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1-1-2002

Carve-Outs in Workers' Compensation: An Analysis of the Experience in the California Construction Industry

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Citation

Levine, David I., Frank W. Neuhauser, Richard Reuben, Jeffrey S. Petersen, and Cristian Echeverria. 2002. Carve-Outs in Workers' Compensation: An Analysis of the Experience in the California Construction Industry. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research. https://doi.org/10.17848/9780585469690



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An Analysis of the Experience in the California Construction Industry

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1
Introduction

Throughout much of the late 1980s and early 1990s, the costs of workers' compensation systems across the country escalated for employers and problems increased for injured workers. Medical and indemnity costs soared, claim frequency increased dramatically, employers alleged fraud by workers and providers, workers complained that benefits were inadequate and often delayed, and both parties were concerned about the increasing cost of litigation. Widespread frustration led to a series of reforms in 1993.

One innovative set of reforms adopted in several states allowed unions and employers to collectively bargain their own workers' compensation system, essentially "carving-out" that arrangement from the statutory system. The parties were allowed to negotiate alternative medical and medical-legal arrangements meant to reduce medical costs. Alternate dispute resolution (ADR) mechanisms were encouraged to speed the legal process and reduce litigation-related expenses.

The carve-out legislation was modeled on a similar experiment in Massachusetts, where Bechtel and the Pioneer Valley Building and Construction Trades Council had a collective bargaining agreement (CBA) governing a single construction project. The Bechtel experience was important because of the apparent success at reducing reported workers' compensation costs, largely by lowering injury rates and reducing litigation (see Table 1.1).[1]

In California, the state with the most workers under these agreements, the parties were given substantial latitude in how they set up the program. For example, they could create an exclusive list of medical providers and medical-legal evaluators, and they could create an ADR system to replace most Division of Workers' Compensation (DWC) and Workers' Compensation Appeals Board (WCAB) procedures. These ADR procedures were often accompanied by restrictions on the participation of attorneys. Two constraints remained on carve-outs: the agreement could not reduce compensation to injured workers and the final step of the ADR system had to include the option of an appeal for reconsideration by the WCAB.

Table 1.1 Changes in Pioneer Valley Results when Carve-Out Was Implemented

	8 months before carve-out	8 months after carve-out
No. of claims	38	22
Lost-time claims	11	2
Litigated cases	7	0
Costs	$480,000	$220,000
Hours worked	217,117	223,744
Lost-time incidence	10.12	1.78
Rate[a]		
Costs per hour	$2.21	$0.98

[a] The lost-time incidence rate is the number of lost-time injuries per 200,000 hours worked.

SOURCE: Bechtel Construction Co. (1997).

This volume evaluates the first few years with these novel organizational forms in California. We also draw out lessons for carve-outs in California and other states and for the statutory workers' compensation system. Importantly, the experience of carve-outs also provides insights into how all employers might want to alter their handling of workers' compensation claims and, more generally, into ADR programs and decentralization of employment regulation.

CARVE-OUT PROGRAMS IN CALIFORNIA

Within three years of the passage of the legislation, eight carve-out agreements had been reached (see Table 1.2). The largest carve-out covering a single project was an agreement between the California Building and Construction Trades Council, AFL-CIO, and the Metropolitan Water District of Southern California. This was a project labor agreement covering all contractors and subcontractors on a $2 billion, 5-year construction project to create the Domenigoni Reservoir (Eastside Reservoir Project or ESRP). The largest carve-out covering multiple employers involves the 23 local unions making up the state's International Brotherhood of Electrical Workers (IBEW) and a multi-

Table 1.2 Addendums to Collective Bargaining Agreements that Established Carve-Out Programs Before 1997

Employer(s)	Union(s)	Date of agreement
Signatory's to CBA	S. Calif. Pipe Trades District #16	July, 1994
Cherne Contracting Corporation	Local 250 and S.C. Pipe Trades #16	July, 1994
District 9, NECA	IBEW, 9th District	Oct., 1994
Several contractor associations	So. Calif. Dist. Council of Laborers	Dec., 1994
TIMEC Co.	Intl. Union of Petroleum and Indust. Workers	Jan., 1995
Morrison-Knudsen of Ohio	Contra Costa Building Trades	May, 1995
Signatory Employers	So. Calif. Carpenters (12 Counties)	Dec., 1995
ARB Inc.	Building and Construction Trades (Intl.)	May, 1996

employer group called the National Electrical Contractors Association (NECA), consisting of about 500 contractors. Each individual employer has the choice to sign up or remain in the statutory system.

In 1997, carve-out employers had over 5,000 full-time equivalent employees (about 1 percent of construction employment in the state) and paid over $240 million in payroll. The carve-outs had a number of elements in common and some variation. For example, each of these carve-outs established lists of medical and medical-legal providers and vocational rehabilitation providers who could provide services for injuries and illnesses occurring under the carve-out.

All but one agreement (TIMEC Co.) also established ADR systems. These ADR systems start with an "ombudsperson," a neutral person available to all parties who attempts to avert and/or resolve disputes at an early stage. If this is unsuccessful, the worker may move the matter to the next step, typically formal mediation by an independent, neutral mediator. Two ADR programs used a joint labor-management committee at this point.[2] If mediation is unsuccessful, the parties turn to an outside neutral arbitrator—often a retired Workers' Compensation Administrative Law Judge. By statute, the decision of the arbi-

trator may be appealed to the seven-member WCAB (California Labor Code Section 3201.5[a][1]). Ultimately, a decision of the WCAB can be appealed to the civil courts at the Court of Appeals level.

EARLY EVALUATIONS OF THE CARVE-OUTS

While the original DWC reports stated that it was too early to evaluate thoroughly the impact of carve-out programs on the cost of workers' compensation, preliminary results were promising.

At the end of each calendar year, carve-out participants report to the DWC on claims during that year. From 1995 to 1997, these annual reports listed only eight mediations and two arbitrations on over 2,000 claims. The DWC reports suggested that this represented a virtual elimination of disputes under the ADR process.

In addition, the DWC reported that costs to employers in carve-outs were approximately one-half of those experienced by employers outside the carve-out arrangement.

Insurers stated that they were offering employers a workers' compensation premium discount of approximately 5 to 25 percent for participating in a carve-out program. Because workers' compensation costs are typically 3 to 15 percent of wages in construction, these premium reductions were potentially substantial.

At the April 1996 National Conference of the Building and Construction Trades Department, AFL-CIO, a workshop was held consisting of representatives from carve-out programs in California and Florida. These presentations were extremely favorable, although anecdotal, and focused on the following results that had been achieved to date.

- ***Lower injury/claims rates***. It was felt that, with labor and management working together to achieve common results, greater awareness of safety had been achieved on carve-out construction projects. At the same time, this was the area where the anecdotal evidence seemed weakest and where the evidence seemed most conflicting. On the one hand, it was reported that the number of claims filed on construction projects covered by these programs had declined. On the other hand, none of the presentations could

provide specific descriptions of the types of safety provisions that had been put in place. It was not clear whether reduced claims frequencies could have arisen from favorable selection of employers into these programs or from injured workers being accommodated in such a way that they did not file claims.

- ***More effective medical delivery.*** It was widely reported that the quality of medical care delivered was better under the collectively bargained programs, although there was no health service research data to back up this claim. Anecdotally, two sources of improvement were noted: there was an increased willingness of care providers to participate, as exemplified by the University of California at Los Angeles Spine Center agreeing to become a provider to collectively bargained programs. The Spine Center is reported to be a premier treatment facility that had avoided the workers' compensation field because of all the legal disputes involved. Another example of this increased willingness was the care which at least one program exercised in selecting medical providers it accepts into its program.

  Several programs had case managers assigned to see injured workers through treatment and rehabilitation, which much improved the continuity of care. No specific examples were provided to support this claim, and there was no evidence to suggest that these programs were able to establish procedures that routinely enable injured workers to return to employment at an earlier stage.

- ***Virtually no friction in dispute resolution***. There was unanimous agreement among the existing programs that the dispute resolution system was working very well—better than expected. At the time, no disputes had proceeded to the arbitration stage.

- ***Cost savings***. Based in part on the experience from Pioneer Valley (see Table 1.1), these programs held out the hope that cost savings of as much as 30 percent could be achieved through fewer claims and greater effectiveness. All of the programs then in operation reported savings significantly in excess of the expected 30 percent. In addition, Florida's rate-setting authority allowed a 15 percent discount off the top of the manual rate in

recognition of the special program features, including the managed care medical networks.

- ***Great satisfaction expressed by employers, workers, and union leaders***. Union leaders claimed they had not heard a single complaint about these programs from other union leaders or employers and had complete support for the programs from union membership.

AREAS OF CONCERN ABOUT COLLECTIVE BARGAINING

There was also a growing body of criticism and concern about aspects of the carve-out program (Moscovitz and Van Bourg 1995; Ozurovich 1995). The concern centered around five areas:

- ***Inadequate due process.*** It was alleged that ADR might weaken the legal rights to due process by denying workers access to legal representation and the ability to collect information through discovery or deposition.
- ***Reduced benefits.*** It has been suggested that the use of limited medical networks reduces choice of physician by workers and may result in reduced quality of medical care.
- ***Distribution of savings.*** It has been suggested that employers will not pass on anticipated savings to workers. The distribution of savings is particularly problematic on projects with defined time frames and little opportunity for multiple, consecutive, CBAs.
- ***Continuity of treatment and adjudication.*** Perhaps the most important and least considered concern has to do with continued coverage for long-term disabilities. CBAs are time-limited, while partial or total permanent disabilities and certain temporary disabilities may extend well beyond the limits of these agreements. Further, the disabled worker may cease to be a member of the bargaining unit covered by the agreement. Finally, many disabilities result from cumulative exposures over long periods of time,

where many employers inside or outside a particular agreement retain partial responsibility for these cases.

- ***Unnecessary risk to unions and employers.*** It has been suggested that these programs may place unions at risk of legal liability for failure to provide fair representation to each member (for instance, by denying the current system's right to due process or by limiting benefits). It also has been suggested that these programs may jeopardize the employer's immunity from civil action filed by employees that are provided for in the current system.

OUTLINE OF THE BOOK AND RESEARCH METHODS

We begin in Chapter 2 by giving some important background information on the reasoning behind the development of carve-outs and how the carve-out structure fits within the framework of current institutions. We describe the important characteristics of the workers' compensation system and the particular characteristics of the construction industry and how those have influenced the development of carve-outs. An overview of carve-outs in California is then presented in Chapter 3.

This study utilized a number of methods to evaluate carve-outs. We reviewed the CBAs and surveyed the ombudsmen for all California carve-outs. The survey covered their background, training, and duties, among other issues (Chapter 4).

We chose two carve-outs for intensive case study because they represented two very different models. The ESRP carve-out was a very large project with a single owner (Metropolitan Water District) and more than 200 contractors and subcontractors and all crafts unions (Chapter 5). The NECA/IBEW agreement was a multi-employer carve-out with a single union covering electrical contractors employing union electricians throughout the state (Chapter 6).

Within each category (large-project and multi-employer carve-out), we chose the carve-out with the most members and longest history. This sample selection rule increased our respondents' experience and yielded more data. At the same time, because we chose our sample

partially on the basis of its success in getting started, these two projects may not be representative of all carve-outs.

We interviewed representatives of all the interested parties at each carve-out: the ombudsman, employers, employees, union, workers' compensation insurer, arbitrators, mediators, and lawyers. At the ESRP we included the project owner as well as local, state, and national representatives of the building trades. At the NECA/IBEW we included representatives of NECA, the employers' federation. We read all written materials we could identify for each carve-out, including the PLA (at ESRP), the CBA, handouts from the ombudsmen to injured workers explaining the carve-out, injury reports, other reports by parties to the agreements, and standard correspondence from insurers to injured workers.

We performed site visits using pairs of researchers. The ESRP visits were from May to August in 1997; the NECA visits were from June to September in 1997. All interviews were recorded and transcribed and the entire research team read all interviews. Most interviews involved follow-up phone calls (or occasionally faxes or e-mails) to clear up specific points or to ask follow-up questions.

At each case study site, we asked the ombudsperson to identify workers who had disputes that had resulted in filings for mediation or arbitration. The workers were chosen based upon suggestions made by the ombudsperson. The ombudsperson first contacted the workers to get approval for our interview. Thus, the sample of workers we interviewed was biased towards those individuals who had "tested" the system. We did not interview any workers who did not have a dispute or whose dispute was rapidly and successfully handled by the ombudsperson.

Because the point of the ADR is to avoid mediation, our informants are an unrepresentative sample. That is, these employees in some sense represent the failures of the ADR system to avoid a formal dispute. Thus, they provide one extreme bound of the problems that ADR might cause. (The other bound involves injured employees who did not know they had rights to compensation.) The intent of interviewing these employees was not to find out the experience of the representative injured worker, but to find out the worst-case experience of employees for whom ADR was not leading to a rapid resolution of their dispute.

Finally, we analyzed quantitative data from the first two to four years of experience of the NECA/IBEW carve-out (Chapter 7). We examined a number of important outcomes including indemnity, medical, legal and medical-legal costs, injury rates, and dispute frequency.

We conclude with a summary and with recommendations for changes to carve-outs, to the statutory system, and for future research (Chapter 8).

Notes

1. Bechtel indicated in discussions with the authors that they had been unsuccessful at recreating the success of the Pioneer Valley project at other large construction projects in subsequent years. However, Bechtel felt none of these later projects included all of the unique characteristics of the Pioneer Valley project simultaneously.
2. These were the Pipe Trades and Cherne programs. However, the ombudsperson for the Pipe Trades recommended a mediation stage to replace the committee. In the subsequent round of negotiation, the Pipe Trades addendum was amended to replace the committee with a mediation stage.

2
Background

Carve-outs in California involve modifying the workers' compensation system in the construction industry. Carve-outs primarily affect medical service providers, utilize ADR procedures, and may improve safety programs. Thus, this chapter briefly presents background information on the workers' compensation system, the construction industry, special issues of workers' compensation in construction, ADR, and safety programs.

WORKERS' COMPENSATION

Workers' compensation systems provide compensation to employees for work-related injuries or illnesses, including medical treatment costs, temporary payment for lost wages, and permanent disability payments that compensate workers for residual impairment disability resulting from occupational injuries.

Established in California in 1911, workers' compensation trades rights and benefits between employers and employees. In the workers' compensation systems, employees give up the right to pursue awards (which may be larger) through the tort system in exchange for a system that is supposed to guarantee prompt delivery of benefits and that provides legal protection against discrimination. Employers provide workers' compensation benefits regardless of fault, in exchange for protection against civil action by employees.

Both parties are provided with an administrative law system for dispute resolution that aims to resolve disputes quickly. By constitutional mandate, "the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character . . . " (California Constitution, Article 4, Section 14).

In the early 1990s workers' compensation costs were at historic highs. The perceived success of an experiment in labor-management

negotiation at reducing these costs—the Pioneer Valley Project in Massachusetts —encouraged the California Legislature to enact Senate Bill 983. This bill allowed CBAs between a private employer or group of employers engaged in construction unions to create an alternative workers' compensation system. These agreements, called carve-outs, allow the parties to negotiate any of the following.

- An ADR system governing disputes between employees and employers or their insurers that supplements or replaces all or part of those dispute resolution processes contained in California Labor Code Division 4: Section 4903 and 4905 (Workers' Compensation and Insurance), including, but not limited to, mediation and arbitration
- 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, limited list of qualified medical evaluators that may be the exclusive source of such 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

The parties were not allowed to collectively bargain an "agreement that diminishes the entitlement of an employee to compensation payments for total or partial disability, temporary disability, vocational rehabilitation, or medical treatment fully paid by the employer as otherwise provided in this division" (California Labor Code Section 3201.5b).

Parties

Within carve-outs, union and management negotiators design and control the dispute resolution process. Employers, unions, or insurance companies employ and compensate the dispute resolution personnel. Consequently, unlike the state administrative law system, the decision maker in the dispute process is not necessarily neutral about the outcome, especially as they affect third parties. In addition, the collective

bargaining process may leave one side with greater control over the ADR. Therefore, we will carefully define the parties and the roles they play within workers' compensation.

Employers

The "employer" side of the compensation system has three functions: 1) the employer of the injured worker (employer), 2) the party having financial responsibility for costs arising from an injury (insurer), and 3) the party administering the claim (claims administrator).

All of these functions can reside in a single entity (self-administered/self-insured employer) or exist in various combinations. The incentives of these parties are not always coincidental, nor is the communication among these parties and with the worker always similar across different arrangements.

Insurers

Insurance arrangements within workers' compensation take several forms, ranging from self-insurance to insurance with experience rating to insurance without experience rating (for small employers, for example). In addition, the adjudication process can determine certain awards that fall outside the coverage supplied by the insurer, either directly on the employer, another insurer, or another third party.

Private insurance

Most employers (over 99 percent of private sector employers, representing 80 to 85 percent of private sector payroll) purchase insurance from private insurance companies or the State Compensation Insurance Fund. These policies usually cover all direct indemnity, medical, and legal costs of a workplace injury. A deductible policy is unusual among small employers but more common among large employers. The economic incentive for safety (independent of indirect costs to employers, e.g., training replacements, etc.) is maintained for employers by recording all insured costs for an employer (at the Workers' Compensation Insurance Rating Bureau [WCIRB]) and adjusting insurance premiums based on an employer's past experience as mea-

sured by experience modification. Experience modification adjusts an employer's premium to reflect the firm's performance relative to other employers with workers in a similar industry and/or occupation.

Self-insurance

Large private companies and county and local government agencies can elect to self-insure. They are required to establish the financial resources to cover any expected liability. Less than 1 percent of private employers self-insure, representing approximately 15 to 20 percent of private payrolls. Nearly all public agencies, other than state agencies, are self-insured.

Safety groups

Legislation was passed in 1969 allowing employers to form "safety groups."[1] These are employer associations involved in a common trade or business. The association negotiates rates for members. Usually, the agreement involves cost-plus contracting. Excess premiums are returned to the group and divided among employers based on each employer's portion of the overall premium paid, not the individual safety record. However, the incentive of experience rating is maintained in that "each member of an organization insured under a group policy shall be treated as a single and separate entity as respects rates, classifications, and rating plans."[2] Data on each individual employer's experience is reported to and maintained separately by the WCIRB. In addition, each such group is required to "seek to reduce the incidence and severity of accidents" [California Insurance Code §11656.6 (5)]. Employers with annual premiums of less than $250,000 joining a carve-out arrangement are required to be members of a safety group.[3]

Owner controlled insurance plan (OCIP)

Also referred to as "wrap-up projects," OCIPs are used for large construction projects where the owner assumes responsibility for workers' compensation and liability insurance on the part of all general contractors, contractors, and subcontractors. These policies are generally written as "large-deductible" policies. For example, the owner might be responsible for the first $100,000 of losses on any claim and

$500,000 to $1,000,000 of losses overall, with the insurer liable for the remainder. In addition claims administration costs are billed separately at either a flat rate per claim type or a percentage of claim costs. Under this arrangement, a separate policy is written on each and every contractor and subcontractor, and the experience of each policyholder is reported to the WCIRB. However, the owner pays the insurance premiums. Construction carve-outs negotiated as part of a PLA are insured under this type of arrangements.[4] Safety incentives are maintained for the individual contractor because the individual employer's experience under the OCIP policy is combined with any experience on work outside the OCIP to create the future experience modification for that employer.

Legally uninsured state agencies

State government agencies are not required to carry insurance. They are "legally uninsured." Despite efforts by the California Department of Corrections to promote legislation allowing a carve-out to be formed covering the California Correctional Peace Officers Association, no state agencies are eligible to participate in carve-outs.

Injuries and Illnesses Within Workers' Compensation

Approximately 8 percent of California's workers suffer an occupational injury or illness each year.[5] Most of these injures are minor, with approximately two-thirds resulting in medical treatment with at most one or two days off work. Each of these injuries or illnesses result in a claim being opened and a report filed with the Department of Industrial Relations. Most however, are quickly resolved, with all medical care paid for by the employer or the employer's insurer. These cases make up less than 5 percent of the costs of workers' compensation. The remaining one-third of claims involve indemnity payments and are more complex to resolve.

If an injured worker misses more than three days work, the worker receives Temporary Disability payments equal to approximately two-thirds of the worker's wage at injury, up to a set maximum (equal to $490/week in 1999). These payments continue until the injured worker is released to return to work or is declared "Permanent and Stationary"; that is, the worker has reached his or her level of maximum medical

improvement. This may be complete recovery (80–85 percent of the total injuries, totaling about 9 percent of costs) or there may be Permanent Partial Disability (15–20 percent of claims, making up 80 percent of so of total workers' compensation costs). Permanently disabled workers receive disability payments meant to compensate them for their lost ability to compete in the open labor market.

A worker who incurs a permanent disability that precludes him from returning to his previous occupation and is unable to work an alternate or modified job is eligible for vocational rehabilitation benefits. These benefits include resources for temporary support, vocational rehabilitation maintenance allowance, training, and job search assistance.

Minimum indemnity benefit levels are set by statute. Nothing precludes an employer or insurer from increasing the level of benefits. However, even in unionized workplaces, where the maximum workers' compensation benefit is a low proportion of some employees' earnings, few contracts increase benefits.

Serious and frequent disputes arise over the duration of temporary disability, the level of permanent disability, and eligibility for vocational rehabilitation. These disputes often involve opinions by competing doctors selected by the opposing parties. Many observers feel that these disputes arise and are difficult to resolve because the parties choose doctors whose opinions are more extreme and consequently more favorable for the selecting party.

Medical treatment

Medical treatment in the workers' compensation system is paid for by the employer or its insurer. Medical treatment costs represent approximately 40 percent of the benefits paid out to injured workers ($2.0 billion for insured employers in 1997 (WCIRB 1998)). Statute establishes the following conditions that govern medical treatment and bear directly on the motivation for a development of carve-out arrangement.

- Coverage is "first dollar coverage" with no deductibles or co-payments by the employee.
- The employer is required to pay for all treatment that is reasonably required to cure or relieve the effects of the injury.

- The employer under nearly all circumstances can determine the choice of medical provider only during the first 30 days of treatment.
- The employee has the option after the first 30 days to select any doctor, chiropractor, psychiatrist, acupuncturist, etc. If the employee notified the employer prior to an injury, the employee can predesignate a treating physician for all treatment, including during the first 30 days. Almost no employees predesignate physicians.
- Starting with the 1993 California reforms, the opinion of the primary treating physician on a claim was given special legal authority when there was a dispute over medical or medical-legal issues. The opinion of the primary treating physician is presumed correct, and it is difficult for the opposing party to rebut. Consequently, control of the choice of primary physicians is an important issue when a claim involves a dispute.

Medical treatment costs are governed by the Official Medical Fee Schedule. This schedule establishes "reasonable maximum fees paid for medical services" provided under workers' compensation (California Labor Code Section 5307.1).

Disputes between medical providers and insurers concerning medical treatment are common. These disputes involve the length, intensity, or appropriateness of treatment and the charge for treatment. Disputes between the provider and payer concerning medical treatment frequently result in medical liens being filed against a case. These liens require the intervention of the WCAB to resolve. In the late 1990s, lien resolution accounted for 25 percent of conferences and hearings scheduled by the WCAB.[6]

Medical cost containment is a major issue, in part, because workers pay no co-payments or deductibles. In addition, group health models such as health maintenance organizations that have helped reduce the growth of health care costs are not easily transferable to workers' compensation because these models involve increasing the health care provider's incentives to reduce costs. However, the employer controls medical care for only the first 30 days, and the majority of medical costs is due to the relatively few cases that last more than 30 days (Ernst & Young 1996a). The result of these forces is that health insur-

ance costs increased little during the 1990s, but employers still faced 5 to 10 percent annual increase in average medical costs per claim within workers' compensation (WCIRB 1999).

Under carve-out arrangements, labor and management can negotiate over the length of medical control. This flexibility permits the carve-outs to integrate care with group care providers, including the worker's non-occupational treatment provider. CBAs usually have set the length of employer medical control at the life of the claim. However, the employer does not choose the doctor, as can be done in the statutory system, but restricts the doctor to a jointly negotiated list. While this list is often extensive, applicant attorneys have voiced frustration at not being able to choose doctors they feel will treat or evaluate injured workers most favorably.

Complaints about abuse of control of the treating physician are also leveled at the employer. In fact, the statutory maintenance of the 30-day limit on employer control in the face of rising costs has been justified as a way to encourage employers to maintain the proper trade-off between treatment and cost. The reasoning is that if the employee receives good medical treatment during the initial period, they will have little incentive to change physicians after 30 days.

Medical-legal evaluations

Many critical issues in workers' compensation are legal questions determined by medical findings. This is referred to as the medical-legal process and is distinct from treatment. Medical-legal evaluations generally begin at the time the injured worker reaches maximum medical improvement, referred to as "permanent and stationary" in the California system. At this time, the primary treating physician makes a report concerning several issues, the most important of which are listed below. As with decisions about treatment, these findings are presumed to be correct and are difficult for an objecting party to overcome.

Permanent disability. The most important issue and the most often disputed concerns the level of residual impairment present when the worker's condition has stabilized. The evaluating doctor records both objective and subjective findings that measure impairment according to California's rating schedule. These impairment measures are translated into disability ratings, from 0 to 100 percent, by raters

who modify the standard rating for impairment by age and occupation.[7] Workers receive permanent disability payments based on these findings.

Apportionment. When permanent disability results from the aggravation of an existing disabling condition or underlying disease process, then the permanent disability benefits are apportioned between the current injury and the pre-existing condition. For example, if a worker sustained a previous back injury resulting in a work restriction of no heavy lifting (a 20 percent Standard Rating) and the current injury results in a further restriction to semi-sedentary work (60 percent Standard Rating), the worker's employer will be liable only for the additional disability. This has important implications for both the worker (whose award may be reduced) and the employer (whose cost can be reduced). Also, apportionment can involve a second or third employer where exposure occurred on a cumulative injury.

Future medical care. The evaluating physician determines whether the worker will require medical care subsequent to settlement of the indemnity portion of his or her claim. Since the employer/insurer is responsible for all medical care connected with an injury, even 20 or more years in the future, this issue is often financially important and subject to dispute. This issue is usually resolved as part of a lump sum payment covered by a Compromise and Release agreement at the close of a claim. However, a substantial minority of claims are resolved through a stipulated settlement which settles all issues but reserves the worker's right to future medical treatment paid for by the insurer.

Qualification for vocational rehabilitation. If the treating physician decides a worker's permanent impairment precludes that worker from returning to his or her usual occupation, then the worker is eligible for vocational rehabilitation benefits. This benefit typically increases the indemnity on a claim by 20 to 50 percent.

Worker restrictions. The physician also determines what work restrictions the worker and employer should follow. These are important to workers' early return to work and eligibility for vocational rehabilitation.

The cost of medical-legal exams fell substantially between 1990 and 1996, by 85 percent at insured employers (Neuhauser and Wiegand 1997). However, medical-legal costs represent less than 3 percent of insurers' direct costs. The major effect of the medical-legal process on employer costs and employee benefits is through the effect of the opinion of the medical-legal evaluator on the indemnity payments to injured workers and reserves for future medical treatment. For many injuries, opinions on the degree of permanent disability are partly subjective. Thus, parties can influence evaluations by manipulating the choice of the evaluating physician. For example, two doctors evaluating the same patient may differ in their permanent disability evaluation by a substantial amount. In one study examining ratings from pairs of doctors, claims differed by more than 7.5 rating points on half of the ratings—a difference of between $3,000 and $15,000, depending on rating and average weekly wage (e.g., a disability precluding very heavy lifting and one precluding climbing, walking over uneven ground, or comparable physical effort). On 10 percent of these claims, the two ratings differed by more than 35 rating points, a difference of between $20,000 and $100,000, depending on rating and average weekly wage (e.g., a disability precluding heavy lifting and one limiting the work to semi-sedentary work). These differences are particularly extraordinary in light of the fact that the vast majority of ratings are below 25 percent (Peterson et. al. 1998). Extreme ratings are concentrated among a subset of the evaluating physicians.

Carve-outs offer an opportunity for management and labor to agree on establishing limited lists of medical-legal evaluators. Ideally, the lists of evaluators would eliminate the most extreme doctors while including the majority of evaluators and thus maintaining choice. This selection would require substantial efforts by management and labor to identify and agree upon an appropriate list. As we will discuss later, this has been one of the areas where carve-outs have been least successful.

Dispute resolution

A small percentage of claims have disputes that result in formal dispute resolution processes. Disputes can occur at each step of the process, from determining if an injury was work related to the choice of medical treatment provider to the length of time off of work. The

costly disputes typically relate to permanent disability, with disputes centering on the extent of permanent disability. Moreover, employees can pass through each stage of the dispute resolution process multiple times in complicated cases.

When a dispute occurs, it first goes to a mandatory settlement conference—a form of ADR. If no settlement is reached, the parties can move on to a formal hearing. Only about 7 percent of claims are formally adjudicated.

Subsequent to a decision by a judge, parties can appeal the decision to the WCAB. (This is also the level at which a dispute that is unresolved in the carve-out ADR process would enter the conventional compensation dispute resolution process.) A very small proportion of decisions of the WCAB are appealed to the State Courts of Appeals.

Claim resolution in workers' compensation is a long process. Half of all permanent disability claims are unresolved 30 months after injury and 10 percent remain unresolved after 5 years.

One of the few efforts to analyze the determinants of litigation (Falaris, Link, and Staten 1995) found that insurance status (self-insured vs. insured) and industry group affected the frequency of litigation. These variables do not come into play here because all employers are insured and within a single industry. The nature of the injury also played a role in litigation frequency with back, knee, shoulder, and multiple body part injuries leading to higher litigation rates. Litigation also followed a hump-shaped age profile, increasing and then declining. For this analysis, we did not have age and body part data available.

Attorney representation. Eighty percent of permanent disability claimants are represented by attorneys (WCIRB 1992–1998 Survey). The legal fees for attorneys' representation of injured workers are determined by the WCAB. The average award is 12 to 18 percent (depending on the custom of the particular WCAB office) of the award for permanent disability, future medical, and vocational rehabilitation maintenance amounts. Injured workers' attorney fees equaled 12.5 percent of all permanent disability indemnity payments paid to injured workers in 1997. From the employers' perspective, attorney expenses (for employers and insurers) were 4.4 percent of premiums in 1997,

which was about one and a half times the level of applicant attorney fees (approximately 18 percent of awarded indemnity).

Disputes involving other parties. The direct financial liability of a workplace injury can fall on parties other than employer or its insurer. Disputes over these liabilities are sometimes adjudicated within the workers' compensation system and sometimes they involve additional legal issues that are resolved in the tort system. Examples include third-party, serious and willful, wrongful termination, and cumulative injury claims.

Third-party claims arise when an injury occurred in the course of employment but responsibility, through negligence of action, can be attributed to a party other than the worker and employer. Under these circumstances, the worker can pursue compensation through the tort system and the insurer can also seek recovery through subrogation.

Serious and willful[8] and wrongful termination[9] violations related to workplace injuries subject employers to substantial penalties that cannot, by law, be indemnified by the insurer. The former involves egregious acts of employer conduct, while the latter refers to dismissing an injured worker due to his or her injury. As will be discussed later, these violations pose particular problems for adjudication under a system where the employer is involved in selection or payment of the adjudicator.

