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

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

permanent partial and total disability claims. The failure to provide adequate compensation for these types of devastating workplace incidents, in my assessment, represents a threat to the continued viability of the historical compromise. There is a perception among many workers' compensation advocates, supported by very little information, that compensation for minor injuries is probably better under workers' compensation than under tort, and *vice versa* for more serious injuries and death. I think a valuable extension of this research would compare workers' compensation benefits to awards that one might expect in tort for similar injuries, after taking account of the cost, delay, and apportionment of fault between the worker and employer that are also part of the tort determination.

I have only a few minor quibbles. First, I wish the authors had provided more information on the actual results—that is, the statutory benefit amounts and lifetime income amounts that were projected in their analysis of expected statutory benefits—perhaps in an appendix. In addition, the many bar graphs comparing results across states would have benefited from showing the actual value of, for example, the replacement rate in each state. All of this information would be helpful to researchers who are trying to replicate these results as a starting point in pursuing future research, as well as for readers who wish to make their own determinations of adequacy.

Related to the issue of the metric that determines adequacy, there is a somewhat distracting focus on classifying a particular workers' compensation benefit as adequate if it replaces two-thirds of lost earnings, and inadequate if it does not. It is clear from the discussion contained in the concluding chapter that some members of the advisory panel overseeing the project upon which this volume was based may have had similar sentiments. Although the authors creditably defend the two-thirds replacement rate standard as a reasonable one, it is ultimately arbitrary, and adequacy is in the eye of the beholder. Taking the very key steps of explaining and estimating the various measures of adequacy was enough, in my view; emphasizing the two-thirds rule was not necessary.

Of necessity, this volume confines itself to looking at the adequacy of wage loss indemnification. Workers' compensation systems, as described earlier, provide a number of other benefits, including medical and vocational rehabilitation, and there may be tradeoffs between the benefits provided. That is, a state may

choose to offer relatively generous medical benefits, but at the cost of more modest wage loss benefits. I agree with the authors that the adequacy of wage-loss benefit compensation is an important issue in its own right, and that a fuller evaluation of all of the benefits offered by workers' compensation should be the subject of future research. Indeed, the concluding appendix of the book sets out an ambitious research agenda that should be the point of departure for many future dissertations.

This volume represents another in the Upjohn Institute's growing list of important contributions to the workers' compensation literature. It will be valued by both researchers and policy-makers. I would also recommend it to those who are new to workers' compensation, not least because the background information on the historical origin and the operation of workers' compensation is one of the best, and briefest, primers on the subject that I have read.

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*Carve-Outs in Workers' Compensation: An Analysis of the Experience in the California Construction Industry.* By David I. Levine, Frank W. Neuhauser, Richard Reuben, Jeffrey S. Petersen, and Cristian Echeverria. Kalamazoo, Mich.: W.E. Upjohn Institute for Employment Research, 2002. 175 pp. ISBN 0-88099-238-7, \$40.00 (cloth); 0-88099-237-9, \$18.00 (paper).

Workers' compensation is a state-specific, usually mandatory social insurance program providing workers with cash (indemnity) benefits and medical care for work-related injuries and diseases. Recent years have seen the emergence of various workers' compensation alternative dispute resolution (ADR) programs. Workers' compensation ADR has been characterized as an alternative to what, from the outset, was itself an ADR system (Lex Larson, *Larson's Workers' Compensation, Desk Edition*).

First introduced in the United States around 1910, workmen's compensation legislation was intended to provide adequate medical care and prompt, predetermined cash benefits "while limiting the employer's liability strictly to

workmen's compensation payments." The most "radical" feature of these laws was "a legal principle alien to the common law: liability without fault" (*Report of the National Commission on State Workmen's Compensation Laws*, 1972). These fundamental principles are unchanged. Increasingly, however, concerns have been raised about frequent disputes, long delays, costly litigation, rising costs of workers' compensation itself, and inaccessible or inadequate medical care. Approximately nine states, so far, have responded by authorizing unions and employers, through collective negotiations, to "carve out" a workers' compensation ADR system administered by them outside the traditional, statutory system. (I hereafter refer only to these collectively negotiated programs even though there are other forms of workers' compensation ADR.)

This recent legislation typically authorizes creating not only a dispute resolution system, but also light-duty, modified-job, or return-to-work programs; an agreed-upon list of exclusive medical providers; safety committees; and vocational rehabilitation or training programs. The dispute resolution system and the medical delivery system, however, constitute the heart of such programs. (John H. Lewis, "Improving Workers' Compensation through Collective Bargaining," *John Burton's Workers' Compensation Monitor*, November/December 1994; Ellyn Moscovitz and Victor J. Van Bourg, "Carve-Outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements," *Syracuse Law Review* 46:1, 1995.)

According to the authors of the book under review, proponents claim that workers' compensation ADR lowers rates of injuries and workers' compensation claims, improves medical delivery, minimizes friction in dispute resolution, and saves money. Opponents point to shortfalls in due process, in access to medical care, and in the distribution to workers of ADR's cost savings. Evidence relevant to these conflicting views has, to date, been largely anecdotal. Levine et al.'s stated intent to evaluate California's initial experience, and to draw lessons, is therefore welcome.

Following some preliminaries, four chapters present the core evaluation. Chapter 4 reports findings from interviews with six ombudspersons. These officials primarily worked for, were compensated by, and were accountable to a joint labor-management trust. They viewed their most important functions as furnishing information, advocating for or protecting injured workers, facilitating communication, and factfinding/clarification. Levine et al. conclude

that injured workers were probably better off in the ombudsperson-centered ADR system than they would have been in the traditional, statutory system. However, the findings also suggest a need for greater statutory specificity regarding ombudsperson hiring, training, and responsibilities.

