



Department of Industrial Relations

Its Failure to Adequately Administer the
Qualified Medical Evaluator Process May
Delay Injured Workers' Access to Benefits

November 2019

REPORT 2019-102





CALIFORNIA STATE AUDITOR

621 Capitol Mall, Suite 1200 | Sacramento | CA | 95814



916.445.0255 | TTY **916.445.0033**



For complaints of state employee misconduct,
contact us through the **Whistleblower Hotline:**

1.800.952.5665

Don't want to miss any of our reports? Subscribe to our email list at auditor.ca.gov 



November 19, 2019
2019-102

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As directed by the Joint Legislative Audit Committee, my office conducted an audit of the Department of Industrial Relations' Division of Workers' Compensation (DWC) and its oversight and regulation of qualified medical evaluators (QME). This report concludes that DWC's failure to adequately oversee QMEs and administer the process for selecting them to examine workers may delay injured workers' access to benefits. DWC has not ensured that it has enough QMEs to meet demand, that it follows the department's regulations to discipline certain QMEs, and that QMEs produce high-quality reports.

QMEs are physicians who examine injured workers when disputes arise between the workers and their employers regarding medical issues in workers' compensation claims. DWC oversees QMEs by appointing physicians to be QMEs, and it administers the QME selection process by generating lists from which a QME is selected to evaluate an injury. Although DWC is responsible for overseeing QMEs and the selection process, it has not adequately ensured that it has enough QMEs to keep up with demand for their services. Without an adequate number of available QMEs, injured workers can experience delays in receiving evaluations and therefore delays in receiving the benefits they need.

Furthermore, DWC inappropriately used its reappointment process to discipline certain QMEs alleged to have committed overbilling violations. We believe that this practice raises concerns about due process. Specifically, instead of having used its regulatory process to discipline QMEs at the time it identified alleged violations, DWC denied their reappointments because of the alleged violations. When DWC denied their reappointments, QMEs were prohibited by law from performing QME services until the allegations were resolved, a process that can take months.

Finally, DWC has not ensured that QMEs produce high-quality reports. Although state law requires DWC to continuously review QME reports for quality and to generate an annual report with the results of those reviews, it has not done so since at least 2007. These reports provide medical evidence to help judges and others resolve disputes related to workers' compensation claims; therefore, their quality is especially important. QME reports that are inaccurate or incomplete can delay resolution of disputes and workers' receipt of benefits, and delays can increase costs for employers involved in the disputes.

Respectfully submitted,

A handwritten signature in black ink that reads "Elaine M. Howle". The signature is written in a cursive, flowing style.

ELAINE M. HOWLE, CPA
California State Auditor

Selected Abbreviations Used in This Report

DWC	Department of Industrial Relations' Division of Workers' Compensation
OMFS	Official Medical Fee Schedule
QME	qualified medical evaluator

Contents

Summary	1
Introduction	5
Audit Results	
DWC Has Failed to Address Its QME Shortage	11
DWC's Practices for Disciplining Some QMEs Raise Due Process Concerns	16
DWC Has Failed to Comply With State Law to Ensure That QMEs Produce High-Quality Reports	22
Recommendations	25
Appendix	
Scope and Methodology	29
Response to the Audit	
Department of Industrial Relations' Division of Workers' Compensation	33
California State Auditor's Comments on the Response From the Division of Workers' Compensation	43

Blank page inserted for reproduction purposes only.

Summary

Results in Brief

Qualified medical evaluators (QMEs) are physicians who examine injured workers when disputes arise between the workers and their employers regarding medical issues in workers' compensation claims. Workers' compensation benefits can include payment for medical treatment, paid time off during recovery, and compensation for any permanent disability incurred as part of a work-related injury. The Department of Industrial Relations' (department) Division of Workers' Compensation (DWC), whose mission is to minimize the adverse impact of work-related injuries on California employees and employers, is responsible for overseeing QMEs and administering the process for selecting QMEs to examine workers. It oversees QMEs by appointing physicians to be QMEs, investigating complaints against QMEs, and disciplining QMEs who violate the department's regulations. It administers the QME selection process by generating a list of QMEs (known as a *panel*) from which a QME is selected to evaluate an injury. However, DWC has not adequately ensured that it has enough QMEs to meet demand and that QMEs are producing high-quality reports containing the findings of the examinations. By not fulfilling these responsibilities, DWC may delay injured workers' access to benefits and increase costs for employers.

Without an adequate number of available QMEs, injured workers can experience delays in receiving evaluations and therefore delays in receiving the benefits they need. Furthermore, employers can incur increased costs. Our review found that from fiscal years 2013–14 through 2017–18, the total number of QMEs decreased by 12 percent while requests for QMEs increased by 37 percent. Consequently, the availability of QMEs has decreased during those years, indicating that the current number of QMEs is not meeting the demand for their services. For example, during this time period, the number of panels that were requested to be replaced because QMEs were unavailable more than quadrupled—from about 4,600 replacement panels in fiscal year 2013–14 to nearly 19,000 in fiscal year 2017–18. DWC's data show that if a workers' compensation case required one replacement panel because of an unavailable QME, the case was delayed more than two months nearly half of the time. Nevertheless, DWC has not taken sufficient action to address the QME shortage, such as establishing a process to recruit new QMEs and updating the 13-year-old rates on the fee schedule that QMEs use to charge for their services, which could help DWC attract and retain QMEs.

Audit Highlights . . .

Our audit of the DWC and its oversight and regulation of QMEs revealed the following:

- » *Although DWC is responsible for overseeing QMEs and administering the process for selecting QMEs to examine workers, it has not adequately ensured that it has enough QMEs to keep up with the demand for their services.*
 - *From fiscal years 2013–14 through 2017–18, the total number of QMEs decreased by 12 percent and requests for QMEs increased 37 percent.*
- » *DWC inappropriately used its reappointment process to discipline some QMEs alleged to have committed overbilling violations, which raises due process concerns.*
 - *DWC lacks sufficiently detailed, written policies and procedures for investigating and resolving complaints.*
- » *DWC has not continuously reviewed QME reports for quality and has not tracked when workers' compensation judges have rejected QME reports that failed to meet minimum standards.*
 - *Low-quality QME reports can delay injured workers' receipts of benefits and add expenses for employers involved in disputes.*

Because QMEs have become more frequently unavailable, we believe changes to the panel selection process are also warranted. Injured workers represented by an attorney have a different selection process than unrepresented injured workers. Data show that the rate of replacement panel requests for represented cases is three times higher than the rate of requests for unrepresented cases, partly because unrepresented workers generally can select from among a panel of three QMEs while represented workers generally have to use the remaining QME after each party strikes one from a panel of three. Thus, unrepresented workers can select from more QMEs.

Furthermore, DWC inappropriately used its reappointment process to discipline some QMEs alleged to have committed overbilling violations, a practice that we believe raises due process concerns. Rather than following the department's regulations to discipline QMEs at the time it identified alleged violations, DWC denied the QMEs' reappointments, citing the alleged violations. The QMEs whose reappointments were denied were prohibited by law from performing QME services until the allegations were resolved, a process that can take months. Moreover, we found that DWC was slow to schedule hearings QMEs requested after DWC denied their reappointment appeals, or it did not schedule the requested hearings at all, which were deviations from its regulatory hearing process. Consequently, the QMEs had an incentive to settle with DWC so that they could resume providing QME services and earning income from those services. We found that DWC generally entered into settlement agreements with QMEs while they were unable to practice as QMEs. These agreements required the QMEs to make restitution payments to insurance companies for alleged overbilling violations instead of proceeding with the disciplinary process outlined in the department's regulations. We believe DWC's lack of sufficiently detailed, written policies and procedures for investigating and resolving complaints contributed to these concerns.

Finally, DWC has not continuously reviewed medical-legal reports, prepared by QMEs and containing the findings of the examinations, for quality and has not tracked when workers' compensation judges have rejected medical-legal reports because those reports failed to meet minimum standards. These reports must provide medical evidence to help judges resolve disputes related to workers' compensation claims. The quality of these reports is especially important because reports that are inaccurate or incomplete can delay resolution of disputes and workers' receipt of benefits, and the delays can increase costs for employers involved in the disputes. Because it did not perform these reviews or track when workers' compensation judges rejected reports, DWC lacks the data to identify whether report quality is a systemic problem or whether individual QMEs are producing low-quality reports.

Summary of Recommendations

Legislature

To ensure that DWC maintains a sufficient supply of QMEs and appropriately compensates these individuals, the Legislature should amend state law to specify that DWC review and, if necessary, update the fee schedule for compensating QMEs at least every two years based on inflation.

To reduce the delays that replacement panels cause in resolving workers' compensation claims, the Legislature should revise state law to increase the number of QMEs on the panels DWC provides.

DWC

To ensure that DWC appoints enough QMEs to keep up with the demand for services, it should, by April 2020, develop and implement a plan to increase the number of QMEs, prioritizing specialties with the greatest shortage relative to demand.

To ensure consistency and transparency in overseeing QMEs, DWC should, by April 2020, develop and implement separate written policies and procedures that define and specify its internal processes for disciplining and reappointing QMEs.

To ensure that DWC monitors and reviews QME report quality and to ensure the efficient resolution of workers' compensation claims, it should, by April 2020, create and implement a plan to continuously review QME reports for quality and report its findings to its administrative director annually.

Agency Comments

DWC accepted our recommendations but it disagreed with certain statements in our report. DWC's response to our report begins on page 33 and our comments on DWC's response begin on page 43.

Blank page inserted for reproduction purposes only.

Introduction

Background

California workers who experience injuries or illnesses caused by their employment generally have the right to receive workers' compensation benefits, including employer-paid medical care, temporary wage replacement during recovery, and compensation for any permanent disability that is work-related, as well as other potential benefits. Workers injured in California during fiscal year 2017–18 submitted 684,000 workers' compensation claims. When disputes between employees and their employers arise over medical issues in workers' compensation claims, medical professionals—including qualified medical evaluators (QMEs)—conduct medical-legal evaluations and generate reports that play a major role in determining the benefits to which injured workers are entitled.¹ In fiscal year 2017–18, 100,000 new requests were submitted for QMEs to resolve disputes, or about 15 percent of claims. This audit report focuses on QMEs and the process for selecting QMEs to examine workers overseen by the Division of Workers' Compensation (DWC) within the Department of Industrial Relations (department). In fiscal year 2017–18, DWC had about 2,800 participating QMEs in the State in more than 30 specialties, including chiropractic, dentistry, internal medicine, neurology, pain medicine, psychology, and hand and spine issues.

QMEs generate medical-legal reports to help clarify disputed medical issues. Contested claims may involve a dispute over whether work caused an injury, the total period of temporary disability, the existence and extent of permanent disability, or the need for future medical care. The text box lists the various issues that QMEs may consider as part of their evaluations and reports. To make these determinations, QMEs review medical records, examine injured workers, perform tests if necessary, and write medical-legal reports that can be used as evidence before workers' compensation judges. The medical-legal reports must address the issues in dispute and include the QME's findings that a workers' compensation judge may need to resolve a dispute.

Medical-Legal Evaluations and Reports

QMEs conduct evaluations and issue medical-legal reports to determine the following for an injured worker:

- Eligibility for workers' compensation benefits.
- Ability to return to work.
- Permanent and stationary status (when the medical condition reaches the maximum medical improvement).
- Existence and extent of permanent disability.
- Ability to engage in his or her usual occupation.
- Need for future medical treatment.
- Existence of new and further disability.

