

**SANTA CLARA VALLEY MEDICAL CENTER**

**SEISMIC SAFETY PROJECT**

**ALTERNATIVE DISPUTE RESOLUTION**

**CARVE OUT PROGRAM**

**LABOR CODE 3201.5**

**Shogren**  
**Ombudsperson**  
**Services**

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Attachment D  
WORKERS' COMPENSATION COVERAGE AND  
ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Section 1. Intent and Purpose.

(a)(1) The Building and Trades Council of Santa Clara & San Benito Counties (Council), the signatory craft unions (Unions) and the County of Santa Clara ("County") (collectively, the "Parties") working on the Santa Clara Valley Medical Center Replacement Bed Building #1 pursuant to the Extension Agreement - Project Labor Agreement (the "Agreement") jointly recognize the importance of an effective and efficient program to provide a workers' compensation delivery system for the benefit of the employees covered by this Agreement. The Parties (including the Contractor who has, pursuant to Appendix A to the Agreement, agreed to be bound to the Agreement) will therefore work together, under the provisions of Section 3201.5 of the California Labor Code (the "Code"), to implement a dispute resolution procedure that will reduce disputes arising out of the workers' compensation delivery system established for this Project, and which will provide fair and expeditious methods for resolving such disputes. Additionally, the Parties will work together to broaden and improve the workers' compensation process to include optimum access to delivery of medical care and disability benefits for covered employees affected by occupational injury or disease and covered under the Agreement. The Parties further, through the Joint Labor-Management Workers' Compensation Committee (the "Committee") hereinafter established, will endeavor to develop an effective quality control and improvement program for the medical coverage provided to the employees covered by the Agreement. Finally, the Parties agree that abuses of the system will not be tolerated and will cooperate in any investigation of a claim of abuse.

(a)(2) To accomplish the goals of (a)(1) above, the Parties have agreed:

(i) That all employees working under the Agreement shall be covered to the fullest extent required by the workers' compensation provisions of the Code, and that nothing in this Attachment D diminishes the entitlement of an employee covered by the Agreement to compensation benefits for disability or medical treatment and other benefits as required by California law, fully paid for by the County through the purchase of a policy of workers' compensation insurance from an insurer authorized to issue such a policy in the State of California; and

(ii) To implement a medical and benefits delivery system complemented by an alternative dispute resolution process, hereby established, in cooperation with the Committee as created under this Attachment D to the Agreement.

(b) This Attachment D shall apply only to injuries as defined by the Law sustained by employees covered by this Project Labor Agreement during their employment by an employer who meets the requirements of Labor Code section 3201.5(c)(1) when that employee is engaged in employment activities related to work

on the Santa Clara Valley Medical Center Replacement Bed Building #1 and covered by the Owner Controlled Insurance Program (OCIP). The term injury as used in this agreement is to be defined the same as under California Labor Code Section 3208 et seq. to include any injury or disease arising out of the employment.

(c) This Attachment D shall remain in effect from the date of execution by the parties, until expiration of the OCIP. Attachment D may be extended by mutual agreement of all parties to this Agreement. It is the parties understanding and intent that this Attachment D will remain in effect beyond the completion of the Replacement Bed Building #1 project. In order to effectuate this intent, the parties agree that those provisions of the Agreement necessary for the effectuation of this Attachment D shall extend beyond the Project's completion and shall expire at the same time as this Attachment D.

(d) This Attachment D along with the emails exchanged between attorneys for the County and Sheetmetal Workers dated 8-25-09, 8-28-09 and 9-2-09 that are attached hereto represent the complete understanding of the parties with respect to the subject matter dealt with herein.

(e) In any instance of conflict, the provisions of this Attachment D shall take precedence over provisions of the Law, as far as permitted by the provisions of Labor Code Section 3201.5 of the State of California.

Section 2. Joint Labor-Management Workers' Compensation Committee (the "Committee").

(a) There is hereby established a Committee to review, oversee, consult and advise all parties involved with the development, implementation and provision of benefits and procedures for workers' compensation covered under the Code and this Attachment D, with particular reference to the workers' compensation provisions of this Attachment. Such Committee shall participate in the selection of the providers and other personnel as set forth in Section 3 below. The power of the Committee may only be exercised through a majority vote of its members, with each party having representatives on the Committee pursuant to subsection (b) below. The Committee is not an independent entity and shall have no status as any separate entity; it is created only for the purposes of administering this Agreement. Individuals who comprise the Committee shall receive no compensation for such service, and it is anticipated that no expenses shall be incurred as a result of serving on the Committee.

(b) The County shall designate no more than two (2) Contractor representatives, which may rotate annually to assure broad representation by as many contractors as possible, and two (2) County representatives. The Council and the signatory craft unions shall appoint four (4) representatives to represent the unions. The Council and the signatory craft unions may assign one alternate for every two (2) representatives. The County may do the same. The Committee shall be chaired by a representative appointed by the County (or designee). The County shall also appoint an

alternate to chair meetings in the appointed Chair's absence.