Cumulative injuries subject each employer at which exposure occurred (in California, only employers during the 12 months prior to the injury date) to responsibility for indemnity and medical benefits. Apportionment of responsibility among these employers or their insurers for the judgment brought in the case against any one employer is the responsibility of the WCAB. Note that in a carve-out, the adjudication could be made by a party interested in shifting costs to outside parties.

Each of the above issues involves specialized legal knowledge; thus, injured workers without legal representation rarely pursue them.

Discussion

In theory, workers' compensation (in the words of the California Constitution), "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance. . . ." Evidence in

recent years, however, indicates that many injured workers in California have not been able to get through the system quickly or easily (Sum and Stock 1997). These workers' problems appear to be caused, in part, by tremendous difficulties in learning about their rights and obligations in the workers' compensation system and in getting sufficient help to process their claims. When faced with denials of their claims, long delays, or threats to their employment, these workers either forego their rights to medical treatment and benefits altogether or end up in protracted disputes and litigation. Many of the workers report they felt the system was unfair, that they were "kept in the dark" about what was happening with their claims, "shut out," and "pushed aside."

Many system participants have blamed the dispute process for the frequency of multiyear delays. The role of attorneys is particularly controversial. Critics argue that attorney involvement leads to delays in resolution and escalation of disputes. Proponents of attorney involvement point out that the system is complex by nature and an unrepresented worker is unlikely to understand the full range of employee rights and potential legal issues and benefits.

Workers' compensation overlaps with many other services

Numerous other social insurance benefits overlap the workers' compensation system. For example, State Disability Insurance (SDI) makes temporary disability payments to workers when they are disabled as a result of a non-occupational illness or injury. The SDI system is supported by payroll deductions from wages earned by workers. While SDI is meant to support non-occupational disability, it also pays workers if the employer or insurer delays acceptance or disputes the occupational causation injury. Once an insurer accepts a claim, SDI attempts to recover its disability payments from the workers' compensation insurer. If there is a dispute over compensability, SDI files a lien on any settlement that is reached through the WCAB. SDI payments and liens in workers' compensation are common. For example, they totaled over $300 million in 1997 (Nefsky 1998).

Social Security Disability Insurance and Supplemental Security Income are federal benefits paid to permanently and totally disabled workers. Payment of these benefits is affected by payment of other social insurance benefits, including workers' compensation. Conse-

quently, the structuring of compensation settlements has important effects on eligibility for federal benefits.

Health Benefit: Workers' compensation pays all medical costs for work-related injuries and illnesses. However, there is a good deal of cost shifting between workers' compensation and private health insurance, in both directions. For example, the non-occupational insurer's costs rise if an occupational injury is not reported as occupational and, instead, is treated under the regular health benefit.

The Americans for Disabilities Act (ADA) established protections for disabled workers in the workplace, requiring that employers make reasonable accommodations for seriously disabled workers.

Moreover, workers' compensation itself has many interactions beyond those of the employer, employee, and care providers. Liens by third parties, apportionment of permanent disability between multiple employers, third-party liability against subcontractors covered under a wrap-up project, and liability for future medical treatment on the health benefit side are just a few of the issues that overflow the boundaries of a carve-out.

BACKGROUND: THE CONSTRUCTION INDUSTRY

The construction industry is primarily composed of small employers (less than 100 employees) who employ an itinerant workforce. The majority of individual contractors cannot successfully predict their future volume of business and employment due to the system of competitive bidding for projects. Except for a few key personnel, employment is limited from project to project. Even within a particular project, employment fluctuates widely by craft. On a commercial or industrial building, for instance, operating engineers and teamsters are required to operate earth-moving equipment for site preparation and excavation. They then largely disappear in favor of carpenters, concrete finishers, ironworkers, plumbers, pipe-fitters, and electricians.

One result of this variability in employment opportunities has been the growth of craft unions that persist far longer than any single job (and often longer than most employers). Along with the growth of unionism has been the growth of pension and health care programs that

are jointly administered by each union and a federation of employers. These joint management-labor trusteed benefit plans and the history of negotiating over benefits as well as wages set the stage for carve-outs.

The construction industry is one of the most dangerous, with high rates of injuries and high rates of serious injuries. Workers' compensation costs are a particularly important cost of business to construction contractors. Unionized employers' workers' compensation costs ranged from roughly 3 percent of wages for electricians and plumbers to nearly 8 percent for painters and carpenters, and up to 27 percent for roofers (WCIRB 1994).

Until recently, management/union CBAs almost never involved bargaining over the design of the workers' compensation system or the delivery of medical or indemnity benefits in the compensation system. The sole exception to this was agreements involving salary continuation benefits for industrially injured workers. These were common for police and firefighters in California, and for some state and government employees, but unusual for workers in the private sector.[10] The medical provider, rehabilitation professionals, claims administration, and dispute resolution processes, despite their direct impact on workers and working conditions, were not subject to bargaining.[11]

For the purpose of this report, we will be concerned with two types of agreements common to the construction industry, CBAs and PLAs. CBAs are the generic form of these agreements and can be used for any agreement between management and labor. Within this report, we will use them in conjunction with agreements negotiated between a single trade and an employer or group of employers. Each construction trade negotiates a CBA covering a set time period and particular geographic area.

A PLA is a special type of CBA that covers a single project or group of projects and all trades working on the project. They are fairly common on very large construction projects. While CBAs usually involve one union, many employers, and last three years, PLAs involve multiple unions at one work site for the duration of a large project.

A PLA generally contains many of the contract provisions of the CBAs in force in the local area. In addition, PLAs offer several advantages:

1) If a project relied on local CBAs and multiple trades were involved, there would be contracts expiring and being negotiated constantly, with wage and rule changes.
2) They often contain additional clauses, terms that are special to a project (e.g., no strike or special transportation arrangements).
3) They allow employers to insert special safety measures, such as drug testing.

The existence of a CBA or PLA is required for the negotiation of a carve-out arrangement. The carve-out agreement is negotiated as an addendum to the CBA.

Carve-outs require an administrative structure to oversee medical provider selection and administration of the ADR process. Unions and management in construction had a long history of organizing jointly-trusteed funds for specific purposes (health and pension). Consequently, the structure for developing a neutral source of payment for the adjudication process was already extant. Without this reliable structure, it is difficult to imagine that a carve-out ADR would be stable. Direct payment by employers to the adjudicators would not be perceived as neutral. Alternately, workers would be unlikely to participate in paying for the adjudication if the expected benefits of the arrangement inured to the employers.

BACKGROUND: ALTERNATIVE DISPUTE RESOLUTION

The legislation authorizing workers' compensation carve-outs permits unions and contractors to set up an ADR process. The provisions privatize the fact-finding, or trial, phase of disputes that arise from workplace injuries, while preserving the injured worker's ultimate right to appeal to the public system. With minor variations in the CBAs, they uniformly call for the private resolution of disputes by ombudspersons, mediators, and arbitrators.

To understand how ADR methods operate in carve-outs, it is first helpful to understand how they operate and how they differ from traditional dispute resolution processes. For purposes of contrast we begin

with a brief overview of the traditional litigation system and the factors leading to the rise of alternative systems of dispute resolution. As will be seen, the principal distinguishing characteristics of ADR derive from the nature of the process and the roles played by third-party neutrals.

Traditional Litigation

In the traditional legal system the resolution of disputes is an adversarial process that revolves around the law and the courthouse. Disputes are legalized by the rights of constitutions, statutes, court rules, or other sources of law, and parties seeking to vindicate those rights do so in a court of law according to procedures that are generally predictable, well defined, and designed in large part to further the goal of fairness and accuracy in the pursuit of justice.

In an adversarial process, the parties to the dispute present their versions of the facts and the law to an authority who in turn issues a decision resolving the dispute, and the decision may be appealed to a higher authority. The proceedings are conducted according to intricate rules of evidence and procedure. As such, litigation is highly formalized in both its structural institutions and the agents who engage in the process. Judges decide questions of law. Juries (or sometimes judges) decide questions of fact to which the law will be applied. Attorneys generally represent parties in litigation because of the technical sophistication of the process. As a result, direct party involvement is often minimal.

Although specific rules vary between courts and administrative agencies, the essential structure tends to be fairly constant. The litigation process begins with the filing of a complaint by an aggrieved party alleging some violation of law and the response to such complaint by the opposing party. These preliminary filings set out the initial issues of the litigation, which are then clarified during an investigatory or discovery phase. Requests for judicial determination or motions are commonly filed during or upon completion of discovery, including motions on the admissibility of evidence and for summary judgment. The latter typically comes at the close of discovery and asks the court to rule in favor of the moving party as a matter of law. If that motion is rejected, the matter proceeds to trial, after which a decision is reached by a jury

or a judge. Parties can appeal that decision to higher courts to ensure the accuracy and integrity of the decision.

Considerable dispute resolution activity usually takes place informally before the filing of a complaint. Attorneys for both parties spend considerable time evaluating the legal and factual merits of their cases, interviewing potential witnesses, and marshaling arguments that ultimately would be used to persuade the trier of fact to rule in their favor. During this period the two sides begin negotiating possible settlements—a process heavily influenced by the parties' analysis of their respective cases and general negotiation strategies (Mnookin and Kornhauser 1979).

While litigation is often thought of in terms of trial, this pre-trial negotiation process ultimately ends in the resolution of the dispute in the overwhelming majority of civil and criminal cases. Indeed, 95 percent of all disputes are resolved through negotiation and without the need for trial. This phenomenon is also reflected in the California workers' compensation system.

The Rise of Alternative Dispute Resolution

This litigation process may be effective as a truth-and-justice seeking vehicle, but it is very expensive and often quite slow. An already sluggish civil trial process is further slowed by the gamesmanship of litigation, which increases costs to parties and the system itself. These costs then lead to higher insurance premiums and lower public confidence in the system. In addition, the complexity of the process, the trauma often associated with trial, and a general dissatisfaction with the traditional legal system have led to a search for new approaches for resolving disputes.

The late 1980s and early 1990s saw an unprecedented rise in ADR in public and private spheres at state and federal levels.

The potential advantages and disadvantages of ADR involve both efficiency and process. Efficiency arguments supporting ADR are that it is a faster and less expensive process than traditional litigation—although researchers have not been able to document such advantages. Efficiency rationales are by far the most commonly cited justifications for the adoption of ADR in most spheres, including in workers' compensation carve-outs.

Process rationales suggest that ADR processes are more satisfying, produce better outcomes, are more private, and contribute to a more civil society through less contentious methods of dispute resolution (Burger 1982; Raven 1988; Simon 1985).

The disadvantages of ADR are a mirror image of its strengths. To the extent that court formalities equalize the power imbalances between the parties, the informal structures of ADR can reinforce those imbalances. Similarly, the privatization of dispute resolution through ADR infuses a profit motive for the neutral third party into dispute resolution processes that does not exist in the public system. As such, "repeat players," particularly large institutional players like insurers and banks, have been found to enjoy a significant advantage in ADR (Bingham 1997). ADR also results in the sacrifice of constitutional and other public rights, such as the right to an attorney and due process, and to the accurate application of public laws. It also sacrifices the deterrent value of public decision making. For all these reasons, one of the most controversial issues in modern ADR is whether one can be compelled into such processes.

Forms of Alternative Dispute Resolution

Carve-outs use three of the many forms of ADR: arbitration, mediation, and the assistance of ombudspersons. Each will be discussed in turn.

Arbitration

Arbitration refers to an adversarial process in which a neutral third party decides the dispute between the parties in an informal proceeding, not bound by traditional rules of evidence or procedure. The arbitrator's decision, or "award," is generally final and not appealable on substantive grounds.

Today, virtually all CBAs include provisions for arbitrating grievances. Contractual arbitration is also common in the nonunion workplace; employment disputes in the securities industry, for example, are almost all decided by arbitration rather than trial.

Arbitrators wield considerably more unchecked power than judges. They act alone and blend the functions of triers of fact and law into a single adjudicatory power for resolving disputes that is supported by

broad statutory and common law discretion. Moreover, they generally are not bound by the constraints of substantive law in either the procedures by which they conduct their hearings or in the standards they use to resolve the dispute. In fact, arbitrators need not even have legal training.

The several types of arbitration share some characteristics. First, they are informal procedures, unlike their highly regimented public court counterparts. Both sides have an opportunity to present witnesses and evidence and to engage in cross-examination—subject to the arbitrator's discretion or, significantly, the rules agreed upon by the parties themselves prior to the arbitration (or by the government in court-related programs). There is typically much less discovery than in traditional litigation. As a result, the arbitrator's decision is generally rendered quickly on the basis of the arbitrator's sense of fairness under the circumstances rather than on traditional legal norms.

Unlike public judges, the decisions of arbitrators are generally not subject to substantive review. They may be modified in the case of technical imperfections, but they may only be vacated upon proof of bias, fraud, misconduct, or abuse of discretion by the arbitrator.

For this reason, the selection of the arbitrator is critical to the process. As expected, the identity of the individual arbitrator plays a significant role in the outcome of a given case (see, for example, Schultz 1990; Rosenberg and Folberg 1993). Thus, the competence, neutrality, and independence of the arbitrator are crucial if the process is to be both fair and perceived to be fair.

However, arbitrators often support themselves by arbitrating. The desire for repeat business coupled with a situation where one side is a repeat player can put dangerous pressure on the arbitrator to favor the repeat player. The pressure can be eased somewhat by the customary participation of all parties in the selection process. Reputation is the arbitrator's stock in trade, and a reputation for bias can lead to the refusal of parties to select an arbitrator. While the marketplace provides this safeguard at one level, the safeguard is only likely to be effective if both parties are aware of potential arbitrators' reputations.

Mediation

Unlike adjudicatory judicial and arbitration proceedings, mediation is a consensual process in which the parties decide the resolution

of the dispute themselves with the help of a neutral third party. This is typically accomplished by the mediator taking the parties through a series of stages such as: agreeing upon ground rules, identifying facts and positions, promoting mutual understanding and developing mutually acceptable options, and agreeing on options (Moore 1987).

As a method of dispute resolution, mediation's central strength lies in the ability of the parties, with the help of a neutral third party, to get beyond the initial positions that defined the conflict to the real underlying interests of the parties—as well as the powerful potential to unleash creative solutions not possible in a more adversarial process. As such, it can be particularly effective in interest-based cases where the preservation of relationships is particularly important and which allow for the consideration of options for resolution that exceed those that would be traditionally available in a court of law. While courts can confirm mediation agreements for purposes of enforcement, the process' most fundamental enforcement power comes from the fact that the parties themselves have reached the agreement.

On the definitional question, there are two central models of mediation: facilitative and evaluative. Under the facilitative model, the less controversial of the two, mediators may only facilitate the parties' own consensual dispute resolution process and should offer neither their opinions nor their substantive expertise to the parties. This view has been adopted by the American Arbitration Association, the Society of Professionals in Dispute Resolution, and divisions of the American Bar Association. Under evaluative mediation, mediators are encouraged to offer whatever opinions, expertise, and advice the parties need to resolve the dispute. As a result, evaluative mediations can often resemble the settlement conferences that are a staple of the traditional public litigation system.

One's definition of mediation will in turn affect the question of mediator training and qualification, also an issue of continuing debate. Many, if not most, states (through legislation, court rules, or task force recommendations) now use a hybrid method of mediator qualification, requiring some combination of two or more of the following factors: academic degree, apprenticeship or mentoring requirements, training requirements, and practical experience. Although, no consensus has emerged and states have not yet begun to regulate mediator qualifications (Shaw 1994a, 1994b; Rogers and McEwen 1989, Ch. 10).

Regardless of orientation, mediation may not be effective for all disputes. Mediation can favor the economically or emotionally stronger party and work against the one who can least tolerate conflict and who most values a harmonious resolution. This may inspire some parties to settle for far less than they might obtain before a judge in a traditional adversarial setting. As Auerbach (1983) put it, "Compromise only is an equitable solution between equals; between unequals, it inevitably produces inequality."

One common remedy for this problem is the ability of parties to be represented by counsel in mediation proceedings. This solution is controversial because it moves away from the vision of mediation as a party-driven process that seeks to get beyond legal issues to the underlying causes of the dispute. Involving lawyers leaves open the controversial issue of the lawyer's role. Whether the lawyers should assume their traditional role of primary spokesman and advocate for their clients, and the standards by which they should assess and provide counsel on the ultimate mediation agreement are open questions that are the subject of vigorous debate in the dispute resolution community (Riskin 1984).

Ombudsperson

The third type of ADR process called for by the carve-outs is that of the ombudsperson. This is something of a misnomer, however, in that an ombudsperson is not a process at all. Rather, it is a mode or vehicle for dispute resolution that can include many different processes.

The term "ombudsperson" is of early 19th Century Scandinavian origin and most generally may be understood as a buffer between large institutions and their constituents. "Most commonly, the ombudsperson in Scandinavia was appointed by the Parliament to ensure that the laws and statutes were properly applied, and to guard against abuses, malpractice or error by officials designated to administer the laws; the person holding the office has been referred to as 'the watchman of the watchman'" (Marti 1994).

Today, ombudspersons may be found throughout American life—in universities, government agencies, newspapers, hospitals, prisons, social welfare agencies, and consumer settings. There are two principal types of ombudspersons: classical and organizational.

The "classical" ombudsperson derives most directly from the Scandinavian model—one who serves as a bridge between a government and its citizenry. As described by one of America's foremost administrative law scholars and early students of the ombudsperson, Walter Gellhorn, the classical ombudsperson is a "high-level, independent, legally constituted, greatly respected officer" who will "look into citizen's dissatisfactions with government" (Gellhorn 1996). The classical ombudsperson has the power to investigate, criticize, publicize, and persuade, but not to reverse or dictate official actions. While it is true that the classical ombudsperson handles individualized complaints, his primary concern is to use such grievances to identify and correct flaws in the system, to minimize the likelihood of similar grievances arising in the future. As Gellhorn (1996) put it, the "primary purpose of the external critic [ombudsperson] is to build for the future rather than to exhume the past." To the extent the ombudsperson has a client, it is the system itself, not the parties to the system.

An example helps illustrate the classic ombudsperson's role. A police officer arrests a young boy at his school for shoplifting. The parents of the boy sue the police officer for what they claimed was an unnecessarily embarrassing incident that stigmatized the child in the eyes of peers. The court dismisses the complaint because the officer had a valid arrest warrant to seize the child. As far as the courts were concerned the matter was over. If there was a classical ombudsperson in the police department, however, he might have suggested to the chief of police that such arrests in the future should take place in a more private setting than the classroom. The ombudsperson would not be concerned with whether the police officer was right in making the arrest; rather, he would have been concerned about finding the most satisfactory method for implementing the policy and easing the friction between citizens and their government.

The organizational ombudsperson performs a similar function in the private and corporate setting—although, unlike the classical ombudsperson, the organizational ombudsperson has no authority to engage in formal investigations or fact-finding. Rather, their central powers are the ability to persuade and publicize. Generally operating outside traditional lines of authority and reporting to the highest levels of the organization, the organizational ombudsperson is a designated neutral or impartial dispute resolution practitioner whose major func-

tion is to provide confidential information and informal assistance to managers, employees, and/or clients of the employer (patients, students, suppliers, or customers).

As such, the organizational ombudsperson often serves as a confidential first-stop clearinghouse for all types of complaints, seeking not to solve problems, but rather to foster values and behavior such as fairness, equity, justice, equality of opportunity, and respect. The scope and limitations of an organizational ombudsperson's powers have developed with an eye toward the preservation of the office's core values of independence, neutrality, and confidentiality. For example, they may provide information, communications assistance, "look into" problems, and provide options to complainants, but as a matter of independence, have no obligation to assist anyone who contacts them. Similarly, they may use their office to publicize and bring attention to issues and to persuade parties and institutions, but in furtherance of their neutrality, they do not have the power to change or dictate policies or to serve as a formal fact-finder, judge, arbitrator, or advocate. Bolstering the confidentiality that is essential to the office, organizational ombudspersons generally do not keep case files, testify as witnesses, or even answer questions from anyone, including senior managers, about those with whom they have had contact.

Problems in Alternative Dispute Resolution

A serious problem with ADR procedures is that an employer may establish procedures rigged in its favor. For example, one law firm proposed that employees give up their legal rights in return for the right to use a company-designed dispute resolution program. This program's highest level of appeal was a partner from another large law firm (Commission on the Future of Worker-Management Relations 1994). It is likely that a young woman working in a law firm who accuses her older male boss of sexual harassment will feel that an (older, male) partner in a nearby large law firm is not a neutral decision maker. Companies have established other ADR procedures that have maximum penalties far below those permitted by law, and others have taken years to resolve disputes.

The Commission on Worker-Management Relations (1994) found that both employers and employees generally agree on a set of stan-

dards that ADR procedures must meet if they are to serve as a legitimate form of private enforcement of public employment law. Specifically, these systems must provide the following: a neutral arbitrator who knows the laws in question and understands the concerns of the parties, a fair method by which the employee can secure the necessary information to present his or her claim, a fair method of cost sharing that ensures that all employees can afford access to the procedure, the option for employees to have independent representation, a range of remedies equal to those available through litigation, a written opinion by the arbitrator explaining the rationale for the result, and sufficient judicial review to ensure that the result is consistent with the governing laws. Some have also proposed that the process must also lead to a timely decision.

Some analysts have argued that union-management bargaining can provide decentralized means to achieve the goals of regulations, what John Dunlop has called an "internal responsibility system" (e.g., Bok and Dunlop 1970).

Union approval of the ADR system can potentially resolve many concerns about ADR. The key insight is simple: unions will not approve a procedure that systematically gives employers the ability to act with no regard for the facts. In principle, the union can require protections such as a written record or access by lawyers when the expected value to employees outweighs their cost. In addition, unions have incentives to have better information about workers' rights; thus, they can inform their members as they work their way through the ADR process. In fact, the literature on workers' benefits is consistent with union members having better information about the system (Budd and McCall 1997). The repeated play problem is less serious because arbitrators and other neutrals are in repeat play with the union as well as management; thus, they do not face strong incentives to favor the employers (who often pay the bills and who will be involved in selecting neutrals for future cases). A goal of this study is to determine the extent that unions can fulfill the oversight functions envisioned by proponents of this form of conditional deregulation.

CONCLUDING OBSERVATIONS

Carve-outs were established with the intention of improving the delivery of medical services and indemnity payments to workers who were injured on the job. The key element of the improvement in benefits was to come from the ADR process. With the help of an ombudsperson, injured workers would be better able to navigate the workers' compensation system and resolve disputes in a timely fashion. If the ombudsperson could not resolve a dispute, mediators and/or arbitrators would be called upon to broker a resolution. The injured worker retained the right to appeal to the WCAB if he or she was not satisfied with the outcome of the ADR process. As will be discussed later, unions and employer associations have established carve-outs with varying success in participation levels.

The specific nature of construction and of workers' compensation in California will somewhat limit the generalizability of findings from this study. Jobs in construction are almost all fairly short. As will be seen, short-term jobs make carve-outs more problematic than do longer term employment relations.

Workers' compensation in California is also distinct from much of the nation. Most importantly, almost 40 percent of California claims involve permanent disability, which is far higher than the 15 percent found in most states. As disputes almost always involve this subset of claims, carve-outs have greater scope for reducing dispute rates in California than in states with fewer injuries "at risk" for a dispute.

With these cautions in mind, in the next chapter we outline the carve-outs created in the first years of the new legislation.

Notes

1. California Insurance Code §11656.6 Employer organizations wanting insurance: an insurer may issue a workers' compensation policy insuring an organization or association of employers as a group if such organization complies with a number of conditions.
2. California Insurance Code §11656.7 Group policy members treated separately.
3. In order to obtain group status, the WCIRB and statute require groups to have bona fide safety programs in place. However, "[t]hese rules are largely ignored by WCIRB member companies and have been for years. The carriers simply file

standard forms, and the Bureau accepts them at face value with no follow up" (Workers' Comp Executive 1998).

4. Until 1995, public agencies were restricted from insuring public projects under an OCIP arrangement. Each such project required separate approval by the California Legislature. In 1995, Ab-791 was enacted allowing public agencies to insure projects under an OCIP arrangement. Prior to 1995, few public projects were handled in this manner. By reducing cost of these arrangements, however, Ab-791 is likely to increase their frequency. According to several insurers, opposition to this bill and introduction of OCIPs into public projects in general had centered on contractors' associations. Contractors on public projects usually charge an overhead fee that is a percentage of costs. Workers' compensation insurance premiums are an important component of labor costs in the construction industry. To the extent that these costs are shifted to the project owner, contractors underlying costs upon which overhead is calculated are reduced.
5. Based on the authors' analysis of Audit Unit data. Between 1994 and 1996, workers in California filed an average of 1.1 million claims each year.
6. Personal communication to authors from the DWC.
7. For more details, see California Division of Workers' Compensation (1997). Rules and instructions for applying the rating schedule can be found in "Fundamentals for Applying California Schedule for Rating Permanent Disabilities."
8. California Labor Code §4552-4556.
9. California Labor Code §132(a).
10. Salary continuation for police and firefighters is often referred to as "4850" benefits after the section of the Labor Code under which they are described. Under 4850 certain peace officers and firefighters receive full salary for the first year they are on total temporary disability resulting from an occupational injury or illness.
11. An exception to this rule is the Early Intervention program negotiated by the California Correctional Peace Officers Association and the California Department of Correction and the California Youth Authority. Among other issues, these groups agreed to a restricted list of agreed upon medical-legal evaluations and rehabilitation professionals. This was an effort to reduce the cost of medical-legal evaluations and rehab services and the frequency of medical-legal evaluations. In turn, this was expected to reduce disputes. Started in 1989, the impact of this program is still inconclusive.

3
Overview of Carve-Outs in California

The carve-out statute in California gives unions and employers considerable leeway to negotiate an alternative to the highly regulated workers' compensation system. Unions and employers can bargain over most of the important elements of workers' compensation including medical treatment, medical-legal evaluation, vocational rehabilitation, dispute resolution, and increases (but not decreases) to indemnity benefits.

This chapter summarizes California's first eight carve-outs, which are those that existed in 1997. By the end of our study period (2000), 16 carve-outs had been formed in California (see Table 3.1).

Each carve-out was established by an addendum to a CBA. The agreements typically established a joint labor and management Trustee Committee composed of union and employer representatives to design and oversee the dispute resolution mechanisms, the administration of the carve-out's funds, and the delivery of benefits to injured workers. A small charge was included on top of workers' compensation insurance rates to pay for the administration of the carve-out and its dispute resolution system.

MEDICAL CARE

Proponents of carve-outs expected substantial savings on medical treatment by allowing the parties to negotiate extended employer control over the choice of physician providers. Workers would be protected because the provider list is negotiated under collective bargaining. Ideally, both unions and management will agree to bar high-cost physicians (many of whom may be operating on the margins of fraud) as well as physicians that under-provide useful services.

Table 3.1 Carve-Out Participants as of March 22, 2000

No./Type	Union	Company
Included in this study (that is, founded by 1997)		
1/C	CA Building & Construction Trades Council	Metropolitan Water Dist. of So. Ca. owns Eastside Reservoir Project (also known as Domengloni). Contractor was Parsons
2/B	International Brotherhood Electrical Workers – IBEW	National Electrical Contractors Assoc. – NECA, a multi-employer group
3/B	So. Ca. Dist. Carpenters & 19 local unions	6 Multi-employer groups with a total of 1,000 contractors
4/B	So. Ca. Pipe Trades Council 16	Plumbing & Piping Industry Council, a multi-employer group
5/A	Steamfitters Loc. 250	Cherne—two projects completed in 1996
6/A	International Union of Petroleum & Industrial Workers	TIMEC Co. and TIMEC So. CA.
7/C	Contra Costa Building & Construction Trades Council	Contra Costa Water District, owner of the Los Vaqueros project
8/B	So. CA Dist. Council of Laborers	4 multi-employer groups—Assoc. Gen'l Contractors of CA, Bldg. Industry Assoc. of So. CA, So. CA Contractors' Assoc. Engineering Contractors' Assoc.
Additional carve-outs created during the study period		
9/C	Ca. Bldg. & Construction Trades Council	Metropolitan Water Dist. of So. CA. is owner of the Inland Feeder project. Parsons is contractor
10/C	Bldg. & Construction Trades Council of Alameda County	Lawrence Livermore National Laboratory is owner of the National Ignition Facility project. Parsons is contractor
11/B	Dist. Council of Painters	Los Angeles Painting & Decorating Contractors Assoc.
12/A	Plumbing & Pipefitting Local 342	Cherne, contracting for construction of Chevron Base Oil 2000 project
13/C	Los Angeles Building and Construction Trades Council	Cherne, contracting for construction of ARCO facility

No./Type	Union	Company
14/B	Operating Engineers Loc. 12	So. California Contractors' Assoc.
15/B	Sheet Metal International Union	Sheet Metal & A/C Contractors National Association (SMACNA)
16/C	Building & Construction Trades Council of San Diego	San Diego County Water Authority Emergency Storage Project

NOTE: A: one employer, one union; B: one union, multiple employers (each employer chooses whether or not to sign the carve-out); C: project labor agreement.

In each case the carve-outs established a list of care providers. In some cases, the lists involved a high proportion of the doctors in the state. Many lists also included the HMO and PPO the workers could access for nonoccupational injuries.

Other lists were more limited. For example, the list of providers for the Carpenters' carve-out was selected by the insurer and was small and restricted. The union reported that these restrictions were due to its low bargaining power when establishing the carve-out.

At the same time, the list of providers was not static. In the Carpenters' carve-out, subsequent negotiations expanded the network of doctors, including a large workers' compensation Preferred Provider Organization and Kaiser (the largest HMO in the state).

The large chemical plant construction company, Cherne, also negotiated very restricted lists of medical providers and medical-legal evaluators. These restrictions were an issue with the union when Cherne was involved in the original Pipe Trades carve-out agreement in Southern California that included other employers. In later negotiations, the union and management agreed on a more open list of medical and medical-legal providers.

A later agreement between Cherne and Pipefitters Local 342 in Northern California included only two doctors and fewer than twenty medical evaluators. Several expert reviewers familiar with California medical-legal evaluators considered the list as including some middle of the road evaluators and some that were likely to report injuries as less serious than the average doctor. These lists were prepared with the assistance of an insurer (Hartford) and a nurse case management firm (Occusystem).

The Cherne agreements also included provisions for extra benefits when the injury was an acute, traumatic injury and not the employee's fault. According to Cherne, however, no injuries had qualified for these extra benefits by the end of the study period.

DISPUTE RESOLUTION

Proponents of carve-outs also expected these programs to reduce disputes and shorten resolution times by allowing employers and unions to negotiate ADR procedures. These procedures always began with an ombudsperson (usually chosen by the joint labor-management board of trustees) who was expected to attempt to resolve disputes quickly. If the ombudsperson was not able to resolve the dispute, it proceeded to mediation and then to arbitration.

These ADR procedures were expected to be more efficient than the state-run statutory system that involves a lengthy and legalistic procedure for dispute resolution, which confuses many workers (Sum and Stock 1997). Dispute resolution in the state system also costs employees and employers almost one-third of all disputed medical and indemnity benefits. Moreover, claim resolution in the statutory system is a long process—in California, half of all permanent disability claims are unresolved three years after the injury and 20 percent remained unresolved after five years. The carve-outs all specified maximum times of six months or less for the first stage of conflict resolution, a maximum that was below the *average* time of the first stage of the statutory dispute resolution system (eight months).

