



Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Research Studies and Reports

ILR Collection

4-2012

Alternative Dispute Resolution [ADR] for Workers Compensation in Collective Bargaining Agreements: An Overview

Fred B. Kotler

Cornell University, fbk2@cornell.edu

Follow this and additional works at: <https://digitalcommons.ilr.cornell.edu/reports>

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

This Article is brought to you for free and open access by the ILR Collection at DigitalCommons@ILR. It has been accepted for inclusion in Research Studies and Reports by an authorized administrator of DigitalCommons@ILR. For more information, please contact catherwood-dig@cornell.edu.

Alternative Dispute Resolution [ADR] for Workers Compensation in Collective Bargaining Agreements: An Overview

Abstract

This paper addresses the argued benefits for cost savings and efficiency of alternative dispute resolution [ADR] procedures for workers compensation. Particular focus is on legislative “carve-outs” that authorize collectively-bargained ADR procedures for the construction industry in New York and other states.

Given the particular pressure to contain rising workers’ compensation costs—and the burden that these costs represent for the construction industry— ADR procedures are one of the most important advantages of unionized construction and, in particular, Project Labor Agreements [PLAs]. The negotiated alternative procedures, subject to Workers’ Compensation Board [WCB] approval, use an expedited and non-adversarial process that can potentially save considerable project time and costs.

Keywords

alternative dispute resolution, ADR, workers compensation, construction, costs

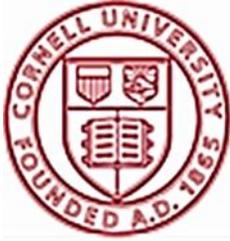
Comments

Suggested Citation

Kotler, F. B. (2012). *Alternative dispute resolution [ADR] for workers compensation in collective bargaining agreements: An overview* [Electronic version]. Ithaca, NY: Cornell University.

Required Publisher Statement

© [Cornell University](https://digitalcommons.ilr.cornell.edu/). Reprinted with permission. All rights reserved.



Cornell University
ILR School

**Alternative Dispute Resolution [ADR] for Workers Compensation
In Collective Bargaining Agreements:
An Overview**

Fred B. Kotler, J.D.
Research Associate
School of Industrial and Labor Relations
Cornell University

April 2012

Alternative Dispute Resolution [ADR] for Workers Compensation In Collective Bargaining Agreements: An Overview

Fred B. Kotler, J.D.

This overview addresses the argued benefits for cost savings and efficiency of alternative dispute resolution [ADR] procedures for workers compensation. Particular focus is on legislative “carve-outs” that authorize collectively-bargained ADR procedures for the construction industry.

Contents

- I. Scope of ADR use and principal approaches
- II. ADR for workers’ compensation in collective bargaining agreements: “Carve-outs”
- III. Why collectively-bargained ADR programs are focused on the construction industry
- IV. New York State’s authorization of collectively-bargained ADR programs
 - A. The 2001 Cornell ILR study
 - B. Statutory requirements
 - C. Self-insurance and insurance carrier plans
 - i. *The Electrical Employers Self Insurance Safety Plan [EESISP]*
 - ii. *Insurance Carrier Plan: Westchester and Hudson Valley [NY] ADR Program: Aon’s Report*
- V. Data from other ADR “carve-out” states: Minnesota and California
 - A. Minnesota
 - B. California
- VI. ADR for Workers’ Compensation and Project Labor Agreements

Acknowledgements

- Appendix A: Summary from 2001 Cornell ILR report, *An Evaluation of the New York State Workers’ Compensation Pilot Program for Alternative Dispute Resolution*
- Appendix B: New York State Statutory Authority

I. Scope of ADR use and principal approaches

Several states have adopted Alternative Dispute Resolution [ADR] procedures for workers compensation claims. This is a response to several issues impacting the traditional statutory system: rising health care costs, the volume of contested claims, delays in processing those claims, concerns about the accessibility and adequacy of medical care, and the cost of litigation. The legislation seeks to reduce administrative costs and case backlog and to improve administrative efficiency. Three principal ADR approaches are mediation, arbitration, and use of an ombudsman. Various states authorize use of one or more of these approaches.

Mediation: A neutral, third-party mediator is charged with bringing the parties closer, to facilitate a process that may lead to settlement of a dispute. The mediator does not, however, have the power to make a decision that settles the dispute. Seventeen states use mediation to resolve workers compensation issues.¹

Arbitration: A neutral, third-party arbitrator hears and makes a determination based on evidence presented by the parties. Arbitration is typically less formal than court proceedings or administrative hearings. The arbitrator is usually experienced in workers compensation issues. Under some statutes, the parties can determine whether the arbitrator's decision will be binding. Statutes may also define an appeals process to an appropriate appellate body or the state workers compensation agency. These eight states use arbitration: California; Illinois; Massachusetts; Minnesota; New York; Ohio; Oregon; and Texas.

Ombudsman programs: An ombudsman [or ombudsperson] is charged with providing information, conducting fact-finding, and guiding the injured worker through procedures. The aim is to protect the injured worker's interests, and to help the worker make well-informed and considered choices for handling of a claim. Early and timely intervention by an ombudsman has the likely effect of reducing the number of number of issues that might otherwise require resolution.² Fifteen states³ use ombudsman programs. Some states may also provide for the ombudsman to serve as a mediator.

¹ These states are: Colorado, Florida, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oregon, South Dakota, Tennessee, Vermont, and West Virginia.

For a list of state statutes and case law references, see Part 14 PROCEDURAL LAW, Chapter 125 ALTERNATIVE DISPUTE RESOLUTION, 7-125 *Larson's Workers Compensation Law* Section 125.02, LexisNexis.

² Part 14 PROCEDURAL LAW, Chapter 125 ALTERNATIVE DISPUTE RESOLUTION, 7-125 *Larson's Workers Compensation Law* Section 125.01, LexisNexis; this section notes the views of administrative officials.

See also Review of *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. *Industrial & Labor Relations Review*, Vol. 59, No. 1. Available at: <http://digitalcommons.ilr.cornell.edu/ilrreview/vol59/iss1/83>

³ Alabama, Arizona, Arkansas, California, Florida, Kansas, Kentucky, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas. See Part 14 PROCEDURAL LAW, Chapter 125 ALTERNATIVE DISPUTE RESOLUTION, 7-125 *Larson's Workers Compensation Law* Section 125.02, LexisNexis.