(c) The Committee shall meet at least once each calendar year, or more often as necessary as requested by the chair or as provided for by rules to be adopted by the Committee. A quorum shall be five or more members provided that notice of meeting is provided at least one week in advance. The Ombudsperson and representatives of the County, OCIP insurer and/or providers of medical care shall be available to attend the Committee meetings and furnish such information as is requested by the Committee. The Committee may recommend to the Program Manager, County and/or OCIP Insurer, as appropriate, changes in the procedural and substantive delivery of medical care and services and ADR processing as it believes appropriate to fulfill the parties' goal to make effective use of the provisions of Labor Code Section 3201.5. Any dispute between the union and contractor parties with regard to the power of the Committee, or with regard to any exercise of the Committee's power, shall be referred to the Arbitrator designated under Section 7(c), below.

(d) Each member of the Committee and/or the member's sending organization shall be responsible for any defense or indemnification of the respective member in the event of legal action arising out of the activities or decisions of that member while serving on the Committee. The County shall have no responsibility for decisions or actions of the Committee. The Committee shall have no separate legal standing. The Committee shall have no income, nor hold title to any assets.

Section 3. Service Providers.

(a) Unless otherwise specifically stated, reference to a "medical provider" may be either to an individual providing treatment or to a group practice or clinic providing treatment to employees covered by this Attachment.

(b) The Parties will jointly designate, under the auspices of the Committee herein established:

- (1) A preferred provider network of health care providers;
- (2) Organizations providing prescription medicine, which may be affiliated with (1), above;
- (3) Vocational rehabilitation evaluator/service organizations if required by law or regulation;
- (4) Mediators (who shall be familiar with and experienced in the California State Workers' Compensation System and related medical issues); and
- (5) Arbitrators (who to the extent available shall possess experience as referees and/or judges under the State Workers' Compensation System and, at a minimum, qualified as arbitrators under the Code).

(c) If the Parties are unable to agree on the organizations in (1) - (3) above or the individuals to serve in the positions listed in (4) - (5) above, in the numbers deemed necessary by the OCIP insurer for the efficient operation of the Workers' Compensation Delivery System (including ADR), or in the numbers otherwise established in this Attachment, appointments shall be made by the neutral arbitrator established under Section 7(c), below, after he/she has heard recommendations and arguments in favor of their respective positions from the Parties to Attachment D.

#### Section 4. Medical Care and Treatment for Occupational Injury and Disease.

**Authorized Medical Providers.** The providers designated under this Attachment shall be the exclusive source of all medical treatment required under Code Section 4600. In addition to the preferred medical provider list promulgated by the Insurer, authorized medical providers shall include preferred provider networks of health care providers contained within any preferred provider panels currently established by any Union (or subsequently established panels approved for inclusion by the parties to this Project Labor Agreement), who qualify and who agree to participate under the terms of this Attachment.

(1) All medical and hospital services, except for first aid and other emergency type services only, required by employees subject to this Agreement as the result of a compensable injury or disease, shall be furnished by health care professionals and facilities selected by the employee from the list of health care professionals and facilities currently used by the parties to this Attachment and available to each employee upon his initial employment at the site. The Committee must approve any and all additional provider(s) before they may be added to the list and can delete providers from the list for cause. In no event shall the deletion of a provider disrupt the ongoing treatment of an employee receiving treatment from that provider at the time of the decision. However, once the specific course of treatment is completed, the employee must use an authorized provider for any additional treatment. The authorized provider organizations shall have on their rosters individual Board Certified providers in their respective specialties available for selection by employees for treatment, or for referral from other individual providers, or to act as evaluators. This designation of providers pursuant to Section 3201.5 of the Labor Code replaces all other provisions regarding the selection of medical providers located elsewhere in the Code.

(2) In case of an emergency requiring treatment covered by this Attachment when no authorized provider is available, the employee may seek treatment from a health care professional or facility not otherwise authorized by this Attachment, to provide treatment during the emergency and such treatment shall be compensated for in reasonable amounts by the OCIP Insurer as if provided by providers authorized under this Agreement. Responsibility for treatment shall be transferred to an authorized provider as soon as possible, consistent with sound medical practices.

(3) After selecting an authorized provider to furnish treatment for a particular injury, an employee may change once to another authorized provider. If the employee has received two conflicting opinions, the Ombudsperson may refer the employee to another provider. Additional changes may be made only with the oversight of the Ombudsperson and approval of the Insurer. Neither the employer nor its OCIP Insurer shall be responsible for the cost of medical services furnished by a health care professional or facility not authorized pursuant to this Agreement (except as provided in (2) above). Nothing in this Article shall be construed to create a right for an employee to receive care at employer obligation or expense that is not reasonably required to cure or relieve a work related injury

(4) Neither the Insurer nor the County shall be responsible for the cost of medical services furnished by a health care professional or a facility not authorized pursuant to this Agreement (except for emergencies as noted in (2) above), nor for care not required by the Code.