A controversial component of most carve-out agreements, including the two case studies discussed below, was the exclusion of lawyers from participation at the ombudsperson and mediation stages of the dispute process. In the statutory system, workers are represented by a lawyer in 80 percent of injuries resulting in permanent disability (WCIRB Permanent Disability Survey 1994–96). Many of the employers and union leaders who participated in carve-outs believed that the heavy reliance on attorneys was a main cause of the high cost of litigation and delays in claim resolution.

Disputes often require forensic doctors to report on issues related to legal questions such as whether the condition is work related, the extent of permanent disability, and the share of the impairment due to prior injuries. Carve-outs allowed the parties to negotiate a limited list of medical evaluators whose opinions were acceptable to both sides. At the time of 1993 reforms, most serious claims involved multiple forensic reports from competing doctors who were often chosen by lawyers for their conservative or liberal interpretation. The cost of these reports exceeded $500 million per year in the early 1990s. Numerous statutory and regulatory measures had been adopted in an effort to limit the incentive for parties to choose doctors that evaluated in a partisan manner. Much of the complexity of these regulations was in place to protect injured workers, who could be less well-informed than insurers on the selection of favorable evaluating doctors.

Carve-outs had to meet two requirements: they could not diminish medical and indemnity benefits to injured workers, and they had to make the final step of their dispute resolution system an appeal for reconsideration by the Workers' Compensation Appeals Board. The Board is also the last administrative law step of the standard system. Parties may appeal a Workers' Compensation Appeals Board ruling to the State Courts of Appeal.

Early analyses of California's carve-outs found fewer litigated disputes, less participation by attorneys, and lower benefit payments per injury (California Division of Workers' Compensation 1996, 1997). While employers were encouraged by indications of potential savings, concern arose that savings on medical costs from restricting treatment to an agreed list of medical providers could lead to lower quality medical care (Moscowitz and Van Bourg 1995). Even more critically, opponents contended that lower indemnity payments per claim could mean that restrictions on access to lawyers was reducing benefits for injured workers (memo to the authors from the California Applicants Attorneys Association 1998).

INFORMING INJURED WORKERS ABOUT THE CARVE-OUT

Construction workers received information about the carve-outs at the time they started a project. More often than not, this information was forgotten when they became injured. Thus, a crucial question is how injured workers find out about their rights under the carve-out. In our surveys we found that some ombudspersons took a proactive role, contacting each injured worker as soon as possible after the accident, while other ombudspersons waited for the injured worker or another party to contact them with a question or a dispute.

At the NECA/IBEW carve-out that covered electricians throughout the state, the ombudsperson role evolved during the course of our study. Originally, the ombudsperson only responded to requests from injured workers with questions or problems. More recently, the ombudsperson has adopted the proactive role of contacting injured workers soon after the injury to supply information and establish communication. The ombudsperson reported that this has improved the operation of the carve-out from both the worker and employer perspective.

VARIETY OF CARVE-OUTS

Carve-out programs in California come in three forms—a single union bargaining with one employer, a single union bargaining with multiple employers, or a single owner bargaining with multiple unions. Single union/multiple employer carve-outs were established on an ongoing basis, whereas single employer/multiple union carve-outs were established for single large projects under PLAs.

When multiple employers negotiated with a single union, employers could opt out of the arrangements and workers at carve-out employers participated as a condition of employment. The NECA/IBEW carve-out was the most successful at achieving significant penetration among the membership of an employers association. This occurred in part because, prior to the carve-out legislation, there was a long established safety group, NECA West, that negotiated jointly for insurance

coverage. This group formed the basis for the subsequent carve-out. None of the other single-union carve-outs signed up many employer members during the study period.

The ombudsperson for the Laborer's carve-out also actively recruited other unions—Cement Masons, Operative Plasterers, and Pipetrades working with landscaping—to join into a single, multiple-craft, carve-out arrangement. While this arrangement appears attractive, at the time this study was written, multi-trade carve-outs outside large projects had not been successfully negotiated.

When a project owner bargained with several unions, the contractors and subcontractors were required to join the carve-out as a condition of participation on the project. In California, two very large reservoir projects used the single employer/multiple union model.

A final variety of carve-out deserves brief mention: The phony carve-out. Some employers have an incentive to set up sham unions for the exclusive purpose of qualifying for a carve-out. Since these "unions" would lack any accountability to the workforce, the ombudsperson, mediators, and arbitrators chosen solely by the employer would presumably look favorably upon the company's interests. Appendix A discusses California's experience with sham carve-outs and the evolution of regulations intended to avoid this problem.

4
Interviews with Ombudsmen

ADR IN CARVE-OUTS

We interviewed the six ombudsmen at the California carve-outs that included ADR and operated during the study period. These interviews were conducted by telephone using a structured interview, and they revealed substantial differences among the ombudsmen according to several important dimensions: their professional orientation (legal vs. medical), the structure of their employment relationship with the carve-out (employee vs. independent contractor), the functioning of their offices (particularly whether they were proactive or reactive in nature), the nature of the matters handled by their offices (especially matters excluded), and their roles with respect to possible subsequent mediations or arbitrations. These interviews also underscored the deep ambivalence that characterizes the relationship between applicants' attorneys and carve-outs, as well as ombudsmen concerns about the carve-outs and their suggestions for improvements. This chapter reports those findings.

Backgrounds of the Carve-Out Ombudspersons

The ombudspersons came from a variety of backgrounds, ranging from rising up through the construction ranks to occupational nursing to law. None had any specific training to become an ombudsperson. Three of them said they had taken related courses or training, such as mediation training or courses in various aspects of workers' compensation, generally taught by insurance organizations, such as ULICO (a union-owned insurer) or the Insurance Educational Association. They did not, however, make any effort to discern the role or traditions of the ombudsperson's office or to learn the dynamics of negotiation, advocacy, or many of the other functions they performed.

Two of the three ombudspersons with legal backgrounds had associations that suggest a proclivity that would favor injured workers: one

was an attorney in an applicants' workers' compensation law firm, while a second was a paralegal with membership in several workers' compensation applicants' bar associations. In contrast, one of the ombudspersons with a medical background provided consulting services for a large hospital and a risk management firm, which might suggest some bias in favor of employers.

Structure of Employment Relationship

Four of the six ombudspersons worked for, were paid by, and were accountable to a joint labor management trust.[1] In contrast, one ombudsman worked directly for the employer and one worked for the employer's workers' compensation insurance broker. Despite the potential for conflicts of interest that can arise when an ombudsperson is accountable to a single stakeholder, we found no direct evidence of partiality. To the contrary, one ombudsperson reported that when the employer attempted to stop her from advising workers about the possibility of wrongful termination actions under Section 132(a), and to avoid lost-time classifications for injuries, she ignored these suggestions.

Three of the six ombudspersons said they worked as full-time employees, earning between $75,000 and $87,000 per year. Two other ombudspersons reported part-time relationships with their projects, working for and paid by the trust on an hourly basis ($85/hour and $125/hour). The other received a percentage (0.5 percent) of the workers' compensation premium as compensation, which produced an income of $45,000 in 1997. Only one of the ombudspersons had significant staff support, although some of the others drew on other resources within their organizations when necessary.

Significantly, none of the ombudsmen reported substantial caseloads and all reported other duties or clients. The three full-time ombudspersons said their work as ombudspersons comprised only 5, 20, and 30 percent of their overall full-time positions; their remaining time was spent developing and promoting the program or performing other administrative functions for their employers.[2] A similar pattern was seen among the three part-time ombudspersons, with each having significant client bases beyond their carve-out responsibilities: one performed workers' compensation ombudsperson services for other con-

struction projects, one practiced law, and the third provided consulting services in disability management for hospitals and risk managers.

Carve-outs remain in their infancy stage and many claims have not matured sufficiently to enter the dispute processes. Moreover, as time passes, there are more years of claims that can enter the system (i.e., in the first year, only these first-year claims can reach dispute stages; in year three, claims from years one, two, and three can trigger disputes). If the pattern of disputes over time matches the statutory system, then we do not expect the process to reach its equilibrium rate of disputes until about year five. This suggests that the interviews were conducted one or two years prior to the average long-run rate of dispute activities that the ombudspersons will be required to handle.

General Functioning of Ombudspersons' Offices

The ombudspersons were reasonably available and accessible to injured workers, insurers, and employers. Only one of the ombudspersons had a permanent office on site, although four of the other five said they could make arrangements for on-site meetings with injured workers if necessary. Moreover, all said they were available by phone during the business day, and four maintained telephone hours well into the evening; some also said they were available to injured workers anytime, day or night. The overwhelming majority of work was done over the telephone, although three of the six ombudspersons surveyed said they tried to meet in person with the injured worker at least once.

Two approaches characterized the ombudspersons' first contact with the workers: proactive and reactive. Four of the ombudspersons took a proactive approach—that is, they generally contacted the worker as soon as they learned of the injury. This model was taken by both ombudspersons with a medical orientation and by two ombudspersons with a legal orientation.[3] The ombudsperson at the Eastside Reservoir project did an examination of every injured worker and recommended if the person needed further treatment at a hospital. Since the work was being performed at a single location, this allowed her to serve this triage role. The other two ombudspersons took a more reactive approach—that is, they generally waited until the injured worker made the first inquiry.

Regardless of which model the ombudspersons followed, all but one of the ombudspersons' offices sent out information about the dispute resolution process, either as the first contact or after the first contact was made.[4] This material typically included general information about the role of the ombudsperson, the ADR scheme adopted by the carve-out, and, in some cases, information about the worker's legal rights.

The research team asked the ombudspersons to rate the frequency by which they engaged in specific dispute resolution processes and certain other functions. Providing information was listed as the leading answer, followed by facilitation ("helping the parties decide their dispute"), advocacy on behalf of workers, case management, fact finding, negotiation, systemic improvements, and arbitration ("deciding the dispute"). There was a relatively substantial break between the top four choices and the bottom four.

The ombudspersons acknowledged some structural limitations on their authority. One limitation was the amount of time that the ombudspersons have to resolve the dispute, which was acknowledged by four of the six ombudspersons surveyed. This limit was typically established in a CBA, with the number of days ranging from 7 to 15 days. This limitation did not appear to be burdensome, as three of the four affected ombudspersons said they were able to resolve issues well before the allotted time period. The medically oriented ombudspersons said they were able to resolve most issues in two to three days, and the fourth said that he would simply get extensions from the trust when necessary.

A more significant limitation was on the nature of the authority of the ombudsperson. None of them said they have the power to direct an actor in the process, whether it is a worker, insurer, contractor, or union official.[5] Rather, they said they only had the power to persuade. Even then, however, most said that both parties typically abided by their recommendations and suggestions. However, one of the medically oriented ombudspersons acknowledged one instance in which it was necessary to go over the adjuster's head to get relief for an injured worker.

Beyond these limitations, the ombudspersons had broad discretion in how they conducted their work. This discretion was a function of the ombudspersons' independence, and the research team asked the

ombudspersons what they viewed as being the most important safeguard of their independence. All four of the ombudspersons who worked for joint labor management trusts said they viewed the fact that they worked for the trusts, and could be rewarded, disciplined, or terminated only by the trust—which essentially would require the agreement of both the unions and management—as the most significant protections of their independence. The two ombudspersons who worked for employer/agents cited only personal integrity factors.

When asked whether the employers or any other actors had asked them to do anything that would compromise their independence or the integrity of their office, the answers for both groups were not materially different. Neither group reported such interference to be a problem, although members of both groups acknowledged that it does occur. Reported instances included either insurers or employers asking ombudspersons to stop giving counsel on serious and willful and unjust dismissal claims, to perform acts described by the ombudspersons as illegal, to deny claims, to encourage employers to hire nonunion workers, and to convince workers with legitimate claims that those claims were somehow invalid. There were no reported instances of a union official attempting to interfere with the judgment of the ombudspersons.

Nature of Matters Handled by Ombudspersons

The research team asked several questions intended to discern the ombudspersons' philosophical approaches to their jobs, the various roles that they perform, and the nature of the matters that they handled in general, as well as some particular matters. The ombudspersons overwhelmingly agreed that legal knowledge was more important than medical knowledge. All six agreed that a substantive knowledge of the workers' compensation system and the law that governs it was necessary to be able to handle more than 75 percent of the issues that they dealt with; some put the percentage at over 90 percent. By contrast, only two of the six said medical knowledge was necessary to the resolution of 75 percent of the issues they handle.

Nearly all of the ombudspersons said they spend much more of their time providing information to workers than they do actually resolving disputes. Estimates varied from an information:resolution

ratio of 90:10 to a low of 50:50. The centrality of information dissemination as a key ombudsperson function was corroborated by an open-ended question asking for the ombudspersons' perceptions of their three most important functions: all five ombudspersons who answered the question listed the delivery of information to workers among those three—the only common single factor cited. Similarly, when asked to order a list of eight functions by the frequency with which they are performed, "providing information" was rated either first or second by every ombudsperson. However, the ombudspersons reported that they still spend a considerable portion of their time resolving disputes. Even then, the role of information is crucial, for as one ombudsperson noted, "They often come in thinking they have a dispute when what's really going on is that they need more information, and when they get that information, they realize that there's no dispute." Questions regarding the tardiness of compensation or reimbursement checks were cited as an example.

The ombudspersons were asked to categorize the types of disputes they deal with according to their perception of the percentage of their total time spent in actual dispute resolution, using the following categories: injury date, arising out of employment/caused out of employment, medical, compensation including temporary or permanent disability, liens, apportionment, and penalties. By far, the most common disputes requiring resolution were those relating to medical issues and compensation, in that order. AOE/COE was a very distant third, followed more distantly by injury date, and even more distantly by penalties, liens, and apportionment.

In all carve-outs, ombudspersons reported problems with handling serious and willful claims and wrongful termination disputes. Two carve-outs delegated these issues to the statutory system for resolution. When handled within ADR, two ombudspersons said they did not directly handle these issues but recommended that the injured workers consult with private attorneys, and two ombudspersons assisted the workers with these claims but preferred that they be delegated to the statutory system. Ombudspersons also said they would be likely to recommend that a worker consult an attorney if the ombudsperson suspected that a third party could have liability.

Mediation and Arbitration

There were too few mediations or arbitrations at the time of the survey to provide meaningful analysis.[6] The research team asked the ombudspersons about the criteria they felt would be important in selecting a mediator or arbitrator, whether the same neutral could serve as a mediator and an arbitrator in the same case, whether they have ever or would ever refuse to certify a case for mediation (and why), the role the ombudspersons would play in the mediation and arbitration, and about the record that would be available to the WCAB if the arbitration were appealed.

Regarding criteria for the selection of mediators and arbitrators, five of the six ombudspersons agreed that legal knowledge of the workers' compensation system was more important than medical knowledge or knowledge of the mediation or arbitration process. Five of the six ombudspersons said their CBAs prohibited a mediator from serving as an arbitrator in the same case; the sixth one said the neutral could switch roles if both parties consented.

Only two of the ombudspersons said they have refused to certify a dispute for mediation—that is, acknowledge that the ombudsperson process was unsuccessful and in most cases, take affirmative steps to arrange the later proceedings. One of those two said the denial had been issued because the worker was seeking a remedy that the ombudsperson did not believe was available in mediation or arbitration because it was not provided for under the law of workers' compensation. The other said the denial was issued because the complaints that the workers sought to mediate were more in the nature of a personality conflict with the ombudsperson than a substantive dispute that could be mediated or arbitrated. Two of the remaining four said they would not do so under any circumstances, viewing the right of a worker to go to mediation or arbitration as absolute.

All of the ombudspersons said they do or would play a role in mediation[7] and arbitration. Three of the five ombudspersons that have mediation components in their ADR processes said they were responsible for setting up the mediations and arbitrations. Beyond that, there was some variation among the additional roles that would be played. Three of the ombudspersons said they would answer questions and provide information or testimony at a mediation; the two others said

they would not provide information or testimony. Similarly, four of the six said they would be willing to provide information and testimony at arbitration,[8] while the other two said they would not.

Determining the record for appeal to the WCAB was more difficult for the ombudspersons because only two said they had actually had disputes go this far into the process. As a result, two ombudspersons said they did not know what record would be available for the WCAB and a third guessed that there would be at least taped minutes, a written decision, and briefing for WCAB review. One of the two who had arbitrations said the WCAB would receive a copy of the opinion, and the other said the WCAB would be able to review the arbitrator's decision and a reporter's transcript of the arbitration hearing, if the transcript was ordered by the WCAB. The sixth ombudsperson said the WCAB would be able to review the arbitrator's decision, the reporter's transcript, and the case files.

The Role of Attorneys

The research team asked a series of questions intended to assess the ombudspersons' perception of the relationship between attorneys and the carve-out ADR process. All six ombudspersons said that in *every* case they tell injured workers that they have the right to consult with an attorney, including at the ombudsperson stage (where direct representation is prohibited by all agreements except that of the laborers). Indeed, all six ombudspersons reported that they *affirmatively recommend*, at least sometimes, that the worker see an attorney—most often when the ombudsperson perceives the possibility of a third-party claim, serious and willful violation of a health or safety law, or a wrongful termination claim. This willingness to make such an affirmative recommendation included ombudspersons who were accountable to employers/agents as well as those employed by the joint labor-management trusts. At the same time, the ombudspersons overwhelmingly agreed that workers rarely requested to be represented at the ombudsperson stage. Four ombudspersons said they had "never" received such a request.[9]

To the extent that the agreements prohibit direct representation at the ombudsperson stage—and the ombudsperson interviews indicate that attorneys tend to drop injured workers as clients when they learn of the carve-out—three ombudspersons offered anecdotes to demon-

strate how this prohibition can be honored in the breach. These ombudspersons said they viewed lawyers as having a positive effect on the carve-out process when drawn in as collaborators rather than kept at bay as enemies. One said he often relies on attorneys to help him "get through to skeptical workers," noting the attorney can be very helpful in conveying information, and sometimes advice, to workers who would distrust that information coming from the ombudsperson. Similarly, another ombudsperson tries to make the attorney a "part of the team that is trying to help the worker" and draws upon the attorney not only for purposes of facilitating communication with workers but also for strategic advice and, occasionally, direct intervention. The third calls upon lawyers to preserve workers' rights, for example, having a lawyer write a request for administrative penalties and interest when there has been a presumptively unreasonable delay in delivering benefits.

Not all of the ombudspersons had such sanguine feelings toward lawyers as they relate to ADR in carve-outs. Two ombudspersons, including one with a legal background, viewed lawyers as harming the carve-outs, either because the lawyers were trying to sign up workers as clients in spite of their knowledge of the carve-outs or because of legal attacks on the validity of the carve-out program as an institution. Another ombudsperson, with a legal background, said lawyers had neither a positive nor a negative impact on the carve-out system.

Beyond the ombudsperson stage, the surveys indicate that attorneys are or would be involved in mediations and substantially involved in arbitrations. Two of the six ombudspersons said they would encourage workers to be represented by counsel at mediation, and all six said they would encourage the workers to be represented by counsel at the arbitration stage. Of the four carve-outs that have had disputes go beyond the ombudsperson to mediation, two of the four ombudspersons reported that the injured workers were represented in more than 75 percent of the mediations.

Ombudspersons' Perceptions of Larger Issues

The research team asked the ombudspersons for their perceptions of several larger issues: 1) the three functions they performed that they felt were most important, 2) the extent of the union's knowledge and

support of the carve-out program, 3) the comfort levels of the various parties with the carve-out program, 4) their biggest frustration about the carve-outs, and 5) ways they would improve the carve-out programs.

All five of the ombudspersons who answered the question listed "providing information" among the most important functions they perform. Three also listed advocacy or protection of the injured workers, three listed facilitating communications among the parties, and three listed fact finding or clarification. The functions included only once on this list of most important functions were helping the injured worker to select and get to a physician and facilitating general improvements to the system.

The ombudspersons were generally critical of the unions' level of knowledge or understanding of the carve-out program. Only one described the unions as "very informed." Four of the other five ombudspersons rated union knowledge or understanding of the carve-outs as low, a dynamic also reflected in part in the ombudspersons' perceptions of union comfort levels. Three of the six described their perception of the union comfort with the carve-out in less than favorable terms, such as "disenchanted," "resistant but warming," and "maybe a 20 percent comfort level." The other three suggested that the unions they work with seemed "very comfortable" with the carve-outs.

Similar equivocation could be seen in the ombudspersons' perceptions of employee comfort levels with the carve-out programs. Again, three of six said they felt employees had high comfort levels with the program, while the other three used more cautious language, ranging from "low comfort" to "some like it, some don't," to "pretty good—for every one who doesn't like it, two do."

Employers and insurers, on the other hand, were perceived to be generally favorably disposed toward the carve-out programs. Five of the six ombudspersons said they perceived employers to be either "comfortable" or "very comfortable" with the carve-out programs; the sixth described employers as "resistant initially, but warming."

The ombudspersons expressed frustrations with external aspects of the carve-outs. Four of the six expressed frustration with various aspects of the medical profession, including the slow turn-around of medical reports, concerns over the quality of medical care that physicians were willing to provide, and a frustration with the operation

(indeed, in a few cases the very existence) of provider lists. Other frustrations noted included WCAB inconsistency in handling workers' compensation disputes that were filed in the statutory system, disputes arising from carve-outs, the lack of uniformity among carve-out programs, and belligerence of some workers toward the ombudspersons.

ANALYSIS OF THE SURVEY AND INTERVIEW DATA

The principal benefit of the ombudsperson programs, at least for injured workers, is that it gives the workers ready access to information and personal assistance in the resolution of problems arising from their workplace injuries. This helps to prevent the unnecessary escalation of conflicts that are essentially information-based from maturing into, or being recharacterized as, conflicts that are rights-based and therefore costlier for both the stakeholders and the system. The carve-outs currently in place must be seen as first generation programs, each with features that are both redeeming and troubling. When the best of the programs are pulled together into a single vision, one can readily see how the ombudsperson office has the exciting and unique potential to provide comprehensive services to injured workers. The ombudsperson can be a personal shepherd to guide individual workers through the system from injury to settlement, a clearinghouse for medical and legal information (including references to both doctors and attorneys as appropriate), and, ultimately, an agent of change to improve health services while minimizing conflicts and improving workplace safety and, possibly, culture. If realized, such potential would not only call for the continuation of carve-out programs in the construction industry, but it would encourage the expansion of their availability to other industries. Carve-outs might also act as a template for focusing expansion of information and assistance efforts by the regulatory agency in the statutory system.

The carve-outs have a long way to go before attaining this high ideal. The surveys reveal several flaws that must be corrected before it is even possible. In particular, the carve-outs today operate with a great propensity for conflicts of interest and without regard for confidentiality, require specialized ombudsperson training well above cur-

rent standards, and are hampered by significant legislative ambiguities. These problems may be readily remedied and should be corrected sooner rather than later, while these institutions are still in the early stages of formation.

Backgrounds of the Ombudspersons

The research team did not feel that any particular educational background was necessary for an ombudsperson to be effective and therefore expressed no preference between the legal and medical orientations seen among the current carve-out ombudspersons. While the ombudspersons' perceptions of the relative importance of substantive legal knowledge of workers' compensation over medical knowledge might suggest a preference in favor of legal backgrounds, specific and ongoing training can meet any deficiencies that may arise from either orientation. In this regard, however, there is cause for concern. Job-specific training is uneven at best among the carve-out ombudspersons in each of the three major areas in which it would be expected: workers' compensation knowledge, medical knowledge, and dispute resolution process knowledge.

Some ombudspersons had workers' compensation training prepared and taught exclusively by insurers or a source closely aligned with a stakeholder in the carve-outs. The concern is less with the quality of the instruction than it is with the bias that could be built into the process of educating a party designated to perform a neutral role. Plainly, medical information, legal standards, and the like are capable of different interpretations, depending upon one's orientation. For example, insurers and employers may have a different view of what constitutes an appropriate temporary or permanent disability rating than may an injured worker or applicant's attorney. More neutral sources of training should be identified or developed.

Training on medical and safety issues appears to be similarly uneven. Medical knowledge is constantly changing and, while the ombudsperson's role does not call for it to "second-guess" qualified medical examiners, a better appreciation of the current state of medical knowledge—particularly with respect to the kinds of injuries frequently observed within their specific carve-outs—would surely help ombudspersons understand the nature and quality of the medical treat-

ment being performed on workers, as well as the reasonableness of the positions being asserted by insurers, employers, and injured workers. More training in safety techniques would sensitize ombudspersons to current industry standards, which would be useful in helping them play a more proactive role on injury prevention, as well as in identifying possible serious and willful violations for purposes of advising workers and negotiating with insurers and employers.

There appears to be a systemic lack of training in the many different dispute resolution functions that ombudspersons perform, including training specific to ombudspersons: mediation, negotiation, advocacy, and case management, just to name a few examples. This is cause for particular concern, given that the ombudsperson's primary role is in dispute resolution, with both workers' compensation and medical knowledge being properly understood as necessary background knowledge. Dispute resolution has become a specialty unto itself, as evidenced by the many nuts-and-bolts training programs in negotiation and dispute resolution that are now widely available to working professionals, as well as the many universities and law schools that now offer graduate degrees and certifications in the field. The differences among techniques are substantial, and a working knowledge of these differences, as well as the special skills required of each, should be an integral part of an ombudsperson's training and would surely enrich the work that they perform. In particular, specific ombudspersons training would help them better understand and apply to carve-outs the historical role of the ombudsperson as watchdog and servant for "the system" as well as dispute resolution facilitator and counselor.

Carve-out ombudspersons have systemic differences from many of the characteristics of traditional organizational or classical (government) ombudspersons. One difference is advocacy. Organizational ombudspersons, of which the carve-out ombudspersons would be classified, are discouraged by ethical codes from advocacy on behalf of a party, while several carve-out ombudspersons tended to view advocacy on behalf of injured workers as a central part of their responsibilities. Confidentiality is yet another point of departure. Where organizational ombudspersons are discouraged from keeping case files—out of concern that the confidential information learned by the ombudsperson during the course of handling a problem could be used against a grievant—carve-out ombudspersons not only keep them routinely, but many

are willing to offer this information in both the mediation and arbitration contexts.

Carve-out ombudspersons said they frequently mediated disputes; yet, relatively few said they have had a single mediation training session, much less exposure to the wide variety of approaches and methods currently being used by today's mediators. Indeed, one might reasonably question whether ombudspersons are in fact performing a mediative function, given that the survey revealed few face-to-face meetings between the parties or between the parties and the ombudsperson before settlement. Rather, the current model for mediation by ombudspersons may be more accurately described as a shuttle negotiation in which the ombudsperson/mediator serves as a buffer through which the parties can communicate, rather than a true mediation in which the ombudsperson/mediator facilitates communication between the parties.

Mediation training would help ombudspersons understand the differences between mediation and shuttle negotiation. At the least, it would help expose the carve-out ombudspersons to the special skills required of a mediator (e.g., active listening, reframing of issues, managing power imbalances), to understand the differences among mediation styles (e.g., facilitative versus evaluative, and joint session versus caucus), and, appreciate the debates among other mediation professionals (e.g., whether the mediator is responsible for the substantive content of the mediation agreement) so that they will be better able to apply these understandings as appropriate to the carve-out context.

By raising these issues, it is not being suggested that the carve-out ombudspersons are malfeasant in their duties. To the contrary, workers appear to be relatively well served. It is simply being suggested that the ombudspersons are not completely fulfilling their potential as dispute resolution providers. A better understanding of the traditional duties, functions, and skills of ombudspersons in general will help the carve-out ombudspersons better understand the nature of their positions and how to adapt those principles to the unique needs of ombudspersons in workers' compensation carve-outs.

Structure of the Employment Relationship

Independence is perhaps the greatest single attribute, and necessity, for an ombudsperson since it protects neutrality (Wilner 1997).

This independence is traditionally preserved through the structure of the employment relationship. Perhaps the most salient structural dimension of neutrality and independence is that of institutional location—that is, for whom the ombudsperson works, reports to, and is accountable to. Organizational ombudspersons typically report to the highest levels of management, often the president, chief executive officer, or board of directors' chair. Because workers' compensation carve-out ombudspersons do not work within a single organizational context but rather work with multiple organizations such as employers, unions, and insurers—each of which is a stakeholder in the dispute resolution process—special care must be taken to assure the independence of the ombudspersons.

The majority of the carve-outs address this problem structurally by making the ombudsperson an employee or independent contractor of a trust that is jointly administered by the major stakeholders—employers and unions. Two of the carve-outs do not follow this model: In one the ombudsperson is employed by and accountable to the employer, while in the other the ombudsperson is employed by and accountable to the employer's workers' compensation insurance broker. The problem could also be addressed by incorporating specific contractual protections for the ombudsperson—either in the CBA or in the individual contract of employment—that would specify grounds and procedures for promotion, discipline, and termination of the ombudsperson.

Absent specific contractual protection for ombudspersons, employment under an employer/agent is fundamentally inconsistent with the concept of neutrality and independence that is essential to the integrity of the ombudsperson. As a legal matter, the ombudsperson of an employer/agent is under a fiduciary duty to act in furtherance of the interests of that employer/agent while not owing a similar fiduciary duty to the injured worker. As a more pragmatic matter, employees tend to act in the best interests of their employers. Therefore, such a configuration creates a conflict of interest and is in violation of industry ethics for ombudspersons. The possibility exists for the delivery of misinformation or omission of relevant information.

Similar concerns regarding conflicts arising from the employment relationship focus on the fact that the carve-out ombudspersons have substantial responsibilities other than their carve-out duties. For example, one full-time ombudsperson we studied spent part of his time mar-

keting the program to other prospective unions and employers as what may be called an "ombudsperson entrepreneur." Such a responsibility creates an incentive to act in a way that makes the program seem attractive. This can be inconsistent with the neutrality required of an ombudsperson, because one of the primary justifications for employers, insurers, and unions is the belief that the program lowers costs. Because lower costs can be found by reducing benefits, there is potential for the ombudsperson try to reduce the injured workers' benefits. Such an incentive could be exacerbated in a situation in which the ombudsperson works for the employer/agent rather than a trust.

For part-time ombudspersons, the other sources of income can raise the potential for conflicts. For example, one part-time ombudsperson is a partner in an applicants' workers' compensation law firm and represents only injured workers. The attorney duties may cause the insurer or employer to doubt the neutrality of the ombudsperson. However, such a background can help balance an employee's inherent lower bargaining power and ensure the ombudsperson is knowledgeable and provides information to injured workers.

It is possible for these competing tensions to be addressed adequately through the collective bargaining process. The CBA between a contractor and a union to name or otherwise accept an applicant's attorney as an ombudsperson would seem to operate to the benefit of the injured worker by leveling the imbalance of power between the parties. Therefore, such an arrangement should be permissible as an example of how the ombudsperson institution may be adapted to the unique environment of workers' compensation. However, it could be problematic if the ombudsperson was an attorney affiliated with a workers' compensation defense firm because such an ombudsperson could dramatically exacerbate the inherent power imbalance between the parties to the substantial detriment of the weaker party, the injured worker. This should not be permitted, as it could frustrate the workers' compensation system's goals of providing adequate compensation for workplace injuries. It could be argued that the union representation in the bargaining over such an agreement would sufficiently protect the rights of the individual worker, although the interests of union representatives in a collective bargaining context can be at odds with those of individual workers at times.

