. Workers Compensation Law

Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in Item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the Policy period. It does not include any federal workers or workmen's compensation law, any federal occupational disease law or the provisions of any law that provide nonoccupational disability benefits.

D. State

State means any state of the United States of America, and the District of Columbia.

E. Locations

This Policy covers all of your workplaces listed in Items 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A. states unless you have other insurance or are self-insured for such workplaces.

P A R T O N E
WORKERS COMPENSATION INSURANCE

A. How This Insurance Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the Policy period.
2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the Policy period.

B. We Will Pay

We will pay promptly when due the benefits required of you by the workers compensation law.

C. We Will Defend

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

D. We Will Also Pay

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance-, and
5. expenses we incur.

E. Other Insurance

We will not pay more than our share of benefits and costs covered by this insurance and other

insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.

F. Payments You Must Make

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;
2. you knowingly employ an employee in violation of law;
3. you fail to comply with a health or safety law or regulation; or
4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.

If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly.

G. Recovery From Others

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

H. Statutory Provisions

These statements apply where they are required by law.

1. As between an injured worker and us, we have notice of the injury when you have notice.
2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.
3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us.
4. Jurisdiction over you is jurisdiction over us for purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of this Policy that are not in conflict with that law.
5. This insurance conforms to the parts of the workers compensation law that apply to:
   a. benefits payable by this insurance;
   b. special taxes, payments into security or other special funds, and assessments payable by us under that law.
6. Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

Nothing in these paragraphs relieves you of your duties under this Policy.

PART TWO
EMPLOYERS LIABILITY INSURANCE

A. How This Insurance Applies

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
2. The employment must be necessary or incidental to your work in a state or territory listed in Item 3.A. of the Information Page.
3. Bodily injury by accident must occur during the Policy period.
4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the Policy period.
5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.

B. We Will Pay

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed

against such third party as a result of injury to your employee;

2. for care and loss of services; and
3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee; provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and
4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

C. Exclusions

This insurance does not cover:

1. liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner-,
2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;
3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;
4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;
5. bodily injury intentionally caused or aggravated by you,
6. bodily injury occurring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries,
7. damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions,
8. bodily injury to any person in work subject to the Longshore and Harbor Workers' Compensation Act (33 USC Sections 901-950), the Non-appropriated Fund Instrumentalities Act (5 USC Sections 8171-8173), the Outer Continental Shelf Lands Act (43 USC Sections 1331-1356), the Defense Base Act (42 USC Sections 16511654), the Federal Coal Mine Health and Safety Act of 1969 (30 USC Sections 901-942), any other federal workers or workmen's compensation law or other federal occupational disease law, or any amendments to these laws;
9. bodily injury to any person in work subject to the Federal Employers' Liability Act (45 USC Sections 51-60), any other federal laws obligating an employer to pay damages to an employee due to bodily injury arising out of or in the course of employment, or any amendments to those laws-,
10. bodily injury to a master or member of the crew of any vessel;
11. fines or penalties imposed for violation of federal or state law; and
12. damages payable under the Migrant and Seasonal Agricultural Worker Protection Act (29 USC Sections 1801-1872) and under any other federal law awarding damages for violation of those laws or regulations issued thereunder, and any amendments to those laws.

D. We Will Defend

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

E. We Will Also Pay

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding, or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance-,
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur.

F. Other Insurance

We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

G. Limits of Liability

Our liability to pay for damages is limited. Our limits of liability are shown in Item 3.B. of the Information Page. They apply as explained below.

1. Bodily Injury by Accident. The limit shown for "bodily injury by accident—each accident" is the most we will pay for all damages covered by this insurance because of bodily injury to one or more employees in any one accident.

   A disease is not bodily injury by accident unless it results directly from bodily injury by accident.

2. Bodily Injury by Disease. The limit shown for "bodily injury by disease—Policy limit" is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for "bodily injury by disease—each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee.

   Bodily injury by disease does not include disease that results directly from a bodily injury by accident.

3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.

H. Recovery From Others

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.

I. Actions Against Us

There will be no right of action against us under this insurance unless:

1. You have complied with all the terms of this Policy; and
2. The amount you owe has been determined with our consent or by actual trial and final judgment.

This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability. The bankruptcy or insolvency of you or your estate will not relieve us of our obligations under this Part.

PART THREE
OTHER STATES INSURANCE

A. How This Insurance Applies

1. This other states insurance applies only if one or more states are shown in Item 3.C. of the Information Page.
2. If you begin work in any one of those states after the effective date of this Policy and are not insured or are not self-insured for such work, all provisions of the Policy will apply as though that state were listed in Item 3.A. of the Information Page.
3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.
4. If you have work on the effective date of this Policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.

B. Notice

Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page.

PART FOUR
YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this Policy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal

papers related to the injury, claim, proceeding or suit.

4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE—PREMIUM

A. Our Manuals

All premium for this Policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this Policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the Policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this Policy.

C. Remuneration

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the Policy period for the services of:

1. all your officers and employees engaged in work covered by this Policy; and
2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this Policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

D. Premium Payments

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this Policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this Policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this Policy.

If this Policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise:

1. If we cancel, final premium will be calculated pro rata based on the time this Policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
2. If you cancel, final premium will be more than pro rata; it will be based on the time this Policy was in force, and increased by our short-rate cancelation table and procedure. Final premium will not be less than the minimum premium.

F. Records

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all your records that relate to this Policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the Policy period and within three years after the Policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

PART SIX—CONDITIONS

A. Inspection

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

B. Long Term Policy

If the Policy period is longer than one year and sixteen days, all provisions of this Policy will apply as though a new Policy were issued on each annual anniversary that this Policy is in force.