Chapters 5–6 are intensive case studies of two carve-outs representing decidedly different models. The Eastside Reservoir Project Carve-Out (ESRP) was a large (\$2 billion) project with one owner (the Metropolitan Water District of Southern California), several hundred contractors and subcontractors, and multiple unions. The National Electric Contractors Association/International Brotherhood of Electric Workers Carve-Out (NECA/IBEW) was a statewide, multi-employer/single trade agreement involving a single union (including all 23 IBEW locals, and some 10,000 of California's 38,200 electricians) and half of the 500 NECA contractors. For each case study, the authors interviewed key parties and reviewed assorted written material, including the project labor agreement (ESRP), the collective bargaining agreement, explanatory handouts for injured workers, insurers' correspondence with injured workers, and injury reports. Site visits were conducted in 1997.

Chapter 7 presents a quantitative analysis of data from the first two years' experience with the NECA/IBEW carve-out. Two control groups were used: unionized electricians working for NECA contractors who did not join the NECA/IBEW carve-out (that is, who remained in the traditional system), and whose job duties, injury risks, skill, and pay thus closely matched the carve-out group's; and non-electricians at carve-out employers. Cost data for selected reporting levels for the years 1992–95 were used.

The authors find little evidence supporting the main claims of either side in the debate:

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 been realized. (p. 130)

Citing the apparent absence of deleterious effects from carve-outs, the authors approve the spread of these arrangements in California beyond the construction industry. (Since this volume's publication, enabling statutory authorization has been enacted.) However, they recommend some additional regulations and requirements for carve-outs.

This volume is a useful starting point for evaluating workers' compensation ADR programs. It contributes much-needed empirical analysis on the subject as well as a concise introduction to some of the key issues of interest. It does, however, have limitations.

First, little national context is provided. Save for brief mention of an often-cited project in Massachusetts, no reference is made to other states' authorizing legislation for, or experience with, workers' compensation ADR. The discussion and terminology, even in the introductory sections, are fairly California-specific.

Second, little may be gleaned from the injured worker interviews, because no workers in a "control group" in the traditional, statutory system were interviewed; very few workers in the case studies were interviewed (only five in the NECA/IBEW carve-out, for example); and, by the authors' own admission, the process for identifying potential interviewees was skewed: "We did not interview any workers who did not have a dispute or whose dispute was rapidly and successfully handled by the ombudsperson" (p. 8). Interviews with a much larger sample (including injured workers in the control groups as well as in the carve-outs) in a detailed survey that addressed benefits provision, access to and quality of medical care, and dispute resolution would have been more informative.

A third limitation may be inherent in any attempt to compare the frequency of disputes in systems of these two types: "matching up" similar levels of dispute resolution can be very difficult. Indeed, consistently identifying even the existence of a dispute, let alone the dispute's nature, can be problematic when comparing these systems. As the authors note, "strong assumptions are required to compare dispute incidence between the [California carve-out] ADR process" (which was measured at the mediation stage) "and the statutory system" (measured at the mandatory settlement conference stage) (125).

A fourth limitation, also admitted by the authors, is major. The qualitative study included only two carve-outs, and the quantitative study only one carve-out and 180 injuries. An array of diverse ADR models was thus not evaluated. The authors caution, "Even with this approach [differences-in-differences, to address possible selection bias], the [empirical] analysis is hampered by small sample sizes and young claims that yield inconclusive results" (126). Workers' compensation claims with "long-tail" maturity—notably, permanent

partial disability claims—are, at a systemic level, among the most contentious and costly.

Findings regarding workers' compensation dispute resolution in California since the 2002 publication of this book are decidedly mixed. On the one hand, a Rand Corporation evaluation of California's "traditional" workers' compensation system flagged three principal complaints: courts were slow to reach decisions, litigation had become more expensive, and the courts' procedures and actions lacked statewide consistency (Nicholas M. Pace et al., *Improving Dispute Resolution for California Injured Workers*, 2003). The Rand authors attributed these problems to severe under-funding and staffing shortages rather than to anything inherent in the traditional, statutory system.

On the other hand, a California Workers' Compensation Research Institute analysis comparing some 2,200 ADR claims with 9,600 claims under the traditional system called its findings "a sobering and much-needed reality check that, to a great extent, tempers the expectations of significant savings and improved systems efficiencies promised by the [statutorily authorized] expansion of California's ADR programs" (Alex Swedlow and Laura B. Gardner, *California Workers' Compensation Alternative Dispute Resolution System: Attorney Involvement Rates and Claims Costs*, 2004, p. 8). The authors called for additional research regarding workers' compensation ADR programs: a bromide, perhaps, but, given the dearth of evaluations to date, the inconclusive findings of the few existing studies, and the general expansion of—and abundant studies regarding—ADR programs in other workplace settings (see, for example, David B. Lipsky et al., *Emerging Systems for Managing Workplace Conflict*, 2003), a prescription that is warranted. It might be argued that since the preconditions for creating collectively bargained workers' compensation ADR (a unionized worksite, requisite trends in workers' compensation costs and in claims frequency, and other factors) rule out the rapid proliferation of such programs, their scope will be limited. Even if that is true, comprehensive follow-up analyses of California's experience with these programs would provide a valuable contribution to public policy regarding workers' compensation and alternative dispute resolution systems in general.

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