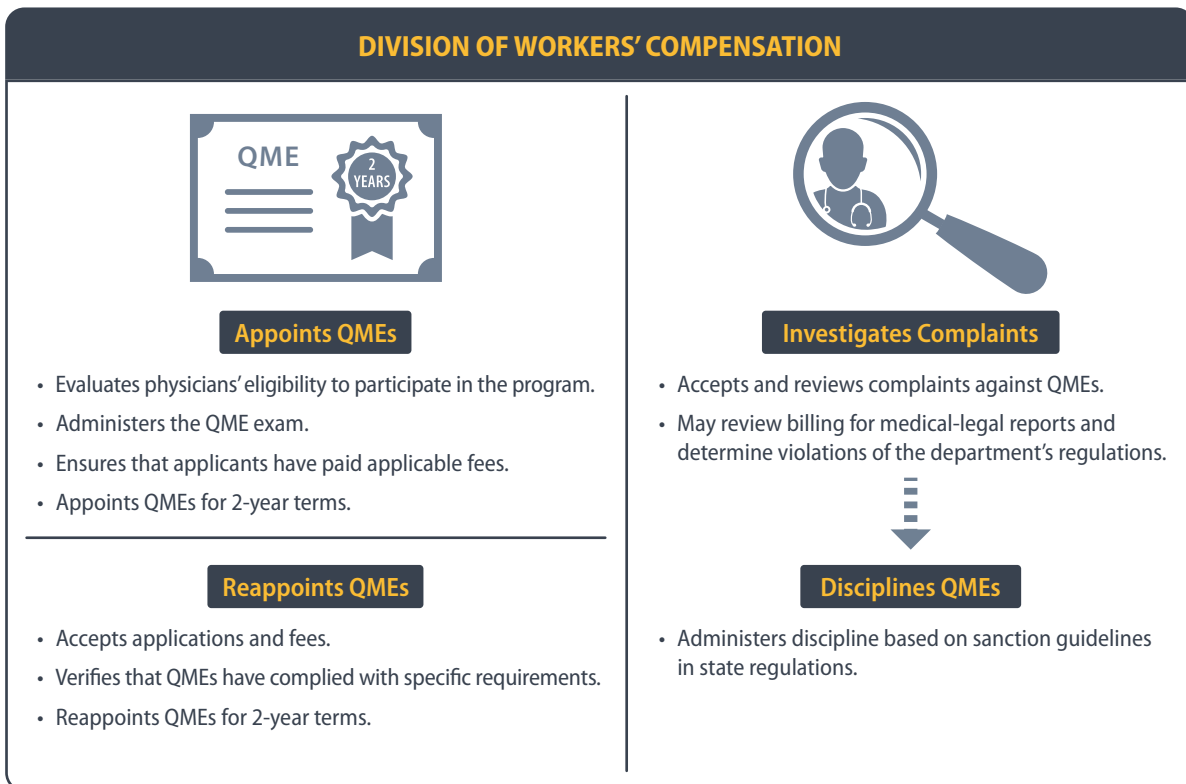
Source: Analysis of documents obtained from the department.

¹ Medical professionals also include *agreed medical evaluators* (AMEs), who both parties may agree to have perform the medical evaluation without going through the QME selection process. However, because the DWC generally does not oversee AMEs in the same way it oversees QMEs, we did not include AMEs in our analysis.

DWC Oversees QMEs and Administers the QME Selection Process

DWC’s mission is to minimize the adverse impact of work-related injuries on California employees and employers, and it is responsible for overseeing QMEs, as Figure 1 summarizes. Those responsibilities include appointing and reappointing QMEs. To become QMEs, physicians must be licensed to practice in California, spend at least one-third of their time providing direct medical treatment, report specified financial interests, take at least a 12-hour course on writing medical-legal reports, and pass a competency exam. Certain types of medical providers may have other requirements. DWC schedules competency exams at least twice each year. After passing the exam, physicians must pay an annual fee to DWC before it appoints them as QMEs for a two-year term. This fee ranges from \$110 to \$1,150 based on the number of office locations they maintain as well as the number of evaluations they performed within the past year, if applicable.

Figure 1
DWC Oversees QMEs



Source: Analysis of state law and the department’s regulations.

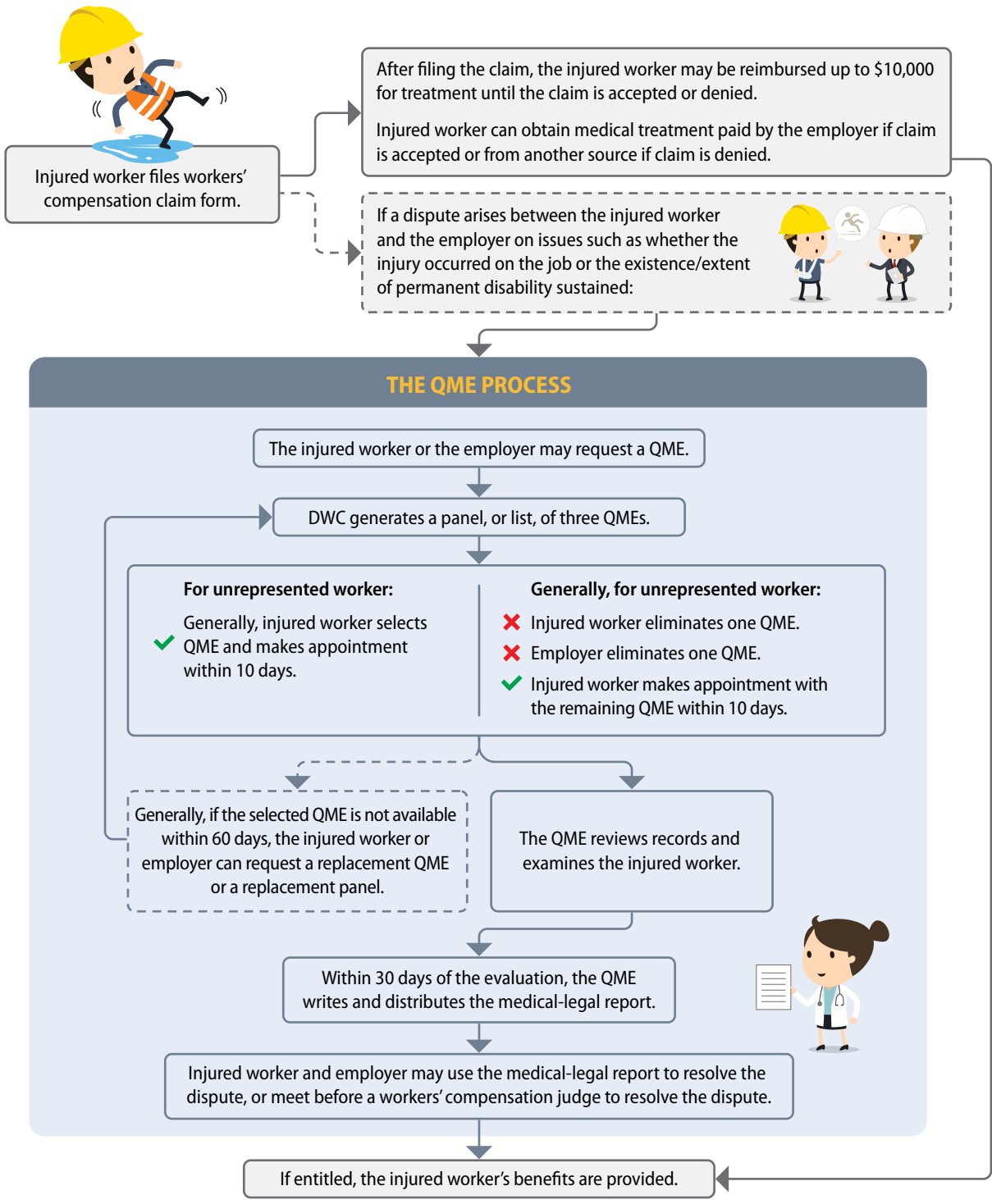
DWC's oversight responsibilities also include receiving and investigating complaints against QMEs and disciplining those found to have violated the department's regulations.² Its QME Investigations and Enforcement Section (investigations section) has 12 staff who investigate and help resolve complaints filed against QMEs.³ Anyone may file a complaint against a QME, and the DWC's medical director may file a complaint on his or her own initiative. For instance, an injured worker could file a complaint alleging that a QME did not treat the worker professionally or discriminated against the worker, or that he or she experienced a wait time exceeding one hour at a QME's office before being examined. Also, an insurance company, for example, could submit a complaint alleging that a QME billed for services he or she did not provide. The investigations section investigates such complaints and forwards evidence of alleged violations to DWC's administrative director, who then may issue a statement of charges (accusation) to the QME specifying which regulations he or she allegedly violated and notifying the QME of his or her right to a hearing. After a hearing, DWC may pursue disciplinary actions including terminating the QME's appointment.

DWC also administers the QME selection process. When an injured worker or employer has a dispute and requests a QME, as Figure 2 shows, DWC creates a *panel*—or list—of three QMEs. It also generates a replacement panel when necessary. DWC uses a computer program to randomly generate these panels based on the requested specialty of the QME and the proximity to the injured worker's residence. The next step in the process differs for represented workers (those represented by an attorney) and unrepresented workers. Generally, for a represented worker, after the injured worker and employer each strike one QME from the list, the injured worker makes an appointment with the one remaining QME. In the case of an unrepresented worker, the injured worker generally selects one QME from the list and makes an appointment. In both cases, state law requires the selected QME to see the injured worker for an evaluation within 60 days of the request for an appointment; however, parties can agree to extensions of up to 30 additional days, or waive the 90-day time limit. If the chosen QME is not available within the required or extended time frame, the parties may ask DWC to generate a

² Although DWC also determines violations of state law through Labor Code section 139.2, the violations we reviewed for the purposes of this report are mostly related to the medical-legal fee schedule, which is described in the regulations.

³ In addition to DWC's investigations section conducting investigations of QMEs, DWC has an audit unit—separate from the investigations section—that consists of 29 filled staff positions and three vacant positions and is responsible for auditing insurers, self-insured employers, and third-party administrators by conducting routine reviews at least once every five years to determine whether they met their obligations under state law. These audits do not include reviews of QMEs.

Figure 2
Injured Workers and Their Employers Use the QME Selection Process to Resolve Certain Disputes



Source: Analysis of state law and the department's regulations.

replacement QME or QME panel, from which the parties select a new QME. After conducting an evaluation of the injured worker, the QME has 30 days to write the medical-legal report and provide it to both the injured worker and the employer, who then may use it to resolve the dispute. DWC received more than 145,000 requests for new and replacement QME panels during fiscal year 2017–18. Injured workers and applicant attorneys made 57 percent of these requests, while claims administrators and defense attorneys made the remaining 43 percent of requests. The text box defines these parties.

DWC is also responsible for adopting and revising a medical-legal fee schedule—the fee schedule QMEs use to charge for their services, and it last updated the rates for this fee schedule in 2006. Based on this schedule, which the department includes in its regulations, QMEs can bill entities, which may include insurance companies, for their evaluations in several different categories, including a basic comprehensive medical-legal evaluation, a complex comprehensive medical-legal evaluation, a comprehensive medical-legal evaluation involving extraordinary circumstances, and a supplemental medical-legal evaluation. Generally, when an insurance company does not pay a QME or does not pay in full, the QME may dispute the payment by going through DWC’s independent bill review process. DWC generally is required to conduct a preliminary review of requests for independent bill review, and if eligible for review, DWC’s independent bill review contractor will review the QME’s bill and determine whether the claims administrator owes the QME additional compensation. DWC’s contract requires it to monitor the performance of its independent bill review contractor and oversee the entire independent bill review process.