(5) The list of authorized providers administered by the authorized provider organization shall contain sufficient providers for each of the specialties which the parties to this Agreement believe are required to respond to the needs of employees subject to this Agreement, at least some of whom, in each specialty, shall be Board Certified. This shall include, but shall not be limited to providers within the following specialties:

- 1 Orthopedics
- 2 Radiology
- 3 Neurology
- 4 Neurosurgery
- 5 Ophthalmology
- 6 Cardiology
- 7 General Practice
- 8 Chiropractic
- 9 Psychiatry
- 10 Internal Medicine
- 11 Dermatology
- 12 Oncology
- 13 Pulmonary/Respiratory
- 14 Occupational Medicine

In the event that an authorized provider furnishing treatment to an employee determines that treatment or consultation is necessary from a specialty for which no authorized provider has been selected through this Agreement, or in the event the distance makes it impractical for treatment from an authorized provider, the authorized provider shall select the additional specialist or additional provider who offers treatment at a practical distance for the employee, not to exceed 50 miles.

(6) All prescription medicines furnished as the result of injuries subject to this Agreement shall be furnished by the OCIP Insurer through a jointly agreed upon medical prescription provider organization or organizations, except in those instances in which an authorized medical provider determines that due to time constraints or other valid medical reasons, use of another prescription source is required.

(7) Evaluations shall be secured in a manner consistent with, and utilized for the purposes described in, Division 4, Part 1, Chapter 7, Article 2 of the Code. It is not the intent of the parties to the Agreement in this section or in any other portion of this Attachment to add to or diminish the rights of the respective parties to a workers' compensation dispute to introduce evidence or be prohibited from introducing

evidence in an arbitration proceeding in any different manner than they would otherwise be allowed to do in a proceeding before an Administrative Law Judge of the WCAB.

(8) The OCIP Insurer and the employee shall each be bound by the opinions and recommendations of the authorized provider selected in accordance with this Attachment. In the event of disagreement with the authorized provider's findings or opinions, the sole recourse shall be to obtain a second opinion from another authorized provider to the extent permitted by Division 4, Part 1, Chapter 7, Article 2 of the Code, and to present the second opinion through the Alternative Dispute Resolution Program established in this Attachment.

(9) A physician that an employee has designated in writing as his or her personal physician as defined in the California Labor Code Section 4600 shall also be considered an Authorized Provider if the employee has notified the employer in writing the name, address, and telephone number of such designated physician prior to the date of the industrial injury. The employer shall also forward this physician information to the committee for review. Nonaction by the committee shall be deemed approval of the physician as an Authorized Provider.

Section 5. Authorized Vocational Rehabilitation Benefits.

Injured employees shall be entitled to all vocational rehabilitation benefits made available under the Labor Code; however, any such benefits, if available, shall be furnished by a vocational rehabilitation service provider selected by the employee from a list of vocational rehabilitation service providers jointly selected by the Committee.

Section 6. Alternate Dispute Resolution Program.

(a)(1) This Alternative Dispute Resolution Program ("ADR" or "Program") shall be used in place of and to the exclusion of the Division of Workers' Compensation hearing and disputes resolution procedures affecting a covered employee's benefits to the full extent permitted by Section 3201.5 of the Labor Code, recognizing the continuing authority of the Workers, Compensation Appeals Board ("WCAB") and the California State Courts of Appeal to review all actions taken hereunder in a manner consistent with Section 3201.5.

(2) The Program shall be used in place of the filing of an Application for Adjudication of Claim with the WCAB. Any claim subject to this Agreement filed with the WCAB for resolution will immediately be removed on motion of the OCIP Insurer, and placed within the Program established by this Attachment. The Program shall not affect any covered employee's eligibility for, or his/her amount of, workers' compensation benefits, as set forth in the workers' compensation provisions of the Labor Code.

(3) This Program shall apply to all compensable, work-incurred

injuries, including occupational disease, as defined by the Code, sustained by employees while working under and covered by the Agreement, as a result of their employment on the Project, on and after the effective date of this Attachment and during its term. Claims filed within ninety (90) days after the termination of the OCIP shall continue to be subject to the terms of this Attachment D for the duration of the case. Any claims for a compensable injury or illness filed after such ninety (90) days shall be processed as though Labor Code Section 3201.5 does not apply.

(b) The Program shall consist of three components: Ombudsperson, Mediation, and Arbitration.

(1) Ombudsperson. An Ombudsperson shall be selected from a list supplied by the Building Trades Council of candidates currently working for building trades ADR programs in Northern California as well as candidates provided by the County. The Committee shall develop selection criteria, release a Request for Qualifications (RFQ), screen and interview potential candidates, and ultimately select an Ombudsperson for the program. The Ombudsperson may be removed at any time within the sole discretion of the Committee.