C. Transfer of Your Rights and Duties

Your rights or duties may not be transferred without our written consent.

If you die and we receive notice within thirty days after your death, we will cover your legal representative as insured.

D. Cancelation

1. You may cancel this Policy. You must mail or deliver advance written notice to us stating when the cancelation is to take effect.
2. We may cancel this Policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancelation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Information Page will be sufficient to prove notice.
3. The Policy period will end on the day and hour stated in the cancelation notice.
4. Any of these provisions that conflict with a law that controls the cancelation of the insurance in this Policy is changed by this statement to comply with the law.

E. Sole Representative

The insured first named in Item 1 of the Information Page will act on behalf of all insureds to change this Policy, receive return premium, and give or receive notice of cancelation.

INFORMATION PAGE

Insurer: _____

POLICY NO.

| | | | | | | | | | | |

1. The Insured: _____ Individual

Partnership

Mailing address: _____Corporation or

Other workplaces not shown above:

2. The Policy period is from _____ to _____ at the insured's mailing address.

3. A. Workers Compensation Insurance'. Part One of the Policy applies to the Workers Compensation Law of the states listed here:

B. Employers Liability Insurance: Part Two of the Policy applies to work in each state listed in Item 3.A. The limits of our liability under Part Two are:

Bodily Injury by Accident $ _____ each accident

Bodily Injury by Disease $ _____ Policy limit

Bodily Injury by Disease $ _____ each employee

C. Other States Insurance: Part Three of the Policy applies to the states, if any, listed here:

D. This Policy includes these endorsements and schedules:

4. The premium for this Policy will be determined by our Manuals of Rules, Classifications, Rates and Rating Plans. All information required below is subject to verification and change by audit.

Classifications	Code No.	Premium Basis Total Estimated Annual Remuneration	Rate Per $100 of Remuneration	Estimated Annual Premium

Total Estimated Annual Premium $

Minimum Premium $

Expense Constant $

Countersigned by _____

GENERAL INFORMATION PAGE NOTES

1. Insurance carriers may show a renewal agreement statement on the standard Information Page when a Policy is renewed. The carrier must show "Renewal Agreement" or a like heading along with the title "Information Page" if a renewal agreement statement is shown on the Information Page.

2. Insurance carriers showing a renewal agreement statement on the Information Page or entering into a renewal agreement not shown on the Information Page may list any or all endorsements in Item 3.D., elsewhere on the Information Page or in an Information Page Schedule. A carrier is not required to attach such listed endorsements to the Information Page and Policy if the endorsements have already been provided to the insured by that carrier.

3. These General Information Page Notes do not affect the standard Information Page entry requirements set forth in the Information Page Notes.

WORKERS COMPENSATION POLICY ENDORSEMENTS

There are many endorsements authorized for use with the Workers Compensation and Employers Liability insurance policy. The following lists just a sample of those endorsements and describes their content. It should be noted that there are also state-specific endorsements that are applicable only in that particular state named in the endorsement that bring the policy into conformity with state law or regulation. (Those state specific endorsements are too numerous to discuss in any detail here.) There are also endorsements that pertain to federal laws on the subject of workers compensation, such as the maritime coverage endorsement and the federal employer's liability coverage endorsement.

A brief description of the endorsements covered is presented in numerical order. This description includes the purpose and use of each of the endorsements. It is important to again reiterate that this is only a partial list of endorsements that are available for use and that individual states have also developed specific endorsements for use in that particular jurisdiction.

WC 00 03 01 - Alternate Employer Endorsement applies only with respect to bodily injury to the employees of the named insured who are in the course of special or temporary employment by the alternate employer listed on the endorsement. For example, this endorsement can be used when a supplier of temporary office help (the insured) is required by its customer (the user of the temporary office help, that is, the alternate employer) to provide this insurance to protect the customer from claims brought by the insured's employees against the alternate employer. If the named insured has an employee who is injured while working for the alternate employer listed on the endorsement, coverage will be provided for claims made by the employee against that alternate employer.

WC 00 03 03 B - Employers Liability Coverage Endorsement is generally used in monopolistic fund states where the workers compensation system is not open to coverage by private insurance companies. The endorsement is explicit that Part One of the workers compensation policy does not apply to work conducted in the monopolistic fund state. On the other hand, Part Two coverage applies to work in such states as though the states were shown in Item 3.A. of the Information Page. Basically, the endorsement provides "stop gap" coverage for employers in those states where the state fund provides Part One coverage but does not offer Employers Liability coverage.

WC 00 03 05 - Joint Venture as Insured Endorsement states, *"If the employer named in Item 1 of the information page is a joint venture, and if you are one of its members, you are insured, but only in your capacity as an employer of the joint venture's employees"*. The workers compensation policy makes no mention of business arrangements such as joint ventures, but, joint ventures can be employers. Large construction projects often are performed by joint venture contractors. This endorsement makes explicit that the insurance afforded by the policy is limited to that of the employer of those employees that are working for

the joint venture. If an employer is involved in a joint venture but also has other business interests and operations, such employer will need a separate workers compensation policy to apply to injuries suffered by those employees working in the other businesses and operations.

WC 00 03 06 - Medical Benefits Exclusion Endorsement states that workers compensation medical benefits of a state listed on the endorsement are not covered. Some states permit insured's to pay medical benefits directly, instead of channeling them through the workers compensation insurer. Thus, the policy pays only indemnity benefits - often called an "ex-medical policy". At present, 17 states permit self-insurance of medical benefits: **Alabama, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Minnesota, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota**, and **Vermont.** The endorsement directs that the insured employer pay medical benefits as required by law and to the satisfaction of the insurer. In **New York**, a related reimbursement endorsement (WC 31 03 10) applies to insured employers who operate licensed or authorized hospitals or medical facilities.