II. ADR for workers compensation in collective bargaining agreements: “Carve-outs”

Legislation in eleven states authorizes labor and management in the construction industry to establish ADR procedures for workers compensation through collective bargaining. These are the so-called “carve-outs” enabling industry representatives to set-up tailored programs that, in their view, best serves the needs and interests of their workforce and their businesses.

“Carve-out” programs – also called Collective Bargained Workers Compensation [CBWC] programs – are an alternative to, but not independent of, the state supervised insurance program. Statutes commonly impose reporting requirements and authority over appeals and final determination of claims may reside with state officials. The state’s role is primarily to provide oversight of the alternative process – to act more as watchdog than governing body.⁴

The intent is for the parties to realize a range of benefits.⁵ These include:

- Realizing substantial cost savings
- Improving the delivery of medical benefits without reducing benefits to injured workers
- Expediting claims processing and promoting administrative efficiency
- Reducing lost-time injury days and enabling the injured worker to return to work earlier
- Significantly reducing litigation
- Fostering a more cooperative and far less adversarial environment
- Providing immediate information and prompt, appropriate care to the injured worker

Flowing from these are additional advantages of ADR over traditional litigation:

A highly participatory process:

Parties in mediation, for example, can talk directly and informally with each other; issues can more easily be explored and in a way that promotes earlier resolution of a dispute;

Greater freedom to fashion unique and appropriate remedies:

The court system provides limited remedies for dispute resolution. These include the awarding of monetary damages, specific performance, or an injunction. In mediation, by contrast, the parties are free to shape an appropriate remedy that fits the situation, a practicality that promotes a prompt and sensible resolution.

⁴ See *Construction Industry Service Corporation* at <http://cisco.org/collectively-bargained/>

⁵ These states permit collectively bargained “carve-outs”: Maine [1993]; Massachusetts [1992]; New York [1995]; Maryland [1997]; Pennsylvania [1996]; Minnesota [1995]; Kentucky [1994]; Florida [1993]; California [1993]; Hawaii [1995]; Nevada [2009]. William K. Ecklund, COLLECTIVELY BARGAINED WORKERS' COMPENSATION: SMACNA Council of Chapter Representatives, June 2007, available at: http://www.pinp.org/files/lmcc/CBCW_Seminar.pdf

Also see: *IMPACT: Ironworker-Management Progressive Action Cooperative Trust, “Talking Points,”* <http://www.ilga.gov/senate/Committees/WorkersCompensationReform/IronworkerManagementProgressiveActionCooperativeTrust-PublicTestimony.pdf>; www.impact-net.org

Parties have more control over the process:

An example is the selection of the neutral third party.⁶

Participation in the ADR program is voluntary:

Typically it is at the option of the employer – contractor, construction manager or project owner.

III. Why collectively-bargained ADR programs are focused on the construction industry

While some states, most notably California, have extended “carve-out” authority to parties in other industries, the construction industry has been the focus for collectively-bargained ADR. The reasons are straightforward: construction is a particularly dangerous industry and workers compensation rates are correspondingly high. Jobsite fatalities are as high as 1,200 per year, a rate significantly higher than for manufacturing. The risks are inherent in the work and compounded by the presence of multiple contractors and crafts on the site at a given time.⁷

Construction is a highly competitive industry and contractors seek relief from the high costs related to compensation insurance and medical care. The need for prompt medical care, the efficient processing of compensation claims, and the reduction of time lost from injuries is an obvious concern for both contractors and workers.

Workers compensation premiums under the traditional system are based on payroll. Unionized contractors, whose workforce may be both more highly skilled and better paid than nonunion workers, may suffer a competitive disadvantage and pay disproportionately into the state fund. A collectively-bargained alternative program can be based not on payroll but on a more equitable basis of hours worked.⁸

⁶ Jeffrey Schieberl, J.D., “Alternative Dispute Resolution: Using ADR to Resolve Worker’s Compensation Claims,” *Graziadio Business Review / Pepperdine University / Graziadio School of Business and Management*, Volume 9, No. 4 [2006], available at: <http://gbr.pepperdine.edu/2010/08/alternative-dispute-resolution/>

⁷ “The fatality rate in construction is “equal to 12.3 fatalities per 100,000 full-time equivalent workers. This compares to a fatality rate of between 2.3 and 3.3 per 100,000 workers in various manufacturing sectors. And while the fatality rate has declined dramatically in most industries, it has remained stubbornly high in construction... the fundamental disorganization of construction sites makes improving safety particularly challenging.” Memorandum, Victoria L. Bor, Sherman, Dunn, Cohen, Leifer & Yellig, P.C. to US Army Corps of Engineers re: *Solicitation of Comments on the Potential Use of Project Labor Agreements [PLAs] for Large Scale Construction Projects Within Orange County, New York*, February 18, 2010.

⁸ *Construction Industry Service Corporation*

IV. New York State's authorization of collectively-bargained ADR programs

A. The 2001 Cornell ILR study

New York State enacted legislation in 1995 authorizing collectively bargained ADR procedures for workers compensation for the unionized sector of the construction industry.⁹ Initially a pilot program, the legislation directed the School of Industrial and Labor Relations at Cornell University to conduct a study evaluating the “use, costs, and merits” of ADR.

Cornell ILR professors and associate deans, Ronald Seeber and Robert Smith, assisted by researcher Timothy Schmidle, studied the ADR programs under four collective bargaining agreements and examined claims both for and against ADR. The Cornell team reviewed data on over 6000 injuries, interviewed ADR signatories, and surveyed more than 3000 workers to assess the workers' experiences with the medical, insurance, and procedural elements of the various programs. The Cornell ILR report, *An Evaluation of the New York State Workers' Compensation Pilot Program*, was completed in December 2001 and submitted to the New York State Workers' Compensation Board.

The report articulated several key findings that endorsed the legislative authorization of ADR for workers compensation. The points are quoted here.¹⁰ The full summary is included as Appendix A.

Number of disputes

“Injuries that occur under ADR are not more likely, and in some cases are less likely, to lead to a dispute.”

Dispute resolution

“Injured workers generally rate the ADR system highly and the ADR system concludes cases more quickly.”¹¹

Costs

“ADR is associated with lower medical costs, but not lower benefits.”