The person appointed shall have, at a minimum, the following qualifications: five years of work experience which shall have provided him/her with knowledge and understanding of California workers' compensation laws and familiarity with workers' compensation claims and case management and/or be experienced and certified in occupational health practice. The selected Ombudsperson shall have at least 5 consecutive years of experience with ADR and have not represented an injured worker as an applicant or an insurer for defense in any legal proceedings within the last 5 years. The Ombudsperson will be familiar with workers' compensation procedures and practices. He/she shall be available at reasonable times, upon reasonable notice, at the Project site for the convenience of the employees. Within the first 24 hours of a reported injury, the Ombudsman will receive first notice of report and, when appropriate, make immediate contact with the injured worker. The Ombudsperson shall report regularly to the Committee, shall submit an annual report and shall be subject to annual review. The Ombudsperson's length of service under this Attachment D extends until final closeout of all ADR-related claims.

The Ombudsperson shall be compensated by the County at reasonable and customary rates for this service. The County shall set aside and maintain sufficient funding to pay the cost of the Ombudsperson as well as all other costs associated with establishing and running the ADR program including but not limited to: ADR education and promotion of project workers, required meeting expenses, mediations, arbitrations, etc. The County shall determine and set aside money based on current ADR experience and anticipated project needs plus a reasonable reserve. This set aside fund shall remain in place to support claim run out after project completion until such time all claims are closed or this contract is terminated, whichever occurs later. The County shall monitor the funding level and adjust from time to time based on anticipated need.

The Mediator(s) and the Arbitrator(s) will be selected in chronological rotation from a permanent panel not to exceed three of each to be established by agreement of a majority of the members of the Committee. The members of the panel can be changed at any time by the Committee. Each shall be knowledgeable and experienced regarding medical and legal aspects of workers' compensation procedures in California. The compensation of the Mediators and Arbitrators shall be provided by the OCIP Insurer. Pending such agreement under Section 3, should there be a need for a Arbitrator to undertake proceedings required by these provisions, such shall be requested from and appointed pursuant to the rules of the Division of Industrial Relations with regard to the appointment of Arbitrators under the Code for workers' compensation matters, but may not be an attorney engaged in private practice on behalf of either applicants or insurers.

(2) When an employee's workers' compensation benefits are denied, reduced or terminated, or otherwise affected, the employee shall be provided with a written Notice ("Notice") of such action, in a procedural and substantive format similar to those prescribed in Section 4061 of the Code, by the OCIP Insurer, by first class mail. The Notice shall include a summary of the reasons for the action, in terms reasonably calculated to be understandable by the employee.

Within thirty (30) days of the employee's receipt of such Notice, or whenever an employee believes that he/she is not receiving the benefits to which he/she is entitled, including medical and hospital services, the employee shall notify the Ombudsperson. The Ombudsperson shall explain to the employee the response to any employee question or complaint in terms that are understandable by the employee. The Ombudsperson shall maintain a record of all activity affecting any individual employee with whom he/she is involved by reason of these provisions or where he/she becomes aware or reasonably should become aware that such employee should be involved in these procedures, including the date of each notification and request for intervention of the Ombudsperson, the date of each response, the receipt of a form requesting mediation, and the date of reference of that form to the Mediator. All records kept by the Ombudsperson shall be a form consistent with record keeping requirements under the Act, if any. Nothing in this section shall preclude an employee from contacting the Ombudsperson regarding any dispute, request for information or consultation in connection with the employee's claim or injury.

(3) If the issue cannot be resolved to the satisfaction of the employee and the OCIP insurer within the fifteen (15) business days after the date of notification to the Ombudsperson, the aggrieved party may apply for mediation on the form available from the Ombudsperson. Such form shall be filed with the Ombudsperson, who shall promptly notify the appropriate Mediator and furnish the Mediator with a copy of the Notice. The parties to the dispute may extend the fifteen (15) business day period by mutual agreement, and no issue shall proceed to mediation without first being presented to the Ombudspersons.

(c) Mediation. Application for mediation shall be made not more than twenty-five (25) business days after the Ombudsperson provides written notification to all parties that issues cannot be resolved through further efforts of all parties. Failure to timely request mediation will bar any further right to adjudicate the issue. The parties intend that such mediation will be a meaningful informal, non-adversarial effort to resolve all legitimate claims fairly without resort to adversary proceedings or unnecessary procedures. The Mediator will contact the parties to the dispute (the employee and the OCIP Insurer) and take whatever steps he/she deems necessary to bring the dispute to an agreed conclusion. At any mediation, the OCIP Insurer and the employee (and an adviser or legal counsel to each party) may be present. If legal counsel is present, the legal counsel may advise but not represent the parties. Mediation must be attended by individuals who have the authority to resolve disputes.

Mediation shall be completed not more than fifteen (15) business days from the date of referral, unless otherwise agreed by the parties to the dispute, including the Mediator, except that in no event shall an issue be permitted to proceed beyond mediation until and unless the moving party cooperates with the Mediator and the mediation process. The Parties to the dispute may agree in writing to extend such time for a period certain. Neither party will be permitted to be represented by legal counsel at mediation. All communication between the Mediator and the parties shall be directly with the parties to the dispute, unless disability or linguistics dictate the need for a surrogate. In no case may the surrogate act in the capacity of attorney of record.