These are three examples of conflicts that are readily identifiable from the current carve-outs. Others may arise, particularly as the carve-outs mature. But rather than engage in speculation, the research team feels it prudent to alert the community to the possibility of conflicts so that it may be sensitive to these issues and the need for additional regulation as particular problems arise. Beyond the concerns raised by such conflicts of interest and their attendant threats to the ombudsperson's neutrality and independence, there appears at this time to be little reason for concern in the employment relationships between ombudspersons and stakeholders. The ombudspersons were compensated enough to reasonably assure an adequate allocation of time and effort. They also had access to sufficient support staff to be able to accomplish their duties as ombudspersons.

General Functioning of Ombudspersons' Offices

All six of the ombudspersons' offices appear to function in a manner that operates to the benefit of injured workers. Indeed, the institutionalization of a person assigned to provide information and assistance to the injured worker—in effect, to shepherd the injured worker from injury to conflict resolution—may be the chief benefit of the ADR programs for workers, even though the lack of training among ombudspersons to date limits the ability of the ombudspersons' function to reach its full potential in this regard.

Injured workers in the statutory system often lack basic information and have difficulty getting assistance (Sum and Stock 1997). These problems arose even for injured workers who were assisted by an attorney.

Quite the opposite effect may be seen in carve-outs. Rather than complaining about the lack of information, nearly every employee interviewed said they were happy with the information made available to them by the ombudspersons, as well as the dignity with which they were treated by the ombudspersons.[10] Indeed, they tended to be happy with the overall process. This is consistent with the ombudspersons' own perceptions of the comfort level of the parties with the process and is consistent with the findings of dispute satisfaction in other informal methods of dispute resolution. This particular process may have been satisfactory to workers because it is information-oriented, highly

responsive to workers, and is collaborative rather than adversarial in nature. The majority of reported problems apparently were resolved with relative ease and on a schedule that operated to the convenience of injured workers, rather than lawyers, doctors, or the courts.

The ombudsperson/worker relationship is crucial to the successful operation of the ADR component of the carve-outs. All six ombudspersons said they spend at least half of their time simply providing workers with information about their cases or about the workers' compensation or carve-out systems. Most estimated that number to be much higher, around 70 percent, and one said 90 percent. All six ombudspersons cited the provision of information as one of the most important functions they perform—the only common factor cited by all of them.

Much of the information disseminated is routine information regarding workers' compensation or ADR processes. In some cases, however, the ombudspersons also provided information on medical issues—helping workers select physicians from provider lists, interpreting "med-speak," or sometimes making sure that the worker was able to get to his or her medical appointment. Similarly, in half the carve-outs, the ombudspersons were also involved in the return-to-work plan in cases of injuries involving modified work arrangements; the two ombudspersons with medical orientations were more involved in these arrangements, either participating in the drafting of the return-to-work plan or overseeing its implementation. The ombudspersons were also able to get information from parties who—because of the adversarial nature of the WCAB process—might be reluctant to provide information directly or in a timely fashion to workers, such as claims adjusters, employers, and physicians. The availability of such information is significant, as the ombudspersons generally agreed that more often than not workers wanted to know the answers to such questions as "where is my reimbursement check," "what does this medical report mean," and "what are the next steps in my case." As several ombudspersons reported, getting the right information and making it available tends to solve a lot of the problems. This may help provide one reason why the ombudspersons said they were able to resolve most matters and to do so quickly. Many of the workers' complaints in fact were questions reflecting the workers' lack of sophistication or information that the ombudspersons could answer on their own or after

some inquiry with an appropriate party on the worker's behalf. The ability of ombudspersons to provide information to workers quickly and personally, resolve information-based disputes quickly, serve as an ongoing resource for the worker, and operate on a schedule convenient to workers should be seen as a significant benefit of these programs for injured workers.

Nature of the Disputes Handled by Ombudspersons

To the extent that ombudspersons handled actual disputes, they were primarily those relating to either medical issues or actual compensation issues, followed very distantly by whether the injury in question arose out of employment, date of injury, penalties, liens, and apportionment.[11] The medical issues were generally considered the more difficult to resolve, in large part because of the delay in getting access to medical reports and because of the inconsistency in medical evaluations. All but one ombudsperson refused to handle serious and willful, wrongful termination violations, and third party claims, preferring to recommend that injured workers with those possible claims consult with private counsel.

The research team does not view these results as surprising, given the pervasiveness of medical- and compensation-related claims, medical office management practices, the disparity in views in medical treatment, and the statutory ambiguity regarding the proper jurisdiction for serious and willful, wrongful termination claims, and third-party claims. These findings, however, do underscore the need for training and continuing education in the areas of workers' compensation, medicine, and safety.

Mediation and Arbitration

A troubling aspect of carve-outs was the willingness of the ombudspersons to participate in the mediation and arbitration processes as potential witnesses or providers of information or records. While it is true that they cited desire to help injured workers as a reason for their willingness to participate, the actual and potential practice of such participation raises serious questions about the

confidentiality of the ombudsperson process and, ultimately, its integrity and credibility.

As an initial matter, uninhibited communication between the ombudsperson and an injured worker about sensitive medical, legal, and personal issues is often necessary to identify and resolve problems. It should not be inhibited by the possibility of disclosure by the ombudsperson in a subsequent hearing. Moreover, it must be remembered that the mediations and arbitrations at which the ombudspersons said they would provide information and testimony occur *after* the ombudspersons' own efforts have failed. It is plausible that any frustrations or disappointments experienced by the ombudsperson could color perception of the facts and, as testimony from a neutral who previously attempted to resolve the dispute, unduly influence mediation or arbitrations.

For these reasons, confidentiality is considered by professional ombudspersons in other contexts to be "the bedrock upon which all ombudspersons programs are built" (Howard and Gulluni 1996). Breaches of this confidentiality at the more formal levels of dispute resolution can undermine the attractiveness of the program as a safe place to discuss personal matters, in addition to the ombudsperson's credibility as a confidential resource within the carve-out. Legitimate questions may be raised about whether confidentiality in workers' compensation carve-outs should be as unyielding as it is in other contexts, such as the general refusal of most ombudspersons to maintain records. However, disclosing information, which was reasonably expected to be confidential, in the more formalized dispute resolution proceedings that take place after failure of the ombudsperson's efforts can threaten to subvert the credibility of the programs.

The Role of Attorneys

One goal of carve-outs is to reduce employees' use of attorneys. Such a reduction can lead to savings in cost and time, but can also lead to a number of problems (Ozurovich 1997).

Employees' rights

One concern is that the carve-outs' ADR structure violates employees' rights. In *Alexander v. Gardner-Denver Co.* (415 U.S. 36

1974) the U.S. Supreme Court decided that a union generally may not collectively bargain away the rights of individual workers to bring a statutory discrimination claim before a public court or administrative agency. While the ruling is ambiguous on the question, many practicing lawyers view the case as permitting a statutory discrimination claim to be brought under the collectively bargained ADR mechanism, to be handled in a public law process involving both administrative and judicial forums, or both.

The validity of *Alexander* was called into question by a more recent Supreme Court ruling, *Gilmer v. Interstate Johnson-Lane Corp.* (500 U.S. 20 1991), upholding the mandatory arbitration of an Age Discrimination in Employment Act claim in a non-collective bargaining context. If by implication *Gilmer* overruled *Alexander,* employers and unions would be free to include statutory discrimination claims within the scope of mandatory ADR mechanisms, such as the California workers' compensation carve-out ADR processes, thus barring individual workers from filing such claims in a court of law. The U.S. Supreme Court has acknowledged this tension between the two cases, but appears reluctant to overrule *Alexander,* and has cited the case with approval since *Gilmer* (*Wright v. Universal Maritime Services Corp.* 1998).

In the only California Court of Appeal decision on the workers' compensation carve-outs to date, the appeals court rejected a broad constitutional and statutory challenge to the validity of the carve-outs by the applicants' attorney bar, in *Costa v. Workers' Compensation Appeal Board,* 65 Cal.App.4th 1177 (1998). In particular, the court of appeals held that compelling workers into the multi-step carve-out ADR process did not constitute an unconstitutional "incumbrance" to the constitutionally compelled system of workers' compensation.

To the contrary, the court said the constitutional provision was merely intended to "remove any doubt about the constitutionality of the workers' compensation legislation, not to limit the Legislatures' authority to enact additional appropriate legislation to protect employees," such as legislation authorizing the carve-out structure. The court also specifically rejected an argument that *Alexander v. Gardner-Denver,* as applied in California (*Torrez v. Consolidated Freightways Corp.* 1997), mandates invalidation of carve-outs. The court again relied on the legislature's plenary power over workers' compensation,

and noted that the carve-out in issue (IBEW/NECA) specifically authorized claims for workers' compensation benefits to be filed—initially in the carve-out with a right of the worker to appeal to the statutory system.

Costa suggests that California's courts are likely to uphold their general validity. However, many questions regarding their specific scope and application may still require judicial resolution. By giving the employee the power to decide whether to proceed to the next phase or tier of the carve-out ADR process, including a right of appeal to the public statutory system, the carve-out agreements negotiated by the employers and the unions appear to operate within the zone of authority recognized by *Alexander v. Gardner-Denver.* Workers reserve public law rights, albeit subject to the completion of certain procedural steps (completing the ombudsman, mediation, and arbitration phases). However, limitations to this power of the workers—such as the refusal of an ombudsman or an employer to permit an employee to proceed to mediation, arbitration, or to appeal back into the statutory system if dissatisfied with the ombudspersons' efforts—could raise serious legal questions under the doctrine of *Alexander v. Gardner-Denver.*

Practical issues

Another concern is what procedures apply if an injured worker experiences problems after the expiration of the carve-out. In addition, questions remain about advising workers on the proper determination of average weekly wages, vocational rehabilitation eligibility and benefits, applicable penalties, and other benefits and damages that might be available outside the workers' compensation system (for example, the applicability of other state and federal laws, such as the federal Equal Pay Act).

Rule of law

The general relationship between the law and the informal dispute resolution processes in the carve-outs is unclear. Under principles of informal dispute resolution processes, there is no relationship because positive law standards do not necessarily apply in ombudsperson processes, mediations, or arbitrations. The workers' compensation carve-outs are unique entities in that they only partially privatize the ADR process because they provide for appeal from arbitration to the WCAB.

In this context, carve-outs may be viewed as being similar to the non-binding court-annexed arbitration and mediation programs established by the California Legislature or by local court rules.[12] Thus, the carve-outs could arguably be seen as governmental in nature and therefore subject to such constitutional requirements as due process and public access to hearings (Reuben 1997).

Under current law, however, that is an unlikely result because the carve-outs are merely authorized by statute and actually created as a matter of volitional contractual choice through collective bargaining.[13] Therefore, the informal dispute resolution processes would only be subject to public law standards to the degree that the authorizing legislation, California Labor Code Section 3201.5, compels or the CBA itself delineates. Unfortunately, the statute gives little guidance in this regard, providing only that the carve-outs may not result in a diminution of compensation, and says little about how that broad principle is to be implemented. The carve-out agreements themselves are uniformly silent on rule of law issues.[14]

Similarly, the legislative and collective bargaining silence also raises serious questions about the relationship between the rule of law that guides the WCAB system and the informal process that is arbitration or the degree of deference that WCAB should give arbitration awards. For example, would an arbitration decision that ignored the presumption of correctness of a medical report be subject to reversal by the WCAB on that ground? Under the standard law of arbitration, the answer would be no. Arbitrators are not bound to apply substantive law, and their awards are generally not subject to substantive review. On the other hand, if the nature of review of arbitration awards was less deferential, then it would appear to be reversible on substantive grounds, in this example, for failure to apply the presumption upon review. Because the statute calls for arbitration awards in carve-outs to be treated in the same manner as the decision of a workers' compensation judge, as a Request for Reconsideration, it is probable that the WCAB would request formal clarification of the arbitrator's reasoning. If it did not include the presumption, and the presumption in fact should have been employed, the arbitration decision would likely be reversed and remanded on substantive grounds. Greater clarification of what, if any, substantive and procedural workers' compensation law

applies during the arbitration, and the standards to be applied by the reviewing court, would ease this problem.

Attorney fees

Finally, but only by way of example, the statute is silent on the availability of attorney fees for counseling during the ombudsperson and sometimes mediation phases, where workers may consult attorneys but may not have formal representation. The availability of compensation is an integral part of the right to counsel. The applicant's bar is concerned that the current structure does not provide the financial incentive necessary to ensure that injured workers in carve-outs have access to quality representation. Existing law would appear to permit the establishment of compensation systems established by contract, either through the CBAs or in private contractual arrangements between applicant's attorneys and individual injured workers. To the extent there is currently confusion over this question, such authorization should be made explicit.

Problems in practice

In the survey of ombudspersons, they suggested that the relationship between attorneys and carve-outs is more complex and nuanced in practice than at the policy level and even then is in only the early stages of formation. This may suggest that the workers may be more interested in getting their problems resolved than in maximizing their legal rights. All six ombudspersons said that it was rare for a worker to request to be represented by counsel at the ombudsperson stage. They said workers tend to understand that this is an early phase, and they attempt to resolve the problems informally and without the intervention of lawyers. Several ombudspersons stressed that many injured workers just want to get back to work and put the whole matter behind them. This perspective seemed to be corroborated in the injured worker interviews. Nearly all said the ombudspersons' process served them well, without regard to legal standards.

This point of view cannot be said to be uniform among all injured workers because most ombudspersons reported being contacted by attorneys purporting to represent injured workers.[15] Moreover, all ombudspersons reported that they perceived some workers had consulted with an attorney during the ombudsperson stage. More telling,

however, is that several Applications for Adjudication of Claim were filed by workers despite the existence of the ADR systems.[16]

The ombudspersons uniformly said they would recommend that the worker consult with a lawyer if they detected the possibility of a third-party claim, a wrongful termination claim, a serious and willful claim, or a case involving future medical needs. In this regard, at least two ombudspersons said they would regularly send workers to specific firms in such situations and, as noted previously, a third ombudsperson made such recommendations in open defiance of the employer's preference not to raise such options to injured workers. Similarly, while two of the six ombudspersons said they would not necessarily recommend that a worker be represented by counsel at a mediation, all six agreed they would make such a recommendation at the arbitration stage. However, there were several troubling reported instances of workers going into a mediation or arbitration without representation, while the employer or insurer was represented.

Finally, but critically, several ombudspersons said they did not view attorneys as necessarily excluded from the carve-out process. Several expressed a willingness to work with attorneys to help injured workers at the ombudsperson stage, viewing them as possible partners in the furtherance of the rights of the injured workers. In this way, the prohibition on direct representation of workers before the ombudspersons can be "honored in the breach." Similarly, two of the ombudspersons said lawyers can help ADR processes in carve-outs because they might be able to be more effective in developing a strategy to help the injured workers or in helping them understand the sometimes unfortunate realities of their cases.[17]

OMBUDSPERSONS' FRUSTRATIONS AND SUGGESTIONS FOR IMPROVEMENT

Predictably, ombudspersons were reluctant to criticize the system. However, several themes alluded to in the foregoing discussion surfaced again in this portion of the survey. In particular, several ombudspersons cited various frustrations with medical providers, noting that it was difficult to get reports in a timely manner. They said they would welcome

a rule compelling medical providers to do so. Frustration was also expressed about the reticence of doctors, jaded by prior experience with unpaid workers' compensation claims to provide comprehensive medical reports. The ombudspersons called for greater education of the medical profession in this regard. One ombudsperson went so far as to suggest the elimination of the provider list altogether, a view echoed by several others.

On the legal side of the carve-outs, there was considerable frustration with the ambiguity of the statute, particularly as it applied to jurisdiction over wrongful termination and serious and willful claims. Applicants' attorneys were criticized for their ongoing efforts to fight the carve-outs rather than work with them. Similarly, unions were also criticized for their lack of knowledge on the ADR components of the carve-outs.

DISCUSSION

The ombudspersons working for carve-outs in California come from a variety of backgrounds without uniform training for their jobs. There is a dichotomy in their experience with many coming from either medical or legal backgrounds. Medical backgrounds appear suited for large construction projects at a single site because the ombudsperson can perform a triage role and evaluate the need for medical treatment.

Even the ombudspersons with medical training were not performing true disability case management. Case management typically involves integrating medical care, rehabilitation, return to work, and many other elements. Ombudspersons tried to help injured workers navigate the workers' compensation system, but their role was not designed to address the many other service providers a seriously injured worker can encounter.

The lack of specific training to serve as an ombudsperson is a troubling aspect of carve-outs. Uniform criteria for training in the medical and legal arenas of workers' compensation could reduce the potential for injured workers to be misinformed of their rights. We found no evidence that workers were made worse off by their interactions with the current ombudspersons; in fact, workers appear to be better off than

they would be in the state run system. However, the potential remains for serious problems without greater specificity of the duties, responsibilities, hiring practices, and training of ombudspersons.

Notes

1. At least one lawyer-ombudsperson insisted on working for the trust as a condition of employment.
2. One performs "administrative oversight" and serves as an ombudsperson on another project; another performs public relations, educational, and evaluative duties for the program and the trust; the third performs public relations and educational functions. It should be noted that all three full-time and one part-time ombudspersons spent time working on procedures, manuals, and other publications that serve the program.
3. One of these two legally oriented ombudspersons actually changed this practice from a more reactive model to a more proactive approach during the course of the study.
4. All ombudspersons reported that they believed the workers received information about workplace injuries from their employers at the time of hiring, consistent with the employers' statutory obligations.
5. One ombudsperson, however, said he once issued an order directing an insurer to take a certain action because the company was being difficult in negotiations. The insurer reportedly dismissed it summarily.
6. Only three ombudspersons reported that they had cases move to mediation or arbitration: one had 15 mediations and 15 arbitrations, a second had five mediations and no arbitrations, the third had four mediations and one arbitration. One project had actually eliminated the mediation phase of its dispute resolution process as an accommodation to disgruntled applicant's attorneys, replacing it with a Joint Labor Management Safety Committee chaired by the ombudsperson.
7. In the project with the Joint Labor Management Safety Committee, the ombudsperson chairs the committee, explains the dispute to the committee, and serves as an advocate for the injured worker.
8. One limited this availability to the employer.
9. These comments should be considered within the context of comments from the interviews with injured workers. Most workers, at least during the initial phase of their claims, understood the carve-out to *prohibit* representation by an attorney.
10. Surely, the sampling of workers was arguably biased, in that the research team was dependent upon stakeholders to provide us with names of injured workers to contact. A more random sampling could lead to different results.
11. One ombudsperson reported a high instance of wrongful termination disputes, 70 percent of that carve-out's overall disputes.
12. See, for example, California Civil Procedure Code §1141, et seq. (requiring that civil cases worth less than $50,000 be arbitrated as a condition for trial).

13. Id.
14. California Labor Code §3201.5 (b) provides: "Nothing in this section shall allow a collective bargaining agreement that diminishes the entitlement of an employee to compensation payments for total or partial disability, temporary disability, vocational rehabilitation, or medical treatment fully paid by the employer as otherwise provided in this division. The portion of any agreement that violates this subdivision shall be declared null and void.
15. In fact, one attorney was reported by an ombudsperson to be particularly aggressive in soliciting business from injured workers, leading the ombudspersons to ask the union to persuade the attorney to cease the practice, a request with which the union complied.
16. The research team assumes that such Applications for Adjudication of Claims were filed in ignorance of, or in defiance of, the ADR provisions of the carve-outs.
17. By contrast, two ombudspersons had no opinion regarding the impact of lawyers on the carve-outs, while two had a negative opinion, citing repeated challenges to the carve-outs by the applicant's bar, as well as the efforts of some attorneys to recruit clients despite the existence of the carve-outs.

5
Eastside Reservoir Project Carve-Out

The Eastside Reservoir Project (ESRP) is an effort of the Metropolitan Water District (MWD) of Southern California to construct a reservoir in the Diamond and Domenigoni Valleys, near Hemet, California. It is a $2 billion project, the largest construction project in the Western United States, and will take five years to complete. Once built, the reservoir will double the freshwater storage capacity in Southern California.

The ESRP PLA is between the project owner and multiple unions and covers the several hundred contractors and subcontractors on the project. The PLA contains an ADR program for the resolution of workers' compensation issues. The project's owner also covers workers' compensation and liability insurance for all contractors and subcontractors (known as a "wrap-up" or owner controlled insurance program, OCIP).

HISTORY OF THE ESRP CARVE-OUT

The ESRP carve-out emerged as a result of a belief shared by the national and state building trades and the MWD that the ESRP was the ideal situation for a PLA involving an ADR process (Gallagher 1997). The most important motivation for the owner to operate under a PLA was to avoid problems surrounding contracting with the multiple trades over time. Each trade has a separate contract with renegotiation dates that are staggered over the duration of the project. The Eastside Reservoir would be under construction for five years, and most contracts in the building trades last three years. Therefore, the primary goal was to avoid disruptions in the construction schedule.[1]

Several participants to the negotiation indicated that setting up a carve-out arrangement was the deciding factor for MWD to negotiate

a PLA. In 1993, California removed the prohibition on public agencies assuming the risk associated with workers' compensation under an umbrella policy covering contractors and subcontractors on a public project, that is, arranging insurance as an OCIP. Assuming the workers' compensation and liability risk on a project allows the owner to avoid inclusion of these costs in the budgets of contractors and subcontractors on which the contractors' overhead is based. Also, since large projects tend to be safer than the average risk, the project owner might be able to negotiate lower premium rates for the same risk profile among contractors. However, choosing an OCIP arrangement meant assuming the risk for related losses. The use of a PLA allowed for the inclusion of a carve-out arrangement. On the basis of discussions with their broker (Sedgewick of California) and representatives of the National Building Trades, MWD believed that substantial savings on workers' compensation costs could be achieved by using a carve-out arrangement (Gallagher 1997; Uehlein 1997; Goerz and Sedgewick 1997). Previous experiences using PLAs and carve-outs, like the construction of the Trans Alaska Pipeline and the Pioneer Valley Project in Massachusetts, encouraged this approach.

On the employer side, Larry Gallagher (Risk Manager to MWD) believed that the workers' compensation carve-out process had the potential to lower costs. He realized that it had to be implemented in the context of a CBA or a PLA. The water district had no experience with PLAs, so there was some reticence to get involved in union agreements or PLAs. The expectation of cost savings in workers' compensation premiums, combined with a no strike clause helped convince the project owner to implement the ADR in the context of a PLA.[2] Gallagher's initial estimates of cost savings for the ADR were in the 25–30 percent range, although he knew that there was great uncertainty about that figure. According to the MWD as of August 1997, the actual cost saving has been in the expected range.

The National as well as State Building Trades union leaders were very much in favor of carve-out programs. They originally brought the concept to the attention of Mr. Gallagher and the MWD (Uehlein 1997; Balgenorth 1997). This favorable attitude strongly facilitated the setting up of the carve-out and the negotiation of other areas of the PLA. From the unions' perspective, carve-outs had the potential to bring down the cost of union labor because of reduced workers' compensa-

tion premiums. In addition, PLAs had the potential to restrict competition with nonunion labor for jobs on the project because workers can only be covered by a carve-out if they are union members. The water district is a public entity and was thus required to pay the prevailing wage to all workers on the project, and the prevailing wage was the union scale. This took wages out of competition. All else being equal, the owner would prefer the carve-out arrangement if restricting nonunion labor led to cost savings on workers' compensation insurance premiums.

Once the MWD chose the construction management contractor and the insurance broker for the project, negotiations began with local unions to set up a carve-out. In September 1994 all parties signed the PLA for the ESRP that contained an ADR system and allowed for a specific list of medical providers and vocational rehabilitation professionals.

THE STRUCTURE OF THE ESRP CARVE-OUT

In addition to the project owner (MWD), the carve-out has many different participants.

Project Contractor

The water district hired Southern California Associates, a joint venture of Harza Engineering Company of California and The Parsons Corporation, to provide construction management support services. Southern California Associates is the legal successor of ARB Inc., the original signatory of the PLA. The project contractor executes the PLA and monitors the compliance with the agreement by all parties involved, in particular by the contractors and subcontractors to the project.

Unions

A number of unions and union organizations signed the PLA, including the Building and Construction Trades Department, AFL-CIO, the Building and Construction Trades Council of California, the

Building and Construction Trades of San Bernardino and Riverside Counties, and 17 affiliated local unions.

Insurance Providers

The insurance broker is a joint venture of Sedgewick of California Inc. and Dickerson Insurance Services. This joint venture acts as the broker for insurance of all risks involved with the project. The insurance broker marketed the project with individual insurance companies for bids on different risks involved on the project. Ultimately all insurance under the OCIP was carried by ITT Hartford Specialty Risk Services. The water district and each individual contractor are separately insured under the umbrella of the OCIP.

ITT Hartford/Specialty Risk Services is the workers' compensation insurer and claims administrator. The company was selected through a competitive process by Sedgewick of California and the MWD from among four workers' compensation insurance companies (Gallagher 1997). Among the main reasons for selecting this firm were its experience,[3] good reputation, and its willingness to significantly cut the workers' compensation insurance premium if a carve-out process was implemented. Hartford offered a 25 percent discount on the premium for the inclusion of the carve-out arrangements (Lott 1997). As the policy included a very large deductible, the project owner was largely self-insuring the project. Thus, the 25 percent discount on Hartford's premium represented less than a 25 percent cut in all workers' compensation costs.

Construction Contractors

There were over 200 contractors and subcontractors on the Eastside project, and the number fluctuated with the different stages of the project. They were all covered under the same workers' compensation insurance policy. All construction contractors and subcontractors involved in the project were required to agree to the ADR system and to the rules governing the hiring of construction labor through the local labor council's referral system.

Construction Contractor Employees

The PLA set out rules describing who could work as an employee of a construction contractor involved in performing, monitoring, or overseeing the work covered by the agreement. The PLA established a job referral system by which contractors could hire up to 15 percent of the total crew per craft from a contractor's "core" employees (Domenigoni Valley Reservoir PLA; Article III, Section 10). The remaining employees were hired from the local union's hiring hall out-of-work list for the various crafts. There were about 700–1,500 workers on the project at any time. The PLA also established an agreement by both sides to forego strikes and lockouts (DVRPL, Article VI, Section 1).

Joint Labor-Management Workers' Compensation Committee

The PLA established a Joint Workers' Compensation Committee, which met quarterly to oversee the carve-out (DVRPLA, Article XII, Section 6.a). The power of the committee was exercised through the agreement of the union and contractor parties, with each party having one vote. The project construction management contractor designated no more than five contractor representatives, and each local union or district council signatory was able to appoint a representative (but no more than one per trade): The signatory State and Local Building Trades Councils also had one representative. The ombudsperson and representatives of the owner, carrier, and/or providers of medical care were available to attend the committee meetings and furnish information as requested by the committee.

The parties were empowered to jointly designate and remove, under the auspices of the committee: 1) a list of authorized health care providers and medical evaluators to provide all medical treatment and evaluation, 2) organizations which may be affiliated with the preferred health care provider, to provide prescription medicine, 3) an authorized list of vocational rehabilitation evaluators/service organizations, mediators, and 4) arbitrators.

Safety Committee

The PLA established a Joint Safety Committee as a subcommittee of the Joint Workers' Compensation Committee. The project construction management contractor and the unions each designated five representatives to sit on this committee, which was jointly chaired by the site safety representative of the project contractor and an official of the signatory local Building Trades Council appointed by the union. The safety committee received reports on safety programs instituted by the owner, the project contractor, and the individual contractors on the project site and discussed and advised the parties to the PLA with regard to recommended safety programs and procedures (DVRPLA, Article XII, Section 6.b). This committee met regularly each month and was an integral part of the overall project safety effort.

Authorized Providers

As of November 1997, the authorized list of medical providers included the Community Care Network, which included a large number of medical providers throughout California. This provider network was selected by the insurer, Hartford, in conjunction with the owner, MWD. Hartford then negotiated a pricing agreement for services provided by the Community Care Network. According to Hartford, they were able to obtain savings relative to usual charges because the limited provider list available for all medical treatment for the life of the claim meant Community Care Network could expect to maintain control of patients for longer periods than under the standard workers' compensation arrangements (Lott 1997). Participating members agreed to the established charges.

In addition, each union was allowed to include its Health Benefit Trust preferred provider network as authorized medical providers. Each union had one or more HMO preferred provider networks (often including Kaiser). This resulted in an extensive list of medical providers who worked within managed care organizations. It also meant that workers were likely to have access to their regular treating physician for occupational injuries and illnesses.

Ombudsperson

The ombudsperson was selected by the insurance broker, Sedgewick of California, after review of the applicant's qualifications by the Joint Workers' Compensation Committee. According to the PLA, the person appointed was required to have the minimum following qualifications: five years of work experience with knowledge of the workers' compensation laws and familiarity with workers' compensation claims and case management and/or experience and certification in occupational health practice. In addition, the person could not have had a prior employment relationship with any party to the agreement, the owner, the owner's insurance broker, or the insurance carrier, or with any direct affiliate of these organizations or of a party to the agreement. The ombudsperson was required to be available at reasonable times, upon reasonable notice, at the project site for the convenience of the employees. The ombudsperson is employed and compensated by the insurance broker, Sedgewick of California. The duties of the ombudsperson are part time and the ombudsperson is responsible for management of Sedgewick of California operations at the site.

Mediator and Arbitrator

The mediator for any dispute was selected in rotation from a permanent panel of five mediators, established by joint agreement of the parties. The arbitrator for any dispute was selected in rotation from a permanent panel of five arbitrators, established by joint agreement of the parties. All arbitrators were retired workers' compensation judges who were compensated by the insurance carrier.

OUTCOMES AT THE CARVE-OUT

In what follows, we present views on the conduct and performance of the various parties involved in the carve-out. These included the owners, contractors and subcontractors, unions, broker, insurer/claims administrator, ombudsperson, and a subset of injured workers who had complex disputes.

Goals

We interviewed numerous participants on the owner's side of the carve-out, and they identified expected cost savings as the main motivation to setting up a carve-out. Reference was often made to the experience of the Pioneer Valley Project in Massachusetts. The water district originally estimated losses to be 55 percent of the expected losses for similar projects, for savings of $11 million.[4] Because the insurance policy for the project would have a large deductible, these savings would be realized directly to the MWD.

For the unions, the carve-out strengthened their argument for a restrictive policy towards nonunion labor, even when nonunion employers won contracts. The unions negotiated a restriction to no more than 15 percent nonunion labor for nonunion contractors, the lowest level consistent with labor laws. In addition, because all workers in a carve-out are required to be union members, even nonunion "core" employees of nonunion contractors were required to establish nominal union membership. These "temporarily unionized workers" and/or their employers paid dues and contributed to the Health and Welfare Trust and Pension Funds. This arrangement is the model adopted almost verbatim by several later carve-outs (Inland Feeder Pipeline, Los Vaqueros Reservoir, and UC Berkeley's Lawrence Livermore Laboratory's National Ignition Facility).

During our interviews, the owner, unions, and broker/insurer expressed satisfaction with the carve-out. In the following section we present different issues on which parties commented concerning the evolution and functioning of the carve-out.