WC 00 03 08 - Partners, Officers and Others Exclusion Endorsement allows, in a number of states, partners and executive officers to choose to be subject to the workers compensation laws. If these individuals so choose, the premium basis of the workers compensation policy includes their remuneration. However, where the individual partners or executive officers opt not to be covered, endorsement WC 00 03 08 should be attached to the policy. The endorsement states that the policy does not cover bodily injury to any person described in the schedule and that the premium basis for the policy does not include their remuneration. Individuals can be named on this endorsement only when the state workers compensation law allows it.

WC 00 03 10 - Sole Proprietors, Partners, Officers and Others Coverage Endorsement is in direct contrast with endorsement WC 00 03 08. This endorsement is used when partners and executive officers opt to be subject to the workers compensation laws. The endorsement notes that the individuals listed on the schedule have elected to be subject to the law and that the premium basis for the policy includes their remuneration. As with the previous endorsement, individuals can be named in this endorsement only when it is allowed by the state workers compensation law.

WC 00 03 11 - Voluntary Compensation and Employers Liability Coverage Endorsement can be used to cover employees such as domestics, farm workers or other employees who are not subject to the law in the state where the policy is written. This endorsement can be attached to an existing workers compensation policy that is in place for those employees that are required by state law to be covered.

Coverage provided under this endorsement is identical to that for employees required to be insured under the law. The endorsement states that the insurer *"will pay*

an amount equal to the benefits that would be required of you if you and your employees described in the schedule were subject to the workers compensation law shown in the schedule. We will pay those amounts to the persons who would be entitled to them under the law". In other words, benefits are provided for injuries that would have been compensable in the same manner as they would have been provided had the employment been subject to any applicable state workers compensation laws.

It is also to be noted that before any payments can be made to those entitled to such benefits, the beneficiaries must release the insured and the insurer, in writing, of all responsibility for the injury. Any right to recover from others who may be responsible for the injury must be transferred to the insurer, and the injured party must cooperate fully with the insurer in enforcing the right of recovery. If the persons entitled to the benefits of the insurance refuses to comply with the requirements, or if they claim damages from the insured or the insurer, the *duty to pay* under this endorsement terminates immediately.

WC 00 03 13 - Waiver of Our Right to Recover from Others provides that the insurer, through this endorsement, waives its right of subrogation against third parties who may be responsible for an injury if those third parties are named in the endorsement's schedule. In many instances, these named third parties include other companies under the same ownership as the insured.

WC 00 03 15 - Domestic and Agricultural Workers Exclusion addresses the fact that domestic, agricultural, and casual employees are not treated in a uniform manner under the workers compensation systems of the various states. Some states have written their workers compensation laws to include domestic and agricultural employees either on a compulsory basis, or to allow employees to provide coverage voluntarily. This endorsement can be used to deny workers compensation benefits coverage to any agricultural, domestic, or household worker as long as the state law allows this course of action. Those workers denied coverage have to be listed in the endorsement's schedule.

WC 00 03 19 - Employee Leasing Client Endorsement is attached to policies issued to labor contracting businesses. It specifies that coverage for leased workers will be provided by the business that is leasing the employees under contract (the client), not the labor contractor. The endorsement requires that the labor contractor provide its insurer with the following information within thirty days of entering a labor contract: contract effective date and term; client's name; client's federal employer identification number; client's mailing address; and number of workers leased, description of duties of each, and work location for each. Clients of the labor contract must maintain workers compensation coverage for their direct and leased workers, and proof of that coverage must be submitted to the labor contractor's insurer. If proof is not submitted, the labor contractor must pay premium for the leased employees and the insurer may cancel the labor contractor's policy.

WC 00 03 20 A - Labor Contractor Endorsement is attached to policies issued to businesses that lease workers (the client) from a labor contracting business. It specifies that leased employees will be covered for workers compensation under the client's insurance policy. This endorsement is used in conjunction with WC 00 03 19, which is attached to the labor contractor's policy. If the client's insurer is not permitted to pay benefits directly, the insurer will reimburse the labor contractor for benefits it is required to pay for the leased employees. This endorsement does not satisfy the labor contractor's need to carry workers compensation coverage. It addresses only the employees leased by the client from the labor contractor specified in the schedule for the states listed. The coverage may be further restricted to a specific contract or project on which the leased employees are working.

WC 00 03 21 - Labor Contractor Exclusion Endorsement defines employee leasing as an arrangement in which a business engages a third party to provide it with workers for a fee or other compensation. The third party is referred to as the labor contractor. The entity leasing the employees is called the client. The endorsement excludes coverage for workers that the labor contractor leases to clients listed on the endorsement. Coverage must be provided by the client. The endorsement is attached to a labor contractor's policy. Temporary workers are not considered leased workers.

WC 00 03 22 - Employee Leasing Client Exclusion Endorsement limits coverage under the policy to employees of the insured who are not leased from third parties; it excludes coverage under the policy for workers that the insured leases from labor contractors. It defines labor contractor and client in the same way as does WC 00 03 21.

WC 00 04 02 - Anniversary Rating Date Endorsement. Most companies are subject to experience rating and the experience modification is subject to change on the anniversary rating date of the company. The anniversary rating date usually corresponds with the inception date of the policy. However, there are times when the anniversary rating date differs from the policy inception date. When this happens, WC 00 04 02 is attached. The endorsement states that the premium, rates, and experience modification used on the policy may be changed at the anniversary rating date that is shown in the endorsement.

