

Why the Carve-Out Works When the Comp System Does Not

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The California Constitution, Article XIV, Section 4, includes a provision for the “comfort, health and safety and general welfare of any and all workers” and authority to enact legislation that “shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character.” Anyone who works in the California workers’ compensation system knows that this constitutional mandate simply is not followed. Why is this so and how can it be remedied?

If you are a unionized employer in California, the remedy is a carve-out as allowed by Labor Code sections 3201.5 and 3201.7. In a carve-out, the employee’s concerns are considered and addressed. In the statutory system the employer/carrier/TPA does what it has to do to have a successful audit. Also, in a carve-out, the employee participates in the decisions being made concerning their care. In the statutory system, the guidelines dictate the care.

The employer, in a carve-out, shows concern for the employee by utilizing an independent ombudsperson to assist the employee through the process and to make sure the employee is heard. In the statutory system, the employee is reliant on the adjuster or an attorney they have to hire.

There are multiple avenues of communication in a carve-out. The ombudsperson can communicate with the involved adjuster, nurse, doctor, and employer on the employee’s behalf. The union communicates with the employer in the joint committee meetings. This communication eliminates the inherent mistrust ever present in the statutory system.

Because of the increased communication, the treatment process is expedited, meaning that the employee does not sit at home waiting for something to happen while depression sets in. Also, because of the ombudsperson and the increased communication, there is substantially less attorney involvement on both sides.

Evaluations are more complete in a carve-out and eliminate the need for and expense of supplemental reports and the additional temporary disability incurred by the delay. Doctors approved by both labor and management and, accordingly, credible to both sides accomplish permanent disability evaluations.



If, in a carve-out, the ombudsperson cannot resolve disputes, the parties go before a mediator the union and the employer agree to, and if, after that, there is still a dispute, an agreed arbitrator tries the matter. In practice, almost all the claims in a carve-out are resolved before the mediation stage.

These elements of a carve-out accomplish the mandate of the California Constitution while reducing costs substantially and at the same time removing any antagonism that exists in the employee/employer relationship. If you are involved with an employer or a union in the area of workers’ compensation, you should examine whether a carve-out works for you. It is said that doing the same thing over and over and expecting a different result is the definition of insanity. We are all not crazy. Let’s do something different and make a difference.



James Libien graduated from the University of San Francisco School of Law and was admitted to the bar in 1974. He is now a retired defense attorney after representing cities, counties, self-insured employers, and insurance carriers for 38 years. For the last 5 years he has been working with employers to establish successful carve-out programs.