



Demystifying workers' compensation ADR programs

Mediation in the WC arena bears little relation to ADR for personal injury

By TAYLOR E. ARNOLD

Among PI practitioners, there are some common misconceptions regarding workers' compensation alternative dispute resolution programs (ADR). Due to the more informal nature of workers' compensation ADR programs, case-specific information on workers' compensation claims is not as publicly accessible as traditional workers' compensation claims. Additionally, the filing of liens and petitions may share the same timelines as the traditional workers' compensation practice, yet the unique rules for each ADR program, combined with separate operative statutes and regulations, will impose additional requirements that can be the difference between a timely filing or call to a malpractice attorney.

Over the past few decades, workers' compensation programs have seen an increase in ADR utilization. The programs, often referred to as "carve-outs," allow employers and their unionized employees to negotiate alternatives to certain procedural aspects of the workers' compensation claims process while maintaining the employee's entitlement to all benefits available under the law. Navigating these programs is uniquely challenging for even seasoned practitioners, as the procedures agreed to will vary between programs. The following article will provide an overview of the history, intent, and general operation of these programs and provide guidance to practitioners who wish to participate in them.

History of ADR programs

Workers' compensation litigation costs have risen dramatically since the

system was implemented in California over a century ago. By the 1980s, many large employers, their insurance carriers, and unions sought to remedy these issues through collective bargaining, culminating in 1993 with the adoption of Labor Code section 3201.5. This statute allowed collective bargaining of carve-out agreements within certain segments of the construction industry. A study was commissioned by the Commission on Health and Safety and Workers' Compensation, which suggested that carve-out programs "resulted in substantial savings on both medical and indemnity costs, precipitous drops in litigation, and possible marked improvements in safety." (Carve-outs in Workers' Compensation: An Analysis of Experience in the California Construction Industry (September 1999).)

Following the success of the construction carve-out programs, Labor Code section 3201.7 was adopted in 2002, allowing the aerospace and timber industries to negotiate similar programs. The following year, this statute was replaced with a broader statute covering general "labor-management" agreements, and subsequently amended in 2004 to expand the scope of procedural changes subject to carve out and increase the accessibility of the programs to more unions and management.

The dual tracks of the construction and labor-management ADR statutes resulted in statutes that are nearly identical, save for a few key differences that should be pointed out. The applicability of several statutes related to insurance rates, as well as whether an agreement to form an ADR program can be tied to more general collective bargaining, differs between the construction

and labor-management ADR programs. More relevant for the purposes of this article are potential limitations on attorney participation during parts of the process. A labor-management ADR program is precluded from denying a covered employee the right to counsel in the proceedings pursuant to Labor Code section 3201.7, subdivision (b)(1), however no such limitation exists in the construction ADR statutes aside from the general right to counsel during arbitration. While the exclusion of attorneys from some quasi-litigation proceedings may not sit well, it is important to consider that the primary goals of these carve-out programs are to reduce friction due to litigation, expedite the provision of benefits to employees, and lower the overall costs of workers' compensation administration.

What is actually carved out?

The exact form and scope of an ADR program can vary widely, as these are subject to collective bargaining by parties with differing motivations. Labor Code section 3201.2(a) and section 3201.7(a)(3) allows an ADR program to establish alternative procedures for one or more of the following:

- An alternative dispute resolution system governing disputes between employees and employers or their insurers that supplements or replaces all or part of those dispute resolution processes contained in this division, including, but not limited to, mediation and arbitration.
- An agreed list of providers of medical treatment that may be the exclusive source of all medical treatment.
- Use of an agreed, limited list of qualified medical evaluators and agreed medical evaluators that may be the



exclusive source of qualified medical evaluators and agreed medical evaluators.

- Joint labor management safety committees.
- A light-duty, modified job or return-to-work program.
- A vocational rehabilitation or retraining program utilizing an agreed list of providers of rehabilitation services that may be the exclusive source of providers of rehabilitation services.

These programs almost universally start by separating themselves from Workers' Compensation Appeals Board jurisdiction at the trial level, and replace it with a more informal system involving ombudsmen, mediators, and arbitrators. How medical treatment is administered, including the authorization of doctors and treatment requests, is often heavily modified by the language of the ADR program. The discovery process, including replacement of the existing medical-legal process mandated by Labor Code sections 4062.1 and 4062.2 will also be determined by the language of the ADR program. Return-to-work programs are often created. These remove the ambiguity of employer decisions relating to whether or not an employee can be accommodated due to temporary work restrictions.