⁹ Chapter 491 of the Laws of 1995, *NY CLS Work Comp § 25*, Section 2-c. Collective bargaining; alternative dispute resolution

¹⁰ Seeber, R.L., Schmidle, T.P., & Smith, R.S. (2001). *An evaluation of the New York State workers' compensation pilot program for alternative dispute resolution*. Ithaca, NY: Institute on Conflict Resolution, <http://digitalcommons.ilr.cornell.edu/icr/5>, at 7-10.

¹¹ While the authors note certain limitations on the scope of the data, they clearly state that “the consistency of the findings regarding ADR's impact bolster the conclusion that ADR does lead to faster claims closing.” *Ibid* at 87.

Medical care

“ADR and Control Group workers were generally satisfied with the medical care they received and there were no significant differences between the groups.”

Support for the programs

“Interviews with ADR signatories and other ADR officials - representatives from unions, management, and insurance organizations - are highly supportive of ADR in workers' compensation.

“On the whole, a high degree of satisfaction was expressed by all parties regarding the experience to date with ADR (even by those signatories who indicated that they were skeptical of ADR at the onset of the program).”

Citing that “the alternative dispute resolution system for the resolution for certain construction industry claims has been successful for employers and workers...,” the 1995 legislation was amended in 2010 to make permanent the use of ADR for workers compensation claims.¹²

B. Statutory requirements

New York State statutes articulate the approval and reporting requirements of a collectively bargained ADR program. Workers Compensation Law Section 25, 2-c is the enabling legislation. ADR program requirements are found at both Section 25, 2-c and within Workers Compensation Law Section 314. *[Relevant sections are included infra as Appendix B.]*

Collective bargaining agreements, according to the statutes, are permitted to

- establish dispute resolution procedures including but not limited to mediation and arbitration;
- identify the agreed managed care organization or a list of authorized providers for medical treatment;

¹² *BILL NUMBER:A9898: TITLE OF BILL: An act to amend chapter 491 of the laws of 1995 amending the workers' compensation law relating to permitting the establishment of an alternative dispute resolution system to resolve workers' compensation claims through collective bargaining agreements, in relation to making such provisions permanent*

PURPOSE: Makes permanent the alternative dispute resolution system to resolve workers' compensation claims through collective bargaining agreements.

SUMMARY OF PROVISIONS: Section one permanently extends the alternative dispute resolution system for certain workers' compensation claims.

JUSTIFICATION: The alternative dispute resolution system for the resolution for certain construction industry claims has been successful for employers and workers.

Available at: <http://open.nysenate.gov/legislation/bill/A9898-2009>

- define benefits for injured workers, dependents, or survivors that supplement benefits provided under the traditional system;
- outline obligations and procedures for
 - a light duty, modified job, or return to work program;
 - a vocational rehabilitation or retraining program; and
 - worker injury and illness prevention programs and procedures.¹³

The ADR programs are subject to approval by the Chair of the New York State Workers Compensation Board. The program’s details, incorporated within the collective bargaining agreement, are submitted for review at least 30 days prior to the program’s proposed start date.¹⁴ Consistent with the Board’s watchdog status, there is a continuing duty to report: employers are obligated to submit a collective bargaining agreement to the Board annually and whenever renegotiated.¹⁵

Programs must meet or exceed standards established for the state program. The proposed ADR program cannot “in any way diminish or change any benefits to which an employee, or his or her dependents, or survivors may be entitled pursuant to the provisions of this chapter.”¹⁶

The ADR process must follow a series of due process and recording keeping requirements including: adequate and timely notice of proceedings; fair and practical arrangements for mediation and arbitration; maintenance of records for all claims; and reporting of injuries to the Board. The legislation also states that administrative costs, including costs for arbitration, are the responsibility of the employer.¹⁷

The statutes favor arbitration as the last step for resolving disputes. The collective bargaining agreement may establish the arbitrator’s decision as final and binding; the decision is submitted to but not then reviewable by the Workers Compensation Board. An appeal may be filed within 30 days and heard within the state’s court system.¹⁸

¹³ Section 2-c, subsection (c)

¹⁴ WORKERS' COMPENSATION LAW ARTICLE 2. COMPENSATION, *NY CLS Work Comp § 25* (2012) Section 2-c. Collective bargaining; alternative dispute resolution, subsection (f)

See also TITLE 12. DEPARTMENT OF LABOR, CHAPTER V. WORKERS' COMPENSATION, SUBCHAPTER A. GENERAL PROVISIONS, PART 314. ALTERNATIVE DISPUTE RESOLUTION OF CLAIMS, § 314.2. Review process for collective bargaining agreements, subsection (a).

¹⁵ § 314.2 (b) “Subsequent to its original submission, employers must submit to the office of the chair a copy of their collective bargaining agreement annually and whenever it is renegotiated.”

¹⁶ Section 2-c, subsection (b)

¹⁷ § 314.2 (e)

¹⁸ § 25, 2-c, subsection (d); § 314.3

C. Self-insurance and insurance carrier plans

The statutes provide for employers to choose coverage provided either by a self-insurance or an agreed insurance carrier plan.¹⁹ This section provides examples of both types of plans currently in operation in New York State.

i. *The Electrical Employers Self Insurance Safety Plan [EESISP]*

The Joint Industry Board of the Electrical Industry in New York City - International Brotherhood of Electrical Workers Local 3 and affiliated contractors – negotiated and received approval to operate a collectively-bargained ADR program in 1996, soon after New York State authorized such legislative “carve outs.”

The operation and administration of the program, the *Electrical Employers Self Insurance Safety Plan [EESISP]*, involves both ADR and managed care and is the largest ADR program in the state, have provided useful experience, information on efficiencies, costs savings, and overall best practices.