The department’s regulations also outline an appeals process for resolving QME applicants’ disputes over denials of appointments or reappointments. DWC may deny a QME’s reappointment for a number of reasons, such as delivering reports late or performing a QME evaluation without a valid QME certification. If DWC denies a QME applicant’s appointment or denies a QME’s reappointment, DWC sends a notice of denial containing the reasons for the denial. In accordance with regulations, the QME or QME applicant may submit a specific, written response to the notice of denial within 30 days. DWC may then overturn or uphold its denial. If it upholds the denial, it provides a statement of issues specifying the reasons for denial and notifies the QME or QME applicant of

Key Parties Involved in Workers’ Compensation Claims

Injured workers—Employees who have a work-related injury or illness and are seeking workers’ compensation benefits.

Applicant attorneys—Attorneys who represent injured workers in their workers’ compensation cases. “Applicant” refers to the injured worker.

Claims administrators—Individuals or companies who handle workers’ compensation claims for employers. Most claims administrators work for insurance companies or other organizations that handle claims for employers, but some work directly for large employers.

Defense attorneys—Attorneys who help insurance companies and self-insured employers defend against workers’ compensation claims.

Source: DWC’s Physician’s Guide to Medical Practice in the California Workers’ Compensation System, and the department’s Guidebook for Injured Workers and website.

the right to a hearing. If the QME wants to further contest DWC's denial, he or she must request a hearing within 15 days, and DWC may assign the case to an administrative law judge from the Office of Administrative Hearings, or at its discretion, a DWC hearing officer.

Since 2017 QMEs have filed at least three lawsuits against DWC regarding the denial or potential denial of certain QME reappointments. The three lawsuits all included allegations that DWC denied some QMEs' reappointments without a hearing. Two alleged that DWC based some denials on regulations that were not approved in accordance with the State's Administrative Procedures Act. The third lawsuit also alleged that DWC made some reappointment decisions based on whether insurance companies viewed QMEs as tending to make medical conclusions that favored injured workers or that favored the employers/insurance companies, and whether the QME prepared medical-legal reports that were billed at a higher rate than appropriate. According to the department's acting chief counsel, DWC resolved the three lawsuits in 2018.

Audit Results

DWC Has Failed to Address Its QME Shortage

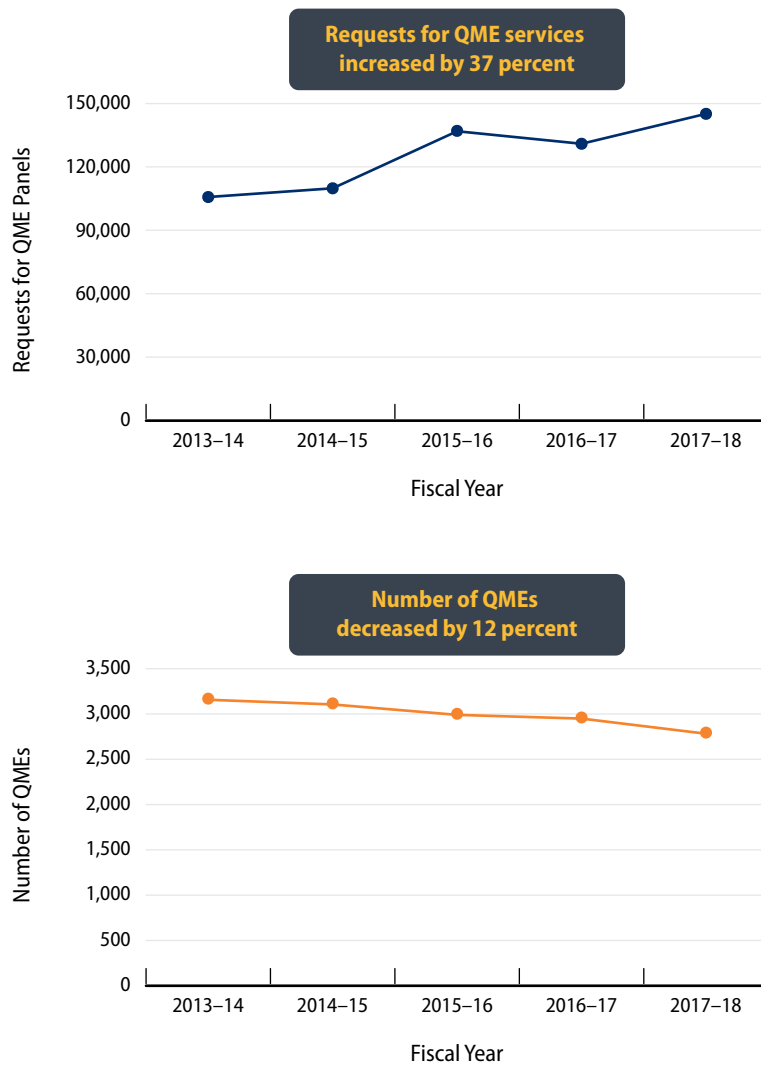
Even though DWC is responsible for overseeing QMEs and administering the QME selection process, it has not adequately ensured that it has enough QMEs to keep up with the demand for their services. Without an adequate number of QMEs, injured workers can experience unnecessary delays in the resolution of their disputes, which can postpone benefits for workers and increase costs for employers. State law requires DWC to appoint QMEs to evaluate the medical-legal issues in the workers' compensation system; therefore, we expected DWC to ensure that it maintains enough QMEs to handle demand without significant delays. However, the number of QMEs has declined steadily from fiscal years 2013–14 through 2017–18, while requests for services have risen significantly. The subsequent QME unavailability means that the current number of QMEs is not meeting the demand.

As Figure 3 indicates, from fiscal years 2013–14 through 2017–18, the total number of QMEs decreased from 3,157 to 2,782, a 12 percent drop; during the same period, requests for QMEs rose from 105,732 to 145,093, an increase of 37 percent. However, the availability of some specialty QMEs dropped even further. For example, from fiscal year 2013–14 to fiscal year 2017–18, the number of QMEs in otolaryngology (head and neck surgeons) decreased by 32 percent—from 38 to 26 QMEs—while the number of requests in this specialty increased significantly, from 914 to 1,484—a 62 percent increase. Further, although the number of physical medicine and rehabilitation specialist QMEs decreased by 21 over this time period, from 132 to 111, the number of panel requests more than doubled from 3,810 to 7,939.

The decrease in the number of QMEs corresponds with a significant increase in replacement panels because, if the original QME is unavailable, another is generally selected, creating a delay in selecting a QME. As described in the Introduction, when an injured worker or employer requests a QME to help resolve a workers' compensation dispute, DWC generates a panel of three from which one QME is selected to perform the evaluation. If the QME chosen from the original panel is not available within 60 days to conduct the evaluation, generally the injured worker can choose to wait for an appointment within 90 days, or either party can request a replacement panel. As Figure 4 shows, from fiscal years 2013–14 through 2017–18, the number of replacement panels that were requested because QMEs were not available within 60 days more than quadrupled—from about 4,600 replacement panels to nearly 19,000. In addition, in fiscal year 2017–18, 31 percent of all QME requests were for replacement panels—45,000 replacement

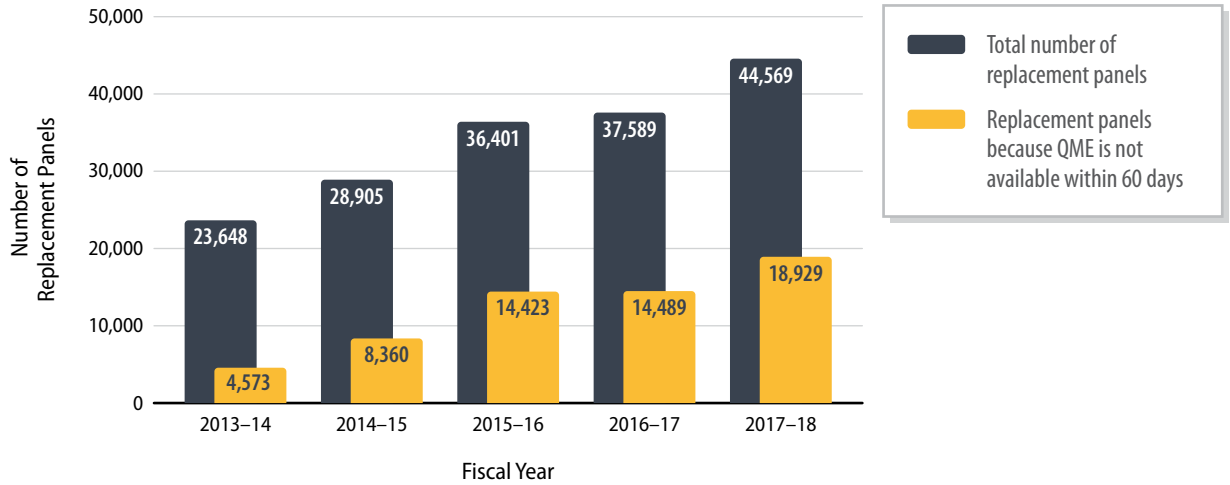
panels out of 145,000 total requests. DWC’s data show that if a workers’ compensation case required one replacement panel because of an unavailable QME, the case was delayed by more than two months nearly half of the time.

Figure 3
As Requests for QME Services Increased, the Number of QMEs Decreased
Fiscal Years 2013–14 Through 2017–18



Source: Analysis of the department’s QME database.

Figure 4
The Number of Replacement Panels Is Increasing Because QMEs Are Not Available



Source: Analysis of the department’s QME database.

Note: Other reasons for replacement panels include, among other things, a workers’ compensation judge’s decision to change the panel, the QME has a conflict of interest, and the QME report is late.

Replacement panels may delay injured workers’ access to their workers’ compensation benefits and increase employer costs. If there is a question about whether an injury is work-related, claims administrators may not accept the workers’ compensation claim until a QME provides a medical-legal opinion on the injured worker’s entitlement to benefits, and employers are generally not liable for benefits to injured workers until a claim is accepted—when an injured worker is eligible to receive workers’ compensation benefits.⁴ Delays caused by the replacement panels because QMEs are unavailable can potentially delay injured workers’ access to benefits that they are entitled to for several months. According to the acting president of the California Applicants’ Attorneys Association, in some cases, workers postpone treatment until they make it through the initial QME process because of the uncertainty of eventual benefit payouts or reimbursements. We, therefore, are concerned that delays of medical treatment could lead to greater temporary and/or permanent disability for injured workers, and that this prolonged process may increase the overall costs to employers.

⁴ Under California law, the employer is required to provide up to \$10,000 of specified medical treatment to the injured worker until the acceptance or denial of the worker’s claim.

Despite the declining number of QMEs, the significant increase in requests for them, and the increase in replacement panels because of QME unavailability, DWC has not acknowledged that there is a shortage of QMEs.

Despite the declining number of QMEs, the significant increase in requests for them, and the increase in replacement panels because of QME unavailability, DWC has not acknowledged that there is a shortage of QMEs. The administrative director of DWC told us that there is no independent study or data analysis showing that accessing QMEs is a problem. DWC's chief of medical administrative services also referenced a 2017 study, which states that a high proportion of panels are assigned to the busiest 10 percent of QMEs. The study also notes that certain QMEs have up to 10 office locations while others have fewer. The chief of medical administrative services implied that QMEs with more office locations can be selected more often and therefore are more likely to be unavailable based on the increased workload. She suggested this could be a significant factor that drives the requests for replacement panels because of unavailability.