If, after the completion of the mediation process, the parties to the dispute are unable to reach agreement, either the employee or the OCIP Insurer may file with the Ombudsperson, within thirty (30) business days of the completion of the process, a request that the matter be referred to Arbitration. Immediately upon receipt of the request, the Ombudsperson shall notify the appropriate Arbitrator from the Panel designated by the parties to this Agreement, as well as all parties to the dispute, that a request for Arbitration has been received and the Arbitrator shall set a date for a hearing, to be commenced no later than forty-five (45) calendar days after the Arbitrator has received Notice of the Request for Arbitration.

(d) Arbitration. The Arbitration proceeding will be conducted pursuant to the rules and regulations applied by workers' compensation judges under the Code (including rules of evidence and burden of proof), and the Arbitrator shall have the same powers and authority as such judges (and, as appropriate, referees), except as such rules, regulations or powers are specifically modified or supplemented by this Attachment or otherwise in writing by the parties to this Attachment. The arbitration proceeding shall be completed within ten (10) business days of its commencement unless otherwise ordered by the Arbitrator, in his/her sole discretion, to further the interest of fairness to all parties to the dispute and/or completeness of the record. Except in extraordinary circumstances, such extension shall not exceed forty-five (45) days. The Arbitrator shall render a decision within ten (10) business days of the completion of the proceedings. The Arbitrator's decision shall be written in a form consistent with WCAB practices and his/her findings of fact, award, order, or decision shall have the same force and effect as

that of a workers' compensation judge and be subject to enforcement proceedings and/or review as provided in Section 3201.5(a)(1) of the Code.

(1) The hearing shall be held in a location convenient to the parties to the dispute as determined in the sole discretion of the Arbitrator, but unless otherwise agreed by the parties to the dispute, no further than fifty (50) miles from the employee's residence at the time he/she was/is working under the Agreement. The proceeding shall be electronically recorded.

(2) In any case that has been assigned to an arbitrator for hearing hereunder, the arbitrator shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case.

(3) Arbitration will be conducted pursuant to the rules of the American Arbitration Association, or such other rules agreed to by the Committee, using the arbitrator assigned by the Committee. Unless the parties to the matter otherwise mutually agree, arbitration proceeding shall be completed in not more than thirty (30) calendar days after referral, and an arbitration decision rendered within ten (10) working days of the completion of the proceedings. The arbitrator's decision shall be in written form consistent with the WCAB practices.

(4) No written or oral offer, finding or recommendation made during the mediation process by any party or mediator shall be admissible in the arbitration proceedings except by mutual agreement of the parties.

(5) The arbitrator may in his/her sole discretion appoint an authorized health care professional to assist in the resolution of any medical issue, the cost to be paid by the OCIP Insurer. The Arbitrator may appoint a trustee or guardian ad litem to appear for and represent any minor or incompetent upon the terms and conditions which he or she deems proper. The Arbitrator may provide for the joinder in the same proceeding of all persons interested therein, whether as employer, insurer, employee, dependent, creditor, service provider or otherwise.

(6) Either side may request the appearance of the treating physician and question him or her at arbitration. If the Arbitrator requests the appearance of a treating physician, or otherwise appoints an authorized health care professional to assist in the resolution of any medical issue, the expense will be borne by the OCIP Insurer.

(7) The decision of the Arbitrator, including his/her findings of facts award, or order, shall have the same force and effect as an award, order or decision of a workers compensation Judge, and shall be subject to review by the Workers' Compensation' Appeals Board in the same manner as provided for reconsideration of a final order, decision, or award made and filed by such judge pursuant to the procedures set forth in Article I (commencing with Section 5900) of Chapter 7 of Part IV of Division

4, and in the Court of Appeals pursuant to the procedures set forth in Article 2 (commencing with Section 5950) of Chapter 7 of Part IV of Division 4.

(8) Any and all settlements and/or compromises between an employee and an insurer involving a workers compensation claim arising on this Project and under this Agreement shall be subject to the same appeals and review by the Arbitrator as if he were sitting as a referee under the Code, and appealed to the WCAB to the extent permitted by the Code.

(9) The Arbitrator shall not have the authority to resolve petitions filed pursuant to Labor Code section 132a. The Arbitrator shall retain authority over the underlying claim.

(e) Notwithstanding any provision of this Attachment to the contrary, an employee who has received benefits under this Attachment, and who is subsequently injured while in the employ of an employer not covered at this time by this Attachment, shall have full access to the Workers' Compensation Appeals Board Procedures in effect at the time on any matter involving apportionment due to the subsequent injuries or subsequent exacerbation of the preexisting condition, and the provisions of this Attachment shall not, in such cases, be applied or asserted to diminish any rights such an employee might otherwise have had, had it not been for the existence of this Attachment.