EESISP Director Jean L’Allier presented these program efficiencies based on statistics compiled for 2004-2011:

- 1) 99.96% of the 24,507 filed cases were resolved without mediations or arbitrations;
- 2) The 24,507 cases filed generated one appeal from an arbitrator’s decision to the 2nd Department and the arbitrator’s decision was upheld;²⁰
- 3) Over the period, for every \$1.00 paid in indemnity benefits, EESISP spent .39 cents in medical benefits, a ratio far better than industry averages;

Director L’Allier also cites the 2001 Cornell ILR study that reviewed EESISP data as stating that the “average time from opening to closing a case in the ADR program was *137 days faster than the traditional workers compensation system.*” [Emphasis added]²¹

As an alternative to litigation of workers compensation claims, EESISP administrators note the following ADR best practices:

¹⁹ § 314.2 (c)

Article 4, Section 50 (3a) and part 317 of Title 12 NYCRR of the Workers’ Compensation Law permits group self-insurance plans, otherwise known as self-insured trusts, self-insured consortiums, association trusts, or group employer plans. For a discussion of self-insurance procedures and risks, see *New York State Insurance Fund* at http://ww3.nysif.com/Workers_Compensation/About_Workers_Compensation/Risks_of_Self_Insurance.aspx

²⁰ *Memorandum, 11/14/11, Jean L’Allier, Director, EESISP* Of 24,507 claims filed during this period, there were 872 medication hearings and 83 arbitration hearings.

²¹ *Ibid.*

ADR provides a useful administrative model in a system that involves a high volume of cases, with repetitive issues and little controversy

Maximum efficiency results from a limited number of key personnel, authorized, oriented and trained to resolve disputes quickly rather than engage in litigation tactics

Routine cases are best resolved when a single advocate for claimants regularly interacts with claims administrators

ADR combined with managed care “provides the best chance to achieve desirable return to work scenarios... [because] a closed panel of higher quality but more experienced providers leads to better clinical outcomes, better return to work results, and lower total costs...”²²

The EESISIP managed care program “uses the same network of doctors as our participants have access to in their major medical plans” but at negotiated rates that are lower than are paid within the statutory system.²³

ii. *Insurance Carrier Plan: Westchester and Hudson Valley [NY] ADR Program: Aon’s Report*

The Westchester / Hudson Valley ADR program is an insurance carrier-based plan negotiated between the Construction Industry Council of Westchester and Hudson Valley [New York] and the Building and Construction Trades Council of Westchester and Putnam Counties and in effect since January 2007.

The agreement designates an ADR Program Administrator and a Joint Labor-Management Oversight Committee to oversee the program’s operation.

The Program Administrator and Broker, Aon Risk Solutions, is the program’s direct contact with the Workers Compensation Board, has operational responsibility for program implementation and serves under the direction of the Joint Labor-Management Oversight Committee. The Oversight Committee, comprised of representatives from participating employers and unions, is the policy and ultimate decision-making authority. The program’s key dispute resolution components are Ombudsperson, Mediation, and Arbitration.²⁴

²² *Characteristics of A Successful Alternative Dispute Resolution Program*, Jean L’Allier, Director, and Vito Mundo, Counsel, EESISIP, 2008.

²³ Memorandum, 1/17/12, Joint Industry Board counsel Vito Mundo.

²⁴ *A Collectively Bargained Workers’ Compensation Alternative Dispute Resolution (ADR) Program, Construction Industry Council of Westchester And Hudson Valley, Inc., et al., and Building and Construction Trades Council of Westchester and Putnam Counties, New York*, executed January 26, 2007.

Aon Global Risk Consulting (Aon) reviewed the performance of the ADR Workers Compensation Insurance Program. Aon's report, *Westchester ADR Program Cost Analysis as of 12/31/11*, issued March 19, 2012, is an analysis of the cost of workers compensation claims and allocated loss adjustments expenses (ALAE). The report is particularly useful because the New York State Workers' Compensation Board, as stated above, does not track ADR data.

Program administrative and claims handling costs are not included. As stated:

The loss costs in this analysis are limited to the cost of claims and ALAE and do not include other costs such as claims handling, administrative costs, or any other costs associated with insurance programs. All losses in this analysis are on an unlimited basis.²⁵

Aon examined two ADR carve-out programs that are part of Project Labor Agreements [PLAs: *discussed below*] for two significant public projects in the Hudson Valley region: the New York City Department of Environmental Protection Ultra-Violet Light Disinfection Facility and the New York State Department of Transportation I-287 project.

Aon found "excellent loss results..."

Based upon approximately \$168 million of payroll within these [two] programs, the projected total ultimate loss is expected to be in the range of \$4MM. This result has been compared to an estimated \$18MM industry expected loss costs for traditional WC results over a five year period from 2006 to 2011 for these projects.²⁶

For the upcoming Tappan Zee Bridge project, in a letter dated April 5, 2012 from Jack J. Frazier, Senior Vice President – Production, Aon Risk Solutions to Allan M. Paull, Senior Vice President, Tishman Construction Corporation, Aon stated that, assuming similar performance,

... In light of our experience, we can conservatively estimate savings of between 10% and 40% of traditional Expected Loss Factors to be anticipated.²⁷

Aon concluded that "PLA ADR Workers Compensation, coupled with a well-run collectively bargained safety program/loss mitigation program, and drug testing (pre-hire, random, and post-accident) will yield substantially lower Workers Compensation costs."²⁸

²⁵ Aon Risk Solutions, Global Risk Consulting, Actuarial and Analytics, *Westchester ADR Program Cost Analysis as of 12/31/11*, issued March 19, 2012, at 4.

²⁶ April 5, 2012 letter from Jack J. Frazier, Senior Vice President – Production, Aon Risk Solutions to Allan M. Paull, Senior Vice President, Tishman Construction Corporation

²⁷ *Ibid.*

²⁸ *Ibid.*

V. Data from other ADR “carve-out” states: Minnesota and California

Minnesota and California are two of the eleven states²⁹ that authorize collectively-bargained ADR for workers compensation program. Data on claims and cost comparisons from these two states are included here for illustration and because the New York State Workers Compensation Board does not track data on ADR programs in New York.

A. Minnesota

Minnesota’s collectively-bargained ADR program, the Union Construction Workers Compensation Program, has been in operation since 1997. A 2009 report from the Minnesota Department of Labor and Industry [DLI] makes these comments echoing the earlier Cornell evaluation of ADR in New York:

The Union Construction Workers Compensation Program was designed to be simpler and less adversarial than the state system... The UCWCP uses a dispute resolution process that is far simpler than the state’s, with a single path and fewer steps. The UCWCP also has slightly lower denial rates and lower costs, and there is no evidence of greater worker dissatisfaction.³⁰

An earlier [October 2007] DLI memorandum, *Construction Collective Bargaining Agreement Claims and Cost Comparison*, noted the following:

The effectiveness of the CBA program can be assessed by comparing various workers’ compensation measures with available data about the construction industry...

