

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
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March 1, 2019

Honorable Rudy Salas
Chair, Joint Legislative Audit Committee
P.O. Box 942849
Sacramento, California 94249-0137

Re: Audit Request – Department of Industrial Relations, Division of Workers' Compensation

Dear Members of the Joint Legislative Audit Committee:

We are in receipt of Assemblymember Rubio's February 21, 2019 letter expressing concerns about the Division of Workers' Compensation (DWC) Qualified Medical Evaluator (QME) program and requesting the State Auditor to review specific issues related to the QME process. We hope that the following response addresses the key issues identified in Assemblymember Rubio's JLAC request and we respectfully suggest a narrowed and targeted scope to expeditiously address the concerns stated and provide transparency about the Division's QME process.

1. Significant Law, Rules, and Regulations

a. The QME discipline process is expressly authorized by Labor Code section 139.2(k), which is a subsection of the statute that establishes the QME program. In addition, Government Code section 11180 allows administrative agencies to "make investigations and prosecute actions concerning: (a) All matters relating to the business activities and subjects under the jurisdiction of the department." The DWC is not required to establish good cause prior to commencing an investigative action. See *Brovelli v Superior Court* (1961) 56 Cal.2nd 524. The regulations implementing the statutes are found at California Code of Regulations, title 8, sections 50 to 65. The Medical-Legal Fee Schedule is found at California Code of Regulations, title 8, sections 9793 to 9795.

b. Audit Unit: DWC conducts audits of claims administrators pursuant to the authority given it under Labor Code sections 129 and 129.5. Regulations implementing the audit program are found at California Code of Regulations, title 8, sections 10100 to 10115.2. The objective of an audit is to insure proper compensation is provided to injured workers. (For example, audits can examine if indemnity payments for temporary or permanent disability were correctly paid or whether injured workers received the proper benefit notices.) The DWC Audit Unit performs about 50 audits of claims administrators each year: the first round audit (Performance Audit Review – or PAR Audit) looks at payments to injured workers to determine if proper benefits are being paid. If a claims administrator fails the PAR audit they go through a Full Compliance Audit (FCA) 1, which reviews a larger sample of claims files, and a failure of that audit results in an FCA 2, which reviews denials and the payment of medical bills. Only about 8% of audits get to a FCA2 audit.

2. QME Numbers

QME Population Decline: Number of QMEs in 2018: 2,684

- a. Number of Filled Panel QME Requests: 147,861
- b. Total number of licensed physicians in CA in 2017/2018: 115,378 and 3,480 chiropractors.
- c. Total CA Population in 2018: 39.56 Million
- i. Percentage of CA physicians to CA population is .3%; in workers' compensation the percentage of QMEs to panel requests is 2%.
- d. Total Number of QMEs appointed for first time (or was a QME but came back to program after re-taking QME test)
 - i. **2006** - 108
 - ii. **2018** - 103
- e. QMEs in 2018: 2,684; QMEs in 2007: 3,526: 24% decline

A 2017 study on QMEs found a general decline in the number of QMEs from 2007-2017 of approximately 17%. (See *Qualified Medical Evaluators: Updating Trends and Evaluations, Availability, and Equity*, Report to Commission on Health and Safety and Workers' Compensation, October 2017, Frank Neuhauser, p.2 "Neuhauser study".) While the number of QMEs has declined over the years, the Neuhauser study found that the rate of decline has slowed since 2007. Prior to 2007 the number of QMEs declined at a greater rate than that seen between 2007 and 2017. (See Neuhauser study.) The study further concluded that the decline in the number of QMEs resulted in the remaining QMEs being appointed to more panels. Therefore, the study found there was no acute problem with access to QMEs even though wait times for the panel evaluation may have increased. (Neuhauser study, p. 3.)

Note that there currently exists a general decline of treating physicians in the state. See "\$3 billion is needed to address California's physician shortage, task force says." *Los Angeles Times*, February 5, 2019. A perceived QME shortage could be viewed as part of larger problem the state has in maintaining the number of trained physicians.

3. QME Appointment/Reappointment (Labor Code § 139.2)

a. Appointment of a QME: The DWC conducts reviews in order to determine the qualifications of applicants. The DWC reviews relevant licensing board websites for license verification and reviews any disciplinary action to determine eligibility. In order to qualify for certification as a QME, a provider must be licensed to practice in California and fulfill the requirements defined in Labor Code section 139.2(b), including:

- Pass an examination written and administered by the DWC Administrative Director (AD).
- Complete a course on disability evaluation report writing approved by the AD.
- Devote at least one third of total practice time to providing direct medical treatment, or serve as an AME eight or more times in the 12 months preceding application for QME certification; and
- Not accept any type of compensation that would create a conflict of interest with QME duties.

b. Reappointment of a QME: The QME certification is valid for a two-year period and renewable upon request by the QME. (Labor Code § 139.2(a).) The DWC conducts a review of the QME on the relevant licensing board website for license verification and reviews any disciplinary action. Further, there is a review of all complaints received, a review of completed education requirements, and a determination of whether the QME is still qualified according to the criteria of Labor Code section 139.2. The criteria for reappointment are defined under Labor Code section 139.2(d), including:

- Compliance with all applicable regulations and evaluation guidelines;
- No more than five of his or her evaluations rejected by a Workers' Compensation Judge or the Workers' Compensation Appeals Board during the most recent two-year period;
- Completed at least 12 hours of continuing education in impairment evaluations within the previous 24 months;
- Has not been terminated, suspended, placed on probation, or otherwise disciplined by DWC.

