ALTERNATIVE DISPUTE RESOLUTION

CARVE OUT PROGRAMS

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WHAT IS ADR?

- Alternative Dispute Resolution Program

- ADR is a system that “supplements or replaces all or part of those dispute resolution processes contained in Division 4 of the Labor Code.”

- Commonly called “carve out” programs because they essentially replace the judicial claims resolution process at least up to the Appeals Board level.
Purpose of a Carve Out

Carve-outs present an opportunity for unions and employees to alter the adversarial culture of the workers’ compensation claims process which could result in reducing costs to the employer; speed up the process and improve the experience for the employee.
Historical Perspective

Per LC 3201.5 Carve Outs were initially limited to employers or groups of employers engaged in construction, construction maintenance, or activities limited to rock, sand, gravel, cement, asphalt, heavy duty mechanics, surveying, construction inspection and a union that is recognized as exclusive bargaining representative.
In 2004 the Legislature added LC 3201.7 which allows carve outs through any labor-management agreement where:

1. The agreement has been negotiated separate from any collective bargaining agreement covering affected employees.

2. The labor-management agreement is restricted to conditions necessary to implement this section.

3. The labor-management agreement has been negotiated between an employer or groups of employers and a union recognized as the exclusive bargaining representative.
LC 3201.7
(as amended in 2012)

Any bargaining representative (union) in an industry not covered by LC 3201.5 may petition the AD to negotiate with an employer or group of employers to enter into a labor-management agreement, including the State; County or City.

Some California supermarkets and union employees are now subject to an ADR program.
LABOR MANAGEMENT AGREEMENT

• Authorizes Joint Labor Management Committee, to have full authority to operate and manage the ADR program. The Committee is made up of equal number of members representing the Employer and Employees.

• The Committee selects the ADR administrator.

• The Committee shall create an exclusive list of medical providers eligible to treat the injured employees.
LABOR MANAGEMENT AGREEMENT

• Parties can tailor the program to particular needs of the industry.
• Can create uniform light-duty/return to work programs.
• Can create panel of quality treating physicians.
• Can create panel of quality medical-legal evaluators.
• Can set the parameters for compensation for employee legal representation.
LABOR MANAGEMENT AGREEMENT

• Can integrate treatment for industrial injuries with group medical providers.
• Can integrate payment of TTD and PD with employment based STD; LTD; wage continuation
• Can create obligation for periodic review and improvement of safety programs and training
LABOR MANAGEMENT AGREEMENT

The labor-management agreement must include provisions that:

- The decision of the Arbitrator is subject to review by the Appeal Board (Reconsideration and Writ of Review.)

- The Findings of Fact, Awards and Orders of the Arbitrator shall have the same effect as those issued at the WCAB.
LABOR MANAGEMENT AGREEMENT

The labor-management agreement may include:

• The use of an agreed list of providers of medical treatment that may be the exclusive source of all medical treatment provided.

• The use of an agreed list of QMEs and AMEs that may be the exclusive source of evaluations.
LABOR MANAGEMENT AGREEMENT

The labor management agreement may include:

- Joint labor-management safety committee
- Light duty/modified job or RTW program
- Voc Rehab or retraining program with agreed list of providers.
LABOR MANAGEMENT AGREEMENT

The labor-management agreement cannot diminish the entitlement of any employee to compensation payment for total or partial disability, TTD, VR or medical treatment.

An injured employee, in a carve out program, must be entitled to receive at least the same level of benefit he would receive before the WCAB.
Which Employees are in the ADR

Since carve out programs are created by labor-management agreements, the injured employee must be under the protection of the labor unit participating in the agreement.

Can a non-union employee, paid prevailing wages and treated like a union member be included in the ADR program?
RIGHT TO LAWYER

LC 3201.7(b)(1) no agreement authorized by this section shall deny to any employee the right to counsel at all stages during the ADR process. The portion of any agreement that violates this paragraph shall be declared null and void.

NOTE: Carve outs created under LC 3201.5 do not discuss the employee’s right to counsel at all stages of the ADR process. The terms of the agreement will dictate. Usually the employee will have the right to counsel at least at the Arbitration.
JURISDICTION

The issue of whether a case is subject to adjudication before the WCAB or ADR is a question of jurisdiction.

Some ADR rules require the issue of proper forum to be adjudicated in the ADR program.