However, when we looked at the data on unavailable QMEs in fiscal year 2017–18, we found that QMEs operating out of fewer than six zip codes—which DWC uses for assigning panels—accounted for more than half of all panel replacements because of unavailable QMEs. Further, the study DWC cited concluded, from data through 2016, that the increase in QMEs being unavailable calls for close monitoring by DWC. As we discuss later in the report, DWC has data to identify its need for additional QMEs, but it has not acted on them. Consequently, DWC should not continue to ignore the indicators of its dwindling supply of QMEs.

DWC acknowledged that the number of QMEs is decreasing and identified three reasons why physicians may not be applying to become QMEs. First, fewer are joining the system because of a general shortage of physicians in California. Although we found that the number of licensed physicians and surgeons in the State has been increasing from 2014 through 2018, a 2017 report by the Healthforce Center at the University of California, San Francisco, concludes that the supply of primary care physicians in California is insufficient to meet the population's needs. Second, DWC believes that many physicians are no longer going into private practices that would better facilitate them serving as a QME. Surveys conducted by the American Medical Association show that the percentage of physicians in private practice dropped from around 53 percent in 2012 to 46 percent in 2018. Third, DWC indicated that barriers exist for physicians who work in particular settings to become QMEs, such as managed care organizations. According to the administrative director, one managed care organization indicated that having its physicians involved in more lengthy QME evaluations would adversely affect the physicians' availabilities to serve their regular patients.

Despite these warnings signs, DWC has not taken sufficient action to address its QME shortage. For example, it has not taken one key step that could help it attract and retain QMEs: updating the rates of its medical-legal fee schedule—the fee schedule QMEs use to charge for their services. This fee schedule’s rates have not been updated since 2006. However, state law requires DWC to adopt and revise the medical-legal fee schedule in tandem with its Official Medical Fee Schedule (OMFS), which establishes reasonable maximum fees paid for specific workers’ compensation medical services. Although DWC updated the OMFS multiple times from 2014 through 2018, it has not updated the rates in the medical-legal fee schedule for QMEs in 13 years. According to the administrative director, DWC has not done so because of limited resources. Consequently, QMEs are billing for their services at 2006 rates, which are much lower than what the rates would be if they had kept pace with inflation. We calculated that costs for professional medical services have increased by roughly 30 percent since 2006 because of inflation, which means that the current fee of \$625 for a basic medical-legal evaluation without allowable adjustments would be \$812 if adjusted for inflation.

DWC has not updated the rates of its medical-legal fee schedule that QMEs use to charge for their services since 2006.

DWC began the process to amend its medical-legal fee regulation in 2018. After it first released its proposed medical-legal fee schedule in May 2018, DWC held a public hearing and solicited fee schedule proposals. In July 2019, two assemblymembers took action to update DWC’s medical-legal fee schedule. The assemblymembers introduced legislation that would make the compensation rates 1.5 times higher than what is currently allowable—\$937 for a basic medical-legal evaluation without allowable adjustments—and would require DWC to update the compensation rates quarterly, as necessary. As of October 2019, the bill is pending action in the Legislature. In August 2019, DWC released a new, updated proposal for the fee schedule for public comment. DWC’s new proposal creates a fixed fee schedule and includes potential adjustments to the fixed fee, such as if an interpreter is needed, or if the evaluation is performed in an underserved area. DWC anticipates it will have the updated medical-legal fee schedule in place sometime in 2020.

In addition, DWC does not have an established process for recruiting QMEs, despite facing a QME shortage. The executive medical director said that DWC representatives have informally encouraged physicians to become QMEs as opportunities arise, such as at educational and professional conferences. In addition, the administrative director said that in July 2019, DWC contacted a major medical group and asked it to consider allowing its physicians to participate as QMEs, but it was unsuccessful because, as we state earlier, the medical group asserted that more lengthy QME evaluations could impact the physicians’ availabilities to serve

DWC should determine how many evaluations QMEs can perform on average to ensure that it maintains the necessary QME supply to meet demand.

their regular patients. He further indicated that DWC intends to contact other medical groups to explore the possibility of recruiting more QMEs.

Although it has data to identify its needs for additional QMEs, it has not yet acted on them. DWC has data on QME demographics, such as location and specialty, and demand statistics such as requests for QMEs and replacement panels overall, per specialty, and by claim. However, it has not used these data to better manage the QME supply and recruit more QMEs. Further, it does not have benchmarks for evaluating the capacity of its current supply, which could inform DWC of how many QMEs it needs to recruit to mitigate its shortage. Specifically, DWC should determine how many evaluations QMEs can perform on average to ensure that it maintains the necessary QME supply to meet demand.

Because QMEs have become more frequently unavailable, we believe changes to the panel selection process are also warranted. DWC previously had a process of “dueling QMEs” if the injured worker was represented by an attorney, in which each party obtained its own QME and generated separate medical-legal reports. However, this process made the system even more adversarial by producing potentially contradictory QME reports. The State abandoned this approach in 2004. Our proposal is to increase the size of certain panels. Data show that the rate of replacement panel requests for represented cases is three times higher than the rate of requests for unrepresented cases, partly because unrepresented workers generally can select from among a panel of three QMEs while represented workers generally have to use the remaining QME after each party strikes one from a panel of three. For represented workers, we believe that expanding the panel size to five QMEs, allowing each party to strike one, and then allowing the party that did not request the panel to select from the remaining three would better ensure availability and reduce the number of replacement panels needed. If the selected QME is unavailable, the parties would then select from among the remaining two QMEs until they find one that is available.

DWC’s Practices for Disciplining Some QMEs Raise Due Process Concerns

DWC did not discipline some QMEs for alleged overbilling violations until they came up for reappointment, a practice that we believe raises due process concerns. Rather than using its formal regulatory process to discipline QMEs before their terms expired, DWC denied the QMEs’ reappointments because of the alleged violations. When DWC denied those QMEs’ reappointments, the QMEs were prohibited by law from performing QME services until the allegations were resolved, a process that can take months.

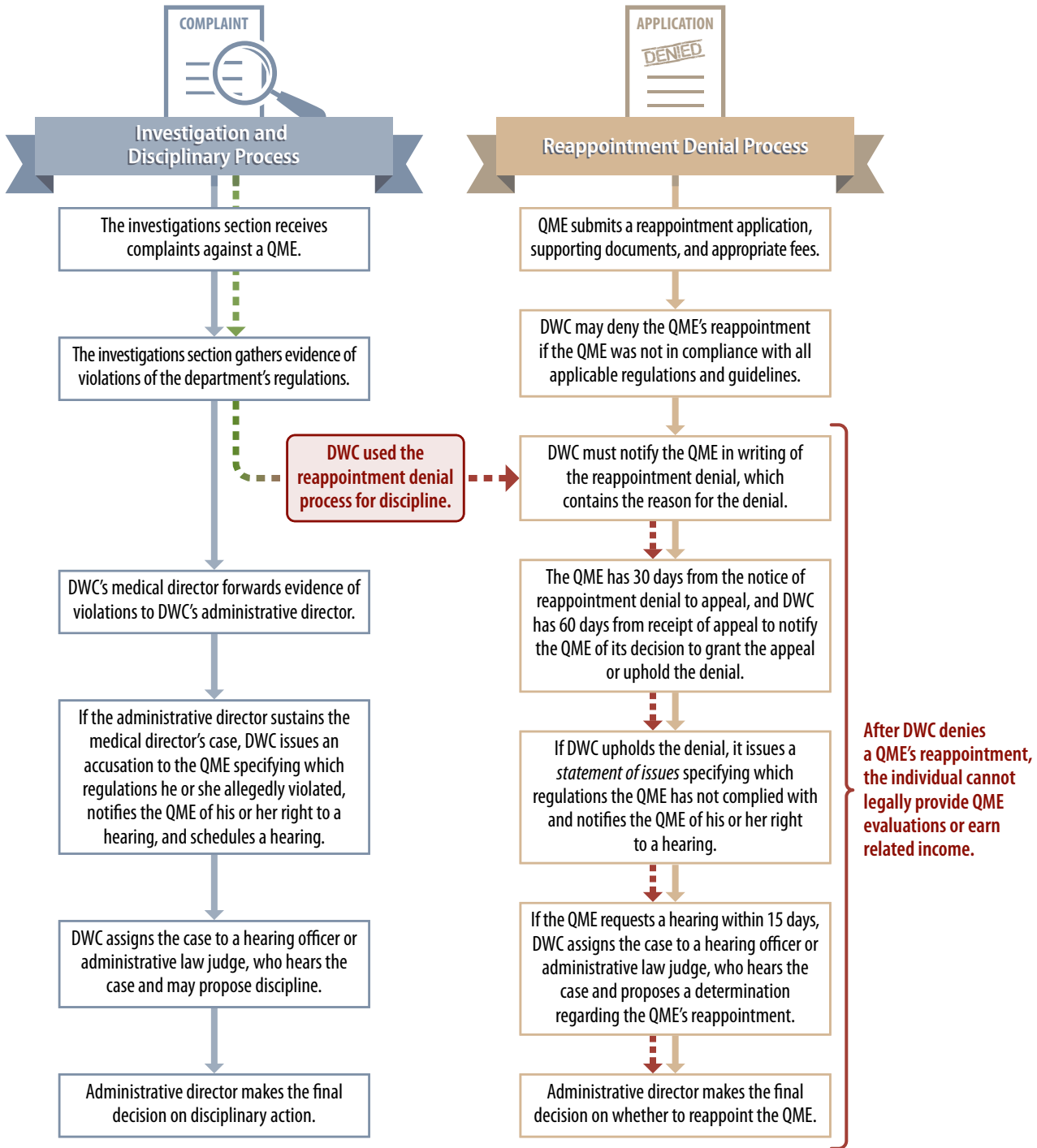
Further, this practice removes QMEs from the available supply without a final decision that the QMEs committed the alleged violations. Moreover, we found that DWC was slow to schedule hearings that QMEs requested after it denied their reappointment appeals, or it did not schedule requested hearings at all. Consequently, the QMEs had an incentive to settle with DWC so that they could resume providing QME services and earn income from those services. We found that DWC generally entered into settlement agreements with QMEs while they were unable to practice as QMEs, and that these settlement agreements required them to make restitution payments to insurance companies for alleged overbilling violations instead of proceeding with the disciplinary process outlined in the department's regulations. We believe that DWC's lack of sufficiently detailed, written policies and procedures for investigating and resolving complaints led to these concerns.

DWC has a regulatory process for imposing discipline on QMEs due to alleged violations of state law. As Figure 5 shows, DWC's Investigations and Enforcement Section (investigations section) reviews complaints regarding QMEs and obtains evidence of statutory or regulatory violations. When evidence of a regulatory violation exists, DWC's medical director submits the case to DWC's administrative director. If DWC's administrative director agrees, state law requires DWC to send the QME a statement of charges (accusation) that specifies the statutes and regulations the QME allegedly violated and to notify the QME of his or her right to a hearing before an administrative law judge or a DWC hearing officer to contest the alleged violations. If a hearing on the alleged violations is conducted, the administrative law judge or hearing officer files a statement of findings and proposed decision with the DWC's administrative director. The administrative director has several options after receiving the proposed decision, including the authority to adopt the proposed decision or to reject it. The administrative director makes the final decision on disciplinary action, which can include probation, suspension, and termination of QME status. With the exception of specific circumstances described in state law, DWC cannot suspend or terminate a QME during his or her term without following this procedure.