#### Section 7. General Provisions.

(a) Except for payments resulting from awards for violation of Labor Code 132a and serious and willful misconduct claims (which are the responsibility of the employer), all required payments made by Contractors pursuant to this Attachment, shall, in accordance with California law, be made by the OCIP Workers Compensation Insurer. Similarly, all actions required by law to be undertaken by the insurer rather than the contractor shall be performed by the OCIP Workers' Compensation Insurer. The OCIP Insurer and/or the Ombudsperson will provide all notices to the employees and/or applicants, and in such form, as are required to be issued or otherwise referenced in the workers' compensation provisions of the Code.

(b) If any provisions of Sections 1 through 6 of this Attachment or their application to any person or circumstances is held invalid, the invalidity shall not affect other provisions or application of such Section or of the remainder of this Attachment that can be given effect without the invalid provision or application. To implement this provision it is understood that the provisions of this Attachment are declared to be severable. Further, in the event of legal action contesting the legality of Sections 1 through 6 of this Attachment, or any portion of them, the parties agree to jointly defend such provision and such Sections and shall actively assist each other in such defense.

(c) It is the intent of the parties to meet the spirit and letter of the requirements of Section 3201.5 of the Labor Code. To the extent that the Department of Industrial Relations, Division of Workers' Compensation, succeeds in enjoining or

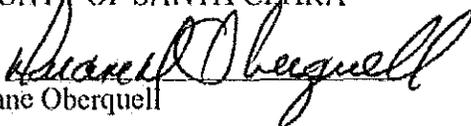
otherwise preventing the application of part or all of the Program and provisions above, by an order of the final court of competent jurisdiction, the parties shall meet expeditiously to adjust this Attachment to meet the requirements of the Code, and failing to reach agreement within thirty (30) days after notification by the Division, the matter shall be referred to an impartial arbitrator to be selected by the Committee for development of an appropriate provision or provisions consistent with the spirit of this Attachment

(d) No employee shall be denied the right to consult and/or be advised by legal counsel of his/her choice, if desired, at any time during the processes established herein. However, it is recognized that the ADR Program here established is intended to be non-adversarial, and until an appeal beyond mediation, no attorney shall participate in the system as counsel of record for either the employee or the OCIP Insurer. Retention of an attorney is the sole and absolute choice of the employee. All costs associated with retaining legal advice is born exclusively by the employee and not shared in any part by the County. The retention of an attorney shall not diminish the ability of the Ombudsperson, Mediator, Arbitrator, or any other party to speak directly with the employee in the attorney's physical or telephonic presence.

(e) The injured worker shall have the right to interpreter services as provided for in the Labor Code.

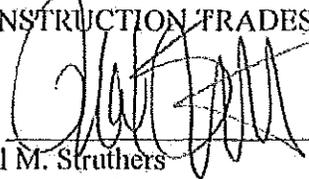
Dated: 10/14/09

COUNTY OF SANTA CLARA

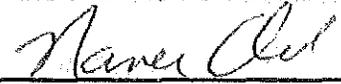
By:   
Duane Oberquell

Dated: 9/21/09

SANTA CLARA & SAN BENITO  
COUNTIES BUILDING &  
CONSTRUCTION TRADES COUNCIL

By:   
Neil M. Struthers  
Chief Executive Officer

APPROVED AS TO FORM AND LEGALITY

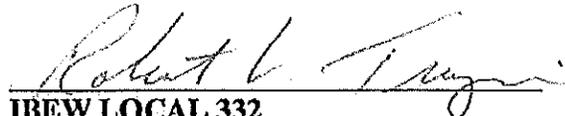
  
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Nancy J. Clark  
Deputy County Counsel

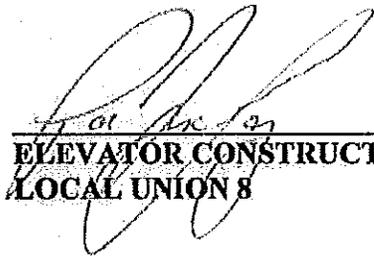
UNION SIGNATORIES

  
ASBESTOS WORKERS LOCAL 16

  
BOILERMAKERS LOCAL UNION 549

  
BAC LOCAL UNION 3

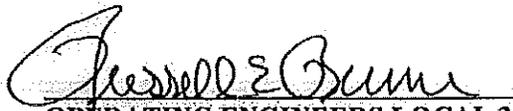
  
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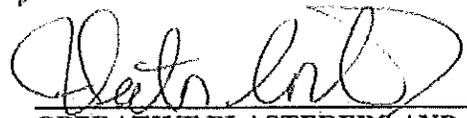
  
ELEVATOR CONSTRUCTORS  
LOCAL UNION 8

  
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IRON WORKERS LOCAL UNION 377