WC 00 04 03 - Experience Rating Modification Factor Endorsement is attached when the experience modification that applies to the policy is not available when the policy is issued. The endorsement states that the factor will be endorsed onto the policy when it becomes available. The premium is subject to change if the modification differs from the one used when the policy was issued.

WC 00 04 05 - Policy Period Endorsement is used if the policy period is longer than one year and sixteen days and does not consist of complete twelve-month periods. It stipulates how the policy will be separated into premium periods.

WC 00 04 06 - Premium Discount Endorsement is used to show the application of a premium discount, or to identify the insured's policy that shows the application of the discount rule. The endorsement (or WC 00 04 06 A) may be used to outline the premium discount percentages that apply to the ascending premium amount.

WC 00 04 20 - Terrorism Risk Insurance Act (TRIA) Endorsement was developed by the National Council on Compensation Insurance (NCCI) to fulfill a requirement of the TRIA to show the charge for terrorism coverage as a separate line item on the policy. The endorsement contains definitions based on TRIA, states the limit of liability on the insurer as stated in TRIA, states that the government will pay ninety percent of terrorism or war losses above the insurer's deductible, and shows the rate per $100 of remuneration for each applicable state.

On a federal level, in response to September 11, Congress enacted and the President signed into law the Terrorism Risk Insurance Act (TRIA) of 2002. This law does not address the compensability of injuries arising from terrorist acts; such injuries remain subject to state workers compensation laws. However, while it is in effect, TRIA requires property and casualty insurers to offer policyholders insurance for losses resulting from acts of foreign terrorism occurring within the United States or on an air carrier or vessel or on the premises of a U.S. mission. Acts of war as declared by Congress are expressly considered terrorist acts for purposes of workers compensation insurance. Insurance coverage offered for terrorist acts may not differ materially from the terms of coverage for losses from acts arising from events other than terrorist acts. In both instances, the U.S. government provides a backstop for a certain percentage of losses under the TRIA.

The prior version of the federal program expired on December 31, 2014. On January 12, 2015, President Obama signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2015. The new law expires December 31, 2020 and, beginning on January 1, 2016, the current eighty-five percent Federal share of compensation under the program decreases by one percentage point per calendar year until it is equal to eighty percent, and the current trigger for aggregate industry insured losses to exceed $100 million increases by $20 million per calendar year until it is equal to $200 million. In addition, the current $27.5 billion insurance marketplace aggregate retention amount increases by $2 billion per calendar year, beginning in 2015, until it is equal to $37.5 billion, and is subject to further revision thereafter.

In response to the new law, The National Council on Compensation Insurance (NCCI) revised the Terrorism Risk Insurance Program Reauthorization Act Disclosure Endorsement (WC 00 04 22 A) to update the references to TRIPRA of 2015, revise the definitions to conform to TRIPRA of 2015, revise the insurer deductible provisions, and revise the Program trigger amounts and the federal share of compensation provisions.

FEDERAL COMPENSATION PROGRAMS

There are various federal laws pertaining to workers compensation that affect workers employed in areas that are beyond the authority of an individual state. As a way to comply with these laws, several endorsements are available for use with certain of these federal coverages.

FEDERAL EMPLOYEES COMPENSATION ACT (FECA)[99]

The Federal Employees' Compensation Act (FECA) provides federal employees injured in the performance of their duties with benefits which include wage-loss benefits for total or partial disability, monetary benefits for permanent loss of use of a schedule member, medical benefits, and vocational rehabilitation. In addition, compensation benefits are payable to surviving dependents if a work related injury or illness results in the employee's death.

Eligible workers include all civilian executive, legislative and judicial branch employees as well as civilian defense workers, medical workers in veterans' hospitals, and employees of the U.S. Postal Service. Additionally, special legislation extends coverage to Peace Corps and other volunteers, federal jurors, Reserve Officer Training Corps (ROTC) cadets, and other groups working in some capacity as part of federal programs. All injuries, including disease proximately caused by the employment, sustained while in the performance of duty by civilian employees of the Department of Defense (DoD) including volunteers and emergency hires are covered.

The FECA disability benefit formula replaces two-thirds of the employee's pay rate if he/she has no dependents, or augmented to three-fourths of the pay rate if he/she is married or has one or more dependents. In addition to the payment of disability benefits, generally, all necessary hospital, physician and medication costs are covered as well as transportation costs to a medical facility for treatment. FECA is administered by the Office of Workers Compensation Programs (OWCP), U.S. Department of Labor, through district offices located throughout the United States.

In FY2009, the FECA program paid out more than $2.7 billion in benefits, including $1.8 billion in disability benefits, $847 million in medical benefits, and $138 million in benefits to the survivors of federal employees killed on the job. In FY2009, administrative expenses made up 4.9 percent of total program costs.[100]

[99] 5 USC Chapter 81

[100] U. S. Department of Labor, Office of Workers' Compensation Programs, *Annual Report to Congress: FY2009*, Washington, DC, April 27, 2011.

FEDERAL EMPLOYERS LIABILITY ACT (FELA)[101]

No-fault workers compensation benefits available to injured workers in other industries are not available to railroad workers injured or killed on the job. To recover for an on the job injury or death, railroad workers or their dependents must prove their case under the Federal Employer's Liability Act (FELA) which was passed by Congress in 1907. FELA allows a railroad worker injured on the job to sue to recover damages for lost earning, both past and future; out-of-pocket medical expenses; any reduction in ability to earn wages because of the injury; and pain and suffering.