In a separate regulatory process, again as Figure 5 shows, DWC considers applications for reappointment. According to state law, DWC shall reappoint a QME for a two-year term if the QME meets specific requirements. A QME must submit completed application forms and evidence of completed continuing education requirements and pay appropriate fees, among other requirements. However, DWC may deny a QME's reappointment for a number of reasons, including if the QME was not in compliance with all applicable regulations and evaluation guidelines or because the

DWC was slow to schedule hearings that QMEs requested after it denied their reappointment appeals, or it did not schedule requested hearings at all.

Figure 5
DWC Used the Reappointment Process to Discipline QMEs, a Practice We Find Inappropriate



Source: State law, the department's regulations, and DWC.

administrative director took disciplinary action against the QME during his or her most recent term. Under the department's regulations, a QME may submit a written response to DWC appealing its denial of his or her reappointment and request a hearing if DWC upholds the denial after reviewing the QME's timely response. However, state law does not allow an individual to perform QME services after DWC denies his or her reappointment. Because such services may constitute up to two-thirds of a QME's practice, such a denial can have a significant impact.

State law does not allow an individual to perform QME services after DWC denies his or her reappointment.

Despite these separate regulatory processes, DWC used the reappointment process to discipline some QMEs for alleged overbilling violations without scheduling hearings, even though the QMEs requested hearings in some cases, a practice that raises due process concerns. Injured workers and insurance companies submitted some of the complaints alleging that certain QMEs overbilled for services. Although billing-related complaints made up a relatively small portion of all types of complaints—around 7 percent of complaints that DWC logged in its complaint database for 2017 and 2018—we focused on these complaints in light of one of our audit objectives—to determine whether DWC collected funds on behalf of the insurance industry from QMEs—and because QMEs can agree to pay restitution to insurance carriers to resolve allegations of overbilling. We reviewed 24 billing-related complaints DWC received from 2014 through 2018, 11 from 2014 through 2016, and 13 from 2017 through 2018. For six of the 11 billing-related complaints DWC received from 2014 through 2016, DWC denied the QME's reappointment application based on alleged violations for overbilling. Although DWC's acting chief legal counsel believes it is appropriate for DWC to deny QME reappointments when it has evidence that the QME violated the department's regulations, we believe the alleged *violations* remain *allegations* until later in the disciplinary process, such as when an administrative law judge files a proposed decision with the administrative director after a hearing or the QME declines to participate in the hearing process. We found no evidence in DWC's records that either of these circumstances had already occurred when DWC denied reappointment to these QMEs.

In these six cases, DWC in effect used the reappointment process to impose discipline on the QMEs without a hearing, which may have denied the QMEs due process. Additionally, by using the reappointment process to impose discipline, DWC delayed the QMEs' reappointments. For two of the six cases, the individuals are no longer QMEs. One of these QMEs did not respond to DWC's statement of issues, and we saw no evidence that the other resubmitted the required application and fees to be reappointed. For the other four of the six cases, DWC delayed the reappointments for about six to 15 months. As a result, these

individuals could not perform QME evaluations and potentially lost income they could have earned as QMEs during this time. During the time they were unable to practice as QMEs, these physicians had an incentive to settle with DWC so that they could resume providing QME services and earning income from them. The QMEs in these four cases agreed to pay restitution to insurance companies for the alleged overpayments. DWC also agreed to reappoint them.

In one example, the individual would have been unable to perform QME services for about 15 months while he and DWC worked to resolve alleged overbilling violations. DWC received a complaint in May 2014 alleging that, among other issues, this QME billed for services that were not provided. After requesting evidence from the QME in June 2014 and February 2015 and reviewing it shortly thereafter, DWC waited until June 2016 to deny the QME's reappointment, effective July 2016. The QME responded to the denial in July 2016, and DWC provided the QME with a statement of issues affirming the denial in August 2016. Within a week, the QME requested a hearing, but DWC never attempted to schedule one because it said settlement negotiations were ongoing. In October 2017, DWC and the QME resolved the alleged violations by reaching a settlement agreement that required the QME to pay more than \$32,000 to nine insurance companies. The settlement also contained a stipulation and proposed order that DWC would reappoint the individual as a QME. The prolonged resolution period between the QME's July 2016 reappointment denial and the October 2017 settlement resulted in a 15-month lapse in the individual's ability to perform QME services. We believe DWC should have resolved the complaint solely through its disciplinary process rather than denying the QME's reappointment based on allegations that had not yet been heard by an administrative law judge or department hearing officer.

We found instances in 2017 and 2018 where DWC denied QMEs' reappointments based on alleged overbilling violations.

Even though DWC resolved some complaints more quickly during 2017 and 2018, we found further instances in those years where DWC denied QMEs' reappointments based on alleged overbilling violations. We reviewed 13 billing-related complaints DWC received during 2017 and 2018 and found that for nine of them, DWC issued a warning to the QME or settled the complaint before the QME was due for reappointment or soon thereafter. DWC did not pursue discipline for the remaining four complaints because the individuals were no longer active or DWC had resolved the allegation in a previous settlement. Under the process described in the department's regulations for disciplining QMEs, DWC must issue an accusation and notify the QME of his or her right to a hearing before taking disciplinary action except in specific circumstances. In four of the nine instances from 2017 and 2018, instead of issuing accusations and notifying QMEs of their right to a hearing, DWC sent letters stating that it had

identified billing violations, listing the amounts of the billing violations, and informing the individuals that they could contact DWC if they wanted to discuss a resolution to the matter. DWC's records indicate that those four QMEs made restitution payments to insurance companies or entered settlement agreements to make payments. We also identified four additional instances from 2017 and 2018 when DWC denied the QMEs' reappointments based on alleged overbilling violations, which did not adhere to its regulatory process for disciplining QMEs.

Although DWC's administrative director does not agree with our characterization that DWC has used the reappointment process for discipline, he indicated that, due to staffing shortages, it was possible that DWC did not inform some QMEs of complaints or did not initiate discipline for violations before denying their reappointments. He also stated that, with increased staffing levels now, it is less likely to happen; DWC filled the last of its four special investigator positions in February 2017 and hired an additional attorney in August 2017.

We also believe that DWC's lack of sufficiently detailed, written policies and procedures for investigating and resolving complaints contributed to the concerns we identified. Although DWC's administrative director indicated that the investigations section has policies and procedures in the form of a high-level flowchart of key investigation steps, we believe that a one-page flowchart is insufficient to provide adequate guidance to staff. We would expect the section to have procedures that, at a minimum, provide sufficiently detailed instructions for staff to follow, a list of expected deliverables, and internal timelines for completing each phase of the investigation process.

While examining DWC's reappointment denials, we identified an additional concern with the reappointment process: DWC was slow to request the Office of Administrative Hearings to schedule hearing dates after the QMEs requested hearings following DWC's reappointment denials in two instances, and we saw no evidence that it requested hearings in two other instances. State law requires DWC to notify a QME of the right to a hearing when it sends a statement of issues. We reviewed 10 cases for which the QMEs appealed DWC's reappointment denials from 2016 through 2018 where the QME could have requested a hearing. The statements of issues we reviewed for each of these cases included the hearing notification, and four of the QMEs requested a hearing. For two of those four, we saw no evidence that DWC attempted to schedule hearings with the Office of Administrative Hearings. DWC attempted to schedule hearings for the remaining two hearing requests, but it scheduled a hearing in only one of these instances while settling the other case five months after the hearing request.

State law requires DWC to notify a QME of the right to a hearing when it sends a statement of issues.

DWC scheduled this hearing for one year after the QME made the request. In all four cases, including the one for which it had scheduled a hearing, DWC resolved the alleged violations by entering into settlement agreements.

Although DWC can submit requests for scheduling a hearing, it has not always done so. DWC's acting chief legal counsel told us that an applicant submitting a "Request for Hearing" form to DWC does not automatically indicate that the applicant is seeking a hearing. She indicated that DWC will attempt to reach an amicable settlement of the discipline issues with the applicant or his or her legal representative. She further stated that the mutual decision to schedule a hearing might be delayed by this process. However, given the negative financial consequences for a QME who DWC does not reappoint, we are concerned that prolonged delays in reappointing QMEs may unnecessarily make them more inclined to settle than they might otherwise be.

DWC Has Failed to Comply With State Law to Ensure That QMEs Produce High-Quality Reports

DWC has not continuously reviewed medical-legal reports for quality and has not tracked when workers' compensation judges have rejected medical-legal reports that failed to meet minimum standards.

DWC has not continuously reviewed medical-legal reports for quality and has not tracked when workers' compensation judges have rejected medical-legal reports that failed to meet minimum standards. As we describe in the Introduction, these reports must provide medical evidence that can help judges resolve disputes related to workers' compensation claims. The quality of these reports is especially important because reports that are inaccurate or incomplete can potentially delay resolution of disputes and workers' receipt of benefits, and they can increase costs for employers involved in the disputes. Because DWC did not perform these reviews or track rejected reports, DWC lacks the data to identify whether report quality is a systemic problem or whether individual QMEs are producing low-quality reports.

State law provides at least two ways for DWC to help ensure that QMEs produce high-quality reports. First, state law requires the DWC's medical director to continuously review the quality and timeliness of QMEs' reports by reviewing a random selection of reports as well as reports alleged to be incomplete or inaccurate. This state law further requires the medical director to submit an annual report to DWC's administrative director that summarizes the results of those reviews and recommends improvements to the QME system. Second, when DWC reappoints a QME, state law requires DWC to reappoint only those QMEs that meet certain criteria, including not having more than five reports rejected by a workers' compensation judge. The rejections are based on the report's failure to prove or disprove a contested issue or failure to

comply with relevant guidelines. State law also requires a workers' compensation judge or the Workers' Compensation Appeals Board (Appeals Board) to inform DWC of QME reports that have been rejected for failing to meet minimum standards.

DWC has not complied with these state laws. Other than one effort in 2015, the executive medical director could neither provide the required annual reports nor demonstrate that DWC has continuously performed a review of report quality since 2007. According to an email from the associate medical director to DWC management, he began reviewing a selection of 100 reports for quality in 2015, but he discontinued that effort in 2016 after reviewing 69 reports. The associate medical director told us that he found that approximately 85 percent of those reports were substandard in one or more ways. However, DWC did not follow up on his findings. The executive medical director does not recall why DWC took no action on the findings identified in the 2015 effort.

Although DWC provided several reasons for why it has not complied with the law requiring continuous reviews of medical-legal reports for quality, we found its reasons insufficient. First, although the executive medical director asserted that DWC needs additional medical and legal resources, he could not demonstrate that DWC has made a good-faith effort to identify the additional resources it needs to comply with state law or that it has attempted to obtain those resources. For instance, according to the chief of medical administrative services, DWC has had a vacant associate medical director position since 2016. Based on its duty statement, the position would be appropriate for reviewing and reporting on QME report quality and timeliness. However, this does not explain why DWC did not produce the required annual reports for at least nine years before 2016. The executive medical director also stated that DWC has trouble attracting candidates for these positions because it is located in an area with a high cost of living, and DWC does not offer the most competitive compensation. However, the chief of programmatic services at DWC indicated that DWC has not conducted a salary survey to justify raising the compensation through the California Department of Human Resources, but would consider it. Alternatively, the executive medical director indicated that DWC can allocate existing resources to give QME report review a higher priority. Ultimately, to meet its legal obligation, we believe DWC has a responsibility to use existing resources or seek additional resources to help ensure the quality and timeliness of QME reports, which injured workers and their employers rely on to resolve disputes.

