



## SECURED CARVE-OUT & COMMUNICATION SYSTEM BY: SCOTT A. O'MARA

### WHAT IS A CARVE-OUT?

The 1993/1994 Senate Bill 853 by Leroy Green opened up the door for a small group of employers and Union/Associations to pull themselves out of the established workers' compensation system by usage of a **CARVE-OUT PROGRAM**. With this program, the parties, employer, and Union/Associations agree to a list of medical providers, medical reviewers and judicial reviewers to evaluate the need for medical treatment and levels of permanent disability. This agreement uses ombudspersons, mediators and arbitrators. The arbitrator has the role of the judge and in many situations is a retired workers' compensation judge.

### IS A CARVE-OUT RIGHT FOR MY ASSOCIATION?

As we are aware, the California workers' compensation system has long been designed to constitutionally provide the availability of medical care to cure or relieve from the effects of a work-related injury. Since that constitutional mandate, there have been several legislative changes such as utilization review which have allowed employers to second-guess the treatment recommendations of the treating physician and thus delay or deny recommended care. And some of the, California injured workers have been severely impacted as a result since an adverse utilization review decision cannot be appealed through a workers' compensation administrative law judge. The **CARVE-OUT PROGRAM** could be legislative alternative to this problem. However, the question becomes: **IS A CARVE-OUT RIGHT FOR MY ASSOCIATION, OR A COMMUNICATION SYSTEM?** Several Unions and Associations have established a meaningful line of communication with Risk Management Claim Adjusters. This should provide direction and understanding to both parties that the Workers' Compensation System is one to cure or relieve the effects of the injury and not create additional barriers regarding same. There are many third-party administrators of the workers' compensation benefits that recognize that timely providing of benefits helps lower the levels of permanent disability and length of time missed from work or worker being forced into retirement. With this knowledge they are not imbedded in the 88.2 – 92% denial rate of medical care through the Independent Medical Review (IMR) system, which is currently the only level of appeal that is established to deal with denial of medical care in the uninformed or uneducated system.

These proactive administrators of the workers' compensation and the Union/Associations system should use a **COMMUNICATION SYSTEM** for growth and knowledge. This line of communication is a powerful tool that does not require the encumbrance of a Carve-Out System but a review and modification.

The establishment and use of a **COMMUNICATION SYSTEM** is another tool before stepping into the Secured Carve-Out System.

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If the current COMMUNICATION SYSTEM is not working, then the updated version of same needs to be created to provide more information for the parties.

This circles back to the concept of a **CARVE-OUT**. The participants in the Carve-Out are not just the employer and the injured worker, but include medical providers, ombudspersons and arbitrators. The Union/Associations considering a Carve-Out needs to examine what the current status is of their member's relationship with the employer. In some situations, the employer has implemented a favorable way to provide care and treatment for the injured worker by electing not to participate in a restrictive Medical Providers Network (MPN) or by judiciously limiting utilization review to certain medical procedures which do not fall within the community standard of care. These forward-thinking employers are proactive and allow greater access to medical care without the necessity of a Carve-Out because of a meaningful COMMUNICATION SYSTEM. Before the Secured Carve-Out is used a review of lowering cost and expenses should be made because the lowering of costs does occur when there is not a delay or denial in treatment by usage of the UR/IMR systems. Avoiding the delay and denial allows the worker to improve faster with less residual impairment. The UR/IMR process can create a conflict between the employer and the worker by the delays or denial of medical care. A strong communication system between the employer and the Union/Associations can benefit all the parties by removing or modifying delays or denials of treatment with a doctor that is knowledgeable and provides timely services. Use of the MPN doctor can work if the doctor is focused and has understanding as to the depth of the case. The MPN doctor and their efforts and results must be monitored to ensure that the MPN doctor is providing proper and timely care to cure or relieve the effects of the injury. This monitoring will be achieved by the injured worker's attorney.

There is substantial cost to the employer to pay for the UR doctor and substantial cost for the employer to pay for the IMR delay. The IMR doctor is paid for by the state, but yet the inadequacies of their understanding may not provide a realistic view as to the medical care to cure and relieve. Currently, the IMR doctors have a denial rate of accessing medical care of 88.2 – 92%. These doctors are not required to be licensed in California; they do not see the patient and are not mandated to provide their name. In addition, these physicians are not subject to medical malpractice if they make incorrect decisions, nor are the UR doctors subject to malpractice. With this responsibility as to what they do or do not do, it requires them to embed and make decisions that have medical substance. This affords accountability. If in fact the employer provides timely care this again lowers the cost.

However, for those Union/Associations whose employer utilizes an MPN in order to restrict medical providers and/or questions every treatment recommendation and forwards the recommendation through Utilization Review for ultimate delay or denial, and will not communicate, a Carve-Out could make sense. However, we are also recommending a new concept called **SECURED CARVE-OUT**. In a Secured Carve-Out system, the union/association would have full input and information as to the identity of approved medical providers and medical reviewers as well as ombudspersons and judicial arbitrators. Traditionally, these decisions have been made solely by the employer to the detriment of workers. However, employers may have a vested interest in establishing a Carve-Out (as do Union/Associations). This reality incentivizes employers to cede some control over these critical decisions to unions/associations. And, with union/association input over the identity of medical providers, medical reviewers, ombudspersons and arbitrators, a Secured Carve-Out suddenly becomes a tool for independence of the entire process. This is the central idea behind a **SECURED CARVE-OUT**.

With the **SECURED CARVE-OUT**, a list of all doctors on the medical provider's board will be partially selected and constantly maintained, contractually and reviewed by the Union/Association and this office. Information will be obtained from workers as the interaction with the selected doctors in order to ensure

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that these practitioners are willing and able to provide the medical care necessary. Further, regarding ombudspersons and arbitrators/mediators, a similar periodic review of commitment to impartiality will be undertaken by this office. Any medical providers or ombudspersons/arbitrators found to have an unacceptable bias will be challenged through the contractual interactive process.

Obviously, Union/Associations will require counsel in order to draft and implement the **SECURED CARVE-OUT** agreement. More importantly, counsel must be involved on a case-by-case basis with each injured worker. This occurs from the outset of the case since an attorney-client privilege exists between counsel and injured worker which do not exist with the ombudsperson, mediator or arbitrator. The attorney can provide a broader spectrum as to the case, medical needs and what options are available. These options would include treatment, functional restrictions of work due to the medical problem and whether or not permanent physical incapacity is likely to result in a medical retirement. This kind of legal advice is paramount to the development of each case under a **SECURED CARVE-OUT**.

Unions/Associations must have a system in place which creates accountability through periodic medical provider and ombudsperson/arbitrator reviews. Moreover, the **SECURED CARVE-OUT** prioritizes worker education regarding both short-term treatment goals and long-term impacts on continued employment. For those associations which decide that a Carve-Out is viable alternative for their members, the **SECURED CARVE-OUT** concept provides an educational template and ongoing internal review system which benefits the Union/Associations and its membership.

In summary, both the COMMUNICATION SYSTEM and SECURED CARVE-OUT establish educational tools for important medical care to cure and relieve the effects of a work-related injury.



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