The legislative history of FELA and judicial decisions interpreting the law plainly indicate that Congress regards FELA as more than a compensation scheme for railroad workers, but also as an inducement to the railroad industry to promote safe work practices to reduce the number of injuries and deaths. Following enactment of the Act 1907, the United States Supreme Court recognized the Congressional intent to promote safety through the FELA when it opined: "*The Act ... is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons*".[102]

In the forty-four years immediately following the enactment of FELA, twenty-six bills were introduced to replace FELA with a traditional workers compensation program. In each instance, Congress refused to make the change. These attempts to change FELA have continued to the present, and in each instance they have been rebuffed by a Congress acutely aware of the need in the railroad industry for a law with the emphasis directed at the cause of safety for the public and for railroad workers exposed to the peculiar hazards of the industry.

Although FELA requires a showing of negligence or fault in the awarding of damages for a work connected injury or death, it employs the doctrine of *comparative negligence,* even in those jurisdictions that have adhered to the common law doctrine of contributory negligence. In the context of FELA cases, the reasonably prudent railroad worker is substituted for the reasonably prudent person. In applying the doctrine of comparative negligence, if the injured employee was negligent, rather than strike out the entire award, the award in a FELA case would be reduced by the percentage that the employee's own negligence contributed to the injury. For example, if the employee was found to be thirty percent negligent and the railroad was held to be seventy percent negligent, the railroad workers damage verdict would be reduced by thirty percent.

Where the injured worker can show negligence on the part of the railroad, he or she can recover damages, generally payable in a lump-sum award which would include payment for any wage loss, past and future medical expenses not covered by insurance provided by the railroad and not already paid by the railroad; along with damages awarded for pain and suffering, past and future, including damages for disfigurement from scarring, permanent injury, or emotional distress.

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[101] 45 U.S.C. §§ 51- 60

[102] *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930)

FELA claims may be pursued in a state or federal court and a jury trial is provided to the injured railroad worker. The jury determines whether there was negligence on the part of the railroad, whether there was any negligence of the injured worker, the percentage of comparative negligence contributing to the injury by each, and the amount of damages, if any.

The Federal Employers Liability Act Coverage Endorsement (WC 00 01 04) applies only to work subject to the Federal Employers Liability Act and any amendment to that Act in effect during the policy period. The liability to pay for damages is limited and the limits are set forth in the schedule. The limits of liability for bodily injury by accident are on an each accident basis; the limits for bodily injury by disease are on an aggregate basis.

FEDERAL COAL MINE HEALTH AND SAFETY ACT (CMHSA)

In 1891, the United States Congress passed the first federal statute governing mine safety, marking the beginning of what was to be an extended evolution of increasingly comprehensive legislation regulating mining activities. The 1891 law was relatively modest legislation that applied only to mines in U.S. territories and established minimum ventilation requirements at underground coal mines and prohibited operators from employing children under 12 years of age.

Following a decade in which the number of coal mine fatalities exceeded 2,000 annually, Congress established the Bureau of Mines in 1910 as a new agency in the Department of the Interior. The Bureau was charged with the responsibility to conduct research and to reduce accidents in the coal mining industry. In 1947, Congress authorized the formulation of the first code of federal regulations for mine safety. In 1966, Congress extended coverage of the 1952 Coal Act to all underground coal mines.

The Federal Coal Mine Health and Safety Act of 1969[103] included surface as well as underground coal mines within its scope, required two annual inspections of every surface coal mine and four at every underground coal mine, and dramatically increased federal enforcement powers in coal mines. The Coal Act also required monetary penalties for all violations, and established criminal penalties for knowing and willful violations. The safety standards for all coal mines were strengthened, and health standards were adopted.

Most importantly, the Coal Act of 1969 provided compensation for miners who were totally and permanently disabled by the progressive respiratory disease caused by the inhalation of fine coal dust pneumoconiosis or "black lung". In addition, miners became eligible for medical and disability benefits and the survivors of miners who died because of black lung disease became eligible for cash benefits. The medical benefits consist of diagnostic testing (available for all claimants) and services needed due to the disease, including drugs, durable medical equipment, home nursing visits, and hospitalization.

[103] 30 U.S.C. § 901 et seq

The base rate of the compensation benefit is set at three-eighths of the Federal salary for an employee in grade GS-2, Step 1. The benefit is augmented if the miner or his or her survivor has dependents, up to double the base rate when there are three or more dependents. In 2006, Congress passed the Mine Improvement and New Emergency Response Act (MINER Act) which amended the former law to require mine-specific emergency response plans in underground coal mines; added new regulations regarding mine rescue teams and sealing of abandoned areas; required prompt notification of mine accidents; and enhanced civil penalties.

The Federal Coal Mine Act is administered by the Federal Office of Workers Compensation Programs and is funded primarily by a tax on coal production. While dust control has yielded some success in reducing new cases, nearly 5,000 new black lung claims are still being received each year and more than 60,000 primary beneficiaries remain on the rolls, at a total cost of $400 million per year.

The Federal Coal Mine and Safety Act Coverage Endorsement (WC 00 01 01) is used when the workers compensation policy is to cover exposures subject to the Federal Coal Mine Health and Safety Act. The endorsement states that the definition of workers compensation law includes the Coal Mine Act and applies only to work in a state shown in the schedule. Under this endorsement, the insurance applies to bodily injury by disease that is caused or aggravated by the conditions of the employment and the employee's last day of exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

RADIATION EXPOSURE COMPENSATION ACT (RECA)[104]

The Radiation Exposure Compensation Act (RECA) was enacted by Congress October 5, 1990 in order to provide a form of government compensation to three groups of people who suffered injury due to atmospheric testing of nuclear weapons in the western states. These three groups include (1) civilian government and contract workers who participated in the nuclear tests; (2) civilians (referred to in the legislation as “down-winders”) living in areas adjacent to the testing sites that may have been injured by nuclear fallout; and (3) mining and milling workers and ore transporters involved in the mining, production, or transportation of uranium for nuclear weapons.