Not tracking rejected reports also inhibits DWC's ability to identify poor QME reports. The compliance manager of the DWC medical unit (compliance manager) informed us that DWC assigned staff

Other than one effort in 2015, the executive medical director could neither provide the required annual reports nor demonstrate that DWC has continuously performed a review of report quality since 2007.

to start tracking reports rejected by judges or the Appeals Board in May 2019, which was after the start of our audit. Without such tracking, DWC misses the opportunity to improve QME report quality, to educate QMEs, and to resolve less serious regulatory violations as described in DWC's sanction guidelines. Although DWC's chief judge could not provide us with documentation for how many reports the presiding judges in her jurisdiction had rejected, she polled her presiding judges to provide this information. Based on the poll, DWC's chief judge told us that the workers' compensation judges rejected about 70 QME reports over the last year alone because they did not provide substantial medical evidence. However, DWC could only provide us with one report rejected by a workers' compensation judge or the Appeals Board within the last five years. After we inquired about this, DWC's chief judge stated that she intends to work with the presiding judges to help establish a process for reporting to DWC when the judges reject QME reports for not meeting minimum standards, as state law requires.

In part because DWC has not complied with these state laws, it lacks data regarding the quality of QME reports and whether this is a systemic problem. We spoke with multiple interest groups about the scope and prevalence of low-quality reports, and some stakeholders expressed concerns. Lawyers from both an applicant attorneys' association (representing injured workers) and a defense attorneys' firm (representing insurance companies or employers) told us that QME report quality is sometimes an issue. For example, the reports may not contain all required medical evidence or do not contain the needed level of complexity. The manager of DWC's Disability Evaluation Unit—the unit responsible for reviewing QME reports to rate an injured worker's level of permanent disability—told us that while he does not think it is a widespread problem, he has concerns that certain QMEs are not producing high-quality reports for the purpose of rating disability. For example, he indicated that one QME did not base his medical-legal evaluations on the guidelines DWC adopted. Another QME failed to evaluate impairment in his report, which is necessary to determine potential permanent disability.

Low-quality QME reports can delay injured workers' receipt of benefits and add expenses for employers involved in disputes.

Low-quality QME reports can delay injured workers' receipt of benefits and add expenses for employers involved in disputes. A workers' compensation judge can reject a report or ask the QME to develop it further if the report fails to meet minimum standards; in such cases, the judge may order a supplemental report from the QME, a deposition of the QME, or a new panel from DWC. All of these scenarios—a supplemental report, a deposition, or a new panel—add time and expense to the resolution of the claim. As we explain in the first section, generating a new panel can cause delays, postpone workers' receipt of any applicable benefits, and increase costs for employers.

In addition, DWC has not reported on the timeliness of QME reports for reasons similar to its reasons for not performing the continuous reviews of report quality. However, it has collected data on complaints of late reports and in some instances, it has taken action to deny QMEs' reappointments based on late reports. State regulations require QMEs to provide written medical-legal reports within 30 days of the face-to-face evaluation of the injured worker. If a QME does not comply with this time frame, either the injured worker or the employer can object in a timely manner and request a replacement panel, which can result in a new evaluation and a new report. According to DWC's complaint data for 2017 and 2018, late reports are the most common reason for complaints against QMEs. For 19 of the 20 reappointment denials we reviewed from 2018 and 2019, DWC denied the reappointment of QMEs who had three or more late reports in a calendar year, as the department's regulations authorize. DWC later granted the appeals of all 19 QMEs, and approved their reappointments.

Recommendations

Legislature

To ensure that DWC maintains a sufficient supply of QMEs and appropriately compensates these individuals, the Legislature should amend state law to specify that DWC review and, if necessary, update the medical-legal fee schedule at least every two years based on inflation. DWC's review of the medical-legal fee schedule should be separate from its review of the Official Medical Fee Schedule.

To reduce the delays that replacement panels cause in resolving workers' compensation claims, the Legislature should revise state law to increase the number of QMEs on the panels DWC provides. Specifically, unrepresented employees should continue to choose from a panel of three QMEs, and represented employees should be provided with a panel of five QMEs, of whom the employee and the employer can each strike one, leaving both parties with the same number of QMEs to choose from as unrepresented employees. The party—the worker or the employer—that did not request the panel would select the final QME. If the selected QME is unavailable, the parties would then select from among the two remaining QMEs until they find one that is available.

DWC

To ensure that DWC appoints enough QMEs to keep up with the demand for QME services, it should, by April 2020, develop and implement a plan to increase the number of QMEs commensurate with demand. The plan should describe how DWC will actively recruit for and increase the pool of QMEs, prioritizing specialties with the greatest shortages relative to demand. It should also use QME data trends to project the necessary QME supply to meet demand. The plan should include continuing negotiation with medical groups to allow their physicians to become QMEs, as well as establishing goals for recruiting new QMEs in specific specialties.

To ensure consistency and transparency in overseeing QMEs, DWC should, by April 2020, take the following actions:

- Develop and implement written policies and procedures that define and specify its internal processes for disciplining QMEs, including timelines for taking disciplinary action and for scheduling hearings or responding to settlement proposals.
- Develop and implement written policies and procedures that define its internal process for reappointing QMEs and how that process should proceed if any disciplinary investigations are pending.

To ensure that DWC monitors and reviews QME report quality and timeliness and to ensure the efficient resolution of workers' compensation claims, DWC should, by April 2020, take the following actions:

- Create and implement a plan to continuously review the quality and timeliness of QME reports, including time frames for review, methodology for selecting reports to review, and the minimum number of reports to be reviewed annually.
- Develop and implement a process for annually reporting to DWC's administrative director its findings on the quality and timeliness of QME reports and recommended improvements to the QME system.
- Create written policies and implement a consistent process for ensuring that workers' compensation judges and the Appeals Board inform DWC of QME reports they rejected for not meeting minimum standards.
- Create written policies and implement a process for tracking QME reports rejected by workers' compensation judges and the Appeals Board for not meeting minimum standards. DWC should consider and include these reports in its annual review of report quality and recommend improvements to the QME system.

We conducted this audit under the authority vested in the California State Auditor by Government Code 8543 et seq. and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives specified in the Scope and Methodology section of the report. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,

A handwritten signature in black ink that reads "Elaine M. Howle". The signature is written in a cursive, flowing style.

ELAINE M. HOWLE, CPA
California State Auditor

November 19, 2019

Blank page inserted for reproduction purposes only.

Appendix

SCOPE AND METHODOLOGY

The Joint Legislative Audit Committee (Audit Committee) directed the California State Auditor to examine the oversight and regulation of the QME process by DWC. The table below lists the objectives that the Audit Committee approved and the methods we used to address them.

Audit Objectives and the Methods Used to Address Them

AUDIT OBJECTIVE	METHOD
<p>1 Review and evaluate the laws, rules, and regulations significant to the audit objectives.</p>	<p>Researched and reviewed relevant laws, rules, regulations, and policies.</p>
<p>2 Identify the number of QMEs and the number of requests for their services during the last five fiscal years. To the extent possible, determine whether the current number of QMEs can meet the demand for the program's services. Determine what efforts, if any, DWC has made to increase the number of QMEs participating in the program.</p>	<ul style="list-style-type: none"> • Analyzed data from the department's database to identify the number of QMEs and requests for their services for fiscal years 2013–14 through 2017–18. • Reviewed trends of replacement panels that DWC generated during fiscal years 2013–14 through 2017–18 caused by QME unavailability. • Interviewed key staff regarding DWC's efforts to increase the number of participating QMEs. • Interviewed an applicants' attorneys organization to gain an understanding of injured workers' access to QME services.
<p>3 Review DWC's policies and procedures for appointing and reappointing QMEs and determine whether they comply with state laws and regulations. Review a selection of QME appointments and reappointments to determine whether DWC is following its processes and complying with statutory requirements.</p>	<ul style="list-style-type: none"> • Reviewed relevant laws and regulations for appointing and reappointing QMEs. • Reviewed a selection of 20 QME appointments and reappointments for 2018 and 2019 to determine whether DWC complied with state laws and regulations when it appointed and reappointed QMEs. • Reviewed a selection of 20 QME reappointment denials (five from the selection in the bullet point above and 15 additional denials) for 2018 and 2019 to determine the reasons DWC denied reappointments. • Interviewed key stakeholders within the workers' compensation system, including an applicants' attorneys association, a defense attorneys' firm, and DWC's chief judge to gain an understanding on one of the issues we identified related to reappointment: poor-quality medical-legal reports by QMEs.
<p>4 Review DWC's policies and procedures for QMEs to appeal denial of appointments and reappointments and determine whether they comply with state laws and regulations. Review a selection of appeals by QMEs to determine whether DWC is following its processes and complying with statutory requirements.</p>	<ul style="list-style-type: none"> • Reviewed relevant laws and regulations that allow applicants and QMEs to appeal denial of appointments and reappointments, including their rights to hearings. • Reviewed a selection of 10 reappointment denial appeals QMEs submitted for 2018 and 2019 to determine if DWC complied with regulations when it processed the appeals. • Reviewed an additional selection of 10 reappointment denial appeals in which DWC provided to QMEs a statement of issues to uphold the denial from 2016 through 2018 to determine whether DWC complied with its regulations to grant hearings when requested.

continued on next page...

AUDIT OBJECTIVE	METHOD
<p>5 Assess the process used by DWC to establish its existing fee schedules for the program and determine whether the process complies with state laws and regulations. In addition, evaluate the process, if any, DWC uses to update or modify program fee schedules. To the extent possible, assess the reasonableness and fairness of the fee schedules.</p>	<ul style="list-style-type: none"> Reviewed state laws for updating DWC's Official Medical Fee Schedule and medical-legal fee schedule. Evaluated the process DWC is currently using to revise its medical-legal fee schedule and determined when DWC last updated the rates. We considered the increases in inflation when assessing the reasonableness of DWC's rates from 2006—the last time DWC updated its rates.
<p>6 Review DWC's process for investigating and resolving complaints filed by QMEs when insurance carriers deny or reduce their payments for services. Review a selection of complaints filed by QMEs to determine whether DWC followed its process and complied with statutory requirements.</p>	<ul style="list-style-type: none"> Reviewed state laws and regulations related to the independent bill review process and DWC's independent bill review contract. Reviewed a selection of 12 independent bill review cases, which are initiated to resolve a QME's billing-related dispute or complaint, and found that from 2015 through 2018, DWC's independent bill review contractor generally followed its process and complied with statutory requirements.
<p>7 Assess how DWC allocates its audit resources and prioritizes reviews of QMEs and insurance carriers.</p>	<p>Compared the roles, responsibilities, and staffing for DWC's audit unit—which audits insurance carriers—and investigations section—which reviews QMEs. Based on the separate organizational structure, staff, and roles and responsibilities, we concluded that the audit unit and the investigations section are separate. The evidence did not indicate that DWC prioritized its investigations section or its audit unit over the other.</p>
<p>8 Evaluate the relationship between DWC, the insurance industry, and the independent bill review process. To the extent that specific concerns are identified, review communications between DWC and the various parties.</p>	<ul style="list-style-type: none"> Reviewed DWC's contract with its independent bill review contractor from 2015 through 2019 to gain an understanding of the contracted services and DWC's involvement in the bill review process. Reviewed communications between relevant DWC staff, the independent bill review contractor, and insurance carriers. Our review did not identify any inappropriate communications.
<p>9 Determine whether DWC collected funds on behalf of the insurance industry from QMEs and distributed those funds to insurance carriers or other parties. To the extent it occurred, determine whether DWC's collection and payment of those funds complied with state laws and regulations.</p>	<ul style="list-style-type: none"> Selected and reviewed 19 billing complaints that DWC received from 2014 through 2018. For each of the billing-related complaints we reviewed, we determined whether correspondence and settlement documents directed QMEs to pay restitution to insurance carriers and determined whether restitution amounts were recorded in DWC's financial records. Reviewed DWC's financial records from 2016 through 2018 to identify the source of DWC's collections. We found that DWC generally directed QMEs to make restitution payments to insurance carriers and we did not identify instances where DWC deposited the money in its account.
<p>10 Review and assess any other issues that are significant to the audit.</p>	<p>Reviewed 24 billing-related complaints (19 selected from Objective 9 and five additional items) to determine whether DWC followed its disciplinary and reappointment processes.</p>

Source: Analysis of Audit Committee's audit request number 2019-102, state law, and information and documentation identified in the column titled Method.