Alternate Dispute Resolution Processes

The owner, general contractors, and insurance broker all saw that eliminating lawyers from the initial stages of a workers' compensation claim was a major advantage. They expected the ombudsperson, perceived as a neutral party, to reduce litigation costs. The model used at the Eastside project was for the ombudsperson to call all injured workers as soon as possible after their injury to help with questions of medical treatment and other benefits. The owners saw this issue as particularly relevant because they felt, "The problem which causes

workers to seek attorneys is related to one of two things: either the employee doesn't have proper medical care or the claims unit of the insurance company is not timely in making their payments. The ombudsman can take care of both of these things" (Gallagher 1997).

Lawyers are not allowed to be involved at the ombudsperson stage nor can they speak for the injured worker during mediation. At the same time, workers can hire a lawyer and the lawyer can be present at any conference or hearing. In practice, this policy has acted as a proscription against the presence of lawyers at mediation.

In the negotiation of the PLA, labor was not in favor of this formal limitation on attorney involvement. Union negotiators argued workers would go to lawyers only when they think that there has been unfair treatment. So, the option to allow a lawyer at the different stages of the ADR process would be valuable, even though it would be seldom used.

The then-president of the Laborers' Union Local was troubled by the limitation on lawyers and aggressively pushed workers from any union to go to an attorney. However, according to the current president of the Laborers' local, "The Laborers have done a 180 degree about-face on the carve-out . . . . Now we feel that the ombudsperson is doing a really good job" (Bell 1998).

Injured workers interviewed appeared well informed about the limitation on attorney participation and how to obtain access to an attorney when needed. Every worker we interviewed was unaware they were covered by a carve-out at the time they were injured. They relied upon the ombudsperson and their local union to provide them with information about the ADR process. In most cases, the ombudsperson initiated the contact, informing the worker of the processes related to their claims.

The reduction in attorney involvement accelerated time frames dictated by the ADR addendum, and the proactive approach of the ombudsperson was expected to speed up claims resolution. The ombudsperson was expected to resolve most problems quickly, either through better information or negotiation between the parties. This and the proscription against lawyers during the early stages of dispute resolution were expected to resolve many disputes. The remaining disputes would be handled quickly through mediation and occasionally arbitration.

Ombudsperson

Sharlene Horn was appointed as the ombudsperson. She holds a degree in psychology, is a registered nurse, and has run her own vocational rehabilitation firm. Horn has also taken and was still taking classes on insurance, largely through the Insurance Educational Association.

Horn contacts the injured workers as soon as possible after an injury, at least all disabling injuries. She sees this as a major strength of the ADR program, "I think it's a great program because the injured party knows a half hour after they're injured what to expect. They know right away that I am the person that they can come to as their representative. I think that is a big strength of the program. The other strength is that Metropolitan has given me authorization to go outside the workers' compensation benefits and provide additional benefits, little minor things, that in the long run save a lot of money, but keep an individual happy and gets them back to work quicker. For example, workers on the project are from all over the country and often living in motels or apartments and without local family. We have provided pet care until a family member arrived, work boots following foot injuries to assist with quicker return to work, extra clothing when there has been clothing cut away in the ER, transportation services not covered under workers' compensation, and on occasions a waiver of the 3-day waiting period for temporary disability in unusual circumstances. We have also gone outside the approved list of providers when it was in the best interest of the injured worker or on attorney request" (Horn 1997).

Horn says she was attracted to this position because it would combine her knowledge of the workers' compensation system with her medical training. Horn says about the job, "You really do need to have good negotiation skills, because the goal is to try to resolve issues yourself, prior to going to mediation, and I do that quite frequently . . . you have to be able to really walk a fine line sometimes. Sometimes, when I am obligated to tell an employee, you have the possibility of a serious and willful claim [i.e., a case when the employer is liable for higher penalties due to willfully negligent safety behavior], it can cause repercussions from the employers and carrier. The insurance company is saying, 'Why did you tell them that,' and the employer is saying, 'Why did you tell them that?' That is my role to make sure that all

injured workers know their benefits. You have to be able to recognize those fine parts of the labor code and not be afraid to offend any of the parties because the first obligation is to the injured worker."

It was common to see this tension between the neutrality of the role as ombudsperson and the protection of the rights of the workers who are often poorly informed about the workers' compensation system. Ms. Horn was comfortable saying in the same paragraph of a discussion, "I am a neutral party" and "I am an advocate for the worker." At least in her experience, these were not contradictory statements.

Each respondent among the owner, insurer, broker, and union leaders (other than the Laborers' Union) showed a high degree of satisfaction with the ombudsperson. All agree that the medical background improved "case management" (meaning here management of all disputes, not complete medical case management). However, several observers were concerned that the legislation did not impose any restriction or qualifications on being an ombudsperson, and among the injured workers interviewed, there was a mixed reaction to the ombudsperson. One respondent felt she was too close to the owner and another thought he was given bad advice about his case.

Issues concerning the ADR process

The Eastside project experienced what all parties perceived as a high level of disputes about wrongful terminations of injured workers (violations of Section 132(a)). The explanation for this was variously attributed to a single difficult employer, aggressive participation by the ombudsperson in making all options clear to injured employees, a specific problem union, and a second union's aggressive business agent. All of these explanations are consistent with the problems experienced at the Eastside project.

There was a lot of uncertainty on how wrongful termination and "serious and willful" disputes should be handled within the ADR process. These violations involve an uninsurable liability with substantial penalties that are placed on the contractor and subcontractor, not the owner or insurer of the project. It is not clear "whether or not the project labor agreement contemplated going through the process of ombudsperson, mediation, and arbitration before going to the WCAB" with these issues (Govan 1997).

Another perceived weakness of the ADR system from the perspective of some on the employer's side was, "we always thought arbitration should be final and binding. It shouldn't be appealed to the appeals board and from the appeals board to the court. We thought the [ADR] system should be sufficient" (Govan 1997). For example, a teamster was injured while operating equipment in conditions that his attorney later argued were negligently dangerous. After release to return to work, he was fired. With the help of an attorney, he brought a dispute to the arbitration stage of the ADR process. The arbiter decided in his favor on the wrongful termination issue but did not find a willful safety violation. In this case the teamster appealed the serious and willful claim and the employer appealed the wrongful termination. Both of these disputes went to the WCAB, the appellate level at which carve-out disputes enter the administrative law system.

Lack of clarity about access to lawyers led to some problems. One worker filed a grievance when his employer claimed his injury was not work related and a wrongful termination claim after his subsequent termination. Horn discouraged him from filing because she said his claim was weak. He was unaware of his right for monetary compensation and asked the mediator to award him his job back. The mediator was able to broker this outcome. The worker subsequently sought indemnity payments for his time away from work. He wanted a lawyer to represent him; however, no lawyer would take the case because the worker signed an agreement at mediation. Prior to mediation, the worker was unaware he could contact a lawyer because the documentation he received said there were no lawyers allowed at mediation. The worker thought his union would represent him at the mediation. However, he said they were of no help during the proceedings.

MEDICAL SERVICES

Employer, insurer, and union interviewees showed satisfaction with the quality and timing of the medical services. When asked about the main benefits of the carve-out system from the perspective of the owner of the project, the greater cost control of a closed list of preselected medical service providers was mentioned often. "The insur-

ance industry develops confidence when the physicians and the trusts are treating the employees properly and giving employers a fair shake financially and on billing. They know that they can enter into these or be part to these kinds of agreements with unions or collective bargaining units and that there is a credible medical service out there that's not out to rip off the industry" (Gallagher 1997).

It was also suggested that a preferred provider list also limits collusion between lawyers and doctors if there is litigation. Some participants felt that in the statutory system, lawyers guided injured workers to doctors who gave a favorable medical-legal evaluation. As discussed in the background section, the treating physician's opinion has a presumption of correctness when challenged by a second opinion in a disputed case.

Preselected medical service providers were thought to give injured workers less leeway, resulting in quicker return to work after an injury. Another reason to expect this result was the active role of the ombudsperson. The owners felt that the ombudsperson facilitated the efficient provision of medical services and monitored the treatment and recovery of the injured worker, a process that reduced the number of days off work. In particular, the quick initial response and advice of the ombudsperson seem to have reduced the extent of minor injuries that could have evolved into more serious chronic ones (Gallagher 1997). However, no evidence was presented to confirm this belief. It was also noted by a number of respondents that, by construction standards, the Eastside project was a long-term job with good pay and a regular 60-hour week. Workers were not anxious to receive only $490/week on temporary disability versus $1200–1800/week when working. Hence, they were highly motivated to return to work and work was usually available when they were able to return.

The fact that the worker could choose the doctor, from the defined list, from the very first day was seen as a positive aspect of the carve-out process. Trust in the doctor was expected to increase when the worker was able to choose the doctor from the first day of injury, rather than having the doctor assigned by the employer. This was expected to reduce unnecessary costs due to second opinions (Balgenorth 1997). As it turned out, all of the workers interviewed received their treatment through the company-selected network, and all remained within that network for the length of their treatment.

Safety

None of the interviewees perceived that the existence of the carve-out had resulted in increased safety or reduced injury rates compared to the standard for this kind of project. The existence of a safety committee and a common safety policy was considered the usual practice on large projects of this type (Dixon 1997). According to the ombudsperson, the project remains below the national average for lost time accidents and just above the national average for total incidence. At least early in the project, the National Building Trades representative was concerned that the accident experience was above average for similar construction projects.

Joint Labor-Management Workers' Compensation Committee

We were able to attend one of the meetings of the Workers' Compensation Committee. The issues discussed were related to problems with medical services providers, the discussion of procedures for ombudsperson's review, 132(a) and serious and willful violations, and vocational rehabilitation procedures. There were presentations by the ombudsperson and reviews of ADR mediation sessions to date, injury statistics and incidence rates, list updating of medical providers and claims procedures manuals.[5] We witnessed the consensual elimination of one doctor from the list of qualified medical evaluators because he did not report timely as outlined in the Labor Code, which effectively held up an injured worker's benefits. We also saw discussion of the quality and timing of medical reports from one large HMO.

Management interviewees felt the existence of the PLA and the ADR had improved communication and labor-management cooperation. The safety committee and the Joint Labor-Management Workers' Compensation Committee were both institutions where union and management representatives met frequently and discussed issues and problems. The close contact and the incentives to both parties set by the job referral system are factors that seem to explain a relatively high degree of communication. This was confirmed in our interviews with union representatives.

Benefits

None of the interviewees thought that workers received lower indemnity benefits under the ADR process than the statutory system. All of them mentioned the quicker payments of the compensation. For example, Sharlene Horn said, "Some cases initially go on Claim Delay but with assistance from the Ombudsperson, often the decision can be made quicker because of access to the parties involved. The circumstances of the injury can be evaluated quicker and a decision often made within 1 day of a delayed claim. Many employers want to delay all claims so educating them is important in relation to timely benefit delivery."

However, except to the extent that the benefits might be delivered more quickly, none of the respondents raised the possibility of expanding indemnity benefits for workers who were disabled. These workers were very highly paid given the mandatory overtime (60-hour weeks). None of the union representatives interviewed felt that workers were receiving lower benefits as a result of the carve-out.

CONCLUDING OBSERVATIONS

The ESRP carve-out was formed with the hope of reducing workers' compensation costs on a very large construction project. The combination of a PLA with a carve-out made it attractive for both unions and the project owner to agree to set up the program. Employers benefitted from the no-strike clause in the PLA and unions benefited from the restrictions on nonunion labor. Employers and injured workers were expected to benefit from quicker return to work due to the ADR process, which facilitated dispute resolution. Our interviews showed a high degree of satisfaction with the program. Actual cost savings from the project were difficult to measure at this time.

Notes

1. The Operating Engineers' locals did strike during the period of ESRP construction. However, the 11-week strike did not affect the dam construction. Without

the no-strike clause, this strike would have shut down nearly all work on the project.

2. Several interviewees commented that an additional incentive to establish a PLA was the opportunity to negotiate a drug testing protocol (Southern California Associates 1994). The Ontario Airport construction project, which was similar in many ways, was not handled under a PLA and thus did not have drug testing. The safety manager on the Ontario Airport project felt that this was a major weakness in controlling safety risks at Ontario (Stringer 1997).
3. Hartford's wrap-ups include the construction of the Ontario Airport in California among several other projects in other states in which Parsons is also the general contractor.
4. Larry Gallagher made it clear that these were just estimates since there was no experience against which to estimate the impact of carve-outs.
5. MDW Workers' Compensation Committee Meeting. June 12, 1997.

6
The National Electric Contractors Association/International Brotherhood of Electric Workers Carve-Out

The National Electric Contractors Association (NECA) and the International Brotherhood of Electric Workers (IBEW) have been operating a carve-out since 1994. The carve-out covers approximately 10,000 of the 38,200 electricians in California and all of the IBEW locals are participants in the agreement. About 260 contractors are members of NECA and are covered by the carve-out (Menicucci 1997).[1]

HISTORY OF THE NECA/IBEW CARVE-OUT

The origins of the NECA/IBEW carve-out go back to 1961 when a group of NECA contractors formed a workers' compensation safety group—NECA West. This group formed to help members improve safety and to permit employers to negotiate like very large employers for workers' compensation rates below the regulated level.

Thus, the safety group had in place an organizational arrangement for jointly negotiated workers' compensation and met the minimum requirements of annual workers' compensation premiums of at least $2 million. This greatly facilitated the establishment of a carve-out agreement. The NECA/IBEW carve-out began its formal existence on October 1, 1994, when the ADR agreement was signed. The safety group had a long-term relationship with California Casualty, which was chosen as the insurance carrier.

The promoters of the carve-out had the task of signing on NECA contractors and the IBEW locals in California. According to Bob Menicucci, owner of ARC Electric and Chairman of the carve-out, it was a

difficult task. The union wanted to share in any cost savings, and the employers needed to be convinced that they would actually save money. Another issue in the initial debate was to define the list of authorized medical service providers. This was an important issue since previously workers had to go to doctors chosen by the employer, and the union wanted to allow workers to choose their doctors (Cake 1997). According to Robert Menicucci, the union finally decided it would be in their interest to join because their members would get back to work sooner. Menicucci said, "I think the main point was returning the men back to work sooner. These guys were making close to $50 per hour in wages and fringes. If they're not working for 5, 6 months, and they're just getting workers' compensation, that's only $250 or $300 a week.[2] So the goal was to get the employees back to work. Get rid of all these nuisance claims. Get rid of these lawyers that wouldn't answer a phone call. And I think that was the main issue in selling the contract to them. Also, I think all the IBEW locals signed up because they didn't want to be known as the only local union in California not to go along with a good program" (Menicucci 1997). This view was confirmed by Chuck Cake, Business Manager of the International Brotherhood of Electric Workers (IBEW) Local 340 in Sacramento, and secretary of the carve-out. Cake also noted the union hoped to reduce costs enough that it would be possible to increase indemnity benefits.

A factor that impeded development of the carve-out, according to Chuck Cake (1997), was that many of employers and union business agents did not want to join the carve-out because it would mean breaking long-standing relations with their insurance carrier, insurance brokers, and lawyers.

Despite these impediments the NECA/IBEW has been the most successful multi-employer/single trade carve-out in California, and probably the nation. All 23 locals in the state joined the agreement. Half of the 500 NECA contractors joined, representing 95 percent of the NECA West Safety Group. Overall, approximately 10,000 of the roughly 20,340 union electricians in California (IBEW 2001) were covered by the carve-out. No other multi-employer/single trade carve-out has achieved as much as a 5 percent penetration of the employer or union market.

The board of trustees of the Workers' Compensation Fund set by the agreement negotiated the group insurance coverage for all employers in the carve-out safety group. In addition, very large electrical contractors (premium in excess of $250,000/year) could opt into the carve-out while remaining separate from the safety group. As of May 1998, five employers had created "stand-alone" carve-out arrangements using the same structure negotiated by NECA West Safety Group.

The union and management associations negotiated the carve-out addendum to the CBA. This addendum established a Workers' Compensation Trust Fund to fund the ombudsman activities and the administration of the ADR program. The employers paid the fund a yearly contribution of an additional 2 percent of their workers' compensation insurance premium, about $60 per full-time employee per year (IBEW/NECA 1994).

The agreement also established a board of trustees with three members representing NECA, and three members representing the union. In case of deadlock, the matter in dispute was to be referred to the American Arbitration Association, although no matters have been. Technically, stand-alone employers could establish different agreements; however, all were operating under agreements identical to those for the NECA West contractors and operated under the board of trustees.

The Board of Trustees of the NECA/IBEW Trust Fund had the power to appoint the administrator and ombudsman of the fund. They chose Richard Robyn, President of American Ombudsman Enterprises, to serve as both the administrator and ombudsman. The administrator managed the paper flow, the filing system, and kept track of all the processes within an individual file. He also corresponded with the arbitrators, mediators, and raters, and he sent letters of explanation to the workers regarding qualified medical examiners (Robyn 1997). His ombudsman duties will be described later in this chapter.

LABOR-MANAGEMENT SAFETY AND HEALTH COMMITTEE

The NECA Vice President for District 9 and the IBEW International Vice President for District 9 each appointed three members to this Labor-Management Safety and Health Committee. The committee participated in advising the parties on the implementation of safety programs.

Preferred List of Medical Services Providers

All medical and hospital services required by employees subject to the ADR agreement as the result of compensable injury were provided by members of a preferred list of medical service providers. This list included the local health and welfare trust preferred-provider network, a list selected by the employer of health care professionals and facilities, and any physician designated by a worker prior to the date of injury (predesignation). The board of trustees for the NECA/IBEW Workers' Compensation Trust Fund could change the list at any time. Any health care professionals not listed on the approved list of authorized providers could be submitted to the board of trustees for review and inclusion. In case of an emergency, when no authorized provider was available, the employee could seek treatment from a health care professional or facility not otherwise authorized by the agreement.

Thus, employees had more choice about the treating physician for the first 30 days than they would have under the state system (except for the very small number who predesignated under the state system[3]), including the option of using their regular physician. At the same time, the carve-out limited employees to one change of doctors after the 30-day period. In the state system, the worker has full choice of doctor after the first 30 days in nearly all cases.

Vocational Rehabilitation Providers

The parties to the ADR agreement developed an exclusive list of vocational rehabilitation providers. The Board of Trustees of the NECA/IBEW Workers' Compensation Trust Fund could make changes, including additions and/or deletions at any time.

Workers' Compensation Insurance Carrier

The board of trustees selected the insurance carrier. Originally, California Casualty acted as the insurer for carve-out employers that did not "stand alone" (i.e., did not choose their own insurance carrier). At the time of our interviews, the insurance was handled through Arthur J. Gallagher & Co., an insurance broker. For the current policy year, starting October 1, 1997, the insurer was Ulico Insurance.

All payments that were required to be made by the employer, pursuant to the agreement and in accordance with California law, should have been made by its workers' compensation insurance carrier. The employers who decided to opt-in the carve-out (i.e., were signatories of the ADR agreement) and whose annual workers' compensation premium was $250,000 or more could stand-alone. The employers whose annual workers' compensation premium was less than $250,000, had to join a safety group to participate in the carve-out. At the time of our interviews, they all had the same insurer. However, there was a question concerning whether this was required by statute or not (Lopez 1997). The employer had the option of suspending the agreement on projects where the owner, developer, or general contractor supplied project wrap-around insurance that included workers' compensation insurance.

Alternate Dispute Resolution Process

The ADR agreement signed between NECA and IBEW establishes a three-stage dispute resolution system that includes an ombudsman, mediation, and arbitration. As of August 1998, there had been approximately 450 disputes in which the ombudsman had been involved. Eleven of them had moved to mediation and none to arbitration.

Ombudsman

The NECA/IBEW Workers' Compensation Trust Fund selected and paid the ombudsman. Upon request the ombudsman assisted injured employees in attempting to resolve disputes with the workers' compensation insurer or employer. If the issue was not resolved to the satisfaction of the employee, the ombudsman could, upon request of

the employee, assist him or her in filing a request for mediation or arbitration related to alleged work-related injuries.

Mediation and Arbitration

Mediators and arbitrators were assigned by the trust from an approved list of mediators. The mediators had to be experienced and knowledgeable in the workers' compensation industry. All mediations to date have been carried out by former Workers' Compensation judges.

The mediator or the arbitrator could, at his or her sole discretion, appoint an authorized health care professional to assist in the resolution of any medical issue. The insurance carrier pays the cost of this health care professional, unless voluntarily paid by the employer.

Neither party was permitted legal counsel at mediation. The fact that an employee or employer representative or its workers' compensation insurance carrier's representative had legal training or was a licensed attorney did not bar him or her from participation in mediation unless he or she sought to participate on the basis of a lawyer-client relationship (NECA/IBEW ADR Agreement Article IV). This provision was not intended to limit any party's right to obtain legal advice. Any party had a right to legal advice at such party's own expense. The participation of legal counsel was limited to the arbitration.

The arbitrator had to have experience and be knowledgeable in the workers' compensation dispute process and had to have been at one time a certified specialist in workers' compensation law or a California Workers' Compensation Judge.

DISCUSSION OF NECA CARVE-OUT

Employer Perspective

Interviews with representatives of the employer side in the ADR suggested that expectations on cost savings were the main motivation to set up a carve-out. The generalized perception that abuses in the statutory system increased the employer's cost and premiums for workers'

compensation provided the incentive to set up an ADR system and a restricted list of medical and rehabilitation providers.

In the employers' opinion, contractors opting for the carve-out had experienced significant workers' compensation insurance premium reductions compared to what they would have obtained without the agreement. We could not get employers to cite solid figures of the percentage savings, but all interviewees pointed out that they were large enough to make it worthwhile to participate in the agreement. Officers and trustees of the carve-out were concerned that the change to an open rating system in the workers' compensation insurance industry that went into effect in the beginning of 1995 was eroding the relative advantage of the carve-out. The premium rates charged all employers had gone down, and insurance companies had been selectively reducing their rates in aggressive competition for low injury rates employers (Englehart 1997). Both employers and union representatives mentioned that "predatory" pricing practices by the insurance companies could tempt employers to leave the agreement, lured by lower short run premium rates. However, our data indicate that participation by NECA employers in the carve-out has increased gradually and the subsequent addition of two of the largest electrical contractors in the state as standalone members has substantially expanded the number of covered employees.

In general there was satisfaction on the employer side with the evolution and performance of the ADR system. Employers also felt that workers were satisfied with the ADR agreement. Robert Menicucci pointed out, "My personal opinion is that they feel it's their own program and it is benefiting them. They will not abuse a program that is developed for their benefit, and they see this as being developed for their benefit" (Menicucci 1997). In part this expectation by employers of employee preference for the carve-out was based on the expectation that the carve-out would significantly improve the quality of the medical services that workers receive when injured. Two aspects were thought to influence such an outcome. 1) The existence of a closed list of medical providers reduced the scope for collusion between lawyers willing to increase litigation and doctors willing to "game the system," when compared to the statutory system (Menicucci 1997). 2) By allowing workers to use their personal doctor from the Health and Welfare Trust for occupational injuries, the quality of and satisfaction with

medical care might improve (Menicucci 1997). A wider choice of physicians during the initial 30 days of treatment was expected to increase workers' satisfaction and trust.

At the same time, employers expected to cut costs by limiting later medical treatment on the small number of expensive cases to employer preferred providers and union HMOs. Employers felt such care was likely to be less expensive and extreme than if delivered by a doctor selected by an attorney.

The elimination of lawyers and litigation at the beginning of a dispute was the main vector mentioned by interviewees by which the ADR exhibited significant advantages compared to the statutory system. This was expected to be accomplished through three improvements.

1) By restricting the role of the legal counsel early in the ADR-process, issues could be resolved quickly without the escalation thought to be part of the adversarial process.

2) By reducing the possibility of collusion between lawyers and doctors, medical treatment duration would not be artificially extended either to support larger indemnity demands or for the direct enrichment of providers.

3) By stressing communication among the parties involved, with the assistance of the ombudsperson, parties were more likely to reach mutually agreeable solutions.

During the carve-out's start-up, problems arose because of an initial lack of awareness of the ADR by some parties. One issue was the lack of awareness among attorneys in California of the scope of ADR within the carve-out. The workers' attorneys sometimes tried to get the claim into the state system, and the ombudsman tried to get it into the ADR. The board of trustees tried to solve this problem by hiring an attorney who represented the board and explained to the other attorneys the ADR process and the legal issues involved.[4] This lack of awareness of the new procedures extended to the union locals. Workers we interviewed contended that business managers at the local level were generally unaware of the carve-out procedures and often recommended that the worker seek an attorney.

During the course of our study, the role of the ombudsperson within the NECA/IBEW carve-out evolved substantially. Initially, the ombudsperson did not communicate with the worker until the worker first contacted the ombudsperson with a question or problem. As the carve-out matured, the ombudsperson's approach evolved into a more proactive mode of contacting each worker after notification of a disabling injury. This initial contact involved communication of the ombudsperson's role, information on the workers' compensation system, and help with any initial problems. The ombudsman, Richard Robyn, has subsequently been hired to act as ombudsman on the Lawrence Berkeley Laboratory/National Ignition Facility, a large construction project carve-out in Northern California. Robyn has introduced the proactive ombudsperson model on that project.

None of the interviewed employers were able to identify aspects of the carve-out that would improve industrial safety compared to the statutory system. Mike Engelhart suggested that, under the carve-out, insurance companies became a little more involved in advising and helping to improve safety, but he was not sure if there had been a significant difference in terms of safety. It seemed to him that the insurance companies' safety people were doing the same practices as before. He also argued that there had been not many changes in terms of the safety programs induced by the carve-out. In fact, NECA West had had a safety program, as required by statute for safety groups, long before the ADR was implemented.

Worker Perspective

We interviewed five injured workers to better understand if the carve-outs were functioning in the manner the ADR addendum stipulated. We asked the ombudsperson to identify workers who had disputes that had resulted in them filing for mediation or arbitration. The workers were chosen based upon suggestions made by the ombudsperson. The ombudsperson first contacted the workers to get approval for our interview. Thus, the sample of workers we interviewed was biased towards those individuals who had "tested" the system. We did not interview any workers who did not have a dispute or whose dispute was rapidly and successfully handled by the ombudsperson. Because

the point of the ADR is to avoid mediation, our interviewees are an extremely unrepresentative sample.

All of the interviewees were males injured during 1995–1996. Four of the electricians were in their early fifties and one was in his thirties at the time of injury. The older electricians had more than 20 years in the trades and the younger had 13 years of experience.

None of the electricians we interviewed knew he was covered by a carve-out prior to injury. The ombudsperson did not know how to address this problem because "the injured worker is not interested in the information [about the carve-out] until they're injured" (Robyn 1997). After being informed by the insurer that they were covered by a carve-out, three of the electricians called their local union halls to get information about the carve-out. However, no one at the local knew about the program.

We heard no concerns about the quality of care for the treatment of the electricians' injuries. Although employee choice about medical care expanded under the carve-out, four of the five workers interviewed used an employer-selected physician or clinic for their treatment. Consequently, their treatment was identical to the treatment they would have received if the employer had not been a carve-out participant (unless the company improved the quality of its designated service provider when employee choice expanded).

Each of these injured workers had a complicated claim, and each contacted one or more lawyers. In each case they pursued their claims until the point when the lawyers they contacted advised them to drop the matter, at which time four out of the five injured workers had received substantial benefits and had their claims resolved to their satisfaction.

However, each of those four was concerned that they may have been able to get more in the traditional system. Every electrician expressed a high degree of satisfaction with the ombudsman. They all felt confident in his ability to inform them of their rights. None of the electricians actually ever met Robyn in person as all contact was conducted over the phone. In all of the interviews there was a tension between the workers' respect for the ombudsperson as a neutral and the desire for someone to play the role of an advocate, to "fight" or "be more aggressive" on their behalf.

Ombudsperson

Richard Robyn is a former Workers' Compensation Judge who has practiced law since 1970. Prior to his appointment as the ombudsperson, the trustees of the carve-out asked Robyn's help in drafting their application to the DWC for the authorization to become a carve-out. He also advised the parties on the draft of the ADR agreement. Robyn took the job of ombudsperson on the condition that the program function essentially the same as the state system but shortening the time frame for settling disputes.

The ombudsman worked part time for the trust. Robyn saw his role as, "trying to help the parties move through the process of a workers' compensation system—provide them with information, suggestions, so that they can make decisions. I certainly give my opinion when I think one party is being unreasonable under the circumstances. I would say most of my discussions are in the form of questions as to why the insurance company may be doing this, and getting an explanation from them, and explaining their explanation to the worker so that he can understand it" (Robyn 1997).

Robyn did not have formal medical training. However, he pointed out that it was advantageous for an ombudsperson to know the medical field, "You've got to have some type of experience with the medical profession. I think it is necessary that you be able to read a medical report carefully and try to understand it and see if it is reasonable and the conclusions are rational. And in the workers' compensation system you want the end conclusion to meet the substantial evidence test. Thus, you need to have an understanding of what a legally sufficient medical report looks like, and certainly a medical background would help with that" (Robyn 1997).

The ombudsperson reported that he always told the workers that they could hire a lawyer to represent them but an attorney could not participate directly at the ombudsperson stage. He also mentioned that on occasion he had affirmatively recommended that an injured worker consult an attorney (Robyn 1997). The workers were also advised that if they hired an attorney, went to arbitration, and were determined to be the prevailing party, they would receive their attorney's fees over and above their award. This is different from the state system in which the injured worker almost always pays his or her attorney fees out of the

settlement. Robyn pointed out that the ADR process includes the issues of wrongful termination 132a, and serious and willful claims. In these cases, the employee was referred to an attorney for litigation of the claim (Robyn 1997). Third-party claims were also referred to an attorney for litigation outside the ADR system.

Robyn identified the best features in the ADR process as the compression of time spent dealing with and resolving issues, resulting in the quicker delivery of compensation and benefits to the injured worker. He also included the involvement of the injured worker in a proactive situation, where the worker learned as much as possible about his situation, his injury, and would communicate well with the doctor. If problems arose with the doctor, the treatment, or the medical report, the worker had someone (the ombudsman) to discuss them with and help work them out. However, Robyn said the most common problem he had seen was, "The timeliness of expense—travel expense reimbursements—checks not arriving when they are expected. Those little checks, for 35 or 40 dollars are very big money to an injured worker when you don't have an income, and you're shelling out that kind of money to make various appointments" (Robyn 1997).[5]

The major weaknesses that Robyn found in the ADR system were the absence of standards with respect to record keeping and the lack of information about the whole process that injured workers had prior to the injury. The ADR system tried to make up for this last issue after an injury occurred,[6] but Robyn thought that most of the problems happened because of this lack of information. In his perception, the local union officers seemed to be, on average, very poorly informed about the carve-out and the ADR process. Some did not want to be part of it. Others had not educated their staffs about it (Robyn 1997). However, this problem had improved by 1998 and continual improvement was expected.

Another source of frustration was the timeliness of the doctors in turning over medical reports. The slow production of reports slowed down the delivery of ombudsperson services and, in the end, the injured worker suffered. According to the ombudsman, there was a need for the claims examiner, the nurse case manager, or the ombudsman to do an immediate follow-up with the doctors to determine the timing of the medical reports. Unfortunately he felt the doctors were often quite dilatory and did not respond to follow-up requests. A

related issue was to get the treating physicians to come up with treatment plans, "One of the most common deficiencies I see with doctors is they don't set out a treatment plan. If you are going to treat somebody over a period of time, it seems to me that you would have an idea of what you are going to treat them for and that you ought be able to write a report that states the course and length of treatment. [This lack of information] is where disputes over medical issues come into play, because the insurance company wants to see the medical treatment come to a conclusion. But if the doctor doesn't ever indicate that it's going to come to an end, then they get concerned, they want to cut off the treatment and send the employee to another doctor" (Robyn 1997).