It is not necessary to prove causation in order to qualify for RECA benefits. Instead, claimants need only show that they were potentially exposed to radiation in a manner specified in the law and have contracted one of the types of cancer specified in a schedule of cancers developed by RECA.

The 1990 Act provides the following levels of remunerations:

- $50,000 to individuals residing or working "downwind" of the Nevada Test Site;

[104] 42 U.S.C. § 2210

- eligible test site workers and “down-winders” receive a lump-sum payment of $75,000;

- and qualified mining workers receive a lump-sum payment of $100,000.

In 2000, additional amendments were passed which added two new claimant categories (uranium mill and ore workers became eligible to receive as much money as uranium miners), added additional geographic regions to the "downwinder" provisions, changed some of the recognized illnesses, and lowered the threshold radiation exposure for uranium miners. According to the Department of Justice, as of October 14, 2009, 21,629 claims under the Act were approved (with 8,736 denied), expending a total of $1,444,082,096.

ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT (EEOICPA)[105]

Congress passed the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) in October of 2000. The purpose of the program is to compensate eligible employees and former employees of the Department of Energy (DOE), its contractors and subcontractors or to certain survivors of such individuals, for occupational illness and death arising from work in a covered DOE facility. The program also provides benefits to certain beneficiaries (uranium miners and millers) under Section 5 of the Radiation Exposure Compensation Act.

EEOICPA provides compensation to persons who have become ill as a result of work at atomic weapons facilities. Individuals, or their eligible survivors, who worked as an employee, contractor, or subcontractor at a Department of Energy (DOE) facility, a designated Atomic Weapons Employer facility, or a designated beryllium vendor facility may be eligible for benefits under the EEOICPA. Part B of the program, effective as of July 2001, provides compensation to workers with beryllium disease, silicosis, or radiation-induced cancer. In October 2004, Congress amended the EEOICPA to add Part E, which provides compensation up to $250,000 and medical benefits for DOE contractor and subcontractor employees whose illnesses were caused by exposure to any toxic substance while working at a DOE facility. Part E benefits were also made available to workers as defined under the Radiation Exposure Compensation Act (RECA).

The program is administered by the Department of Labor (DOL) including the adjudication of issues pertaining to all claims for benefits. The DOL is supported in its role by the Department of Energy (DOE), the Department of Health and Human Services (HHS), and the Department of Justice (DOJ). Facilities that are covered under the Act are determined by DOL and the DOE. All other Part B claims and all Part E claims remain at DOL for review and compensation determinations. According to the DOL, between 2000 and 2009, EEOICP has provided more than $5 billion in benefits to sick workers and their families.

[105] 42 U.S.C. § 7384 et seq

DEATH ON THE HIGH SEAS ACT[106]

Federal Maritime law governs deaths that occur on the high seas. The Death on the High Seas Act, enacted by Congress in 1920, provides remedies to the families and dependents of persons who die as result of negligence or unseaworthiness beyond three nautical miles from the shores of the United States. The opening section of the Act states -

> *"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued".*[107]

Legislation creating the Act was approved in order to codify the provisions that the government requires for families of sailors and seamen who perish in international waters. The act allowed the families to recover damages based on the future earning potential of the lost crewmen.

Only the personal representative of the decedent's estate can bring a wrongful death action on behalf of the statutory beneficiaries (spouse, parent, child or dependent relative). Damages available under the Act include loss of financial support, loss of care nurture and guidance, loss of household services, pre-death medical expenses, and burial and funeral costs. In some cases, compensation for pre-death pain and suffering damages may be available.

DOHSA damages are calculated based upon the value of the financial benefit that would have been received by the relative from the decedent. Dependent children may recover the value of the care and guidance that they would have received from the decedent parent. A surviving spouse can recover the actual value of the financial contribution a decedent would have made to the family, had he lived, subtracting any amount that would have gone toward maintaining the decedent himself. In most cases, DOHSA preempts the general maritime law and limits damages to pecuniary losses.

The act does not allow for a loss of consortium claim. However, spouses can recover the monetary value of any household services the decedent would have provided throughout the remainder of his/her life. This is calculated using the number of anticipated hours of service the decedent would have provided multiplied by an hourly rate for those services.

With legislation enacted in 2000, DOHSA was amended to include commercial aviation accidents beyond 12 nautical miles from the shores of the United States. This section of the Act was amended to provide for recovery of damages for loss of care, comfort and companionship. General aviation accidents on the high seas involving corporate aircraft and privately owned aircraft are excluded. Helicopter flights over water that do not involve

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[106] 46 U.S.C. §§ 761 et seq
[107] 46 U.S.C. § 761

compensation or hire are not covered by the amended DOHSA. Similarly, public-use aircraft accidents and military aircraft accidents are still subject to the limitations of the 80-year-old Death on the High Seas Act, whereby only pecuniary damages can be recovered.

Typically, extending coverage for the Death on the High Seas Act is addressed by adding both WC000201A - Maritime Coverage Endorsement and WC 000203 - Voluntary Compensation Maritime Coverage Endorsement.

MERCHANT MARINE ACT OF 1920 (JONES ACT)[108]

Generally, seamen are not covered by state or federal workers compensation laws. Rather, they are compensated for employment-related injuries through the federal court system. For seamen, the Merchant Marine Act of 1920, commonly known as the Jones Act allows injured seamen to collect benefits for employment-related injuries. The United States Congress adopted the Merchant Marine Act in early June 1920 for the purpose of regulating maritime commerce in U.S. waters and between U.S. ports. The Act was named after U.S. Senator Wesley Jones from Washington and was enacted in support of the U.S. Merchant Marine.