Assessment of Data Reliability

The Government Accountability Office, whose standards we are statutorily required to follow, requires us to assess the sufficiency and appropriateness of the computer-processed information that we use to support our findings, conclusions, and recommendations. In performing this audit, we relied on the department's QME database to determine the number of available QMEs and requests for QMEs. To evaluate these data, we reviewed existing information about the data, interviewed agency officials knowledgeable about the data, and performed data set verification procedures and electronic testing of key data elements. In addition, we performed accuracy and completeness testing related to available QMEs. As a result, we found the data to be sufficiently reliable for our purposes.

Blank page inserted for reproduction purposes only.

STATE OF CALIFORNIA

GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
LEGAL UNIT
1515 Clay Street, Suite 1700
Oakland, California 94612
Tel (510) 286 -7100 Fax (510) 286-0687



October 25, 2019

Elaine M. Howle, CPA*
California State Auditor
621 Capitol Mall, Suite 1200
Sacramento, CA 95814

Dear Ms. Howle:

The Labor and Workforce Development Agency has authorized me to respond to the California State Auditor's draft report on the Department of Industrial Relations' administration of the Qualified Medical Evaluator (QME) program (Report 2019-102), which is administered by the Department's Division of Workers' Compensation (DWC). The Department and DWC appreciate the professionalism and courtesy shown by your office and the time and effort your staff expended in conducting the audit of the Division's program and operations. The Division is committed to finding ways to continually improve the program and ensure that it meets its mission to minimize the adverse impact of work-related injuries on California employees and employers.

Towards that end, the Division acknowledges and accepts the draft report's recommendations, which it will work to implement by April 2020. Below, the Division offers specific responses to those recommendations and provides further context for the proposed draft findings. The Division offers its comments based upon its expertise in workers' compensation, regular meetings with stakeholders, and consideration of recent independent studies addressing various aspects of the QME program.

CSA Finding #1: DWC Has Failed to Address Its QME Shortage

CSA Recommendation: Develop and implement a plan, by April 2020, to increase the number of QMEs. The plan should describe how DWC will actively recruit for and increase the pool of QMEs, prioritizing specialties with the greatest shortages relative to demand. The plan should also use QME data trends to project the necessary QME supply to meet demand. The plan should include continuing negotiation with medical groups to allow their doctors to become QMEs, as well as establishing goals for recruiting new QMEs in specific specialties.

DWC Response to Recommendation: The DWC will create and implement a plan in accordance with the Audit recommendations in the hopes of attracting doctors to the QME program. The plan will utilize available data and will also include outreach goals to specific specialties and geographic areas. However, the DWC has seen a decrease in not only QME physicians, but also in treating physicians within our system. As the Auditor points

* California State Auditor's comments begin on page 43.

Ms. Elaine Howle
October 25, 2019

out, the supply of primary care physicians in California is not sufficient to meet the population's needs. Therefore, while attempts to increase the number of QMEs in our system can be made through outreach at medical and workers' compensation conferences and in continued discussions with medical groups, the DWC faces headwinds in ending the persistent and ongoing decline.

The DWC can increase the pool of QMEs by adjusting how doctors are assigned to panels. Data, as outlined below, shows that only 50 percent of our current QME physicians are being assigned to panels. Therefore, adjusting how the panels are assigned may allow us to access 100 percent of the QMEs and prevent some QMEs from leaving the system due to the fact that they are currently not receiving medical-legal evaluations.

Further DWC Discussion Regarding Draft Findings: Below, the DWC provides responses and additional context for certain draft findings.

- The Audit finds that the "current number of QMEs is not meeting the demand" and that the DWC is ignoring the indicators of a dwindling supply of QMEs.

① While the DWC acknowledges that the number of QMEs is decreasing, the DWC disagrees that it is ignoring the decline and that there is an inadequate supply to meet demand.

① First, independent studies show that a significant portion of QMEs are available but are not being used. An October 2017 study conducted for the Commission of Health and Safety and Workers' Compensation (CHSWC study) found that 10 percent of the QME population accounts for 55 percent to 60 percent of panel assignments.¹ Another study conducted by the California Workers' Compensation Institute (CWCI study) looked at QME billing data which showed that in 2017, only 53.1 percent of registered QMEs had medical-legal billing records.² The DWC supports a study to explore why nearly half of QMEs are not being used. The DWC also will consider changes to the method used to generate the three QME panels so that currently underutilized QMEs are provided additional opportunities to be selected.

①② Second, regardless of any DWC effort, the reasons for a decline in the number of QMEs may be linked to causes outside of DWC's control. For instance, this decline may be linked to the introduction of medical management companies into the workers' compensation industry. The CWCI study found that from the period of 2012 to 2017, medical management companies became more prevalent, with ten groups more than doubling their share of the market (going from 8.9 percent to 19.1 percent).³ The CHSWC study recommends that there should be an investigation into the role that medical management companies have played in the QME system.⁴ Given their potential impact, the DWC has already met with

¹ Neuhauser, F. *Qualified Medical Evaluators: Updating Trends in Evaluations, Availability, and Equity*, p. 27. Available at https://www.dir.ca.gov/chswc/reports/2017/QME_2017_Trends.pdf.

² Jones, S. *Changes in the QME Population and Medical-Legal Trends in California Workers' Compensation*, p. 17. Available at <https://www.cwci.org/document.php?file=3804.pdf>.

³ Jones, S. *Changes in the QME Population and Medical-Legal Trends in California Workers' Compensation*, p. 19.

⁴ Neuhauser, F. *Qualified Medical Evaluators: Updating Trends in Evaluations, Availability, and Equity*, p. 31.

Ms. Elaine Howle
October 25, 2019

some medical management companies to develop a better understanding of their business models.

Another potential reason for the decline is the change in the practice of medicine. For instance, many physicians have left private practice to become employees of large medical practice groups. These physician employees do not have the flexibility to devote time to QME work as the business models of large practice groups limit physician work exclusively to its members or clients.⁵

②

The Audit found that between 2013 and 2018, there was a 37 percent increase in panel requests, a rise that is almost exclusively associated with cases where the injured worker has legal representation. This increase occurred, even though workers' compensation claim filings have not increased and legislation in recent years has limited the issues that QMEs can address.

The DWC encourages studying the cause of why doctors are leaving the system and any barriers to entering the system. The study could also encompass an inquiry into the reason behind the increase in panel requests in represented cases. Such a study could help with the retention of doctors and in DWC's recruitment efforts.

③

- The Audit finds that DWC's data reflects an issue with access to QMEs resulting in delays in cases.

The DWC believes that there is not enough data to draw this conclusion. This finding appears to be based on the amount of time between the issuance of the first QME panel and when a request for a second panel was submitted. If this is correct, this calculation does not necessarily show there is a delay in a case due to QME unavailability. A wide number of reasons can account for the delay in requesting a second panel. Thus, access to QMEs cannot be quantified by looking at the number of replacement panels issued and when they are issued. Instead, data would need to be collected as to the reasons for the requests for replacement panels and how long a delay, if any, is caused by a replacement panel.

④

Moreover, the issuance of a replacement panel does not equate to a denial of access or a delay for the injured worker. If the injured worker is still being seen by the replacement QME within 60 days of the initial call for an appointment, then there is no delay. In fact, the party with the legal right to schedule an appointment can waive the 60-day requirement and the appointment should be scheduled within 90 days.⁶ Any assessment of access to QMEs would thus have to take into account how many injured workers are not able to schedule an appointment with the replacement panel QME within 90 days.

⑤

⁵ This is based on DWC's discussions with medical provider groups in their initial recruitment efforts.

⁶ California Code of Regulations, title 8, section 31.3.

Ms. Elaine Howle
October 25, 2019

- The Audit finds that a replacement panel may cause a delay in injured workers receiving medical treatment and benefits and increase costs for the employer.

⑤ The DWC disagrees that replacement panels result in delays in an injured worker's receipt of benefits and increased costs to employers.⁷ There are legal safeguards to ensure benefits for injured workers.

⑤ California law holds employers liable for up to \$10,000.00 in medical expenses during the time period of delay while they are making a determination on liability for an injury.⁸ In 2018, the number of denied claims accounted for 11.3 percent of the total number of reported injuries, so the number of injured workers who may not have had access to medical care is relatively small. California also provides for disability benefits through the Employment Development Department's Disability Insurance program. If an injured worker is off of work due to an injury or illness but their workers' compensation claim has not yet been accepted, the worker may be eligible for disability insurance benefits. If the employer accepts or is otherwise found liable for the claim, the employer would be responsible for the reimbursement to the Employment Development Department for the disability benefits paid pursuant to California Labor Code section 4656.

⑤ Furthermore, any delay in seeing a QME should not result in a delay of permanent disability benefits to the injured worker. The first payment of permanent disability indemnity is due within 14 days after the last payment of temporary disability indemnity. If the level of permanent disability cannot be determined at that time, the employer must make payments based on a reasonable estimate of permanent disability.⁹

- The Audit finds that the "DWC has not taken sufficient action to address its QME shortage" by updating the medical-legal fee schedule or by recruiting QMEs.

The DWC agrees that the fee schedule is due for analysis and revision and has been actively engaged in this endeavor since 2017. The effort began with the Department commissioning a RAND Corporation study¹⁰ on the medical-legal fee schedule. Thereafter, in 2018, the DWC proposed a revised fee schedule and held a public hearing regarding that proposal. In response to stakeholder feedback, the DWC solicited proposals from the industry, held stakeholder meetings, and proposed an alternative fee schedule in 2019. Currently, the DWC is engaging with representatives of all interested stakeholders to review the proposed fee schedule and address outstanding issues. The DWC intends to promulgate a new schedule in 2020.

⑥ The DWC cautions against the conclusion, however, that a fee schedule adjustment will end the persistent decline in the number of QMEs. In 2006, the DWC amended the

⁷ The draft findings did not explain how delays could increase costs to employers.

⁸ Labor Code section 5402.

⁹ Labor Code section 4650.

¹⁰ Wynn, B. *California Workers' Compensation Medical-Legal Fee Schedule*, RAND Corporation, October 2018. Available at https://www.rand.org/pubs/working_papers/WR1279.html.

Ms. Elaine Howle
October 25, 2019

medical-legal fee schedule providing for a 25 percent increase in payments to QMEs; however, the decline in the number of QMEs in the system continued.

As far as QME recruitment efforts are concerned, the DWC addressed this above. The DWC welcomes the opportunity to recruit new doctors into our system.

CSA Finding #2: DWC's Practices for Disciplining Some QMEs Raise Due Process Concerns

CSA Recommendation: Develop and implement written policies and procedures, by April 2020, that define and specify DWC's internal processes for disciplining QMEs, including timelines for taking disciplinary action and for setting hearings or responding to settlement proposals.

