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Grave Expectations: Handling Complex Grave Injury Claims in Catastrophic Construction Accident Cases

PART I. Overview of Employer’s Liability (EL) Insurance

A. Explain the differences between statutory worker’s compensation and EL exposure

The concept of the modern workers’ compensation system was born out of Germany with the passage of their 1871 Employer’s Liability Law, which provided worker protections for those involved in workplace accidents. There were multiple unsuccessful attempts to pursue workers’ compensation laws across the United States at the end of the 19th Century and at the very beginning of the 20th Century. Sadly in 1911, there was a traumatic event that would forever change the landscape of workplace safety and access to post-accident benefits in the United States. In the Greenwich Village neighborhood of Manhattan, New York on March 25, 1911, the Triangle Shirtwaist Factory Fire was one of the deadliest workplace accidents in the history of the United States. The owners of the factory had locked multiple exits and factory floors because they believed these efforts would enhance production, but this led to more injuries and deaths. As a result of the fire, 146 workers, mostly recently immigrated workers, died due to burns, smoke ventilation, or efforts to escape from the building. Hundreds of workers who survived the fire suffered from severe and in some cases, permanent injuries. Because New York did not have a workers’ compensation system in place, dependents of the deceased and surviving injured workers had to file civil suits against the owners to receive compensation for benefits and medical care. As a result of the lack of expedited benefits to the workers and families impacted by the Triangle Shirtwaist Factory Fire, workers’ compensation became politically and socially supported by Americans. On May 4, 1911, the state of Wisconsin became the first state in the United States to enact workers’ compensation laws that addressed indemnity and medical benefits for workers involved in workplace accidents, establishing the “The Grand Bargain”. After the establishment of Wisconsin’s 1911 workers’ compensation law, every single state in the United States followed in turn to pass their own workers’ compensation laws. “The Grand Bargain” addressed how statutory workers’ compensation in the United States would be established as a “no fault” system, therefore lessening the number of civil suits filed against employers and would provide an expedited legal pathway for workers to obtain indemnity and medical benefits.

B. Define EL Insurance

- a. Discuss other types of EL exposure such as the Jones Act and the Federal Employer's Liability Act (FELA)

Over the course of the 20th Century, workers in the United States began using the courts to challenge employers and their direct negligence for severe workplace accidents. In addition, defendants named in negligent accidents lawsuits such as building owners and general contractors also used the courts to direct liability to the plaintiff's employer. This gave way for the need for a new insurance product to be used for an employer's direct liability for a workplace accident. As a result, employer's liability insurance was created. Employer's liability is in Section 1B of a standard workers' compensation policy which provides coverage for defense costs and indemnity for an employer's negligence because of a workplace accident to *their employee*. All 50 states have differing ways of defining triggers for employer's liability insurance. Certain states such as New York have defined triggers for employer's liability written into their worker's compensation statute.

Workers' Compensation Law § 11 and the definition of grave injury

New York Workers' Compensation Law § 11 prohibits third-party and crossclaims for contribution or indemnification against an employer for injuries sustained by an employee acting within the scope of employment unless (1) the employee has sustained a "grave injury" or (2) there is a written contract entered into prior to the accident by which the employer expressly agreed to contribution or indemnification. Workers' Compensation Law § 11 defines a grave injury as:

[D]eath, permanent, and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia, or quadriplegia, total or permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger, or an acquired injury to the brain caused by external force or its resulting permanent or total disability.

The list of injuries that define the term "grave injury" is "exhaustive and not illustrative" and is narrowly and completely described. *See Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398, 761 N.E.2d 1014, 736 N.Y.S.2d 287 (2001). A traumatic brain injury will only constitute a "grave injury" if an injured plaintiff can prove that he/she will be permanently disabled from work for the rest of his/her life.

In addition, there are other types of workers' compensation exposures that may fall under employer's liability such as the Federal Employers' Liability Act (FELA) and the Jones Act. FELA and the Jones Act were meant to provide coverage to transient workers who due to their profession, may not fall under a specific state statutory worker's compensation act. FELA was passed into law in 1908 to address workers' compensation for railroad workers. FELA can be covered by a worker's compensation policy through the "Federal Employers' Liability Act Endorsement". The Jones Act was passed into law in 1933 and allowed for members of the protected "seamen / seawoman" class of workers. The Jones Act can be

covered by a workers' compensation policy through the "Maritime Coverage Endorsement", which provides coverage under Employer's Liability. An insured can be exposed to the Jones Act in the construction industry due to the use of "navigable barges" while constructing piers, docks, bridges, or any project on navigable waters. Both FELA and the Jones Act provide an avenue to file a civil action claim for lost wages, the cost of past and future medical care, and pain and suffering.