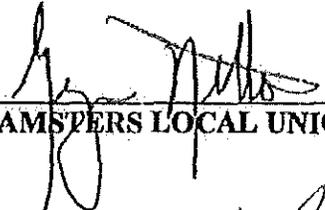
  
LABORERS LOCAL UNION 270

  
OPERATING ENGINEERS LOCAL 3

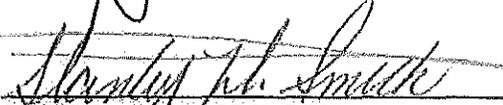
  
OPERATIVE PLASTERERS AND  
CEMENT MASONS LOCAL UNION 400

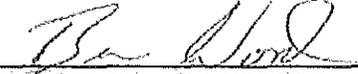
  
PLASTERERS LOCAL UNION 300

  
ROOFERS LOCAL UNION 95

  
TEAMSTERS LOCAL UNION 287

  
UNITED ASSOCIATION, PLUMBERS  
& FITTERS LOCAL UNION 393

  
UNITED ASSOCIATION,  
SPRINKLER FITTERS LOCAL  
UNION 483

  
SHEET METAL WORKERS  
INTERNATIONAL UNION LOCAL 104

  
SIGN & DISPLAY & ALLIED  
CRAFTS LOCAL UNION 510

  
NORTHERN CALIFORNIA  
CARPENTERS REGIONAL COUNCIL

  
LABORERS LOCAL UNION 67

email attachment 8 2528and9 02 ADR final  
From: Nancy Clark [Nancy.Clark@cco.sccgov.org]  
Sent: Wednesday, September 02, 2009 9:12 AM  
To: Peter D. Nussbaum  
Cc: Neil Struthers; ron@ronrakich.com; Catherine Wells  
Subject: RE: Responses to requested changes - ADR Agreement

Hello Peter. I have discussed your responses with my clients and it appears that we have agreement on all points so long as #1 is clear that fees can only be awarded as set forth in the Labor Code. If the employee does not recover anything, then there is no recovery of attorneys fees since the fees are paid out of the employees recovery, if any. The County is not agreeing to liability for attorney fees beyond the recovery available under the Labor Code. I believe this is what your response under #1 states below but wanted to make sure.

How do we want to proceed in terms of making these changes and obtaining signatures? As I had the last draft, I offer to make the changes and forward the document.

-----Original Message-----

From: Peter D. Nussbaum [mailto:pnussbaum@altshulerberzon.com]  
Sent: Friday, August 28, 2009 3:18 PM  
To: Nancy Clark  
Cc: neil@scbtc.org  
Subject: Re: Responses to requested changes - ADR Agreement

Nancy:

I have reviewed your email of August 26 with my client, Sheet Metal Workers, Local 104. As I previously explained to you, Local 104 is willing to enter into an ADR agreement in connection with the project labor agreement for the Valley Medical Center Replacement Bed Building #1, if the ADR agreement adequately protects the rights of its members who may be injured on that project. You have now responded to my proposed changes and I do not think that we are very far apart. As you will see below, I am suggesting that if can have certain understandings, that seem to be consistent with your email, there will not be a need to include several of our suggested additions to the ADR agreement.

1. We have requested that the ADR agreement make clear that an arbitrator can award attorneys fees to an employee's attorney, who represents the employee post-mediation, and resolves the dispute either through a pre-arbitration settlement that is approved by the arbitrator, or by an award of the arbitrator. In our discussions, you have repeatedly told me that the employee's counsel can be awarded such fees under the ADR agreement, and that the agreement already deals with that issue. I asked you to identify what sections of the agreement you are referring to. Your email states that sections 1(a)(2) and 6(d) "relate to the the question of attorney fees." If you are representing, on behalf of your client, Santa Clara County, that sections 1(a)(2) and 6(d) authorize an arbitrator to award attorney's fees, as set forth in the Labor Code, to an employee's counsel for the representation provided post-mediation in securing for the employee a settlement that has been approved by the arbitrator, or an award from the arbitrator, and that our emails can be used as evidence of the parties' intent if a question about the award of fees ever arises, there will not be a need to include in the ADR agreement the language about fees that I had proposed.

2. I had asked you why the phrase "by an employer located in California" is included in section 1(b). In your email you state that the language is there to meet the requirements of Labor Code section 3201.5(c)(1) which sets forth "those employers who will be recognized by the Department of Industrial Relations and the courts." That section does not, however, use the phrase "employer located in California"--a phrase that suggests an employer that is

domiciled in California. Rather, the code section refers to those employers who pay or project a certain dollar amount of workers comp premiums in California, regardless of where they are located. Therefore, now that we understand the rationale for the language that concerns us, we propose that section 1(b) of the ADR agreement be changed to read "The attachment D shall apply only to injuries as defined by the Law sustained by employees covered by the Project Labor Agreement during their employment by an employer who meets the requirements of Labor Code section 3201.5(c)(1) and only when [etc., etc.]...."

3. We had proposed adding language to section 1(f) making it clear that nothing in the ADR agreement is intended to limit the right of employees to go after third parties who are responsible for their industrial injuries. As I told you, it clearly was not our intent to create such a right against the employee's employer. Against that employer, the employee would have only those rights that exist under the workers' compensation law as interpreted by the California courts. You state in your email that "there is nothing in the agreement as drafted that could in any way be construed to limit the rights of workers to seek relief from third-party tortfeasors." Again, if you are making that representation on behalf of the County of Santa Clara, and our emails can be used to as evidence of the parties' intent if a question regarding this issue ever arises, there will not be a need to include the language that we had proposed about the issue.