Overall, construction employers in the CBA program, compared to all construction industry employers, have slightly fewer claims, pay significantly lower benefits per claim, have claims that require vocational rehabilitation less often, and have fewer claims disputes. These results [based on CBA annual data from 2003 and 2004] are consistent with a shorter average duration of indemnity benefits, in which workers are more likely to return to work without requiring additional services. The comparisons...show that:

The indemnity claims rate per \$1 million of payroll is about 18 percent lower among CBA employers;

The overall claims rate per \$1 million of payroll is 5 percent to 10 percent lower among CBA employers;

Total incurred benefit costs per \$100 of payroll are about 40 percent lower among CBA employers;

²⁹ See fn 5 above

³⁰ *Oversight of Workers Compensation*, Report of the Program Evaluation Division, Office of the Legislative Auditor State of Minnesota, February 2009, available at <http://www.auditor.leg.state.mn.us/ped/2009/workcompsum.htm>

Average benefits paid per claim are about 32 percent to 36 percent lower among CBA employers;³¹

B. California

California enacted its carve-out for the construction industry in 1993 and, following ten successful years of collectively-bargained ADR programs, authorized similar carve-outs for other unionized industries.³²

The Southern California Contractors Association [SCCA] references a report of the California Workers' Compensation Institute [CWIC]³³ that compared closed claims from 1993-1999 of an insurance company carve-out program with "Standard Industry Results" and found "a 25 percent reduction on average length of claims and a 39.5 percent savings on average total claim costs."³⁴

The NECA West ADR program of the National Electrical Contractors Association [NECA] and the International Brotherhood of Electrical Workers [IBEW] claims

...pure loss results that are 23% below the California industry average, and the loss ratio for the NECA program has been at approximately 53% [over a 7 year period]. NECA's recent independent actuarial report indicates that the reduced pure loss and DCCE for NECA are attributable to its successful ADR program.³⁵

NECA offers the following data comparing ADR with non-ADR programs on cost savings, frequency of litigation, length of disability, and length of claims:³⁶

³¹

<http://www.ilga.gov/senate/Committees/WorkersCompensationReform/IronworkerManagementProgressiveActionCooperativeTrust-PublicTestimony.pdf> at 8.

³² 65A Ca Jur Work Injury Compensation § 588; also see http://www.workerscompensation.com/compnewsnetwork/news/broadspire_first_alt_dr_process.html; a useful and comprehensive resource guide for the California system is provided by the State of California Department of Industrial Relations, CARVE-OUTS: A GUIDEBOOK FOR UNIONS AND EMPLOYERS IN WORKERS' COMPENSATION [2004], at: <http://www.dir.ca.gov/chswc/CARVEOUTSGuidebook2004.pdf>

³³ California Workers' Compensation Institute: <http://www.cwci.org/> Per the CWCI website: The California Workers' Compensation Institute [CWIC] is a private, non-profit corporation of insurers and public and private self-insured employers that monitors trends and analyzes workers compensation data.

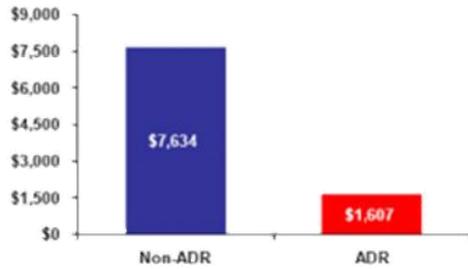
³⁴ Eugene Zondlo and Gary Hamilton, "What you can do about Workers' Comp rates", Southern California Contractors Association, SCCA's ADR Program, http://www.sccaweb.org/workers_comp.htm

³⁵ <http://www.necawest.com/whyadr.htm>

³⁶ *Ibid.*

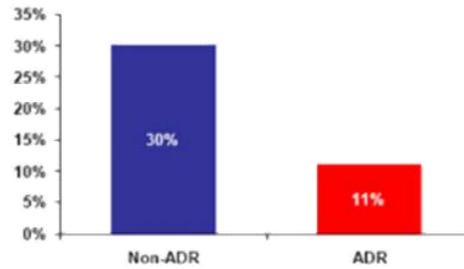
Benefit to Insurers

Average Paid – Closed Claim Study 2003



Source: PointSure Insurance Services (2003)

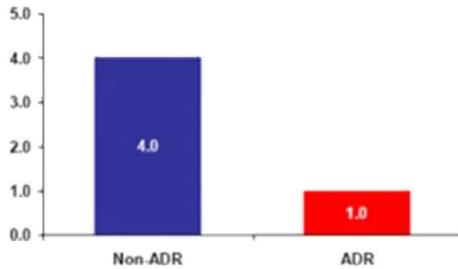
Frequency of Litigation



Source: California Workers' Compensation Institute (March 2003)

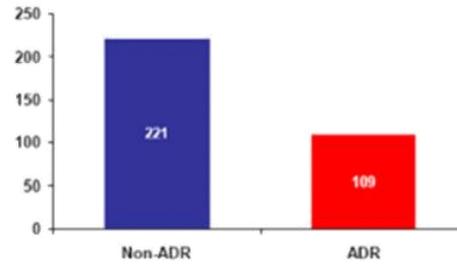
Benefit to Workers & Employers

Average Temporary Total Disability Weeks



Source: PointSure Insurance Services (2003)

Average Claim Life Span in Days
(Includes Contested & Non-Contested Claims)



Source: PointSure Insurance Services (2003)

VI. ADR for Workers Compensation and Project Labor Agreements

Given the particular pressure to contain rising workers compensation costs – and the burden that these costs represent for the construction industry – ADR for workers compensation is one of the most important advantages of Project Labor Agreements – or PLAs. *ADR procedures are permitted in New York State only when established through collective bargaining. And a PLA is a particular type of collective bargaining agreement.*³⁷

A PLA is a pre-hire, project-specific agreement that standardizes contract terms among various crafts for the duration of the project. It is a valuable construction management tool that is properly viewed as a “job site constitution” for labor relations on the project. It represents a particularly high level of labor-management cooperation and planned approach to the job.

Project planners – contractors, owners, and labor – can together strategize ways to minimize disruption and inconvenience to the public for a range of construction or renovation projects involving highways, police and fire stations, bridges, airports, schools, courthouses, office buildings, and other public and private facilities.