4. QME Appeals Process

If the DWC denies reappointment, the physician has an opportunity to appeal the decision within 30 days of the denial (although the DWC is flexible on this time period) and depending on the circumstances, one of the following occurs:

a. If the physician does not appeal the denial of reappointment, no further action is taken.

b. If the DWC receives in appeal, the DWC either files a Statement of Issues within 60 days of receipt of the appeal, or seeks an extension of time from the physician/attorney to allow for the opportunity to discuss settlement. If the parties are unable to resolve the matter, the DWC provides a Statement of Issues which includes a Request for Hearing (which is to be signed by the physician and returned to the DWC). Within 45 days of receipt of the Request for Hearing the DWC attempts to schedule a hearing with the Office of Administrative Hearings regarding the Statement of Issues. Often, the parties do not set a hearing because the physician does not want to move forward. At this time the DWC currently has nine open cases that have not been set for hearing due to various circumstances relating to the ongoing litigation.

c. If the DWC serves a Statement of Issues but does not receive a Request for Hearing from the physician, an Order of Default is sought denying QME reappointment. The DWC previously waited one year to seek an Order of Default, although by statute (Government Code § 11520(a)) only 15 days in needed. At this time the DWC waits 30 days to seek and serve an Order of Default.

- i. If there is no objection to the Default Order then no further action is needed; the QME is not in the system.
- ii. If an objection is submitted, the DWC would work towards a resolution if possible or move for a hearing within 45 days of receipt of objection.

5. History of the Fee Schedule

Prior to 1984 there was no set fee schedule for medical-legal evaluations. From 1982 to 1983, the Administrative Director chaired a committee composed of 42 representatives of medical providers, insurers, self-insured and legally uninsured employers, applicant and defense attorneys and other workers' compensation stakeholders. The recommendations of that committee eventually became Labor Code sections 4620 - 4627 on medical-legal expenses. The schedule set fees at anything that fell below the 80th percentile of the range of what medical specialists actually charged during the previous 12 months.

In 1990, the statute was amended to lower the permissible rates to below the 73rd percentile of what physicians actually charged. The rationale was that fees below this percentile were presumed reasonable.

In 1993, because fees had continued to rise, the legislature adopted Labor Code section 5307.6, which established the current fee schedule. It directed the Administrative Director to establish a fee schedule that would be "prima facie evidence of the reasonableness of fees charged for medical-legal expenses." This fee schedule established fees based on complexity factors resulting from the various tasks that physicians utilized to produce the medical-legal report. This schedule was first promulgated by the DWC in August 1993. It has been revised and updated in 1994, 1999, 2006, and 2013 either to increase remuneration or to adjust complexity factors in light of statutory changes. These changes have been accomplished through rulemaking submitted to the Office of Administrative Law.

Starting in 2017, published studies of empirical data showed a disturbing rise in medical-legal costs in the workers' compensation system. Based upon these trends, currently the DWC is studying proposals submitted by stakeholders and a RAND study for the establishment of a new fee schedule.

6. Medical-Legal Payments

Providers who dispute the amount of payment on a bill must utilize the Independent Bill Review (IBR) process mandated by Labor Code sections 4603.6 and 4622. The regulations implementing IBR, which include a mandatory second bill review process, are found at California Code of Regulations, title 8, sections 9792.5.4 - 9792.5.15. Issues that are not related to the proper application of a fee schedule can be resolved through the filing of a petition with the Workers' Compensation Appeals Board under California Code of Regulations, title 8, section 10451.1.

7. Resources

Audits of claims administrators require far more resources than the investigation of QMEs.

- a. The DWC Audit Unit received 777 complaints in 2018. The Audit Unit currently has 34 staff members (28 auditors, 3 supervisors and 3 audit technicians). Annual reports of the DWC Audit Unit can be found at: <https://www.dir.ca.gov/dwc/audit.html>.

Honorable Rudy Salas
March 1, 2019
Page 5

- b. QMEs: The Discipline Unit of DWC's Medical Unit received 901 complaints in 2018 (42 were for billing and 438 were for late reporting). The QME Discipline Unit has 7 staff members (4 investigators, 1 supervisor and 2 techs). Two attorneys from the DWC Legal Unit are assigned to oversee investigations.

8. Review of DWC Communications

The letter alleges potential improper communications between the Division and the insurance industry and various vendors. We welcome a review of the Division's communications and will fully cooperate with the Auditor's review of these communications.

We would also recommend and invite the Auditor to review and analyze a sample of QME reports and corresponding billings to identify abusive or fraudulent practices and would welcome the Auditor's and legislature's recommendations to further the state's efforts to identify, prevent and prosecute fraudulent practices in the state workers' compensation system.

We look forward to discussing these issues before the committee on March 6.

Sincerely,



George Parisotto
Administrative Director
Division of Workers' Compensation

Cc: The Honorable Assemblymember Blanca E. Rubio