CONCLUDING OBSERVATIONS

The NECA/IBEW carve-out has been the most successful program in California in terms of recruiting employers and union locals to join. Part of this success was driven by the pre-existing safety group that had experience in negotiating workers' compensation arrangements with insurance companies. The NECA/IBEW carve-out has substantially benefited from its choice of ombudsman. They were able to hire an individual with immense knowledge of the workers' compensation industry who received no criticism from the injured workers we interviewed about their interaction with him. The president of the California Building Trades commented that the ombudsman is the linchpin that makes a carve-out work (Balgenorth 1997). In the two case studies we conducted we verified this statement by observing two well-qualified individuals performing their jobs to the satisfaction of injured workers. It remains to be seen how a carve-out will function with an ombudsperson that is not viewed favorably by injured workers with grievances. The forthcoming chapter will give a quantitative evaluation of cost savings and grievance reduction that can be attributed to the NECA/IBEW carve-out.

Notes

1. Members of the NECA West, the safety group, and members of the carve-out agreement were identified with the assistance of Ron Rinaldi, President of NECA West.
2 Temporary Disability payments are two-thirds of the injured workers' average weekly wage up to a maximum. These maximums have increased substantially from $266/week thereafter.
3. Approximately 4 percent of injured workers receive their initial treatment from a physician that was predesignated (California Workers' Compensation Institute 1998).
4. According to Robert Menicucci, the legal counsel to the board of trustees is provided by Mark Lipton, ". . . a very respected trust attorney who works for all the IBEW chapters welfare and health funds."
5. As indicated by the California Division of Workers' Compensation (1998), these types of problems are quite common. In 1997, for audited files, 21 percent had late first payment of temporary total disability, 31 percent had late first payment of permanent partial disability, and 16 percent had late subsequent indemnity payments.
6. Upon being notified of an injury, the ombudsman provides written information to the workers describing the ombudsman's role, the ADR process, and the worker's legal rights, including the role of an attorney in the ADR process. Upon being hired, workers receive the same information as required by statute.

7
Quantitative Analysis of the NECA/IBEW Carve-Out

This chapter presents an analysis of data from the first two years of operation of the NECA/IBEW carve-out. We compared the record of carve-out participants with their experience prior to formation of the carve-out. We then compared these findings to changes over the same period in the experience of NECA members who did not join the carve-out and with the experience of non-electricians at carve-out employers. Non-electricians at carve-out firms were not covered by the agreement. Comparing both participants and nonparticipants over time is crucial because participants in the carve-out were not chosen at random. An evaluation of outcomes without a comparison group(s) could misleadingly find that carve-outs are beneficial or harmful based on pre-existing differences in the carve-out and non-carve-out samples. Comparing rates of change serves as a control for unobserved differences between employers who opted for the carve-out and those who did not. Also, without comparison groups, pre–post comparisons might interpret system-wide or industry trends as the impact of carve-outs. As described below, all of the tests are subject to concerns regarding small sample sizes and the possibility that carve-outs may have different patterns of claims filing.

PROBLEMS WITH EARLY ANALYSIS OF CARVE-OUTS

Early enthusiasm for carve-outs was based on experience reported for the Pioneer Valley Project in Massachusetts (Chapter 1) and the reports on California carve-outs published by the California DWC. These earlier evaluations suffered from methodological limitations that could lead to biased results. For the Pioneer Valley project, the pre–post improvement may be the result of commonly observed improvements in safety measures on the later phases of a large construction

project as the type of work becomes less hazardous. Both studies' conclusions are limited because the carve-out claim experience is viewed for substantially less time after injury relative to the comparison groups. For the Pioneer Valley study, pre-carve-out claims were evaluated at an average maturity of 20 months, and post-carve-out claims were valued at an average maturity of 12 months. The DWC studies evaluated data at the end of the calendar year in which the injuries were reported and compared these with fully developed claims in similar industries (Table 7.1).

Unfortunately, estimates of future costs as reported in incurred data often rise substantially over time. According to our analysis of data from the Self-Insured Plans Unit of the DWC, incurred indemnity costs double, medical costs rise 43 percent, and total costs rise 71 percent from the end of the calendar year when the injury occurred (the measure the DWC report used) to fully developed experience at the end of the fifth calendar year after the injury. Thus, the approach used by the DWC will substantially understate total costs and overstate savings.

Both previous studies involved data gathered during a period of rapid reduction within the overall workers' compensation systems in claim rates, litigation frequency, and many cost measures. Comparisons over time that do not have control groups will incorrectly attribute these improvements to the effect of carve-outs.

Table 7.1 Incurred Losses in Carve-Outs versus "Expected" Losses[a]

Category	1995	1996	1997
Incurred losses at carve-outs per $100 payroll	$2.31	$2.24	$2.67
"Expected" losses per $100 payroll based on non-carve-out workers' compensation costs of all California insurers reporting construction occupations in recent years	$3.92	$4.31	$5.87
Incurred losses at carve-outs / expected losses	0.59	0.52	0.46

[a] Data are valued as of December 31 of the calendar year in which the injury occurred and reported to DWC on or before March 31 of the following year. Data do not include loss adjustment expenses.

SOURCE: California Division of Workers' Compensation 1996–1998.

The same problems arise in the data on the ADR process and frequency of disputes. Many disputes occur long after the date of injury. Early DWC reports looked at the incidence of disputes very early in the life of claims. In addition, no data were presented to indicate how often disputes occurred on similarly severe claims in the statutory system during a comparable period. For these reasons, a more rigorous approach using difference-in-differences methodology and control groups was undertaken to evaluate the impact of carve-outs on employers' costs and injured workers' benefits.

CONTROL GROUPS

All employers in the analysis were unionized electrical contractors who were members of the NECA. Of the approximately 500 NECA contractors in California, about half joined the carve-out and the remainder opted out.

The only electricians covered by a carve-out were those working at NECA employers who had signed the carve-out agreement. We compared the experience of electricians at NECA employers that joined the carve-out with two control groups.

The first control group was unionized electricians at NECA employers who did not join the carve-out. These groups are very closely matched in terms of skill, pay, job duties, and injury risks. They differ in that unionized electricians at NECA employers in the carve-out were subject to the carve-out arrangement, while unionized electricians at NECA employers outside the carve-out were subject to the usual statutory workers' compensation system. This allowed us to control in the pre–post comparison for system-wide trends in the workers' compensation system and industry-specific trends that led to changes over time, independent of the impact of the introduction of carve-outs.

The second comparison group was non-electricians at carve-out employers. This group controlled for changes in the firms' experience after joining the carve-out that would differ from non-carve-out firms. At carve-out firms, only union electricians were covered by the carve-out. All other workers at these firms were covered by the usual statu-

tory workers' compensation system. Consequently, differences over time at carve-out firms that are the result of firm-specific characteristics should have similar effects on both union electricians and all other employees, while the differences between these two groups in the pre–post comparison should again be the result of the effect of carve-outs.

Applying the difference-in-differences methodology to these control groups allows us to analyze the effect of carve-outs on outcomes that a time-series or cross-sectional analysis might miss. For example, if the injury rate of electricians in the carve-out was ten prior to the carve-out and five after the carve-out was started, we observe a 50 percent reduction in injury rates that might be attributable to the carve-out. However, this time-series result could be attributable to other factors besides the carve-out. Another misleading statistic could result from looking at a cross section of injury rates among carve-out electricians and non-carve-out electricians. Suppose we observe that injury rate was five in the carve-out and eight outside the carve-out. Again, we might mistakenly conclude that electricians inside of carve-outs are better off due to the existence of the carve-out. The difference-in-difference method avoids these problems by analyzing the starting and ending points of our control groups relative to the carve-out. For example, if injury rates went from ten to five in the carve-out and twenty to eight outside the carve-out, it would be difficult to conclude there was a correlation between the carve-out and reductions in injury rates.

HYPOTHESES

This chapter analyzes a number of outcomes of carve-outs, including reported injury rates, medical and indemnity costs, and litigation frequency. Before analyzing these outcomes, we look first at whether the employers who joined the carve-out were representative of all NECA members.

Selection of Carve-Out Employers

Employers opting to join the carve-out may have differed in characteristics such as the type and seriousness of injuries or frequency of disputes related to injuries. Employer choice of insurer or claims administrator may affect the handling of claims in areas such as defense legal expenditures, attitude toward settlement of disputed issues, or the timeliness of dispute resolution. The difference-in-differences methodology highlights differences between employers prior to the formation of carve-outs, and it reduces the effect of this heterogeneity on measurement of the impact of carve-outs.

It is possible that safety-conscious employers were more likely to join the carve-out. This could occur because members of the group tried to exclude less-safe employers, because of the requirements of a safety group, or because the insurer attempted to discourage bad risks. If employers joining carve-outs differed in their safety records from those who did not join, then the difference-in-differences analysis will more accurately assess impact of carve-outs. Adjusting for the mix of occupations (known as "class codes"), the assumption of positive selection into the carve-out implies the following hypothesis:

H1: *Carve-out employers had better safety records as defined by claims frequency before joining the carve-out than the non-carve-out employers.*

Safety—Injury Rates

The experience at Pioneer Valley suggested that carve-outs could greatly reduce reported injury rates (see Chapter 1). The improvement could be due to better union-company cooperation on safety issues, fewer fraudulent claims, or elimination of the small portion of fraudulent plaintiffs' lawyers, doctors, and medical-legal evaluators from the process.[1] Conversely, the improvement could be due to fewer legitimate claims filed because of fewer employees having access to legal assistance.

Claim frequency declined rapidly in the statutory system around the time carve-outs were introduced. If carve-outs reduced reported injuries, comparing electricians at carve-out and non-carve-out employers can control for this system-wide trend.

Furthermore, it is possible that carve-out employers had faster or slower improvements in safety due to programs unrelated to the carve-out (e.g., if they were disproportionately likely to implement a company-wide safety program). If so, those programs should also affect non-electricians of those employers. We can measure electricians' rates of safety improvement relative to other employees as a control for such company-wide changes. This leads to the following hypothesis.

H2*: Electricians at carve-out employers have a greater rate of reduction in reported injury rates than either control group.*

Cost Impact—Medical and Indemnity Costs

Employer expectations for carve-outs were fueled by reports of large reductions in costs, for example the Pioneer Valley project and early DWC reports. Carve-outs were expected to control medical and indemnity costs through better case management, improved return to work, greater provision of modified or alternate work, additional control over the treating physician, and possibly by reducing medical treatment given to increase benefits. This reasoning leads to the following hypothesis.

H3: *Employers within the carve-out experience greater reductions in medical and indemnity costs as a percentage of payroll for electricians covered by the carve-out than for either control group.*

Dispute Resolution Frequency

One of the key motivations for carve-outs was the potential to reduce litigation and litigation-related costs. The ADR process was expected to prevent disputes and to facilitate dispute resolution. The ombudsperson was expected to resolve issues at the earliest stages, thereby avoiding problems that could lead to litigated disputes. Controlling the treating physicians and the evaluation process was expected to reduce medical treatment disputes, disputes over the level of permanent disability, legal expenses of parties, and medical-legal evaluation charges. Carve-outs were also intended to reduce the need for attorneys, partly through the role of the ombudsperson and partly through restrictions on participation by attorneys at early stages.

For comparison purposes, we make the strong and possibly unrealistic assumption that the mandatory settlement conference and hearing stages of the regulatory system can be compared to the mediation and arbitration stages of the ADR process.

If ADR reduces formal disputes, this strong assumption leads to the following hypothesis.

H4: *Electricians at carve-out firms have greater reductions in the frequency of litigation per claim, as measured by mediations and arbitrations in the carve-out period, than the control groups do as measured by mandatory settlement conferences and hearings.*

The assumption that mediation equals mandatory settlement conference and arbitration equals hearing is quite strong. To the extent that one process or the other costs less to initiate, workers, employers, or attorneys would be more likely to initiate a formal dispute. This would tend to make the more open process appear to have more disputes, holding other factors constant. In addition, the statutory system permits expedited hearings on some issues that do not have mandatory settlement conferences. In contrast, nearly all carve-outs require mediation as the first step if the ombudsperson cannot resolve the dispute. This could raise the frequency of the first stage of dispute resolution (mediation) in the carve-out while lowering the frequency of the second stage (arbitration) relative to the statutory system.

Dispute Resolution Cost

Early studies of carve-outs did not evaluate the costs associated with dispute resolution. However, expectations among the many parties interviewed for this project were that reducing the number of disputes, controlling the medical-legal process, and limiting attorney involvement would all work to decrease legal costs. This leads to the following hypothesis.

H5A: *Electricians at carve-out firms have greater reductions in the total cost of litigation per claim, measured by combined applicant and defense legal costs and medical-legal costs, than either control group.*

Controlling litigation cost was thought to depend in part on limiting the participation of lawyers. The NECA/IBEW carve-out, like most carve-outs reviewed, placed several restrictions on attorney par-

ticipation at the early stages of dispute resolution, suggesting the following hypothesis.

H5B: *Electricians at carve-out firms have greater reductions in the portion of cases represented by attorneys than do either control group.*

DATA

Cost and injury incidence comparisons were developed from WCIRB data submitted by insurers for the Unit Statistical Report and Individual Case Records.[2] The WCIRB is a quasi-public organization that collects data and publishes summaries to help the Department of Insurance set rates and insurers set premiums. Insurers are required by statute to report according to uniform standards. Data were released to the research team in a fashion that protected employer and employee identities.

Incidence and Cost Data

We report rates per $1 million exposure, where "exposure" equals the total payroll (excluding wage premiums such as overtime or shift bonuses) subject to premium in that occupation for the period of the policy up to one year. When the comparisons are with other union employees, exposure is an accurate measure of time at work—there is very little variation in hourly wages for IBEW locals across the state, especially across the two main employment areas, the Los Angeles Basin and the San Francisco Bay Area. Thus, changes in rates per $1million exposure capture changes in rates per full-time equivalent.

Insurance companies report data on five occasions, as valued at 18 months after the policy inception date—that is, 6 months after the annual policy ends—and at 12-month intervals thereafter (30, 42, 54, and 66 months). As indicated in the discussion at the start of this chapter, data on cost and incidence are sensitive to the timing of the reporting. To control for the issue of timing, the study used data reported at the third report level (42 months) for the 1992 and 1994 policy year claims and the second report level for the 1993 and 1995 policy year

claims. Adjustment was made to control for small differences in the ratio of 1992/1993 (pre-carve-out) and 1994/1995 (post-carve-out) exposure and claim frequency.

Employers primarily care about total workers' compensation costs or costs as a percent of payroll. Injured workers, in contrast, tend to care about benefits per injury. The two trend similarly (given the approximate stability in the relative rate of reported injury in the carve-out and comparison groups). Thus, when results favor one group for costs reduction as a percent of payroll, they will also favor that group for reductions in benefits per reported injury.

Adjusting for Change in Occupational Mix

The distribution of exposure among various occupations for each of the groups under study can change over time. For example, among electricians, the ratio of apprentices to journeymen may change. Among the non-electrician occupations, the ratio of office workers to laborers may change. These changes will affect expected claims frequency and premium costs relative to exposure and average indemnity and medical costs per claim.

Different occupations or class codes have different premium rates that reflect the differences in expected losses. We adjusted for changes in the occupational mix by using the pure premium rates published by the Rating Bureau. For each separate employer, we calculated an average premium rate for exposure under all class codes for both the pre-period and post-period of the carve-out. These averages are based on the premium rates published for the period beginning January 1994. Then the premium and claims frequencies for each employer for the post-period were adjusted to reflect the change in the distribution of exposure among class codes relative to the pre-period.

In practice, the mix of journeymen and apprentice electricians is similar at both carve-out and non-carve-out employers, both pre- and post-period. This constancy in both levels and changes supports the hypothesis that electricians in non-carve-out NECA members are a good control group.

In contrast, the occupational mix of non-electricians shifted during the period of this study to substantially fewer non-electrician crafts and relatively more clerical workers. The occupational shift would have

made carve-out non-electricians appear increasingly safe over time, which emphasizes the need for the adjustment that we perform.[3]

Litigation Frequency

The WCAB on-line system tracks all litigated and permanent disability claims except those that are adjudicated within the carve-out programs. For purposes of this evaluation, the relevant data are dates of application for adjudication, declaration of readiness, mandatory settlement conferences, hearings, continuances, and decisions. The on-line system keeps a record of all such events.

These data were obtained for the NECA employees with reported injuries for 1991 through 1996. The WCAB data was searched even for workers injured at carve-out employers after introduction of ADR processes, but this search was not expected to yield cases for carve-out related claims. Litigation information for the carve-out mediations and arbitrations was collected through telephone contacts with the NECA/IBEW ombudsperson and checked against available records.

Discussion of the Method

Our method implicitly adjusts for all factors that affect all employers in the state, as well as all factors that are time-invariant at an employer. Moreover, when we have data on individual characteristics such as occupation, carve-out, and non-carve-out, employers are quite similar. It is always possible that safety or other trends at carve-out participants would have differed from those at the control group even without the introduction of the carve-out. Nevertheless, although we do not have data on the many other company and individual characteristics that affect injury rates and workers' compensation outcomes, we are confident that our difference-in-differences methodology permits us to identify the effect of interest.

RESULTS

Selection of Carve-Out Employers

One motivation for using the difference-in-differences method is that it corrects for selection bias if employers opting to join the carve-out differed from those not choosing to join. To test for this selection, we examined the following measures of employers' experience with workers' compensation prior to formation of the carve-out: accident rates, experience modification, and premium.

Claims rates (Table 7.2) were slightly lower for electricians at NECA employers that joined the carve-out (4.43 claims per $1 million exposure) compared with employers that did not (4.96 claims, Table 7.2). This difference was statistically significant at nearly conventional levels ($t = 1.89$, $P < 0.06$).[4]

An employer's "experience modification" is calculated by the WCIRB to summarize the employer's recent history of workers' compensation costs and to assist insurers in adjusting premiums. The experience modification of the non-carve-out employers improved more quickly in the early 1990s. However, the average experience modification for carve-out employers was statistically indistinguishable from that of non-carve-out employers for the year 1995 (8.92 vs. 8.99). The experience modification for 1995 reflects the safety experience of the employers across all occupations for the years 1991–1993.

Premium data, a measure of the insurance underwriters' estimation of employers' safety, suggested that employers who opted to join the carve-out differed from employers who did not join. Premium rates for electrician class codes were significantly different for these two groups of employers (pre–post carve-outs percent of payroll, 0.0509 and 0.0334; non-carve-out, 0.0487 and 0.0298; $t = 2.46$). Reported premium may be affected by factors other than the safety expectations of the insurers. These data give mixed results regarding whether there is positive selection of systematically safety-conscious employers in the carve-out. At the same time, the higher premiums but better safety record of electricians at employers who would soon join the carve-out is strong evidence that it is important to control for unobserved hetero-

Table 7.2 Difference-in-Differences Results[a]

	Pre-carve-out	Post-carve-out	Change (%)	Absolute	Std. error of diff.	*t*-stat
Electricians (at carve-out firms)						
Claim incidence	4.43	3.27	–26.2	–1.16	0.264	–4.40
Medical incurred	$10,153	$9,711	–4.3	–$441	1,811	–0.24
Indemnity incurred	$14,491	$11,584	–20.1	–$2,907	2,565	–1.13
Electricians (outside carve-out)						
Claim incidence	4.96	3.83	–22.6	–1.12	0.261	–4.30
Medical incurred	$9,800	$9,874	0.8	$74	1,858	0.04
Indemnity incurred	$15,074	$14,030	–6.9	–$1,044	2,650	–0.39
Non-electricians (at carve-out firms)						
Claim incidence	2.78	2.27	–18.1	–0.502	0.240	–2.10
Medical incurred	$8,190	$5,216	–36.3	–$2.974	1,222	–2.43
Total indemnity incurred	$12,498	$9,642	–22.8	$2,844	2,341	–1.21

Difference-in-differences	Mean	Std. error	*t*-stat
Electricians: carve-out firms minus non-carve-out firms			
Claim incidence	–0.038	0.371	–0.102
Medical incurred	–$515	2,594	–0.19
Total indemnity incurred	–1,863	3,688	–0.50

Within carve-out firms: electricians minus non-electricians			
Claim incidence	–0.658	0.356	1.846
Medical incurred	$2,533	2,185	1.15
Total indemnity incurred	–$63	3,743	0.01

[a] All figures are per $1 million exposure, with adjustments for changes in occupational mix. ($1 million on exposure translates to roughly twenty full-time equivalent employees.)

geneity in analyses of carve-out effects by using the difference-in-differences methodology.

Safety

Electricians in the carve-out experienced a reduction in reported injury rates (claims per $1 million of exposure) of 26 percent from two years before carve-out startup to two years after it (decline significant at $P < 0.01$; Table 7.2). This rate of improvement was slightly, but not statistically significantly, better than the 23 percent reduction for electricians at the non-carve-out employers. Within carve-out employers, injury rates for non-electricians fell 18 percent, which is less, but again not significantly less, than for electricians at the same firm.

In results not shown, we looked separately at the incidence of claims that resulted in time off work. Union electricians showed statistically significant declines in disabling injuries. Rates of disability claims also fell faster (32 percent) for the carve-out electricians than for non-carve-out electricians (20 percent), but the difference was not statistically significant. The decline for carve-out electricians was significantly faster than for carve-out non-electricians (32 percent versus 15 percent, $P < 0.05$).

Looking at the most serious claims, those resulting in permanent disability, we again found across-the-board declines in the rate of permanent disability claims per $1 million of exposure. Though the decline for carve-out electricians was again more rapid than for the two comparison groups, the difference-in-differences comparisons are not significantly different.

Considering each of the three classifications of claims, carve-out electricians showed slightly greater reductions in the number of claims per $1 million of exposure. Although this is consistent with hypotheses that carve-outs can improve safety, the evidence is weak (a lack of effect also suggested by the case studies). In addition, other explanations have been proposed for the decline in claims reported, including the absence of attorney representation to inform the worker that a claim may exist.

Indemnity and Medical Costs

Carve-out electricians had greater declines in both medical and indemnity costs incurred as a percent of payroll than did electricians at non-carve-out employers. Electricians covered by the carve-out had smaller declines in costs than non-electricians at carve-out employers (who were not covered by the carve-out program). These results suggest that any declines for carve-out electricians relative to their non-carve-out electrician counterparts may have more to do with firm-specific characteristics, independent of carve-out programs. The evidence gives additional support for using difference-in-differences methodology to help control for such selection bias.

Incurred costs (what the insurer expects to pay out over the life of the claim) should be interpreted cautiously. To the extent that insurers factor in an *expectation* of a positive effect of carve-outs on the costs of claims, this is reflected in lower reported incurred costs. More time is needed to see if any such optimism affected insurers' reserving practices and whether the optimism was warranted.

We also evaluated paid data (not shown here) that are only available on the more serious claims. These individually reported claims included all permanent disability and a small number of costly temporary disability claims. These data were compared on the basis of average paid amounts per claim—the natural metric when looking for declining benefits (as hypothesized by many critics of carve-outs). The evidence for the effect of carve-outs from paid data was similar to that of incurred data. Average medical costs paid per injury declined slightly for injuries to carve-out electricians and also for non-carve-out electricians and for non-electricians at carve-out firms. While average payments differed across these groups in both periods, the proportional change between periods was virtually identical.

In contrast to medical costs, average indemnity payments rose for all three groups. This is consistent with statutory increases in benefit levels and with system-wide trends. Indemnity paid per disability claim was nearly identical for carve-out electricians as well as non-carve-out electricians for both the pre- and post-periods. The non-electrician occupations showed greater increases in indemnity paid per disability claim than electricians within the same carve-out firms (the difference was not significant). Changes in costs per injury for carve-

out electricians were consistently in the middle of the two comparison groups, emphasizing the lack of significance of any changes.

Paid benefits per claim grow rapidly as claims age and mature. Thus, if carve-out programs change the speed with which payments are made, they will affect the comparison between carve-outs and non-carve-outs at any point prior to the settlement of all claims. Speeding up (or slowing down) the payment of indemnity, for example, by settling cases more quickly (or slowly) will make it appear that carve-out costs are higher (or lower), even if total costs will eventually be the same.

In results not shown we examined the time required to return to work after an injury. Mean weeks of temporary total disability, conditional on an injury resulting in an indemnity claim reported through the individual case record, declined for carve-out electricians by 0.3 weeks. This decline was smaller than for non-carve-out electricians (2.9 weeks, difference-in-differences $t = 0.79$) and for carve-out non-electricians (12.5 weeks, difference-in-differences $t = 2.96$). Median weeks of temporary total disability rose for carve-out electricians but not for the two comparison groups. These findings provide no evidence for hypothesis that carve-outs would show a greater rate of reduction in time to return to work than non-carve-outs. This is consistent with the case studies.

Dispute Resolution Frequency

Table 7.3 presents data on the use of formal dispute resolution mechanisms. For the statutory system, these mechanisms include mandatory settlement conferences and hearings. For carve-outs, formal dispute resolution mechanisms are Mediation and Arbitration. Comparisons with carve-out non-electricians and non-carve-out electricians are given. For brevity, we discuss only the latter comparison group.

The number of mandatory settlement conferences/mediations and hearings/arbitrations held is small for both groups when measured as a fraction of claims, even three to four years after injury. However, the frequency of usage of the first stage of formal dispute resolution mechanisms was not significantly different in the carve-out and control groups. Because settlements reached by joint agreement at mediation

are generally thought to be superior to decisions imposed by a judge or arbitrator, this would suggest a positive effect from ADR.

Arbitration showed a different pattern. Workers in the carve-out did not have disputes move beyond the more informal mediation stage into arbitration, while a roughly constant 7 to 8 percent of cases proceeded to hearings in the statutory system.

In terms of injuries for carve-out electricians during the post-carve-out period, there was a surprising level of activity reported in the WCAB system. This included both mandatory settlement conferences and hearings reported for the same Social Security Number and date of injury. These cases were not included in the table. If these were included, the percent of carve-out claims with mediations or mandatory settlement conferences would have been 12.2 percent and the percent with arbitrations or hearings would have been 4.9 percent. There are a number of possibilities why carve-out claims might be adjudicated in the statutory system. The insurer and injured worker may have chosen to ignore the carve-out process or the employee might have challenged the carve-out process, which resulted in a mandatory settlement conference or hearing; or a cumulative injury may have involved more than

Table 7.3 Use of Formal Dispute Resolution Mechanisms (as a percent of serious injuries, specifically, those individually reported claims where a social security number was reported to the WCIRB)[a]

	Pre-carve-out MSC	Post-carve-out mediations	Pre-carve-out hearings	Post-carve-out arbitrations/ hearing
Electricians (carve-out firms)	7.0	7.3	6.3	0.0
Electricians (NECA non-carve-out firms)	7.1	7.6	7.1	8.4
Non-electricians (carve-out firms)	18.3	1.9	6.1	5.6
Non-electricians (NECA non-carve-out firms)	12.8	7.5	8.3	9.5

[a] These data refer to the dispute mechanisms involving individually reported claims that also included the Social Security Number of the injured worker, allowing matching to WCAB databases. MSC = mandatory settlement conferences, the first stage of formal dispute resolution in the statutory system. Hearings are the second stage of formal dispute resolution in the statutory system.

one employer, one of whom was not in the carve-out, and the employers and worker jointly agreed to adjudicate the claim within the statutory system.[5]

These data should be viewed cautiously. Mandatory settlement conferences are not directly equivalent to mediations, and hearings are not directly equivalent to arbitrations. We make these comparisons solely to get a qualitative feel for whether dispute rates have increased or decreased dramatically. Moreover, only a small percentage of the injuries lead to disputes, so we do not have a large enough sample to make meaningful comparisons of statistical significance. Finally, to the extent that the carve-out has increased or decreased reporting of controversial claims, or decreased or increased reporting of claims that would not lead to dispute, the carve-out dispute rates are biased up or down.

Introduction of the ADR mechanism and increased control over medical-legal evaluators under the carve-outs was anticipated to reduce legal and medical-legal costs. This was expected to be the product of both fewer disputes and lower transaction costs when disputes arose. Average total dispute resolution costs—legal costs as well as medical-legal costs for both applicant and defense —fell 6.5 percent for carve-out electricians (Table 7.4). The rate of reduction in dispute resolution costs was not better for carve-outs, given that the non-carve-out electricians experienced a 14.5 percent decline and non-electricians at carve-out firms experienced a 38 percent decline. Thus, we found no support for the hypothesis that legal costs are lower in carve-outs.

Interestingly, the total legal cost for carve-outs at this stage of claim maturity is under $50,000 for all claims per year. It is unlikely that reducing dispute costs will ever suffice to pay for maintaining ADR unless there are other benefits to employees or employers.

The NECA/IBEW carve-out imposed certain restrictions on the involvement of attorneys at various stages in the claim resolution process. The ombudsperson was meant to replace some of the informational aspects of the attorney role and to resolve minor disputes that might have led to the applicant hiring an attorney. The NECA and IBEW intended these services to reduce legal costs. While total legal costs were not reduced within the carve-out relative to the control groups, the fraction of disability claims represented by an attorney declined significantly faster for carve-out electricians than for non-

Table 7.4 Dispute Resolution Cost of Disability Claims (per $1 million of exposure)

	Pre-carve-out	Post-carve-out	% Change	Difference	Std. error of diff.	*t*
Electricians (at carve-out firms)						
Average legal cost (paid)	$880	$823	–6.5	$57	269	–0.21
Fraction of claims represented	0.374	0.193	–48.4	–0.181	0.049	–3.67
Electricians (outside carve-out)						
Average legal cost (paid)	$1,525	$1,305	–14.5	–$221	257	–0.86
Fraction of claims represented	0.355	0.320	–9.9	0.035	0.041	–0.87
Non-electricians (at carve-out firms)						
Average legal cost (paid)	$1,449	$897	–38.1	$551	432	–1.28
Fraction of claims represented	0.384	0.318	–17.2	0.066	0.081	–0.82
Difference-in-differences				Mean	Std. error	*t*
Electricians: carve-out firms minus non-carve-out firms						
Average legal cost/disability claim				$163	372	–0.44
Fraction of disability claims represented				–0.146	0.064	–2.28
Within carve-out firms: electricians minus non-electricians						
Average legal cost/disability claim				$494	372	0.44
Fraction of disability claims represented				–0.115	0.095	–1.21

carve-out electricians. The difference was large relative to the non-electrician control group, but the small number of presented claims in the control group sample did not lead to a statistically significant finding at conventional levels.

DISCUSSION

These results are quite preliminary, covering only 180 serious—that is, individually reported—injuries within the carve-out. The results may be sensitive to differences in injuries leading to claims and claim maturity, the speed of closure for costly cases, and to the appearance of a few high-cost claims. Nevertheless, the general pattern is fairly clear.

There is evidence that employers joining the carve-out had better safety records than did the non-carve-out electrical contractors. Claims frequency relative to exposure was lower across injury types, but premiums were significantly higher and experience modification levels were similar. To the extent this weak evidence is correct, that carve-out employers were systematically different before joining the carve-out, then valid comparisons among carve-out and non-carve-out participants require the difference-in-differences methodology used here.