ADR for workers compensation operates within this cooperative framework. PLAs ban strikes and lockouts and necessarily include dispute resolution provisions to deal with contract and jurisdictional issues. Joint labor-management committees monitor safety and provide an avenue for ongoing communication to promptly respond to problems that arise during the project.

PLAs assure that contractors will have access to a highly-trained, skilled labor pool through union referral. And there is a close connection between worker training and worker safety – as much as a 25% lower fatality rate for construction workers has, for example, been shown in states with prevailing wage laws.³⁸

PLAs provide cost savings, flexibility and efficiency through standardization of contract terms among various crafts and, typically, through adjustments to hours of work, the number of paid holidays, shift differentials, and apprentice-journeyman ratios.

The cost savings provided by collectively-bargained ADR procedures for workers compensation add value to PLAs for owners and contractors. ADR procedures add to a PLA’s efficiency by more promptly addressing the needs of injured workers and by contributing to a positive and cooperative work environment.

³⁷ Kotler, F. B. (2009). *Project labor agreements in New York State: In the public interest* [Electronic version]. Ithaca, NY: Cornell University, School of Industrial and Labor Relations — Extension Division, Construction Industry Program. <http://digitalcommons.ilr.cornell.edu/reports/22/>, at 20.

³⁸ Kotler, F. B. (2011). *Project labor agreements in New York State II: In the public interest and of proven value* [Electronic version]. Ithaca, NY: Cornell University, School of Industrial and Labor Relations, at 19. Available at: <http://digitalcommons.ilr.cornell.edu/reports/36/>

Acknowledgements

In addition to sources cited above, phone interviews were conducted with the following ADR practitioners during period January 20-24, 2012. These interviews were particularly helpful for information, context, and advice for research:

- Richard Robyn, Workers' Compensation Judge, Retired, NECA/IBEW Workers' Compensation Trust, Imperial Beach, CA
- Dr. R. Edward Minchin, Jr., Professor of Construction, Rinker School of Building Construction, University of Florida, Gainesville, FL
- Vito Mundo, General Counsel, Joint Industry Board of the Electrical Industry, Local 3, IBEW, New York, NY
- Jack Frazier, Senior Vice President – Production, Aon Risk Solutions, Jericho, NY
- Roy Barnes, Esq., Barnes, Iaccarino, Virginia & Shepherd LLP., New York, NY
- Ross Pepe, Ross J. Pepe, President, Construction Industry Council of Westchester and Hudson Valley, Inc.
- L. Todd Diorio, President, Hudson Valley Building and Construction Trades Council
- Michelle Bobb, Executive, EMCOR Group, [electrical industry], Norwalk, CT
- Richard Sakata, Program Administrator, Collectively Bargained Workers Compensation, International Brotherhood of Electrical Workers and Electrical Contractors of Hawaii
- Robert M. Archer, Esq., Archer, Byington, Glennon & Levine, LLP, Melville, NY

Fred B. Kotler

Fred Kotler, J.D., is currently Research Associate, School of Industrial and Labor Relations at Cornell University and Adjunct Faculty member, National Labor College.

Mr. Kotler has served as Associate Director, Cornell Construction Industry Program and written numerous reports, articles, and training materials related to the construction industry.

He is co-author, with Linda Donahue, of the Cornell ILR study, *The Cost of Worker Misclassification in New York State* [2007] that served as a basis for an Executive Order establishing the New York State Joint Employment Task Force on Employee Misclassification and enactment of the New York State Construction Industry Fair Play Act.

His 2009 report, *Project Labor Agreements in New York State: In the Public Interest* reviews the history of, and standards for, PLA use in New York State.

The 2011 report, *Project Labor Agreements in New York State: In the Public Interest and Of Proven Value* examines why PLA use significantly increased for both public and private sector work in New York City and New York State during 2009-2011.

Mr. Kotler recently taught a course at Cornell's ILR School on the history and role of public infrastructure projects for U.S. economic development.

He attended Harvard University, the University of California, Berkeley, and received his law degree from the University of San Francisco School of Law. He can be reached at fbk2@cornell.edu.

APPENDIX A:

Summary from 2001 Cornell ILR report, *An Evaluation of the New York State Workers' Compensation Pilot Program for Alternative Dispute Resolution*:

Number of disputes: Injuries that occur under ADR are not more likely, and in some cases are less likely, to lead to a dispute. Six categories of disputes (compensability, medical treatment, weekly benefits, return to work, and the existence or extent of permanent disabilities) were used for this report.

Dispute resolution: Injured workers generally rate the ADR system highly and the ADR system concludes cases more quickly. ADR claimants were far less likely to speak to or hire a lawyer than were claimants in the traditional (statutory) workers' compensation system... Most ADR claimants (seventy-five percent or more, for most questions) rated the Ombudsman or mediator as good-to-excellent in answering questions, resolving issues, and affording the claimant an adequate opportunity to express his or her point of view. Most comparison group claimants (seventy percent or more, for most questions) gave good- to - excellent ratings to the administrative law judge. Some seventy-to eighty percent of ADR and comparison group claimants who hired a lawyer, gave, on average, their lawyer good-to-excellent ratings with respect to the lawyer's ability to answer questions or resolve disputes.

Costs: ADR is associated with lower medical costs, but not lower benefits. Medical and indemnity payments transactions files were used to compute medical and indemnity costs that were paid to claimants through three, six, twelve, and eighteen months, respectively. Simple differences revealed lower indemnity benefits associated with ADR, but when more sophisticated, multivariate techniques were used those differences were found to be associated not with ADR but with part of body or nature of injury. The multivariate empirical results indicated that ADR was associated with lower medical costs at all measured points in time, but for most categories of paid indemnity benefits ADR did not have a statistically significant impact. That is, after taking into consideration the nature of the injury, the part of body injured, and other explanatory variables, ADR was associated with lower medical treatment costs but was not associated with a diminution or increase in indemnity benefits. Data availability limitations precluded comparisons on other types of costs (i.e., legal, claims processing, dispute resolution, or other administrative costs).