4. We had suggested adding at the end of section 4(4) the words "including occupational diseases." As I indicated to you, this suggestion was made to be consistent throughout the agreement. In your email you state that in section 1(b) "we did not include 'occupational disease' as injury as defined in the labor code to include diseases." Later, however, in section 4(1), the agreement refers to "compensable injury or disease" rather than just "compensable injury." We suggest that, to be consistent, the agreement indicate initially that when the term "injury" is used it includes both injuries and diseases.

5. In section 4(5) we proposed that an employee cannot be required to go to an additional provider or specialist who is more than 50 miles from where the employee lives. Your response states that "we believe that there are circumstances where an employee will benefit and wants to see a provider who is in excess of 50 miles." (Emphasis added.) It certainly was not our intention to prevent an employee who is willing to travel beyond 50 miles to do so. We are, however, opposed to forcing an injured worker to have to travel over 100 miles round trip to get medical care. In our view, our proposal is reasonable and this type of limitation is common in ADR agreements. In fact, the maximum one way distance is often less than 50 miles. Moreover, having a figure in the agreement eliminates disputes over whether "the distance makes it impractical," as the agreement now provides with no guidance.

6. We proposed language making it clear that employees can receive alternative treatments if recommended by an authorized provider. You state that "there is nothing in the agreement which would prevent the receipt of alternative treatment if recommended by an approved provider." We interpret that statement to mean that an employee can receive alternative treatments pursuant to the ADR agreement if recommended by an authorized provider. Again, if that is what you are stating on behalf of the County of Santa Clara, and our emails can be used to as evidence of the parties' intent if a question regarding this issue ever arises, there will not be a need to include the language that we had proposed about the issue.

7. You have agreed to make the other changes that we suggested.

Hopefully, the above proposal will settle our differences and allow the County to go forward and get approval of the ADR agreement. Please let me

email attachment 8 2528and9 02 ADR final  
know after you have discussed this proposal with the County.

Peter

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Sent from my BlackBerry Wireless Device

-----Original Message-----

From: Nancy Clark <Nancy.Clark@cco.sccgov.org>  
To: Peter D. Nussbaum  
Sent: Tue Aug 25 14:46:10 2009  
Subject: Responses to requested changes - ADR Agreement

You asked for the provisions of the ADR agreement that relate to the question of attorney fees. Section 1(a)(2) provides that "nothing in this Attachment D diminishes the entitlement of an employee covered by the Agreement to compensation benefits for disability or medical treatment and other benefits as required by California law." These benefits necessarily include the fee provisions set forth at Labor Code section 4903 et seq.

In addition, under Section 6(d) entitled Arbitration, the Arbitrator has "the same powers and authority" as worker compensation judges except those that have been modified by the agreement. As the agreement does not change the authority of the arbitrator to award fees even pursuant to a settlement, the ability to provide fees are as set forth in the labor code currently.

With respect to your other suggested changes: on Section 1(b) we did not include "occupational disease" as injury as defined in the labor code to include diseases. The ADR does not in any way change the types of injuries or disease that are covered. Thus, we do not feel it necessary to make this change.

Section 1(b) -the sentence "during their employment by an employer located in California" is there in order to meet the requirements set forth at Labor Code section 3201.5 in terms of those employers who will be recognized by the Department of Industrial Relations and the courts. Specifically, under Labor Code section 3201.5(c)(1), it must be "An employer developing or projecting an annual workers' compensation insurance premium, in California, of two hundred fifty thousand dollars (\$250,000) or more. . .". This language should remain.

Section 1(f) - the suggested language is overly broad. There is nothing in the agreement as drafted that could in any way be construed to limit the rights of workers to seek relief from third party tort-feasors. This proposed language could be interpreted to include the employer which is unacceptable. Again, we do not feel the language change to be necessary.

Sections 2(a) and 2(c) . This language change appears to be semantics. Unnecessary but probably okay to make.

Section 4(5). We believe there are circumstances where an employee will

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benefit and want to see a provider who is in excess of 50 miles. We do not  
feel this limitation is necessary and do not agree to its inclusion.

Section 4(10). This language is not necessary as there is nothing in the  
agreement which would prevent the receipt of alternative treatment if  
recommended by an approved provider.

Section 6(b)(1). We don't feel these changes are necessary but they are not  
unacceptable.

Section 6(d) and 6(d)(2) these changes are to remove redundancy. Acceptable.

Section 6(10) - the language as proposed is wholly unacceptable for the  
reasons already discussed and it is my understanding that this language has  
been withdrawn. I addressed the outstanding question on the issue of  
attorneys fees in the first paragraph above.

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Version: 8.5.409 / Virus Database: 270,13,71/2331 - Release Date: 09/02/09  
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