The evidence for any effect of carve-outs on safety is weak. Claims frequency relative to exposure declined slightly more rapidly among carve-out employers, an effect more pronounced for more serious injuries. While none of these comparisons was statistically significant, the sign of the differences was consistent, with slight improvements in safety or slightly reduced reporting of injuries.

What is clear is that declines in frequency of claims were large for all groups of employees for the policy years under study. This trend emphasizes that analyzing carve-outs using a pre–post comparison requires a control group and the difference-in-differences methodology used here. Because the workers' compensation system went through massive changes in California in the mid-1990s, failure to use a control group would lead to a serious overestimation of the carve-out's effects on safety.

There is no evidence to suggest that carve-outs reduced medical or indemnity costs. Incurred costs as a percentage of exposure declined

for all subgroups for both medical and indemnity costs. An exception was non-carve-out electrician medical costs, which were essentially unchanged. Rates of declines in incurred costs for electricians covered by the carve-out always fell between those of non-carve-out electricians and non-electricians within carve-out firms. In any case, no differences were statistically significant.

Comparisons of changes in paid data also provided no support for early expectations that carve-outs would reduce costs. Similarly, the time between injury and return to work as measured by weeks of temporary total disability paid did not decline more quickly for injured workers within carve-outs.

The lack of effect of the NECA/IBEW carve-out on workers' compensation benefits carries implications both favorable and unfavorable. On the unfavorable side, because benefit payments are the major cost of workers' compensation, there is no evidence to suggest that the carve-out substantially reduced employer costs. This result may reduce the enthusiasm of employers for forming new carve-outs. On the favorable side, there is no evidence to suggest that the carve-out reduced benefits to which injured workers were entitled. In addition, reducing the use of lawyers, if settlements are the same, can increase the level of benefits paid to workers. Lawyers receive 12 to 18 percent of a worker's settlement. This result may reduce concerns of organized labor.

Cost reductions were most anticipated in the area of dispute resolution. Though medical and indemnity benefits are only indirectly affected by carve-out mechanisms, the ADR process directly affects resolution costs. Total legal and medical-legal costs declined for all three subgroups. However, costs did not decline as rapidly for claims by electricians in the carve-out as for the other subgroups. Increases in defense legal costs offset the advantages of lower medical-legal and applicant legal costs.

Legal costs are to some extent driven by the level of disputes. There is little evidence that dispute frequency has been reduced by the ADR process and ombudsperson. Strong assumptions are required to compare dispute incidence between the ADR process and the statutory system. However, there are no big changes in the frequency of first-stage dispute resolution (mandatory settlement conference or mediation). Contrary to conclusions drawn in earlier reports, disputes are not

eliminated. Rather, they are infrequent in either system at early levels of claim maturity and relative to the large number of claims, including medical only, that are resolved quickly and simply.

CONCLUDING OBSERVATIONS

Selection bias of safer employers joining the carve-out is a possibility and changes in the workers' compensation system were great during the period of our study. For both of these reasons, we employed a difference-in-differences approach. Even with this approach, the analysis is hampered by small sample sizes and young claims that yield inconclusive results. Moreover, these data come from a few years of experience at a single carve-out and may not represent the experience of other carve-outs. With these caveats in mind, there is no evidence to suggest that carve-outs resulted in reduced costs of workers' compensation to employers or that carve-outs reduced the benefits received by workers.

Notes

1. Three very large insurance companies that were interviewed reported rates of 5, 7, and 10 percent for the portion of indemnity claims that are investigated by their fraud units.
2. Data for medical-only claims and closed indemnity claims up to $2,000 are usually reported as a group by class code and the data include number of claims and incurred medical and indemnity amounts. Similarly, open or resolved temporary indemnity claims less than $5,000 or closed temporary disability claims between $2,000 and $5,000 are reported in the same detail but individually. All other claims are reported individually with all data indicated in the analysis.
3. At the same time, the shifting occupational mix of non-electricians is a concern because the adjustment relies on additional assumptions and increases measurement error. Thus, we did not perform the most theoretically compelling analysis, comparing the rates of change of carve-out electricians versus carve-out non-electricians with the same groups at non-carve-outs. This difference-in-differences analysis controls for common factors that affect all firms over time, all electricians over time, and all carve-out employees at a given time. It is also very sensitive to measurement error. Analysts with larger data sets may want to use this method.

4. Comparing the relative safety of non-electricians at carve-out and non-carve-out employers prior to the introduction of carve-outs was also done. However, these comparisons required substantial adjustments for the mix of occupations and their related frequencies of injury, and interpretation was therefore more difficult. The data are available from the authors upon request.
5. The authors have evaluated this issue with respect to cumulative injuries, and based on the limited data available identifying cumulative injuries, found no evidence the claims involve multiple employers.

8
Conclusions

In this chapter, we first summarize the study and note some of its limitations. We then present several recommendations and conclude with a discussion of possible future research.

SUMMARY

Structure of Carve-Outs

The structure of carve-outs varies enormously, even within the limited experience of California's first eight carve-outs. Conclusions about carve-outs in general need to be considered with this variation in mind. For example, our two case studies had very different structures. The ESRP involved a one-time agreement of fixed duration for a single large construction project. The agreement was between a single self-insured owner and all 17 construction trades for the local area. Contractors and subcontractors were required to participate in the carve-out as a condition of bidding on project work. The agreement between the NECA and the IBEW involves a periodically renegotiated agreement that is consequently of indefinite length. The agreement covers all IBEW locals statewide; NECA contractors can choose whether or not to participate in the carve-out.

In addition, carve-outs are new and continually evolving. Large projects have fixed PLAs covering carve-out arrangements, but each new large project builds upon past structures and the experience of the participants. Agreements that involve periodic renegotiations evolve internally as parties improve their understanding of the arrangements or come to understand the trade-off between the carve-out addendum and other parts of the collective bargaining process.

Finally, as carve-outs have become better understood and more common, new participants have become involved with new ideas and possibly a different balance of interests in negotiations. These partici-

pants not only involve new employers, projects, and union locals, but also different insurers and service providers. A larger number of insurers, especially the introduction of multiple insurers offering coverage within the same carve-out, is likely to improve premium experience for employers that participate in carve-outs through safety groups. Similarly, provider networks may offer products especially tailored for carve-outs. In particular, with unlimited medical control, forms of capitation that would be less workable under the statutory system become possible within carve-out arrangements.

The statutory system is a "one-size-fits-all" approach. A valuable aspect of the diversity in structure among carve-outs is the opportunity to evaluate different innovations, innovations that may be useful to the statutory system as well as to other carve-outs. Different carve-out structures may result in different "best practice" solutions for different situations. For example, we have noted a dichotomy in the ombudspersons' backgrounds (medical versus legal) and approaches to the job (proactive versus reactive) that roughly match the distinction between single-owner, geographically limited projects and multiple-employer, statewide carve-outs. The differences in background and approach offer learning through experimentation, and differences relative to project structure offer insight into how the carve-out structure can allow customized solutions to fit different situations.

Overview of Preliminary Results

The data we collected on the NECA/IBEW carve-out is very preliminary. Nevertheless, it permits two gross generalizations to be made. First, the most optimistic predictions about the effects of carve-outs on increased safety, lower dispute rates, far lower dispute costs, and significantly more rapid return to work have not been realized. Second, the most pessimistic predictions about effects on reduced benefits and access to representation have not appeared. Given the preliminary state of the data and the fact that it involves only a single carve-out, it is possible that one set of predictions will receive further verification. Additional data is also likely to give us a more nuanced view of the effects of carve-outs.

Because the data are new and include a limited number of claims, and because, as mentioned previously, the changes are not large, each

comparison is not likely to be statistically significant. However, this does not mean that there are no smaller positive (or negative) changes that will become apparent as the data mature. Looking across all of the measures, there is weak evidence that the NECA/IBEW carve-out might be moderately successful at accomplishing some of its main goals.

Across all types of claims (all claims, disability claims, and permanent disability claims), the NECA/IBEW carve-out showed larger declines in claim frequency than the two control groups. These differences were small but consistent across each of the three claim types.

Considering indemnity benefits paid per claim, workers in the carve-out had indemnity benefits that increased more (permanent disability) or declined less (total temporary disability) than the two control groups. Again, the differences were small but consistent across benefit types.

These data provide weak support for positive safety effects and weak evidence that workers' benefits were protected. A second interpretation would be that some characteristic of the carve-out such as ADR or restrictions on attorneys reduced the reporting of minor claims, leading to fewer reported claims and higher average benefits.

The consequence of fewer claims but higher average benefits paid per claim is that workers' compensation costs did not decline as a share of payroll more rapidly for carve-out members than for comparison groups. Here the carve-out electricians are in the middle of the two control groups on each category of benefit (medical and indemnity) and on total benefits. This result is consistent—all three groups experienced nearly identical decreases in premiums.

Finally, the data on legal costs under ADR are mixed and inconclusive at this stage. Carve-outs had lower medical-legal and applicant legal costs than both control groups. Total legal costs improved less than for either control group because defense legal costs increased under the carve-out while they declined for both control groups. Attorney representation showed a much larger decline for carve-out workers, suggesting that applicant legal costs will remain low as these data mature. However, the rate of claim closure declined more rapidly for carve-out claims, resulting in a higher percentage of open claims at the time of the study. As more claims are resolved, applicant and defense

legal costs, medical-legal costs, and the number of disputes on this set of disability claims are likely to increase.

These data are based on young claims and encompass only two years experience prior to and two years experience after formation of the carve-out. While there is no evidence of the large changes anticipated by early proponents of carve-outs, there is some evidence that the NECA/IBEW carve-out demonstrated modest positive results. The comparison of carve-out electricians to non-carve-out electricians, which attempts to control for occupation-specific characteristics, is more convincing than the comparison between electricians and non-electricians at carve-out firms, which attempts to control for firm specific characteristics. Consequently, characteristics specific to firms opting to join the carve-out may have been responsible for the small (and not statistically significant) improvements in safety.

Safety

Perhaps the most hopeful evidence for carve-outs was the decline in injury rates at the initial Massachusetts site, Pioneer Valley (see Chapter 2). In contrast, evidence from the case studies in California would not lead to expectations of improvement in safety. That is, both NECA employers and the contractors at ESRP appeared to follow good procedures with active safety committees and so forth. At the same time, no respondent claimed an improvement in safety due to cooperation on workers' compensation issues.

Reported injury rates declined substantially at both carve-out and non-carve-out employers in California during the study period. Consistent with the case study, our preliminary data analysis for the NECA/IBEW carve-out did not indicate significantly more rapid declines in reported injury rates for electricians within the carve-out than for the groups.

It is possible that the impressive reduction in reported injuries at Pioneer Valley was due to better safety, but it may also have been due to random fluctuation, normal improvement in safety as the project progressed, reduced fraud, or discouraging legitimate claims due to reduced attorney representation.

Medical Treatment and Evaluation

Employees had access to a large list of medical providers at the case study sites (and at some other California carve-outs). The use of a large list of approved doctors increases choice of doctors during the first month of treatment (when medical choice is usually restricted under the statutory system). At the same time, choice of doctors is restricted after the first month of treatment (when medical choice is nearly unrestricted under the statutory system). Given the size of the lists, we did not expect to see any reduction in medical costs.

In fact, at the NECA/IBEW case study, preliminary data analysis indicates that the rate of decline in incurred medical costs as a percent of payroll was between the rates of change at the two control groups. Similarly, paid medical costs per claim fell at a rate between the two control groups. Thus, these findings do not support the hypothesis that this carve-out substantially reduced medical benefits for employees. There is also no evidence, however, that the carve-out arrangements resulted in any savings on medical costs for participating employers.

For the NECA/IBEW carve-out and most others, medical control (restriction to the agreed list of medical providers) continues for the life of the claim. Medical costs are driven by a small percentage of high cost claims, usually of long duration. Consequently, carve-outs might realize cost savings in the long run that are not apparent in these early data. All cost data we analyzed relied on either a subset of payments or on insurers' estimates; thus, they will change over time. Importantly, we did not examine employees' satisfaction with care.

Medical-legal costs per claim declined more quickly for carve-out electricians than for the other two control groups. However, the differences were not statistically significant. In addition, a lower percentage of carve-out claims had been resolved at the time of the study, suggesting that medical-legal costs are likely to "develop" more quickly in the carve-out as the remaining claims are resolved.

Indemnity Benefits

Opponents of carve-outs have expressed concerns that possible limitations on due process and restrictions on the involvement of lawyers would reduce indemnity payments received by injured workers.

Indemnity payments did not decline disproportionately for covered employees at the NECA/IBEW carve-out (California Applicant Attorneys Association 1998). This result is subject to cautions because paid benefits are evaluated early in the process and incurred benefits depend on employers' possibly biased estimates of future benefits. Moreover, we can do only limited adjustments for the severity of injuries.

At the same time, if indemnity benefits declined slightly in a carve-out and the use of lawyers declined substantially, then employees' net benefits (after paying roughly 12 to 18 percent of their award to a lawyer) may actually increase. Conversely, even if injured workers' indemnity benefits, net of legal costs, are similar or higher within carve-outs, workers could still miss a range of benefits that were not evaluated here (e.g., serious and willful or wrongful termination violations or penalties for unnecessary delays in payment of benefits). In addition, other benefits (e.g., through the Americans with Disability Act) or third-party claims against employers that are outside the system could be reduced by lack of representation. These potential benefits were also not part of the data we evaluated.

Identifying High-Quality Caregivers

The early results provide no evidence for any difference in the speed or quality of care or of more rapid return to work.

The selection of medical doctors and vocational rehabilitation providers offers an opportunity for integrative bargaining by unions and management. Specifically, the two parties can bargain for a list of providers that restricts the most egregious "company doctors" or "applicants' doctors." Ensuring a mainstream choice can improve care and cut costs because the primary treating physician has a presumption of correctness in medical-legal evaluation and treatment decisions.

In the detailed case studies, as well as in the survey of carve-outs, we did not find unions and employers making such a bargain. At ESRP and NECA/IBEW, a very large list of medical doctors was provided. The bias against employees was low, but the cost savings may have been foregone. In contrast, at the Cherne carve-outs, the company chose a tightly restricted list of treating doctors and qualified medical examiners. This process may have lowered costs but at the

risk of treatment and evaluations biased against employees. Again, the integrative solution was not chosen.

One obstacle to the integrative solution is that unions often do not have the detailed knowledge of doctors that might be useful when negotiating the carve-out. Applicant lawyers may have this knowledge, but they might not share it with the unions, with whom they have an adversarial relationship over the issue of carve-outs. Several carve-out administrators acknowledged reluctance to seek the assistance of the applicant and/or defense bar in selecting physicians. Employers have access to this knowledge through the carve-out insurer. Given this asymmetric knowledge, it is logical that the provider lists were relatively unrestricted (maybe sub-optimally for both groups) and the provider lists were sometimes highly restrictive favoring the employee where labor's position was weaker.

To some extent the failure of cost reduction may be due to carve-outs' lack of use of the tools at its disposal. Carve-outs provide a natural model for integrating occupational and non-occupational care. This powerful model ensures employees a choice of physician, probably including their own non-occupational physician. It also may improve unions' and employers' incentives to pick high-quality medical doctors, as the preferred provider organization of medical doctors is used for both industrial and other care.

Permitting employees to visit their own doctor is a powerful check on employers' incentives to pick "company doctors." At the same time, at the geographically remote ESRP and for the small number of employees the research team interviewed for the NECA/IBEW case study, most employees received all of their care from the doctor to whom they were initially directed by the employer at the time of injury.

Alternative Dispute Resolution

Alternative dispute resolution can potentially improve both efficiency and process. Efficiency arguments supporting ADR are that it is a faster, and therefore less expensive, process than traditional litigation. Efficiency rationales are by far the most commonly cited justifications for the adoption of ADR in workers' compensation carve-outs. However, the quantitative analysis (with its very small sample size) did not support the efficiency rationale. The process was not significantly

cheaper and the claims closed somewhat more slowly. The limited data on dispute resolution time frames does suggest that while claims close more slowly, the process is quicker in the carve-outs once a dispute reaches the formal resolution stage (mediation in a carve-out, mandatory settlement conference or a hearing in the statutory process).

Process rationales suggest that ADR processes are more satisfying and produce better outcomes through less contentious methods of dispute resolution. The position of ombudsperson is critical to much of the process rationale. The ombudsperson plays an important role as a source of information to avoid disputes and as an early negotiator between parties to resolve disputes before they reach the more formal stages of mediation or arbitration.

The role of the ombudsman

The classic ombudsperson is a "staff" position. For example, standard disputes in a workplace go up the managerial chain of command, while the ombudsperson provides an alternative avenue for dispute resolution that is not part of the standard process. Moreover, the ombudsman has a role in working for systemic changes to avoid future disputes and inequities.

The organizational ombudsperson is a designated neutral or impartial dispute resolution practitioner whose major function is to provide confidential information and informal assistance to managers, employees, and/or clients of the employer (e.g., patients, students, suppliers, or customers).

Within carve-out ADR, the ombudsperson is a hybrid of the classical and the organizational traditions. In addition, the ombudsman is the first line in all dispute resolution and has a role that is written into both statute and the CBAs. Corresponding to the greater role in all disputes, the ombudsperson is not a consultant to the organizations' heads; thus, the ombudsperson's job description does not include working for systemic change. At the same time, the case studies and interviews presented a number of examples where an ombudsperson has made important contributions to the evolution and improvement of a carve-out agreement. Consequently, many comments on early drafts of this report argued that the term ombudsperson was misleading and should not be applied to this hybrid position even if the term was used in the originating legislation. At present the ombudsperson duties

often involve both the classical and organizational traditions with the addition of new responsibilities. This combination of roles is not without problems.

An implication of the nontraditional role that the carve-out ombudspersons played is a weaker attachment to the professional norms of the ombudsperson role; most importantly, the norm of confidentiality. The code of ethics of the American Ombudspersons Association requires written permission before the facts of any case are discussed. In contrast, some of the ombudspersons we interviewed would have been willing to testify at arbitration. The extreme version of the confidentiality norm probably should not apply in carve-outs: if an employee asks for help getting a late check, it does not make sense for the ombudsperson to require written permission to discuss the situation with the insurer. Nevertheless, it is essential that employees in disputes know their discussions will be held in confidence.

Some ombudspersons also face the problem of an appearance of impropriety, which can arise in two fashions. Some work directly for the employer, which reduces the credibility of neutrality. Others are formally independent but are looking for more employers and unions to sign up with them. To the extent these "carve-out entrepreneurs" have a harder time signing up employers than unions, they have an incentive to reduce costs—potentially at the expense of employees. (In California during this study employers tended to be more difficult to sign up than unions. The incentives for ombudspersons would be reversed in cases where employers wanted carve-outs more than unions did.) These incentives to reduce costs can be especially troublesome for cases of severe injuries or for potential serious and willful violations, where the employer (not the insurer) pays any penalty.

An important motive for establishing carve-outs was to reduce employees' confusion about the workers' compensation system, particularly relating to dispute resolution. Carve-outs, because they are novel, can actually worsen the confusion if an injured employee receives mixed information from colleagues, union officials, and/or lawyers. Several employees and union officials provided examples of such confusions, particularly because employees did not appear aware of the carve-out prior to injury and in a number of cases, the officials of the union locals were likewise uninformed.

The expanded role of the ombudsperson within carve-outs, especially the critical role as information source, highlights two important dichotomies that were detailed earlier: a proactive versus reactive approach to contacting workers, and a medical versus legal background. Given the promise of the informational role, the proactive ombudsperson—that is, one who contacts each employee at the time of injury—appears more appropriate than a reactive ombudsperson—one who awaits contact from an employee. This proactive model appeared to be the direction towards which most carve-outs were evolving during the study period.

The dichotomy of medical versus legal background was more difficult to judge. Carve-out ombudspersons with medical and case management backgrounds were closely associated with early, large projects with on-site medical care. Newer large project carve-outs have split over this approach. For example, the National Ignition Facility opted for an ombudsperson with a legal background while the Inland Feeder project opted for one with a medical background.

The tendency has been to move toward a legal background. The survey and case studies conducted by the research team revealed legal issues to be the most common questions and important areas of dispute faced by ombudspersons. However, ombudspersons with medical/case management backgrounds were responsible for the innovation of a proactive approach. It remains to be seen if the proactive approach becomes the norm and if the background of the ombudsperson is important to implementing this aspect of their role effectively.

The role of lawyers

We found a gap between 1) employees' perception of access to lawyers and 2) ombudspersons' claims of informing workers and letters sent by insurers. The ombudspersons all claimed to inform workers of their rights to an attorney, and the letters that we have seen from two of the insurers were clear on the issue. At the same time, virtually all of the injured workers reported that they were told they could not have an attorney. Apparently, the message is not being communicated successfully.

We also found a set of injuries that involve gray areas of the law. For these, it is unlikely that an employee will be well served without a

lawyer to push his or her claim. It was appropriate for the ombudsmen to refer employees to lawyers in such cases, as they sometimes did.

This carve-out system has several difficulties with respect to lawyers. To the extent that lawyers will be involved only in the most difficult cases, they may not be able to support themselves on the customary level of fees. Conversely, if lawyers become involved in cases that are fairly clear-cut, their customary level of fees will outweigh their value to employees.

The role of arbitrators

Given the short history of the carve-outs, we have no evidence on which to base an analysis of arbitrations. Arbitrators in ADR are traditionally permitted wide latitude to achieve substantive justice, even if they do not follow precedent. On the one hand, this flexibility permits solutions to best fit facts. The entire goal of carve-outs is to increase flexibility and promote decentralization. On the other hand, arbitrators should follow WCAB precedents to avoid inequity, increase predictability, and ensure that (as required by law) the ADR process does not harm workers.

One important advantage of arbitration in other contexts was not a potential advantage in carve-out ADR. Traditionally, arbitration allowed parties to choose an arbitrator with a specialized knowledge of the subject area in dispute. There is no reason to see this as an advantage in carve-outs or for that matter as an alternative to other administrative law processes. The alternative to ADR arbitration is a hearing before a workers' compensation administrative law judge who specializes in this particular area of administrative law. In fact, the arbiters chosen to date by carve-outs have all been retired Workers' Compensation Judges.

Dispute rates

Proponents of carve-outs hoped that they would greatly reduce dispute rates and costs. Opponents of carve-outs feared that lower dispute rates would largely indicate a lack of benefits and access to representation. Differences in definitions of a dispute and of a "level" of dispute resolution, the small sample of cases, and the fact that we analyzed data from only two carve-outs limit our confidence in the generalizability of our findings. Nevertheless, so far dispute rates are not sub-

stantially different between carve-outs and the statutory system. Representation by lawyers is significantly lower in carve-outs, but it is still common. Thus, we do not support the hypothesis that employees have no recourse to appeal ombudsman and insurer decisions. The downside of these findings is that dispute resolution costs within carve-outs do not appear lower than in the statutory system.

Wrongful termination, serious and willful, and third-party claims

Carve-outs are intended to deal with workers' compensation claims. The situation is complicated, however, because many workers' compensation claims, particularly the most serious, can involve wrongful termination, serious and willful violation claims, or third-party claims. These put the ombudsperson, for example, in a conflict of interest; he or she is hired in part by the employer but can be helping an employee sue the employer for a serious safety violation.

Third-party claims are more complex. At some work sites, the third party would be (for example) an equipment maker, and the ombudsperson would have no conflict of interest. On a PLA, in contrast, the third party might be another subcontractor whose liability costs (including third-party claims) are paid by the project owner under a large-deductible, owner-controlled insurance policy. When the ombudsperson's employment (either at this site or at future sites) depends on satisfying the project owner, such third-party claims can present a conflict of interest.

Some ombudspersons would prefer to move these issues to the statutory system. However, this leads to problems of jurisdiction shopping (if the entire claim moves to the statutory system) or to delays and extra hearings (if the case must be heard once in the carve-out ADR and once in the statutory system).

The role of unions

The principle of carve-outs is that employers and unions can create a better alternative than the state-run system. A presumption is that both sides will know if the new system is meeting their members' needs. A critical component of a successful internal responsibility system is careful scrutiny by both sides.

In fact, few union leaders were following the progress of the carve-out. As far as we could tell, no union leader surveyed or systematically spoke with injured employees about the impact of the carve-out. In the case study of the NECA/IBEW carve-out and several interviews with union officials, it was consistently mentioned that there was very little understanding or even knowledge of the existence of carve-outs at the level of the union local.

The statutory system evolved incrementally through a balance of political forces representing various coalitions of interest groups. The balance of power among interest groups varies over time, but any change is still usually incremental. Carve-outs are more experimental and subject to wider structural variation. Consequently, the balance of power between the negotiating parties and the resulting agreements have potentially more impact on outcomes for injured workers. Preliminary work (shown in Appendix B) suggests that the favorability of current carve-outs for injured workers may reflect in part the strength of union and management bargaining power when the carve-out was negotiated. When unions are strong and well-informed relative to management, the agreements are more favorable to injured workers. If this is true and workers are risk averse, unions may be less willing to enter into new agreements unless the benefits are clear. Knowledge gained through monitoring of current agreements can improve the likelihood that carve-outs benefit workers and, thus, the willingness of unions to participate.

The Problem of Boundaries

"Carve-outs" cannot fully carve out a new system that handles all the problems of injured workers. In our cases, we saw interactions of carve-outs with unfair termination, serious and willful claims, third-party claims, the WCAB, and the court system. Injured workers also can receive benefits from State Disability Insurance, Social Security Disability Insurance, and Department of Rehabilitation. Employers must contend with rules from Cal-Occupational Safety and Health Agency, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Problems may arise when employees switch among employers, particularly after a carve-out ends. The creation of 24-hour care reduces some complexities, but it adds new forms

of interaction concerning payments for long-term medical care between the workers' compensation insurer, the worker (if he receives a lump sum payment for a work-related injury), and the union-management health and welfare trust.

Each of these interactions has its own complex logic and history. For example, few argue that employers and unions should be able to opt out of the protection of the Americans with Disabilities Act. At the same time, the linkages limit the ability of the participants in the new system to create a coherent alternative system for injured employees. That is, too often participants think about an alternative system of workers' compensation but, from the injured employees' perspective (or that of a small business), workers' compensation is but a piece of the puzzle they confront.

Related to the complexities of the interactions we described above, the workers' compensation system remains incredibly complex even after a carve-out. Carve-outs can help streamline some aspects that facilitate coherence from the injured workers' perspective (e.g., permitting employees to use their regular doctors). At the same time, the system remains incomprehensible to most participants. From the perspective of injured workers and of all but the largest employers, creating a simpler system is crucial to providing proper incentives for prevention and appropriate care and incentives after an injury.

Limitations of This Study

A preliminary study such as this one is subject to a number of limitations.

Most obviously, the qualitative study covered a sample of two and the quantitative study (though it covered hundreds of employers and thousands of injuries) covered only one carve-out. Given the encouraging (if less carefully estimated) reports coming from other states, the general lack of effect of NECA/IBEW carve-out may not be representative.

The quantitative analysis is subject to its own limitations. The sample size of serious injuries was (fortunately for employees) small, and we do not have true medical or indemnity cost data on claims. It is crucial to understand if the carve-out changed injured employees' entry into the workers' compensation system. Any system can look good by

reducing the proportion of injuries that are reported, and we did not measure changes in reporting practices.

Carve-outs are new and better practices may evolve over time, implying that future carve-outs may have fewer problems and better results than the initial ones. The initial costs of starting a carve-out (writing contracts, and so forth) should decline as these documents become more standardized and as litigation declines after courts clarify their legal status.

RECOMMENDATIONS

Subject to the many qualifications noted above, this section provides recommendations to the parties involved in carve-outs, including unions, employers, insurers, lawyers, ombudspersons, and the state.

The Bottom Line

Overall, we found no evidence that carve-outs operating in California in 1997 made employees worse off. Thus, we did not find evidence that carve-outs should be curtailed. Moreover, we found no evidence against expanding carve-outs to other industries in settings where both employers and unions agree they can be mutually beneficial.

At the same time, the logic of decentralizing the workers' compensation system requires that employees be represented in designing the alternative system. Thus, expanding carve-outs to nonunion settings seems quite problematic.

Moreover, the same logic implies that employees are less likely to benefit from carve-outs unless unions actively monitor the experience of their members with providers and the dispute resolution process. We did not observe much evidence of such monitoring.

We also found little evidence that the few carve-outs we studied in detail successfully reduced costs. Given the anecdotal and (limited) quantitative evidence from other states that do suggest substantial cost savings, future research is clearly called for. In the meantime, we describe below several possible policies unions and employers can adopt to realize cost savings without reducing quality of care. These

recommendations may raise costs, but they may also improve the quality of decision making and care.

Identifying High-Quality Caregivers

Unions and employers should work together to eliminate the few doctors, medical examiners, and vocational rehabilitation providers with records of extremely high-cost or limited service. Eliminating a modest number of service providers from the list of potential providers should permit both higher quality care and lower cost.

Develop a Comprehensive Regulation

California should develop a comprehensive regulation that would bring uniformity to some elements of the carve-outs while still permitting adaptation experimentation in individual carve-outs. It should address the issues presented below. To the extent that no regulation covers these topics, CBAs should ensure that employees have the appropriate protections.

Create standards for the ombudsman

The regulation and any CBA should require that ombudspersons demonstrate familiarity or a plan to acquire familiarity, as well as provide a plan for continued learning for the following topics: ombudspersons' role, mediation, negotiation, workplace safety, workers' compensation, occupational medicine, and ethics.

A requirement could be written using minimalist criteria, requiring only a demonstration of competence. Competence could be demonstrated from prior job descriptions (e.g., a vocational nurse can show competence in workplace safety from past professional duties, a retired workers' compensation judge has familiarity with workers' compensation) or from completion of a class within the last six months. Continued learning could be shown with subscriptions to relevant publications, participate in relevant conferences and professional associations, or classes taken annually.

Alternatively, training standards could be mandated in more detail; for example, with a continuing education requirement included in reporting to DWC.

An important part of the qualifications for the ombudsperson job is knowing what they do not know. Unions and employers should ask ombudsperson candidates to describe some of the gray areas of the workers' compensation law. It is important that ombudspersons understand that, for some difficult cases with potentially large settlements, it is appropriate and important to recommend that the injured worker seek legal consultation with an attorney.

Remove appearance of ombudsman partiality

The regulation and/or CBA should require all ombudspersons to work for joint management-labor workers' compensation trusts (as opposed to directly for employers), or to be protected by specifically enumerated contractual terms that include rules to ensure neutrality and avoid the appearance of conflicts of interest in hiring, training, and retention.

As long as the ombudsperson is marketing the carve-out, he or she will have a strong incentive to focus on the needs of the party who is most leery of the new processes. Thus, limitations on marketing may also be appropriate.

Improve confidentiality

The regulation and/or CBA should prohibit ombudspersons from disclosing information to any of the parties without consent. Such consent would be implied when an employee asks for assistance in matters such as a late check, but confidentiality should be guaranteed in matters of conflict.

The ombudsman should not be permitted to testify during the mediation and arbitration stages without the written consent of all parties.

Wrongful terminations, serious and willful, and multiple-employer disputes

The interaction of carve-outs with wrongful terminations and serious and willful claims is not easy to resolve. At a minimum, the steps described above to improve ombudsman neutrality are called for.