The Act addresses two issues: The first deals with *cabotage* (i.e., trade or navigation in coastal waters) and initially required that all goods transported by water between U.S. ports be carried in U.S.-flag ships, constructed in the United States, owned by U.S. citizens, and crewed by U.S. citizens and U.S. permanent residents. The second issue allows injured sailors to obtain damages from their employers for the negligence of the ship owner, the captain, or fellow members of the crew. It operates simply by extending similar legislation already in place that allowed for recoveries by railroad workers and providing that this legislation also applies to sailors.

Since the Jones Act deals with the recovery for injury to or death of a seaman, that term merits examination. The United States Supreme Court has attempted to clarify the definition of seaman. In 1995, the Supreme Court said that a seaman must contribute to the function of the vessel and that his or her connection to a vessel must be substantial in both duration and nature.[109] The Court added that as a rule of thumb, a seaman should spend more than thirty percent of his or her time on the vessel. Since that time, lower courts have tried to use this direction from the Supreme Court to determine just what a seaman is, on a case-by-case basis.

In 1997, the Supreme Court made another attempt to clarify the issue. In the latter case, a worker was injured while on a one day assignment obtained through the union hiring hall to paint a tug at dockside. This worker fell from a ladder and hurt his leg. He sued for benefits under the Jones Act and, after the trial court decided he was not a seaman and could not receive Jones Act benefits, an appeals court declared that he was a seaman. The Supreme Court took the case and agreed with the initial finding by the trial court. The Court said that defining a seaman under the Jones Act is a

[108] 46 U.S.C. § 688 et seq. and re-codified on October 6, 2006 as 46 U.S.C. § 30104
[109] *Chandris, Inc. v. Latsis,* 515 U.S. 347 (1995)

mixed question of law and fact, but that coverage under the act should be confined to those who face a regular exposure to the perils of the sea; land based employment is inconsistent with the Jones Act.[110]

In the early history of ocean marine insurance, an injured seaman could file an action *in rem* to seek compensation for his injury. In such an action, the seaman filed a suit directly against the ship and not the owner, thereby seeking compensation by claiming a property interest in the ship and bypassing the problem of whether or not the ship owner carried liability insurance. An endorsement did exist that provided coverage for such *in rem* lawsuits, but that endorsement is now obsolete since WC 00 02 01 A includes a statement that a suit or action *in rem* against a vessel owned by the insured is treated by the insurer as a suit against the insured requiring a defense by the insurer.

An endorsement, WC 00 02 01 A (the Maritime Coverage Endorsement) has been developed for attachment with the standard workers compensation policy and states that the insurance afforded by the Employers Liability insurance part of the workers compensation policy for bodily injury to a master or member of the crew of a vessel is changed by the provisions of the endorsement. The endorsement applies the insurance to bodily injury by accident or by disease arising out of and in the course of the injured employee's employment that is described in the schedule on the endorsement. The bodily injury must occur in the territorial limits of, or in the operation of a vessel sailing directly between the ports of, the United States of America or Canada.

Court decisions through the years have supported the proposition that federal and state courts have concurrent jurisdiction to enforce the right of action established by the Jones Act. However, since the act is a federal law, federal principles of law and rules of construction prevail if a conflict arises with a state law. As to the potential for dual recovery, in a precedent setting case in Louisiana, a federal court decided that a workers compensation action is not precluded under the Jones Act under certain circumstances. However, if a seaman receives compensation under the Jones Act for his injury, and then files a state workers compensation claim based on that same injury, a court may allow the workers compensation action as permitted by state law, but will offset any award by the amount already received.[111] Thereby the possibility of double recovery being an unlimited source of compensation is remote.

LONGSHORE AND HARBOR WORKERS COMPENSATION ACT (L&HWCA)[112]

Sixteen years after the first state workmen's compensation law was passed, the United States Longshore and Harbor Workers Compensation Act was enacted in 1927. The federal act was designed to provide medical and physical rehabilitation and compensation for lost wages to employees (other than seamen) who work in maritime

[110] *Harbor Tug & Barge Co.v. Papai,* 520 U.S. 548 (1997)
[111] *Dominick v. Houtech Inland Well Service, Inc.,* 718 F. Supp. 489 (1989)
[112] 33 U.S.C. §§ 901- 952

employment upon the navigable waters of the United States and who were usually considered outside the scope of state compensation laws. Even so, the purpose of this federal compensation law is no different than that of a state compensation law; namely, to compensate workers for injuries that affect their wage earning capabilities and that arise out of the workers' employment.

The L&HWCA covers injuries that occur during maritime employment on “navigable waters” of the United States. Benefits are paid by the employers, with oversight by the OWCP in the U.S. Department of Labor rather than State governments. The program was originally established in response to a United States Supreme Court decision holding that state workers compensation laws did not apply on the nation’s navigable waters. [113]

One of the original problems that arose with the L&HWCA was that anyone performing work however remotely connected to maritime employment attempted to obtain the benefits of the Act. Therefore, in order to curb the jurisdictional scope of the Act, not only does the coverage paragraph of the L&HWCA contain certain exclusions, but the definition of "employee" has been limited to specific classes of workers.

The term "employee" means any person engaged in maritime employment, but this term does not include clerical, secretarial, security, or data processing work; it does not include individuals employed by a camp, restaurant, recreational operation, or retail outlet; nor does it include individuals employed by a marina, aquaculture workers, individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length. Masters or members of a crew of any vessel or any person engaged to load or unload or repair any small vessel under eighteen tons net are also not considered employees under the Act. Needless to say, disputes and legal challenges over what constitutes an "employee" continue.