- C. Address Employer's Liability claim triggers via statutory provisions vs. case law
 - a. Intentional Acts vs. Willful Indifference

In New York, employer's liability is defined by statute. Many states, including New Jersey, have defined employer's liability through case law rather than by statute. Under certain situations in other states, an injured employee can directly sue their employer. This is not the case in New York, because New York explicitly defines Workers' Compensation as the sole, exclusive remedy available to a plaintiff who was injured during his employment, even if he died because of the accident.

In general, many states have triggers for employer's liability for intentional acts, willful negligence, and/or "the substantial certainty standard." Under the substantial certainty standard, for example, is when an employer creates a condition that is substantially certain to cause an accident.

PART II. FREQUENT CHALLENGES WITH EMPLOYER'S LIABILITY CLAIMS (30 Minutes)

- A. Contractual and Common Law Claims Scenarios
 - a. Practical effects of a "grave injury" on a Labor Law case and issues that arise.

If a plaintiff alleges that he/she has suffered a grave injury while working at a construction site, then an attorney representing an employer in a routine Labor Law third-party action (where an owner/general contractor sues the "down the line" sub-contractors, including an employer with an indemnification agreement in place), may then tender the defense to the Workers' Compensation 1B carrier. If that carrier accepts the tender, then often the legal fees are split between the attorneys handling the bodily injury defense, and the 1B carrier.

There are several cases where the carriers do not agree whether the definition of a grave injury has been met. This can put the carriers at odds and in opposition with each other. There has also been a considerable amount of litigation among the insurance carriers to enforce other NY rules that exist in the NY case law that came into play.

Labor Law cases become even more complicated when employers in a grave injury case have already accepted the tender of other "up the line" entities such as an owner or general contractor. Then, it becomes a "fight" between horizontal and vertical coverage, and which insurance is primary to other applicable insurance policies. On New York construction sites, each contractor typically has their own primary and excess/umbrella policies, as well as Workers' Compensation policies. When there are tenders throughout the course of a case, the tenders need to address which policies are primary, non-

contributory, and which will be the “next in line” for vertical or horizontal coverage once the case ultimately resolves.

- B. Interplay between other lines of coverage such as general liability and environmental insurance
 - a. Employer’s Liability can be used as a “sword or a shield”

Due to the facts of a claim, there may be scenarios where due to the lack of available coverage, employer’s liability may be the only and best available insurance option for an insured. This can be due to fact specific triggers for the denial of coverage for other lines of insurance such as general liability or environmental insurance due to exclusions. Entities in the construction industry must be aware of opportunities for additional coverage when exploring contractual risk transfer opportunities. For example, if a general contractor has provisions in their contract for general liability additional insured status via a contract they have with a subcontractor and the value of the claim may exceed the limit of available coverage, employer’s liability may be another opportunity for additional coverage. This is especially important in New York, a venue with the Labor Law statutes and the propensity for “nuclear verdicts”.

C. Anti-Subrogation

Anti-subrogation laws in New York prevent an insurer from suing its own insured until the general liability limits are exhausted. New York’s anti-subrogation rules arguably prohibit the umbrella/excess carriers from bringing a common law indemnity action against the lowest tiered party until the general liability/excess limits are exhausted and then the 1B is required to step in and pay the amount more than the general liability/excess policy limits. The primary carriers frequently take this position and are prepared to litigate over which carrier is responsible to pay and in what order. This is a complex situation that requires the client, defense counsel, and broker to work in partnership for the optimal insurance outcome.

PART III. EXECUTING A “CLAIMSPLAN”

- A. Taking proactive measures to address EL exposure prior to the filing of an EL claim
 - a. Urgent Response Plan

Insureds, brokers, and claims professionals need to be keenly aware of potential exposure for an employer’s liability claim at the onset of a significant loss. As part of the claims triage process, it is important to identify a defense attorney who is adept at litigating employer’s liability claims due to their infrequency. For a state like New York with specific severe injury triggers, exposure for employer’s liability claims can reach 8-figures dollar values. Ensuring that every potential employer’s liability claim is thoroughly investigated is critical to mitigating future exposure. Collection of photos / videos, safe work plans, toolbox talks, witness statements, cloaking the investigation with defense counsel, etc. are all key to mitigating an insured’s risk.

- b. Complex injury claims

Historically, injured workers and their attorneys attempt to pierce the “exclusive remedy” bar whenever there are significant injuries in the underlying statutory workers compensation claim because of a severe accident. All parties should be monitoring for potential injury triggers throughout the lifespan of a statutory workers’ compensation claim for New York Employer’s Liability exposure, especially due to common challenges such as “body creep” and “consequential injuries”. The underlying statutory workers’ compensation claim can play a key role in mitigating damages and injuries using mitigating resources such as nurse case managers, vocational rehabilitation specialists, social workers, independent medical examiners, etc. When faced with an employer’s liability claim in a state like New York, it is critical to obtain the best medical experts possible. For example, employer’s liability claims can hinge on whether the plaintiff has a traumatic brain injury and/or is permanently totally disabled. Securing defense medical resources can make multi-million-dollar differences for an insured’s exposure.