Medical care: ADR and Control Group workers were generally satisfied with the medical care they received and there were no significant differences between the groups. In lieu of available information on other measures of the quality of medical care, this study relied solely on patient satisfaction responses. Eighty-three percent or more of ADR claimants indicated that they were satisfied or very satisfied with the medical care received during their first office visit, the medical care received during their last office visit, and with their medical care, overall; eighty-seven percent or more of comparison group claimants answered in a similar manner. There were no statistically significant differences between these mean values. These results are comparable to those reported in a study of managed care in workers' compensation. See Report; to the Labor-Management Committee. Data Analysis Pilot Program: Management Care in Workers' Compensation, prepared by the New York State School of Industrial and Labor Relations; May 17, 2000.

Interviews with ADR signatories and other ADR officials - representatives from unions, management, and insurance organizations - are highly supportive of ADR in workers' compensation: On the whole, a high degree of satisfaction was expressed by all parties regarding the experience to date with ADR (even by those signatories who indicated that they were skeptical of ADR at the onset of the program). The use of a nurse advocate (who was viewed by claimants, unions, and contractors as an advocate for workers rather than as a case manager) and other ADR-specific features were seen as a means by which ADR, compared to the traditional workers' compensation system, furnished better quality care, sooner and in a less disputatious environment, to injured workers. Faster claims closing, more rapid return to work, cost savings, and the resultant competitive advantage - without a diminution in the quality of medical care or any adverse effect on due process -were also cited as other, favorable outcomes of ADR (at least some administrative costs may have arising under ADR though).³⁹

³⁹ Seeber, R.L., Schmidle, T.P., & Smith, R.S. (2001). *An evaluation of the New York State workers' compensation pilot program for alternative dispute resolution*. Ithaca, NY: Institute on Conflict Resolution, <http://digitalcommons.ilr.cornell.edu/icr/5>, at 7-10.

APPENDIX B: New York State Statutory Authority
WORKERS' COMPENSATION LAW
ARTICLE 2. COMPENSATION
NY CLS Work Comp § 25 (2012)

2-c. Collective bargaining; alternative dispute resolution

(a) For the purposes of employments classified under sections two hundred twenty, two hundred forty and two hundred forty-one of the labor law, an employer and a recognized or certified exclusive bargaining representative of its employees may include within their collective bargaining agreement provisions to establish an alternative dispute resolution system to resolve claims arising under this chapter.

Any collective bargaining agreement or agreement entered into by the employee and an employer which purports to preempt any provision of this chapter or in any way diminishes or changes rights and benefits provided under this chapter, except as expressly provided herein, shall be null, void and unenforceable.

(b) Except as specifically provided in this subdivision, nothing in this section or any collective bargaining agreement providing for an alternative dispute resolution system for the resolution of claims arising under this chapter shall preempt any provision of this chapter or in any way diminish or change any benefits to which an employee, or his or her dependents, or survivors may be entitled pursuant to the provisions of this chapter.

(c) The collective bargaining agreement may establish the following obligations and procedures:

- (i) an alternative dispute resolution process to resolve claims arising under this chapter, which may include but is not limited to mediation or arbitration;
- (ii) the use of an agreed managed care organization as defined in section one hundred twenty-six of this chapter or a list of authorized providers for medical treatment, which may be the exclusive source of all medical and related treatment provided under this chapter;
- (iii) the use of an agreed list of authorized providers for the purpose of providing medical opinions and testimony, which may be the exclusive source of all such medical opinions and testimony under this chapter;
- (iv) benefits for injured workers, their dependents or their survivors supplemental to those provided under this chapter;
- (v) a light duty, modified job, or return to work program;
- (vi) a vocational rehabilitation or retraining program; and
- (vii) worker injury and illness prevention programs and procedures.

(d) The determination of an arbitrator or mediator pursuant to an alternative dispute resolution procedure pertaining to the resolution of claims arising under this chapter shall not be reviewable by the workers' compensation board, and the venue for any appeal shall be to a court of competent jurisdiction in accordance with section twenty-three of this chapter.

(e) (i) Determinations rendered as a result of an alternative dispute resolution procedure shall remain in force during a period in which the employer and a recognized or certified exclusive bargaining representative are renegotiating a collective bargaining agreement.

(ii) Upon the expiration of a collective bargaining agreement which contains a provision for an alternative dispute resolution procedure for workers' compensation claims, the resolution of claims relating to injuries sustained as a result of a work-related accident or occupational disease may, if the collective bargaining agreement so provides, be subject to the terms and conditions set forth in the expired collective bargaining agreement until the employer and a recognized or certified exclusive bargaining representative negotiate a new collective bargaining agreement.

(iii) Upon the termination of a collective bargaining agreement which is not subject to renegotiation, the employer and its employees shall become fully subject to the provisions of this chapter to the same extent as they were prior to the implementation of the collective bargaining agreement provided, however, that when a claim has been adjudicated under the alternative dispute resolution procedure, the claimant or employer to such claim or matter shall be estopped from raising identical issues before the board.

(f) Commencing January first, nineteen hundred ninety-six, and annually thereafter, a copy of the collective bargaining agreement shall be filed with the chair. The employer shall report the number of employees subject to the collective bargaining agreement. The chair or the chair's designee shall review the collective bargaining agreements for compliance with the provisions of this section, shall notify the parties to the agreement if the agreement is not in compliance, and shall recommend appropriate action to bring the agreement into compliance.

TITLE 12. DEPARTMENT OF LABOR
CHAPTER V. WORKERS' COMPENSATION
SUBCHAPTER A. GENERAL PROVISIONS
PART 314. ALTERNATIVE DISPUTE RESOLUTION OF CLAIMS

§ 314.2. Review process for collective bargaining agreements

(a) When an employer and union enter into a collective bargaining agreement that establishes an alternative dispute resolution system for claims arising under the Workers' Compensation Law as authorized by section 25 (2-c), the parties shall submit the following to the office of the chair at least 30 days prior to the proposed commencement date of such alternative system:

- (1) a copy of the collective bargaining agreement;
- (2) a statement of the approximate number of employees to be covered thereby;
- (3) an affirmation that the business activity covered by the collective bargaining agreement is classified under one or more of *sections 220, 240, and 241 of the Labor Law*;
- (4) evidence that the particular union is a recognized or certified exclusive bargaining representative of the covered employees;
- (5) the name, address, and telephone number of a contact person of the employer and the union. Within 30 days after receiving the proposed agreement, the chair or the chair's designee shall review the agreement for compliance with section 25(2-c) and these rules and shall notify the parties either that the agreement is not in compliance and recommend appropriate action to bring the agreement into compliance or that the agreement is in compliance.