The tribunal where the case is first filed should proceed to make the determination of the proper jurisdiction (Taylor vs. Superior Court 21 CCC 331)

In practice, where the employee or their counsel question the proper jurisdiction for a claim, the issue of jurisdiction will be first litigated at the WCAB.
JURISDICTION

Issues subject to ADR jurisdiction:

- All regular issues
- S&W claims are subject to ADR jurisdiction (Morrison vs. WCAB 66 CCC 1308). S&W is a Division 4 benefit. LC3201.5 and LC 3201.7 refer to Division 4 benefits only.
LC 132a CLAIMS

- **Kiewit Pacific Co v WCAB 66 CCC 1873**
  - Parties subject to carve out. Defendant submitted 132a to Arbitrator who ruled that she does have jurisdiction to adjudicate the 132a claim. Employee submitted issue to WCAB. WCJ ruled that he has jurisdiction to adjudicate 132a claim.
  - Court of Appeals held that LC 3201.5 applies only to Division 4 benefits. LC 132a is contained in Division 1.
  - The WCAB retains jurisdiction over 132a claims.
JURISDICTION

Death/Dependency claims.

In the Writ Denied case of Brunton Enterprises vs. WCAB 75 CCC 1172 the WCAB held that a dependency claim is not subject to the jurisdiction of the ADR in that the dependents were not represented by the union; they were not members of the union; they were not subject to the provisions of the CBA (in spite of Rule 9811 which defines “employee” to “include dependent in the event of an injury which results in death.”)
MEDICAL TREATMENT UNDER THE ADR

- The JLM Committee might designate a nurse advocate to assist the employee in selecting the right treating physician or consulting specialists.
- The Employer shall not be responsible for cost of medical services furnished by a doctor or facility not authorized.
- Employee required to treat with approved physician in both admitted and denied claims. (Can vary from program to program. Look at the language in the Agreement, e.g. “injured employee vs. employee”)
- Medical Fee Schedule applies.
MEDICAL LEGAL EVALUATIONS

- Plan specific.
- JLM designates a list of approved physicians.
- In ADR each party can select their own Medical Evaluator from the approved QME list.
- Agreed Medical Examiners are permitted.
- In some ADR programs, the Ombudsman provides a 3 doctor QME panel. If employee is unrepresented, he selects the QME. If represented the parties each strike a doctor.
DISPUTE RESOLUTION

Three levels of dispute resolution:

1. OMBUDSPERSON
2. MEDIATOR
3. ARBITRATOR
OMBUDSPERSON

• Should be proactive; try to identify and prevent potential disputes before they occur.

• Receives complaints from either side (e.g. non-payment of compensation; failure to authorize treatment, refusal to attend exam).

• Interfaces with claims to see if dispute can be resolved.

• If dispute not resolved within 30 days, either party can request Mediation.
MEDIATOR

- Selected by the ADR administrator.
- Contacts both parties to discuss dispute and attempt to resolve dispute.
- Mediator will issue written recommendation.
- Any aggrieved party has 30 days from receipt of Mediator’s written recommendation to request Arbitration.
- The Ombudsperson shall appoint the Arbitrator (usually retired WCJs)
ARBITRATOR

- Designated by Ombudsperson.
- Hearing must be set within 30 days of request.
- All Arbitrations are recorded by Certified Court Reporter.
- Applicant attorneys to be paid consistent with WCAB practices. (9% to 15%)
- Arbitrator has right to refer employee out for “Independent Medical Evaluation.” Employer pays.
- Similar to WCAB hearing; same substantive law applies. Same burden of proof.
ARBITRATION

- Aggrieved party has right to petition for reconsideration/removal or Writ of Review.
- Any third party may voluntarily submit to the ADR process (co-defendant in CT case or lien claimant).
- Arbitrator must issue his decision within 30 days of submission.
DISCOVERY

- As per the Labor Code.
- Depositions of Employee
- SDTs
SETTLEMENTS

• Compromise and Release
• Stipulation with Request for Award.
• ADR uses their own forms.
IS ADR SUPERIOR TO WCAB?

- Higher level of service for the employee on the front end of the case.
- The provision of timely and quality medical care.
- Expedited return to work.
- Short time limits: 30 days from Ombudsman to Mediator; 30 days from Mediation to Arbitration; 30 days from Arbitration to decision.
- Only one case set at a time.
- Continuances not favored.
- Speedier resolution of cases
WHAT CAN BE ACHIEVED WITH AND ADR PROGRAM?

- Improve safety programs
- Increase access to quality medical treatment
- Lower costs of medical treatment
- Reduce disputes
- Expedite resolution of all disputes
- Some carriers provide premium discount to employers in ADR
ADVANTAGES FROM CLAIMS PERSPECTIVE

• Lower litigation costs (try to keep attorneys involvement limited to depositions and arbitrations.)

• Claims examiners able to resolved disputes thru Ombudsperson and/Mediator

• More medical control

• Faster file closings

• Later referrals to counsel
ADR VS WCAB COSTS

- WCAB is Free???
- ADR costs to the employer/carrier
- Mediator/Arbitrator costs average between $2,000 and $3,000 per session