The liability of the employer is exclusive and precludes all other liability of the employer to the employee, his legal representative, or his dependents. In other words, the exclusive remedy theory as applied to the employer. Of course, if the employer fails to secure payment of compensation, an injured employee can file suit at law or in admiralty for damages and the employer cannot use the defenses that were common prior to the enactment of state workmen’s compensation laws: negligence of a fellow servant; the assumption of risk by the employee; or contributory negligence on the part of the employee to the employer

L&HWCA insurance may be provided by attaching endorsement WC 00 0106 A to the standard workers compensation policy. The endorsement applies to work done in the states scheduled (including those states with a monopolistic state fund) and extends the definition of workers compensation law to include the L&HWCA. This is necessary because the policy declares in the General Section that the term "workers compensation law" does not include any federal workers compensation law. The statutory obligation of an employer to furnish benefits required by the L&HWCA is thus satisfied. The coverage, exclusions, and conditions of Part One of the workers compensation policy are applied to those parties involved under the L&HWCA.

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[113] *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917)

WC 00 0106 A declares that exclusion 8 under the Employers Liability part of the policy (Part Two) does not apply to work subject to L&HWCA. This is, of course, similar to the wording found on endorsement WC 00 0101 A as noted above. It is also stated on the L&HWCA coverage endorsement that the endorsement does not apply to the Defense Base Act, the Outer Continental Shelf Lands Act, or the Nonappropriated Fund Instrumentalities Act.

Under the Employers Liability portion of the policy, the insurance applies to bodily injury by accident or by disease arising out of and in the course of the injured employee's employment. The L&HWCA endorsement drops exclusion 8 of the Employers Liability insurance. For operations subject to the L&HWCA, the standard limits of liability under Part Two of the policy are: $100,000 per each accident for bodily injury by accident; $100,000 per each employee for bodily injury by disease; and a $500,000 policy limit for bodily injury by disease. Increased limits are available for an additional premium.

Based on the nature of the work involved, with accidents and injuries happening on land as well as on or over water, conflicts arise over which coverage, state or federal, takes precedence. In a Louisiana case, the employee, was injured while repairing a barge on the defendant's dry dock. He filed for Louisiana workers compensation and sued to obtain benefits. The employer responded that the employee could have sought benefits under the L&HWCA and so, he was not eligible for state workers compensation. A Louisiana court of appeals decided that just because there is a federal remedy does not necessarily mean there is no state remedy. The court, in finding for the employee, held that the L&HWCA does not expressly say that it is the exclusive remedy for injured workers; the proper approach is for state workers compensation laws to complement the federal law.[114]

It is important to note that recent amendments to the L&HWCA require that a worker or dependent who is excluded from the definition of "employee" must first claim compensation under the appropriate state workers compensation program and receive a final decision on the merits of that claim before any claim may be filed under the L&HWC Act.

It is recognized that the L&HWCA covers more than maritime industry workers. Through a series of amendments, coverage was extended to include several miscellaneous classes of employees through the following extensions to the law:

> **Defense Base Act (DBA) –** Established in 1941, the primary goal of the Defense Base Act was to cover workers on military bases outside the United States. The Act was amended to include public works contracts with the government for the building of non-military projects such as dams, schools, harbors, and roads abroad. A further amendment added a vast array of enterprises revolving around the national security of the United States and its allies. Today, almost any contract with an agency of the U.S. government, for work outside the U.S., whether military in nature or not, will likely require DBA coverage.
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> Defense Base Act coverage is accomplished through attachment of endorsement WC 00 01 01 A. This endorsement applies only to the work described in the schedule or

[114] *Logan v. Louisiana Dock Co.,* 541 So.2d 182 (1989)

described on the Information Page as subject to the Defense Base Act. The endorsement modifies the workers compensation policy by replacing the definition of "workers compensation law" found in the policy with the following meaning: *workers compensation law means the workers compensation law and occupational disease law of each state or territory named in Item 3.A. of the Information Page and the Defense Base Act (42 USC Sections 1651-1654)*. The definition clarifies that it does not include any other federal workers compensation law or occupational disease law.

Nonappropriated Fund Instrumentalities Act - enacted in 1952, this Act, which is an extension of the Longshore and Harbor Workers Compensation Act (LHWCA), provides workers compensation coverage to civilian employees of non-appropriated fund instrumentalities. The most common application of this Act is to civilian employees who provide services to the U.S. Armed Forces such as at a military post exchange. Like the LHWCA, the Non-Appropriated Fund Instrumentalities Act is administered by the Office of Workers Compensation Program (OWCP).

The Non-Appropriated Fund Instrumentalities Act Coverage Endorsement (WC 00 01 08 A) applies only to the work described in the schedule as subject to the Non-Appropriated Fund Instrumentalities Act and the definition of "workers compensation law" is expanded by this endorsement to include the Non- Appropriated Fund Instrumentalities Act.

Outer Continental Shelf Lands Act - enacted in 1953, the Outer Continental Shelf Lands Act[115] covers mineral exploration and production workers such as those on offshore drilling platforms. The 1953 statute defines the Outer Continental Shelf (OCS) as all submerged lands lying seaward of state coastal waters (3 miles offshore) which are under United States jurisdiction. The statute authorized the Secretary of Interior to promulgate regulations to lease the OCS in an effort to prevent waste and conserve natural resources and to grant leases to the highest responsible qualified bidder as determined by competitive bidding procedures.

The Outer Continental Shelf Lands Act Coverage Endorsement (WC 00 0109 A) applies only to the work described in the schedule as subject to the Outer Continental Shelf Lands Act. Therefore, the description of the work must show the state whose boundaries, if extended to the outer continental shelf, would include the location of the work.

[115] 43 U.S.C. §§ 1331 - 1356