Perhaps the starkest contrast for practitioners who are accustomed to the traditional workers' compensation track is the informality of the process, and the more collaborative and direct approach that is often taken between applicant's attorneys and employer representatives and claims examiners. This is often the intended result as these carve-out programs are collectively bargained for the express purpose of simplifying the process for all parties. However, due to the fact that these programs are collectively bargained, they can be modified or terminated at the end of a collective bargaining period. An ADR program's language, as well as any statements relating to the intent of the parties in termination of a program, will control when and how existing ADR claims revert

to Workers' Compensation Appeals Board jurisdiction. The Department of Industrial Relations maintains a list of active and former ADR programs, including the existing expiration date. (Construction Carve Outs: <https://www.dir.ca.gov/dwc/Carveout/ConstructionCarveOut.htm>; Labor-Management Care Outs: <https://www.dir.ca.gov/dwc/Carveout/NonConstructionCarveOut.htm>.)

What can't an ADR program limit?

As a threshold matter, an ADR program is precluded by both operative statutes from diminishing in any way the benefits owed by employers to injured workers otherwise available under workers' compensation law. The process to obtain these benefits may be altered, but the destination in both the traditional system and an ADR program must lead to the same place. Furthermore, due process requires that the appellate process automatically reverts to the Workers' Compensation Appeals Board and Courts of Appeal for disputes of final determinations by an ADR program.

The permanent disability rating schedule is still mandated in an ADR program, as are employer posting requirements and some pre-claim employee rights such as physician pre-designation. Many of the most important requirements of claims administrators include the duty to provide claim forms, issue notices to employees denying claims or benefits, and to maintain accurate records, which are subject to audit. (Code of Regulations sections 10201(g) and 10202(i), which outline the eligibility requirements for both operative ADR statutes each incorporate numerous other regulations and insurance codes covering many core workers' compensation rights.)

Additionally, claims for death benefits under the workers' compensation system cannot be included in an ADR program. The claimants in those cases are

the heirs and dependents of the employee, and thus not represented by their union. Finally, Labor Code section 132a claims for discrimination are also precluded, as these causes of action arise under Division 1 of that labor code rather than Division 4, which contains the workers' compensation statutes. (*Kiewit Pacific Co. v. WCAB (Beaver)* 68 CCC 1873 (writ denied).)

Understanding the general ADR process

As discussed above, each ADR program is negotiated between the parties bound to it, which creates some variance in the actual discovery and litigation process. Some ADR programs utilize formal Workers' Compensation Appeals Board forms and procedures, such as filing an Application for Adjudication of Claim to initiate jurisdiction, while others have automatic jurisdiction upon the filing of a claim with the employer. Attorney involvement at the initial stage of dispute resolution may be precluded by some construction ADR programs, while others encourage attorney participation on more complex claims. Additionally, the filing of liens, documents related to credits, or third-party stipulations or settlements are often done directly with the employer or the ADR program director, rather than the Workers' Compensation Appeals Board, who will reject filings for matters subject to ADR.

An attorney who will be handling cases in a specific ADR program must familiarize themselves with the individual program agreement and stay informed on potential changes that may be implemented when a program is renegotiated. A copy of any ADR program can be obtained by email request to dwc@dir.ca.gov.

While the underlying workers' compensation benefits and legal foundations remain the same, it is impossible to create a single practice guide inclusive of the rules and procedures for all ADR programs. That being said, in general, in most ADR programs in California



Workers' Compensation ADR programs, the dispute resolution process follows a two- or three-stage path involving an ombudsman, a mediator, and an arbitrator. The roles of each are discussed below.

Ombudsman

The initial stage normally involves bringing a dispute to the ombudsman, who is agreed to by the both employer and the union and acts as a neutral party to assist both sides. Ombudsmen can be thought of as analogous to an information and assistance offer at the Workers' Compensation Appeals Board. They assist unrepresented employees navigate a complex legal system, and can be equally helpful for practitioners inexperienced in a particular program. In some ADR programs, the ombudsman will act as an independent, impartial, and confidential resource to either side to provide guidance and clarification to the parties. One must be aware however that in other programs the ombudsman may actually be the initial arbiter of a dispute whose opinions must be timely objected to or become binding on the parties.

Mediator

If an issue or dispute is not resolved by the ombudsman, or if the ombudsman does not have authority to issue potential binding findings, the next step in the process would be requesting mediation. Mediators in ADR programs are generally former workers' compensation attorneys or judges who will have an opportunity to review the complete file prior to discussions with the parties. Often mediators will request briefs and records from the parties prior to the mediation start date, or even as a prerequisite for scheduling a mediation date. Mediators can be thought of as the settlement conference judge whose goal is to seek an informal or agreed upon resolution of an issue between the parties. Mediation can last a single day and be handled via telephone or video conference, or it can take several weeks in a more informal written form. If mediation is successful, or if the issue is informally resolved between the parties, mediators generally have authority to

approve stipulations on disputed issues, or settlement documents. In the event of an unsuccessful mediation, the parties then proceed to arbitration.