(b) Subsequent to its original submission, employers must submit to the office of the chair a copy of their collective bargaining agreement annually and whenever it is renegotiated.

(c) Employers that contract with an insurance carrier for workers' compensation coverage shall submit a statement signed by their insurance carrier expressing the carrier's consent to the workers' compensation claims provision contained within the collective bargaining agreement. Employers that do not contract with an insurance carrier and that seek the chair's review of a program authorized by section 25(2-c) shall submit proof of self insurance on board form SI-12.

(e) The alternative dispute resolution process set forth in collective bargaining agreements for workers' compensation claims shall adhere to the following procedural requirements:

- (1) adequate and timely notice of all proceedings must be given to the necessary parties;
- (2) the time, place and manner established for mediation and arbitration must be fair and practical for all parties;
- (3) the alternative dispute resolution process shall provide a mechanism for the resolution of contested issues, which may include but is not limited to mediation or arbitration;
- (4) all mediators and arbitrators must be agreed upon by the employer and the union;
- (5) a report of injury shall be submitted to the board on an ADR-1 form by the party designated in the agreement within ten days after the accident occurs. The board will assign a file number to the claim;
- (6) reasonable time periods must be established for the various procedural stages provided in the agreement;
- (7) appropriate records shall be maintained for all claims;
- (8) at all times, parties are obligated to make a good faith attempt to resolve disputes;
- (9) settlement of disputes may occur at any time during process;
- (10) all costs associated with the administration of the alternative dispute resolution process, including, but not limited to the services of the arbitrator, shall be the responsibility of the employer.

(Add, Aug 14, 1996; amd, April 19, 2006.)

§ 314.3 Alternative dispute resolution process

(a) Claims not resolved in any prior procedural stages provided in the agreement may be referred to arbitration which shall be conducted pursuant to the rules established by the agreement and in which the parties shall have the right to be represented by legal counsel. A written record of the arbitration proceeding shall be kept. No offers or recommendations made during prior procedural stages shall be admissible in the arbitration proceeding.

(b) All settlements and decisions resulting from proceedings authorized by section 25(2-c) shall be filed with the Workers' Compensation Board and shall be final and binding upon the parties. Any appeal must be made within 30 days after notice of the filing of an arbitrator's award or decision. All such appeals shall be made to the appellate division of the supreme court, third department as designated in *section 23(2) of the Workers' Compensation Law*. There shall be no intermediate review by the Workers' Compensation Board.

Section statutory authority: Workers' Compensation Law, § 23, § 25

Statutory Authority: Workers' Compensation Law, §§ 117(1), 142, 25(2-c)

Added 314.3 on 8/14/96.

§ 314.7 Reporting requirements

(a) Within 30 days of the final disposition or settlement of a workers' compensation claim under the alternative dispute resolution system, the employer shall be responsible for filing a completed ADR-2 form with the workers' compensation board.

(b) At least annually and as otherwise required by the chair, each employer shall submit a report to the chair containing the following information:

- (1) the number of employees within the alternative dispute resolution program;
- (2) the number of claims filed;
- (3) the total amount of lost wage benefits paid within the program;
- (4) the total amount of medical expenditures paid within the program;
- (5) the number of decisions rendered, settlements made, and appeals taken.

(c) In addition to the reporting requirements outlined above, all parties must promptly comply with the data collection requests of the New York State School of Industrial and Labor Relations which is statutorily mandated to evaluate the alternative dispute resolution pilot program.

Statutory Authority: Workers' Compensation Law, §§ 117(1), 142, 25(2-c)

Added 314.7 on 8/14/96.

§ 314.8 Board adjudication of certain issues

(a) Special funds applications: Any employer participating in an alternative dispute resolution program pursuant to *Section 25(2-c) of the Workers' Compensation Law*, or such employer's carrier or third party administrator, that seeks relief pursuant to *Sections 14(6), 15(8) or 25-a of the Workers' Compensation Law*, shall, at the time its application is filed with the Special Funds Conservation Committee, also file a copy of the application with the board and all affected parties.

(b) Other applications. Any such employer, or its carrier or third party administrator, that submits an application for relief involving a claim that is not subject to the same section 25(2-c) alternative dispute resolution program shall file a copy of its application with the board and all affected parties simultaneously. Such applications may include, but are not limited to, requests for approval of a settlement agreement pursuant to *Workers' Compensation Law, section 32* and/or an apportionment of liability pursuant to the *Workers' Compensation Law*. This section does not apply to claims or issues which involve individuals who or entities that are all subject to the same Alternative Dispute Resolution Program.

(c) Negotiated resolution: In the event the parties reach an agreement regarding an application for relief described in subdivision (a) or (b) of this section, a copy of the agreement, signed by an authorized individual for each party, shall be submitted to the board for review. The board shall issue a written decision approving the agreement unless it finds that the agreement is unfair, unconscionable, or improper as a matter of law. No agreement entered into under this subdivision shall become effective until approved by the board. Decisions approving an agreement described in this subdivision shall not be reviewable under *Section 23 of the Workers' Compensation Law* absent evidence that the agreement is the result of an intentional misrepresentation of a material fact by, or was induced by fraudulent behavior on the part of, a signatory to the agreement or their agent. If the board disapproves a submitted agreement, it shall issue a written decision stating the reasons for such disapproval. Decisions disapproving an agreement shall be reviewable under *Section 23 of the Workers' Compensation Law*.

(d) Adjudication: In the event the parties are unable to reach an agreement regarding an application for relief described in subdivision (a) or (b) of this section, the applicant may request that the board adjudicate the issue or issues raised in the application. Upon receipt of such request, the board shall schedule a hearing before a Workers' Compensation Law Judge or other board attorney for the purpose of resolving the disputed issue or issues. Decisions issued by a Workers' Compensation Law Judge or board attorney pursuant to this subdivision shall be reviewable under *Section 23 of the Workers' Compensation Law*.

(e) Nothing herein shall in any way affect or be deemed to modify the statutory agreement approval provisions of *Workers' Compensation Law Section 32*.

Statutory Authority: Workers' Compensation Law, §§ 117(1), 142, 25(2-c)
Added 314.8 on 4/19/06.