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CARVE-OUT *AND* FALL-OUT
By Scott O'Mara

The Workers' Compensation laws are supposed to ensure fair and just treatment for California workers who incur injuries in the course of their employment, providing medical care to cure and relieve the effects of the injuries for the full life span of the injured worker.

In 1993, Labor Code § 3201.5 created the Alternate Dispute Resolution (ADR) system (aka, CARVE-OUT, "CO"), to either supplement or replace rules in the Workers' Compensation (WC) system. The methodology is the usage of an Ombudsman, Mediation, and/or ADR/CO trial. The marketing of this system is that it will expedite the medical care because it limits WCAB (Workers' Compensation Appeals Board) involvement.

The ADR/CO specifically limits the involvement of workers' attorneys. The ADR/CO procedure has set forth a protocol requiring the Ombudsman to resolve issues at the first level. Failure to resolve those issues goes to the second level, Mediation process. If Mediation is unfavorable, the worker usually retains attorney representation at the third level, an ADR/CO trial.

The employer has sophisticated Claims Adjusters, Ombudsman, Mediators and Arbitrator all paid for by the employer. Use of these individuals is a risk for the worker and benefit to the employer. The worker does not have a sophisticated source of information at first, since workers' attorneys are not usually utilized during stages 1-2, and, obtained only at the trial level. This is a favorable set up for the employer. Preparation of the worker is necessary before the Ombudsman, Mediation, and/or at the ADR/CO trial level.

When the trial is not favorable, the next step is the WCAB. Substantial Evidence is the determinative factor for a sustainable decision. Substantial Evidence is developed based upon the information provided by the worker to the medical evaluators, or treating doctors. This information is then compared to what the medical records reflect.

The worker usually does not understand the significance of their subjective complaints or how to articulate those. A doctor's questions need to be answered in a comprehensive manner, as

opposed to only what the worker feels on a bad day. The worker that does not understand all the elements of a WC case is at a high risk of not providing complete and Substantial Evidence.

Involvement of the attorney at the onset of the case is necessary to develop Substantial Evidence, so that the worker can provide a complete picture of the exposure that has happened at work, the residual impairments, and need for medical care.

The ADR/CO fails to provide checks and balances to ensure that the worker understands the two types of job-related injuries, *i.e., specific injury and cumulative trauma (CT) injury,* and the accompanying mechanisms of each injury. The *specific injury* is one that the worker can easily define, (e.g., being struck by a car, falling down a stairway, etc.), and then identify the body parts that are injured. The *cumulative trauma injury* requires more information regarding repetitive work activities and exposures, and their continued impact on the injured body part or system.

An ancillary problem that occurs is the compensable consequence. If a worker injures their right knee and has limited walking because of the injured right leg, and then develops symptomology in another body part (e.g., the left knee) as they compensate for the injury, the worker is usually unaware that this new injury is also work-related. Another example of compensable consequences covered by WC are the side effects of medications taken to treat an injury, which can cause conditions like GERD or IBS.

Attorneys aid workers to obtain the care to which they are entitled. Usually, the Ombudsman and Mediation process limits the involvement of a worker's attorney.

Pursuant to a WCAB decision, the Applicant may seek legal *advice* from attorneys at the Ombudsman stage, however, attorneys can be limited for the employee at the Ombudsman or Mediation stage of the procedures, they might only appear at the ADR/CO trial level.

Per the *Burton Enterprises v. WCAB* decision, the ADR/CO process cannot be forced upon dependents for death benefits.

Per the *Chamberlain v. Irwin Industries* decision, the worker is not bound by of the ADR/CO process if he is not a member of the Union that agreed to the ADR/CO. ("FALL-OUT")

The impartiality of the WCAB is preferred because the Judges are paid by the State, not the employer.

Typically, the ADR/CO agreements can compel the parties to agree to an AME/QME, and MPN prior to attorney involvement. The success of a case is based upon the foundation of Substantial Evidence--the information provided by the worker to doctors. When the worker brings the attorney into the ADR/CO too late, the attorney is limited in their ability to comprehensively develop all mechanisms of injury, restrictions and treatment, and protect the worker regards to their retirement rights or continued employment.

ADR/CO may indeed speed up the process, benefitting the employer because there are more opportunities to deny care/treatment based on lack of Substantial Evidence. At the appellate level, the worker will be challenged to present Substantial Evidence to overturn ADR/CO because that was not developed earlier on in the case.

The FALL-OUT factor of ADR/CO could encourage workers not to become members or stay as a member of an Association/Union, because if they do not have a membership on the date of the injury, they are not forced into ADR/CO. As the limitations on Substantial Evidence favors the employer. The ADR/CO is a powerful tool for the employer to control and limit benefits.

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