Some CBAs specifically exclude these areas as issues. When they are not excluded from ADR, the ombudspersons were generally in favor of moving these disputes to the statutory system. The ombuds-

persons' discomfort is due in part to the statutory provisions that the penalty on any award for serious and willful, or wrongful termination violations on any award, is paid by the employer, not the insurer. Unfortunately, the movement of some or all of cases to the statutory system creates problems of its own.

It would be possible to pursue these issues in the statutory system while the case-in-chief was pursued in the carve-out. The process could require determination of violations in one system and penalties (as a percent of award) in another system. This would slow decision making, increase costs, and reduce the ability to negotiate compromise over all issues.

Alternatively, if the serious and willful or wrongful termination claims trigger jurisdiction by the statutory system for the whole case, then lawyers that venue shop could attach one of these as an issue to any case they want brought at the statutory system instead of the carve-out's ADR.

We have no specific recommendation here, other than to create further experimentation with different systems and monitor actual rates of use, outcomes for employees, and transaction costs for each system.

To date there have been no problems resolving multiple-employer claims. However, it is not clear if the injured worker has the discretion to bring a claim in the system of his or her choice, and whether an employer could object to a claim being resolved in one system or the other. One solution proposed was to have these claims arbitrated under the Section 5272 arbitration procedures of the statutory system. Alternately, the adjudication could take place within the system of the employer first notified. Since benefits are supposed to be equivalent across systems, there should be no systematic bias in favor of either party.

How are carve-out injuries adjudicated after the carve-out arrangement has ended?

No concern seems justified. The statutory system always exists as a venue for resolution of a worker's claim when the carve-out arrangement is not in place. Some CBAs specifically devolve this authority to the statutory system; some have less clear language. These agreements specify that the carve-out will adjudicate all issues on claims filed within 90 days of the termination/expiration of the carve-out agreement. Claims filed after that would be the responsibility of the WCAB.

This ignores the issue of claims filed prior to expiration of the carve-out on which the disputes arise months or years in the future. Clearer language within the CBA would direct that disputes occurring after the expiration or dissolution of the carve-out would revert to the statutory system.

Worker Contact

The principal benefit of ombudsperson programs for injured workers is ready access to information and personal assistance in the resolution of problems arising from their workplace injuries. This assistance ideally can prevent the unnecessary escalation of conflicts that are information-based from maturing into, or being recharacterized as, conflicts that are rights-based and therefore costlier for both stakeholders and the system. Indeed, all the carve-outs currently in place must be seen as first-generation programs, each with features that are both redeeming and troubling. When the best of the programs are pulled together into a single vision, one can readily see how the ombudsperson office has the exciting and unique potential to provide comprehensive services to injured workers: a personal shepherd to guide individual workers through the system from injury to settlement; a clearinghouse for medical and legal information (including references to both doctors and attorneys as appropriate); and, ultimately, an agent of change to improve health services while minimizing conflicts and improving workplace safety and, possibly, culture. If realized, such potential would not only call for the continuation of carve-out programs in the construction industry, but it would encourage the expansion of their availability to other industries. Carve-outs might also act as a template for focusing expansion of information and assistance efforts by the regulatory agency in the statutory system.

Collective bargaining agreements should consider adoption of a proactive contact by the ombudsperson, so that all injured employees (or at least those with disability claims exceeding some minimum number of days) know of their rights and have information on how to contact the ombudsperson. The evolution of carve-outs in this direction is strong evidence of the effectiveness of this approach. In the section on future research we propose a study to determine objectively the impact of the proactive approach.

The Role of Unions

Insurers and employers automatically receive information on workers' compensation costs. Unions do not automatically receive information on outcomes for employees. Thus, for effectiveness and continuous improvement of carve-outs, union leaders should follow up with injured employees. For example, a short phone call or a one-page survey asking about quality of care and about dispute resolution might be helpful. The mere presence of this feedback will give insurers and ombudsmen better incentives to provide high-quality service to injured employees.

Given the busy schedule of most union officials, coupled with the relatively small number of seriously injured employees, the effect of this recommendation is unclear. At the same time, the credibility of decentralized regulation depends on ongoing participation by union leaders.

The Role of Lawyers

Attorney participation in ADR

Attorney participation in ADR is controversial in at least two important respects: whether they should be involved in the process at all and, if they are, what their proper role should be. On the first issue, some contend that attorneys should not be involved in mediation at all because mediation is a party-driven process which seeks to get beyond legal issues to the underlying causes of the dispute; the presence of lawyers will only lead to the domination of legal standards in a process that seeks to get beyond such standards. Because of the problem of power imbalances, this is increasingly a minority view. The issue of role, then, becomes more important. Whether the lawyers should assume their traditional role of primary spokesman and advocate for their clients and the standards by which they should assess and provide counsel on the ultimate mediation agreement are the subject of vigorous debate in the dispute resolution community.

Ultimately a recommendation on the point may be made moot by two developments. First the courts may take up the issue of restrictions on employee representation. In *Costa v. WCAB*, the 4th District of the California Court of Appeals clearly wanted the sides to raise in oral

arguments the issue of labor unions' ability to limit, through collective bargaining, workers' right for representation by attorneys. At some point a case on that issue is likely to be brought before the courts. Second, the role of the proactive ombudsperson is meant to eliminate many early issues that can result in dispute, intervene in disputes early reducing the need for mediation, and assist workers at mediation as appropriate. As such, this early, proactive intervention is expected to eliminate many of the disputes on which opponents think attorney participation is counterproductive. Restrictions on attorney representation at mediation may be unnecessary if the ombudsperson is proactive. This is even more true if injured workers are well informed about the cost of attorney contingency fees and if future research confirms our finding that employees' benefits are protected within carve-outs despite lower attorney participation.

Referring lawyers

Attorneys play an important role, even in ADR, in resolving difficult cases. Due to the apparent conflict of interest, the ombudsperson should not refer injured workers directly to lawyers. One alternative is to refer the worker to the union business agent for recommendations to attorneys. The business agent may want to provide a list of recommended lawyers to the ombudsperson to reduce delays.

Employee versus employer representation

An unrepresented party is often disadvantaged when contesting a decision against a party with legal representation. The data section reviewed data from a carve-out that at least suggests that this imbalance may be a problem. Some CBAs require the insurer to pay legal costs for the worker if that worker prevails at the latter stage(s) of the ADR process. Collective bargaining parties may want to review these arrangements and strengthen the protections for the unrepresented worker.

Attorney fees

Carve-outs should have all settlements reviewed for adequacy by an arbitrator or agreed legal authority. In such a system the mechanism is in place to assign attorney's fees just as they are in the statutory system. The arbitrator would set the fees at settlement, just as they are set

in the statutory system. There have been no issues raised concerning attorneys' fees within the carve-outs on the numerous represented cases, but this rule would resolve any potential issues in the area and establish procedures that are not present in some agreements for review of settlements for adequacy.

IMPLICATIONS OF THIS STUDY

The unionized construction industry in California is a large sector. At the same time, the experience of carve-outs in one state has implications that are much wider. Most directly, carve-outs in other states should draw on the lessons outlined above. Legislatures and regulators considering initial rules to permit carve-outs may want to include many of the protections listed above.

If carve-outs are successful in construction, they may be permitted in other industries within California. Construction is a leading contender for carve-outs because of its high injury rates and workers' compensation costs. At the same time, as the study makes clear, the short duration of almost all construction jobs greatly complicates carve-outs. Thus, unionized employers in other industries with modest workers' compensation costs and longer-duration employment relations may find carve-outs to be effective.

Our results present a number of cautions about when carve-outs will effectively protect employees. At the same time, we found no evidence of harm from carve-outs that should inhibit the dissemination of an appropriate version to other industries.

More generally, the principles of ADR may be helpful in other spheres of employment regulation. For example, the principle of "carving out" a sphere of regulation if a high-quality substitute program has been approved by employees may apply to other areas. Regulations such as unemployment insurance, safety, employee involvement, and other areas might benefit from experimentation. A lesson learned in the California construction industry is that employee representatives must remain active partners for deregulation to achieve its goals. At the same time, an important limitation of decentralization is that trade union leaders have little time for the minutiae of workers'

compensation and that unions with relatively weak bargaining positions initially appeared willing to accept alternative workers' compensation systems that were likely to be less favorable to injured employees.

These latter lessons apply to ADR in other areas of employment regulation. The courts are increasingly willing to permit employers to unilaterally impose ADR programs on employees, often with only minimal quality standards. Given the concerns we noted about programs that *did* have union oversight, nonunion ADR programs would be even more suspect. (Texas, for example, permits employers to opt to handle all workers' compensation claims through the tort system. Thus, an ADR system unilaterally established by the company that includes mandatory binding arbitration is legal [Barrier 1998].)

The strength of carve-outs was often the presence of an ombudsperson who contacted each injured worker and helped him or her navigate the complex system. Both private employers and the statutory system should continue to experiment with such proactive systems. There is some evidence that employees with better understanding of the system return to work more rapidly (Daniels 1997).

For example, Information and Assistance officers in the statutory system assist employees in navigating the workers' compensation system but only after employees first contact the Information and Assistance office. It would be worth experimenting to see if a proactive approach would help employees avoid the many pitfalls in the statutory system. For example, half of a set of new claims could be given to Information and Assistance officers for proactive contact and half could be treated under current rules. Employee satisfaction, post-injury earnings, and the outcomes studied in this volume could all be compared.

Future Research

Carve-outs permit experimentation. Nobody knows how to create a coherent workers' compensation system that best reduces injuries, has low costs, and guarantees injured workers' standard of living. Thus, the workers' compensation system must be open to experimentation and learning. This conclusion has two implications.

First, the law states that carve-outs cannot reduce benefits to workers. This law cannot be interpreted to mean that carve-outs not reduce benefits to a single employee under any scenario. Instead, each employee must be made better off by joining the system at the time of joining, even if some risks are shifted.

For example, consider the case where, in the state system with a given set of facts, a judge would hold half the time for the injured worker and half the time for the employer. Thus, the employee would receive either $1000 or $0. Because the facts are quite close in this case, the decision is random from the employees' point of view. Further, assume (as California Applicant Attorneys Association claims is likely) that an arbitrator in the carve-out splits the difference and provides a sure $500. In this situation, a risk-averse employee would prefer the carve-out, though *ex post* half of the workers find themselves worse off than in the state system. Interpreting the current law to make this situation illegal leaves workers worse off since it does not harm employers and it makes employees better off in an *ex ante* sense. It should suffice that a rational employee should prefer at the time of injury to be in the carve-out, not that they are never harmed by the move to ADR.

Second, experimentation is only valuable if there are mechanisms in place for evaluation and feedback. Employers, insurers, and unions all have a stake in studying what is working and what is not. As noted above, the research in this report is very preliminary. At the same time, carve-outs are perhaps only worth having if follow-up studies will help stakeholders monitor what is working and modify what is not. Moreover, such monitoring is a public good because many of the lessons can apply to other carve-outs and to the statutory system as well. Thus, it is appropriate for the state to be involved in such studies.

Finally, the outcomes observed at current carve-outs are imperfect indicators of how future carve-outs will perform. Even if carve-outs in one study have poor outcomes, future carve-outs may learn from them and perform better.

One starting point for future research is repeating the current study design with more years of data and more carve-outs. For large projects with hundreds of subcontractors, it might be possible to find a comparison project with a similar mix of tasks.

A powerful methodology for evaluating the longer term effects of carve-outs on employees is to follow up their earnings over time (an outcome measured used by Peterson et al. [1998], in another context). It would be important to see if carve-outs do better or worse at providing higher benefits to injured employees who, in fact, do not return to full-time work.

Finally, it would also be useful to survey employees about the quality of care they received and about their perceptions of fairness with dispute resolution. Past research on ADR suggests that even if observable outcomes are similar, employees who participate in ADR procedures may be more satisfied with the outcomes.

In conclusion, experimentation is necessary for learning to occur, but only if that experimentation is monitored and participants receive feedback. Carve-outs need feedback systems to current participants such as union leaders as well as to stakeholders, ranging from injured workers to employers to legislators.

Appendix A

Potential for Phony Unions

A potential problem with carve-outs is the possibility that employers could set up sham unions for the exclusive purpose of qualifying for a carve-out. A case in point is found in an application to the DWC in 1993 by the Builders Staff Corporation (BSC). The BSC was a multi-trade construction company that leased construction workers to contractors.

In a posted advertisement titled "Evolve or Die," the BSC stated their company assumed workers' compensation coverage for the workers they provided to construction contractors. The BSC also assumed all employee-related risks such as wrongful termination lawsuits and lawsuits alleging discrimination in hiring, promotion, or firing under the Americans with Disabilities Act.

When BSC filed for a carve-out in October of 1993, they claimed their employees were represented by the United Association of Construction Workers (UACW). As part of the applications, they submitted a copy of the CBA between BSC and the UACW. The agreement included an ADR process for workers' compensation grievances, as well as a list of exclusive medical providers and qualified medical evaluators for medical treatment for workers injured on the job.

The San Diego Public Works Task Force, which is charged with the duty of seeing that construction contractors in the San Diego area comply with the California Labor Code, investigated the BSC and found the following. BSC claimed they had been approved by the DWC for a carve-out, and the president of BSC gave the name of the union president to the task force. When the task force called this person, she claimed she was not the union president but the ombudsperson for the carve-out. This person was also the administrative assistant of the president of BSC.

Current statute has minimum requirements that the employee representative provide evidence to the Department of Workers' Compensation demonstrating that it is a legitimate union. Thus, BSC's application for a carve-out was eventually denied by the Department of Workers' Compensation.

The current law is sensible, but will not necessarily stop all potential for abuse. It is unlikely, but still possible, for a legitimate existing union to partner with an employee leasing company in some other field in order to exploit non-members.

Appendix B

Preliminary Evaluation of Negotiating Strength and Terms of the Carve-Out

This appendix offers a preliminary look at how the strength of each employer or group of employers and union or group of unions correlates with the balance of a carve-out agreement. We scored the relative bargaining power of the two parties and the relative balance of the agreement. We then examined if union-management pairs where the union had more bargaining power also had agreements with terms that were likely to favor employees.

The parties were first evaluated on six dimensions of relative bargaining power, as listed in Table B.1. By convention, a plus score (+1) means a dimension favored the union. For example, if the agreement will be covered by prevailing wage laws, then the union's position is stronger because union scale will be paid on the job by law. Conversely, if the employer has negotiated several similar agreements and the union has not, the score –1 is applied.

Each of 12 current and past carve-outs for which agreements were available were then assessed for the relative balance of the agreement; that is, does the agreement favor employers or unions. Each agreement was assessed on eight dimensions (Table B.2). Again, by convention, a plus score was assigned when an aspect of an agreement favored labor. For example, if the agreement allows the worker access to a large number of medical providers during the first 30 days and that list includes the union's Health and Welfare Trust preferred provider network, the score is +1. Conversely, if the provider list is highly restricted the score is –1.

These scores have meaning only relative to each other. That is, a score of +1 for the balance of an agreement has no meaning except to suggest that the agreement is less favorable to workers than one with a score of +3 and more favorable than one with a score of –2. For the graphical presentation, all scores were centered zero.

We analyzed only one scoring system. The use of other systems with different values, say 1 to 5 for each dimension, or different weighting of dimensions, or inclusion of different dimensions across which party strength and agreement balance are measured could result in different rankings for each agreement.

With these caveats in mind, the data suggest that if unions were in a weaker position relative to employers when negotiating a carve-out agreement, the

agreements were more favorable to employers (see Fig. B.1). The rank-order correlation is 0.75, which is statistically significantly different from zero at the 0.01 level. Results were almost identical with the standard Spearman correlation.

A more complete test of the hypothesis that bargaining strength matters would come from evaluating how relative bargaining strength correlated with employees' outcomes. If bargaining strength matters, then we would expect to see lower costs per payroll dollar, lower benefits per claim, and lower benefits relative to future wage losses when the employers are relatively strong. This analysis would require comparing data on multiple carve-outs in a manner similar to the difference-in-differences methodology presented in this report.

This preliminary analysis should serve as an additional caution when interpreting the data from the NECA/IBEW carve-out. That carve-out received a neutral value for relative party strength under this analysis. Agreements with more or less favorable provisions for either side might have quite different outcomes.

Finally, we need to consider the balance of the equation from the perspective of the average worker as well as that of the injured worker. The evaluation of the balance of an agreement in Table B.2 reflects point of view of an injured worker. During the bargaining process, union negotiators may be trading lower workers' compensation benefits for higher benefits in other areas (e.g., higher wages, more jobs, etc.). After an injury (*ex post*), the worker may have preferred a different agreement. However, at the time of the negotiation (*ex ante*), the agreement may reflect a reasonable trade-off between higher wages or steadier employment and the risk of being injured and receiving lower benefits.

Table B.1 Coding Bargaining Strength[a]

Topic	Explanation	Scoring
Prevailing wage	In a project controlled by prevailing wage laws, the employee has less to gain by an agreement that lowers employer costs; thus, power shifts to the union	Project covered by prevailing wage law = +1 No prevailing wage = –1
Multi-union	Agreements requiring multi-trade participation (PLAs) likely favor the unions; employer must meet needs of all trades simultaneously	PLA = +1 Otherwise = 0
Repeat players	The side with repeat experience has upper hand	Union repeat player = +1 Employer repeat player = –1 Neither or both = 0
Experience of negotiators	Experience of negotiators matters; local-level organizations are less experienced than state-level, who are less experienced than national-level.	Union local = –1 Union regional or state = 0 Union national = +1 Employer local = +1 Employer state = 0 Employer national = –1
Percent of trade unionized (U.S.)		+1 if above national average –1 if below national average
Workers' compensation cost relative to all construction		+1 if above average –1 if below average ($6.3/$100)

[a] Positive scores indicate strong union bargaining position.

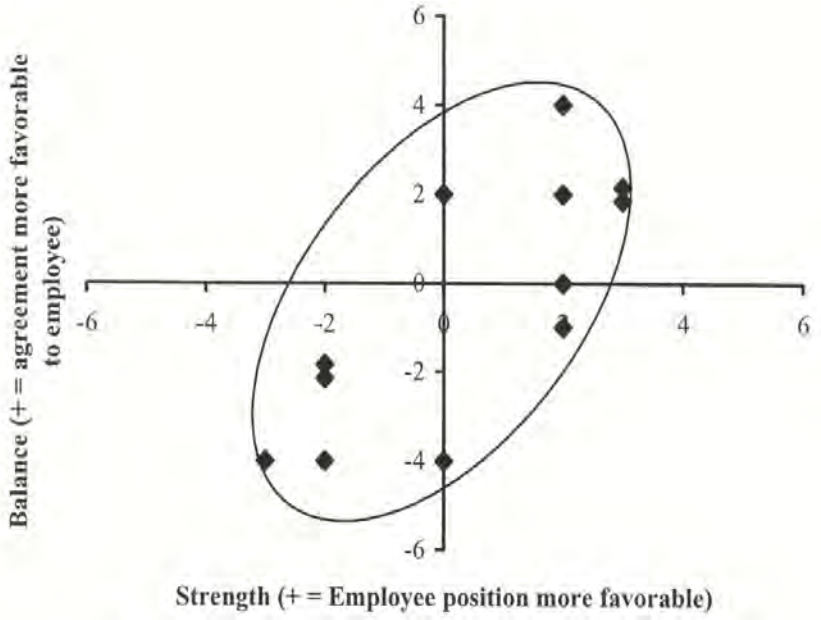
Table B.2 Coding Agreement Balance[a]

Issues	Explanation	Scoring
Predesignation	Elimination of predesignation indicates restriction on choice available in statutory system. Predesignation is neutral to the system.	No predesignation = –1 Predesignation = 0
Medical provider restrictiveness	Union approved list is a plus, a broad selection but employer determined is neutral, and a restricted employer determined is negative.	Employer + union PPO = +1 Employer limited restriction = 0 Employer very restricted = –1
Medical-legal provider restrictiveness	Statutory system has no restriction.	No restriction = +1 Some restriction = 0 Very restricted = –1
Who pays ombudsperson	If the employer pays, it is coded negative; employee pay is coded positive. Management-labor trust is neutral.	Union pays = +1 Management-labor joint trust = 0 Employer pays = –1
Mediation	Management-labor committee is less generous than neutral mediator. One party as mediator is bigger problem.	Neutral mediator = +1 Management-labor committee = 0 Mediator chosen by employer = –1
Arbitration	Some arbitrators are selected from rotating agreed list. One carve-out has arbitrator selected by employer representative.	Employee selected = 1 Rotating list = 0 Employer selected = –1
Inclusion of wrongful termination and serious and willful violations under ADR	If not included, workers' chance of recovering is reduced, because these recoveries are attached to claims and would require dual litigation.	0 if included –1 if excluded

Issues	Explanation	Scoring
Lawyer participation	Restricting legal representation is a loss for employees.	Representation at all levels = +1 No representation at ombudsperson stage = 0 No representation at mediation = –1

[a] Positive and negative scores are relative to each other, not to the statutory system.

Figure B.1 Strength of Bargaining Position vs. Balance of Final Agreement



References

Alexander v. Gardner-Denver Co. 1974. 415 U.S. 36.

Auerbach, Jerold S. 1983. *Justice Without Law?* New York: Oxford University Press.

Balgenorth, Robert, California State Building Trades union leader. Sept. 8, 1997. Interview by Jeff Petersen and Cristian Etcheverria.

Barrier, Michael. 1998. "A Working Alternative for Settling Disputes." *Nation's Business* 86(7): 43–46.

Bell, Gerald, President of the Laborer's Local 1184. July 14, 1998. Interview by Jeff Petersen and Cristian Etcheverria.

Bingham, Lisa B., and Charles R. Wise. 1996. "The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Success?" *Journal of Public Administration Research and Theory* 6(3): 383.

Bingham, Lisa B. 1997. "Employment Arbitration: The Repeat Player Effect." *Employee Rights and Employment Policy Journal* 189(Fall).

Bok, Derek, and John Dunlop. 1970. *Labor and the American Community.* New York: Simon and Schuster.

Budd, John W., and Brian P. McCall. 1997. "The Effect of Unions on the Receipt of Unemployment Insurance Benefits." *Industrial and Labor Relations Review* 50(3): 478–492.

Burger, Warren. 1982. "Isn't there a Better Way?" *A.B.A. J*. 68: 274.

Cake, Chuck. August 1997. Interview by Jeff Petersen and Cristian Etcheverria.

California Applicants' Attorneys Association. 1998. "Analysis of the DWC Report, 'The Construction Carve-Out Program.'" Memo.

California Division of Workers' Compensation. 1972. "Fundamentals for Applying California Schedule for Rating Permanent Disabilities." State of California Department of Industrial Relations, Sacramento, California.

———. 1996. "The Construction Carve-Out Program: Report of Activities in Calendar Year," California Department of Industrial Relations, Sacramento, California.

———. 1996, 1997, 1998. "Annual Report to the Legislature on Carve-outs." Report, California Department of Industrial Relations, Sacramento, California.

———. 1997. "Schedule for Rating Permanent Disabilities." Report, California Department of Industrial Relations, Sacramento, California.

———. 1998. "1997 Audits: A Report to the California Legislature on Claims Handling Practices of Workers' Compensation Administrators."

State of California, Department of Industrial Relations, Sacramento, California.

California Workers' Compensation Institute. 1998. "Medical Treatment," *CMS* #98-2. Sacramento, California.

Commission on the Future of Worker-Management Relations. 1994. "Report and Recommendations." U.S. Department of Labor: U.S. Dept. of Commerce, Washington, D.C.

Costa, Tony v. WCAB. 1997. Case No. G022181, Court of Appeal, Fourth Appellate District, Division Three.

Daniels, Susan. 1997. "Injured Workers Found to Want More Facts About WC." *National Underwriter* 101(29): 21–22.

Dixon, Gary, Labor Relations Manager, SCA, the General Contractor of the Project. August 8, 1997. Interview by Jeff Petersen and Cristian Etcheverria.

DVRPLA. 1997. "Domenigoni Valley Reservoir Project Labor Agreement." Section 10(c), ARB Inc. and The Building and Construction Trades Department, AFL-CIO. September 15, 1994.

Eastside Reservoir Project Labor Agreement (Addendum). 1997. "Southern California Associates Alcohol/Drug Free Workplace Policy."

Englehart, Mark. July, 1997. Interview by Jeff Petersen and Cristian Etcheverria.

Ernst & Young LLP for the California Workers' Compensation Institute. 1996a. "Treatment Guidelines for Low Back Injuries: A Qualitative and Quantitative Analysis of the Industrial Medical Council and the Agency for Health Care Policy and Research Low Back Guidelines." Photocopy.

Ernst & Young, LLP. 1996b. "Supporting Documentation for Treatment Guidelines for Low Back Injuries." Photocopy.

Falaris, Evangelos M., Charles R. Link, and Michael E. Staten. 1995. *Causes of Litigation in Workers' Compensation Programs.* Kalamazoo, Michigan: W.E. Upjohn Institute for Employment Research.

Gallagher, Larry, Risk Manager to Metropolitan Water District (MWD). August 7, 1997. Interview by Jeff Petersen and Cristian Etcheverria.

Gellhorn, Walter. 1996. *Ombudsmen and Others: Citizens' Protectors in Nine Countries*. Cambridge, Massachusetts: Harvard University Press.

Gilmer v. Interstate Johnson-Lane Corp. 1991. 500 U.S. 20.

Goerz, Gary, and James Sedgewick. August 8, 1997. Interview by Jeff Petersen and Cristian Etcheverria.

Govan, Gregory, AWZ Labor Relations Manager. August 8, 1997. Interview by Jeff Petersen and Cristian Etcheverria.

Horn, Sharlene, Ombudsman for the ESRP carve-out. August 8, 1997. Interview by Jeff Petersen and Cristian Etcheverria.

Howard, Charles L., and Maria A. Gulluni. 1996. *The Ombudsman Confidentiality Privilege*: *Theory and Mechanics 2*. Dallas, Texas: The Ombudsman Association.

IBEW/NECA. 1994. *CA Workers Compensation Agreement*. IV.

Lopez, Robert, Laborers Ombudsman. October 1997. Interview by Richard Reuben and Frank Neuhauser.

Lott, Stuart. September 5, 1997. Interview by Frank Neuhauser.

Marti, Virgil, M., ed. 1994. *The Ombudsman Handbook.* Dallas, Texas: The Ombudsman Association.

Menicucci, Robert. September 15, 1997. Interview by Jeff Petersen and Cristian Etcheverria.

Mnookin, Robert, and Tony Kornhauser. 1979. "Bargaining in the Shadow of the Law." *Yale Law Journal* 88: 950.

Moore, Christopher W., ed. 1987. *Practical Strategies for the Phases of Mediation.* San Francisco: Jossey-Bass.

Moscowitz, E., and V. Van Bourg. 1995. "Carve-outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements." *Syracuse Law Review* 46: 1–60.

Nefsky, Dave, Manager, Disability Insurance Division, California Employment Development Department. Telephone conversation, December 17, 1998.

Neuhauser, Frank, and Andrew Wiegand. 1997. *Evaluating the Reforms of the Medical-Legal Process Using the WCIRB Permanent Disability Survey.* The Commission on Health and Safety and Workers' Compensation, Sacramento, California.

Ozurovich, Michael. 1995. "Pitfalls in collective bargaining can cause serious harm to injured workers and their unions." In *The 1996 Workers' Compensation Yearbook*. Horsham, Pennsylvania: LRP Publications, pp. 164–168.

———. 1997. Correspondence from Michael Ozurovich, past president of California Applicants' Attorneys Association to Ms. Christine Baker.

Peterson, Mark, and others. 1998. *Compensating Permanent Workplace Injuries.* Santa Monica, California: RAND, Institute for Civil Justice.

Raven, Robert. 1988. "Alternative Dispute Resolution: Expanding Opportunities." *Arbitration Journal* 43: 44.

Reuben, Richard C. 1996. "The Lawyer Turns Peacemaker." *ABA Journal* 54.

———. 1997. "Public Justice: Toward a State Action Theory of Alternative Dispute Resolution." *California Law Review* 85.

Riskin, Leonard L. 1984. "Toward New Standards for the Neutral Lawyer in Mediation." *Arizona Law Review* 26: 329.

Robyn, Richard, Ombudsman for the NECA/IBEW carve-out. August 1997. Interview by Richard Reuben and Frank Neuhauser.

Rogers, Nancy, and Craig McEwen. 1989. Chapter 10. In *Mediation Law, Policy, Practice*. Rochester, New York: Lawyers Co-operative Publishing Company. San Francisco, California: Bancroft Whitney.

Rosenberg, J.D., and H.J. Folberg. 1993. "Alternative Dispute Resolution in a Civil Justice Reform Act Demonstration District: Findings, Implications and Recommendations." University of San Francisco School of Law, San Francisco.

Schultz, K.D. 1990. *Florida's Alternative Dispute Resolution Demonstration Project: An Empirical Assessment*. Florida Dispute Resolution Center.

Shaw, Margaret. 1994a. "Selection, Training, and Qualifications of Neutrals." In *National Symposium on Court-Connected Dispute Resolution Research*, Susan Keilitz, ed. Williamsburg, Virginia: National Center for State Courts, p. 157.

———. 1994b. *Selection, Training, and Qualifications of Neutrals in State Courts*. CPR Institute for Dispute Resolution.

Simon, William. 1985. "Informality and Redistributive Politics." *Clearinghouse Review* 19: 384.

Southern California Associates. 1994. "Alcohol/Drug Free Workplace Policy." Addendum to Eastside Reservoir Project labor Agreement.

Stringer, Larry, Safety Manager for Ontario Airport Project. 1997. Interview by Frank Neuhauser.

———. November 1997. Telephone conversation, Frank Neuhauser.

Sum, Juliann, and Laura Stock. 1997. "Navigating the California Workers' Compensation System: Injured Workers' Experience, An Evaluation of Services to Inform and Assist Injured Workers in California." Report, Labor Occupational Health Program, University of California, Berkeley.

Torrez v. Consolidated Freightways Corp. 1997. 58 Cal. App. 4th 1247.

Uehlein, Carl, attorney and labor negotiator for MWD. September 12, 1997. Interview by Frank Neuhauser.

United States Department of Labor, Commission on the Future of Worker-Management Relations. 1994. *Commission on the Future of Worker-Management Relations—Final Report*. Washington DC.

Wilner, Gabriel M., ed. 1997. *Domke on Commercial Arbitration (The Law and Practice of Commercial Arbitration*). Wilmette, Illinois: Callaghan.

Workers' Compensation Executive. 1998. 8(10).

Workers' Compensation Insurance Rating Bureau. 1994. *California Workers' Compensation Unit Statistical Plan.*

———. 1996, 1997, 1998. *Annual Report: Workers Compensation Losses and Expenses*.

———. 1999. "WCIRB Bulletin No, 99-01." San Francisco, California: WCIRB.

———. 1994. *California Workers' Compensation Insurance Manual.* San Francisco, California: WCIRB.

———. Survey years 1992–1998. *Permanent Disability Claims Survey.* Data supplied to authors by WCIRB. San Francisco, California: WCIRB.

Wright v. Universal Maritime Services Corp. 1998. No. 97-889, United States Supreme Court.

Yawn, Jim, Bechtel Engineering Environmental Safety and Health Unit. Telephone conversation, February 23, 1998.

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ISBN 0-88099-237-9
90000>
9 780880 992374