Arbitrator

In most ADR programs, if the mediation ends without resolution, a panel of arbitrators will be assigned with instructions to the parties on selection. Unlike the prior stages of the ADR program, attorney participation at this stage is allowed. Arbitrators are generally granted the same authority as a workers' compensation judge and fulfill the same role. They will have the power to compel production of documents or the testimony of witnesses. They are required to create a full evidentiary record, resolve disputes of law and fact, award benefits and attorneys' fees, and resolve issues of contribution and liens.

Appellate procedures for ADR decisions

After the arbitrator has made their decision, the appellate process is handled by the Workers' Compensation Appeals Board in much the same manner as non-ADR cases, with several notable exceptions. A Petition for Reconsideration of a final decision by an arbitrator is authorized by Labor Code section 3201.5(a)(1) and section 3201.7(a)(1)(A). It must be filed with the Appeals Board in San Francisco, and will be denied if filed at a local district office. (Regulation section 10990(b).) The petition must be captioned specifically and include copies of the ADR agreement and a completed Application for Adjudication of Claim without venue listed. (Regulation sections 10990(c)(1).) Once properly filed, jurisdiction is established at the Workers' Compensation Appeals Board and the appellate process proceeds the same as other workers' compensation cases.

The attentive reader will note that the preceding discussion only references a Petition for Reconsideration of a final order from an arbitrator. An appeal of a non-final order from an arbitrator, known

as a Petition for Removal, is not referenced in Labor Code section 3201.5 or Labor Code section 3201.7, and Regulation section 10990 authorizes only the filing of a Petition for Reconsideration. The Workers' Compensation Appeals Board has ruled in several panel-level decisions that it lacks jurisdiction to hear these appeals due to the exclusion of language related to non-final orders in both the statutes and regulations. (See *Bradford v. McMillan Bros. Electric, Inc.*, 2008 Cal. Wrk. Comp. P.D. LEXIS 756; *Hayes v. Anderson & Howard Electric*, 2018 Cal. Wrk. Comp. P.D. LEXIS 150.)

Non-final orders in workers' compensation are generally related to the types of discovery matter that carve-out programs are designed to modify and replace in the traditional forum. While it is understandable that the Workers' Compensation Appeals Board has thus far declined to intervene in these disputes, this is an underdeveloped issue that will likely be addressed in the future.

Closing thoughts

Entering into an ADR program can be a bit of a culture shock for those used to traditional workers' compensation claims. It is important to keep in mind that these procedures are designed to streamline litigation and expedite the provision of benefits to injured employees. For instance, litigation regarding the validity of a medical provider network is often triggered by a lack of acceptable doctors made available by an employer. This becomes a moot point when the employee's representatives have significant input on the selection process for these physicians.

The delay and denial of requested medical treatment creates a significant portion of litigation before the Workers' Compensation Appeals Board. This litigation is often made unnecessary when an ADR program has agreements to pre-authorize common treatment requests or defers the determination of their necessity to a doctor collectively bargained by the employee's representatives.



The medical-legal process is often limited to certain physicians who are agreed to by the parties, with each party allowed to select their own physician to issue reporting, while retaining the employers' liability to pay the costs of discovery. The greater control over the selection of physicians for these roles presents a unique opportunity to create a more complete record, in a shorter timeframe, which can provide unique opportunities, leverage, and expedite settlement of related third-party claims.

Perhaps the most noticeable difference between traditional litigation and an ADR program is the expedited timeframe involved in resolving disputes. A case with jurisdiction at the Workers' Compensation Appeals Board may take six months or more from the filing of a hearing to receipt of a decision from a judge, whereas the same process in an ADR program can often be concluded in half that time. It is crucial for practitioners to

be actively engaged with their counterparts on the other side, and continuances are rarely granted due to the expectation that the parties have actively tried to outline and resolve any issue submitted to arbitration.

In order to be competent and successful litigating workers' comp ADR programs, one must familiarize themselves with the parties on both sides of the collective bargaining process, as well as the individuals who administer the actual ADR program. It is imperative to stay abreast of potential changes to a program implemented at the expiration of the prior agreement, and keep the ADR program advised of any difficulties and shortfalls perceived in its operation.

Practitioners who wish to venture into litigation within ADR programs should approach them with an eye towards expedited timeframes, an openness to communication, and be willing to attempt a more collaborative

approach with the opposing side. Keep in mind that the end goal of these programs is to provide benefits while reducing delay, litigation, and costs. All parties within these programs are assumed to be operating in a manner that furthers those goals, and success is often achieved by keeping the underlying motives of a program in mind.

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