- **DWC Response:** To the extent that the DWC can outline best practices and procedural timelines, it will do so, with the understanding that such policies will need to allow for the exercise of discretion as appropriate based on the specific facts of each case.

CSA Recommendation: Develop and implement written policies and procedures, by April 2020, that define DWC's internal processes for reappointing QMEs and how that process should proceed if any disciplinary investigations are pending.

- **DWC Response:** Currently the DWC has policies and procedures in place to address these issues, but the DWC will evaluate those policies and update them as appropriate. (7)

Further DWC Discussion Regarding Draft Findings: Below, the DWC provides responses and additional context for certain draft findings.

- The Audit contends that the DWC denied QMEs' reappointments based on "alleged violations" and its process for disciplining some QMEs raises due process concerns.

The DWC administers QME discipline under the Administrative Procedures Act. The DWC does not proceed with discipline based upon mere "allegations" for either an Accusation or a Statement of Issues. The DWC requires prima facie evidence of a physician's violation of the Labor Code or Administrative Director's regulations to proceed with discipline. (8)

Under the Administrative Procedures Act, there are two ways to enforce discipline against a QME. If prima facie evidence of a violation is developed against the QME during their term of certification, discipline is carried out through the Accusation process. If the QME's term of certification has expired and they have reverted to the status of an applicant, discipline is carried out through the Statement of Issues process. The DWC utilizes both processes.

While the Audit finds that the use of the Statement of Issues process could possibly result in a denial of due process, it fails to cite any legal authority to support that conclusion. It is a (9)

Ms. Elaine Howle
October 25, 2019

well-settled legal principle that when a physician occupies the status of an applicant, there is no right to a hearing before the denial of the application.¹¹ Rather, the physician receives due process through the hearing provided after the denial of the application.¹²

In discussing the DWC's use of the Statement of Issues process in discipline, the Audit finds that "we believe the violations remain allegations until later in the disciplinary process, such as when an administrative law judge files a proposed decision with the administrative director after a hearing, or the QME declined to participate in the hearing process."

⑩ However, this analysis generally describes the Accusation process. That process should not be conflated with the Statement of Issues process, which is distinct, authorized by the Administrative Procedures Act, and legitimately used by the DWC for the QME reappointment process. While Figure 5 in the Audit report reflects the dichotomy in the two processes, it fails to acknowledge the due process protections provided under the Statement of Issues track.

⑪ As to the concerns expressed about the possibility of QMEs being deprived of income during the discipline process, it is important to note that the QMEs can continue to sit for depositions, issue supplemental reports, and act as an Agreed Medical Evaluator during the discipline process and bill for those services.

- The Audit suggests that the DWC must issue an Accusation prior to resolving discipline issues.

The DWC received complaints from the QME community that in some instances, the first time a physician received verification that there was a complaint against them was when they received the denial of their reappointment application. In an effort to address this concern, the DWC instituted a policy of contacting the physicians early in the process to let them know the prima facie evidence that had been gathered against them. This early contact, made in an effort to mitigate adverse consequences for the physician, has led to settlements of overbilling complaints prior to the physician's reappointment anniversary and without the need for any litigation. While the Audit suggests that this proactive effort by the DWC may reflect a violation of the Accusation discipline process, there is no mandate to initiate litigation via an Accusation for documented violations of applicable statutes or regulations. Moreover, there is no prohibition on informal resolutions, which ultimately lowers enforcement costs.

⑫

- The Audit finds that the DWC was slow to schedule hearings with the Office of Administrative Hearings following a denial for reappointment.

⑬ Upon the service of the initial litigation pleading on the QME, the physician is required to return a "Request for Hearing" form to preserve his or her right to have a hearing. The return of this form is not a request to schedule a formal hearing; rather, it prevents the DWC from proceeding to a decision based on the pleadings and without holding a hearing.

¹¹ Cases finding there is no right to pre-deprivation hearing for applicant: *Board of Regents v Roth* (1972) 408 U.S. 564, 575; *Paramount Convalescent Center, Inc. v. Department of Health Care Services* (1975) 15 Cal.3d 489, 500.

¹² California Government Code section 11504.

Ms. Elaine Howle
October 25, 2019

In most cases, the parties will attempt to settle the violations enumerated in the litigation before setting a hearing. If those attempts are not fruitful, the parties will then typically agree that a formal hearing needs to be set. The parties to the action, the agency and the physician, must follow the procedures outlined in California Code of Regulations, title 8, section 1018 in order to set a hearing at the Office of Administrative Hearings.

Although mere recitation of a timeline in a case may give the impression that the setting of the hearing was delayed, a review of the actual facts of any given case would indicate that the DWC has not used the setting of a hearing as a tactic for negotiation, nor has the DWC refused to set a hearing for a physician. (14)

CSA Finding #3: DWC Has Failed to Comply with State Law to Ensure that QMEs Produce High-Quality Reports

CSA Recommendation: Create and implement a plan, by April 2020, to continuously review the quality and timeliness of QME reports, including time frames for review, methodology for selecting reports to review, and the minimum number of reports to be reviewed annually.

- **DWC Response:** Presently, the DWC has a procedure in place to address untimely reporting by QMEs, but the DWC will assess and update the existing process as appropriate. The DWC is currently evaluating methods and procedures to evaluate the quality of QME reports and provide meaningful feedback to the community. As the workers' compensation system is adversarial in nature, the parties to the workers' compensation process will serve as the best assurance of quality of QME reporting with disputes being resolved by a workers' compensation judge. (15)

CSA Recommendation: Develop and implement a process, by April 2020, for annually reporting to DWC's administrative director its findings on the quality and timeliness of QME reports and recommended improvements to the QME system.

- **DWC Response:** In conjunction with its efforts to develop a plan for evaluating the quality of QME reporting, the DWC will formulate a process for annual reporting of its findings. In addition, the DWC will continue to perform educational outreach on these topics to providers in the system, including QMEs, through resources it has developed for this purpose, including an online QME educational course and the *Physician's Guide to Medical Practice in the California Workers' Compensation System*.

CSA Recommendation: Create written policies and implement, by April 2020, a consistent process for ensuring that workers' compensation judges or the Appeals Board inform DWC or QME reports they rejected for not meeting minimum standards.

- **DWC Response:** The DWC will continue its efforts to develop policies and processes to ensure timely and complete reporting of judicial rejections of QME

Ms. Elaine Howle
October 25, 2019

reports. In an attempt to facilitate this reporting, a form Order has been developed and will be provided to the workers' compensation judges for this purpose. The new form ensures that both the QME and the DWC are served with the judicial findings and order rejecting the medical-legal report. It is expected that this will lead to the collection of reliable data to aid in the assessment of report quality for QMEs. While the DWC has no jurisdiction over the Workers' Compensation Appeals Board, it will reach out to the Appeals Board to determine the best manner to obtain information regarding rejections of QME reports from them.

CSA Recommendation: Create written policies and implement a process, by April 2020, for tracking QME reports rejected by workers' compensation judges and the Appeals Board for not meeting minimum standards. DWC should consider and include these reports in its annual review of report quality and recommend improvements to the QME system.

- **DWC Response:** The DWC will continue its efforts to develop policies and processes to ensure consistent tracking of QME reports rejected by workers' compensation judges and the Appeals Board. Towards that end, the DWC has developed a tracking system for orders issued by workers' compensation judges that reject QME reports. In May of 2019, the Medical Unit assigned a dedicated person to review judges' orders related to the QME program to ascertain if any of them contained rejections of reports. The DWC intends to serve copies of orders rejecting the reports on the physicians who prepared them.

CSA Recommendation to the State Legislature: Amend state law to specify that DWC review and, if necessary, update the medical-legal fee schedule at least every two years based on inflation. DWC's review of the medical-legal fee schedule should be separate from its review of the Official Medical Fee Schedule.

Revise state law to increase the number of QMEs on the panels DWC provides. Specifically, unrepresented employees should continue to choose from a panel of three QMEs, and represented employees should be provided with a panel of five QMEs of whom the employee and the employer can each strike one, leaving both parties with the same numbers of QMEs to choose from as unrepresented employees. The party that did not request the panel would select the final QME. If the selected QME is unavailable, the parties would then select from among the two remaining QMEs until they find one that is available.

- **DWC Response:** The DWC will work with the Legislature in implementing any changes made to the QME program. The DWC does caution that the implementation of the recommendations of the Audit may have unintended consequences, and recommends that the proposals be evaluated in conjunction with the Division's input.

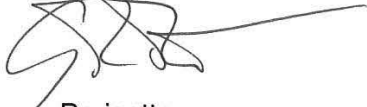
The DWC agrees with the recommendation that the medical-legal fee schedule should be reviewed every two years by the Administrative Director. The imposition of an automatic increase in the schedule tied to inflation could lead to negative consequences for the overall costs of medical-legal services in the workers'

Ms. Elaine Howle
October 25, 2019

compensation system. Between 2007 and 2017, the average cost of a medical-legal report increased by 64 percent,¹³ even though fees were not increased. In addition, one study found that the actual rates did not necessarily need to be increased when compared with the Official Medical Fee Schedule and other states.¹⁴ These findings suggest that there are a myriad of factors that should be considered when reviewing the medical-legal fee schedule for a possible adjustment. Whether or not to adjust the fee schedule up or down at any given time should be left to the discretion of the Administrative Director, and not tied to an automatic increase.

Thank you for the opportunity to provide this response.

Sincerely,



George Parisotto
Administrative Director
Division of Workers' Compensation

cc: Julie A. Su, Secretary, California Labor and Workforce Development Agency
Victoria Hassid, Chief Deputy Director, California Department of Industrial Relations

¹³ Jones, S. *Changes in the QME Population and Medical-Legal Trends in California Workers' Compensation*, p. 6.

¹⁴ Wynn, B. *California Workers' Compensation Medical-Legal Fee Schedule*, p. 16.

Blank page inserted for reproduction purposes only.

Comments

CALIFORNIA STATE AUDITOR'S COMMENTS ON THE RESPONSE FROM THE DIVISION OF WORKERS' COMPENSATION

To provide clarity and perspective, we are commenting on DWC's response to our audit. The numbers below correspond to the numbers we have placed in the margin of DWC's response.

Notwithstanding its comments to the contrary, the evidence we obtained demonstrates clearly—as our results summarize on pages 11 through 15 of our report—that DWC has not adequately ensured that California has enough QMEs to keep up with demand for their services. In its response, DWC mentions two studies that describe the underuse of certain portions of the pool of existing QMEs. However, as we state on page 14, QMEs who operate out of fewer than six zip codes accounted for more than half of all panel replacements because of unavailable QMEs. Moreover, DWC cited the CWCI study's results that only 53.1 percent of registered QMEs had medical-legal billing records. However, it failed to disclose that CWCI calculated the percentage based on billing data for only the first six months of 2017 and that the study noted that this percentage will likely increase as the data mature beyond the initial six months of 2017.

As we mention on page 11, the increasing number of replacement panels because of unavailable QMEs means that the current QME supply is not meeting the demand for their services. Furthermore, despite DWC's denial that it ignored the decline of QME supply, we mention on page 15 that it does not have an established process for recruiting QMEs. Therefore, we stand by our findings, conclusions, and recommendations regarding QME availability.

DWC's comment regarding outside causes for a decline in the number of QMEs deflects the reader's attention away from its lack of action regarding this decline. Although we acknowledge that other factors can contribute to the decline in QME numbers, such as the drop in the number of primary care physicians as we state on page 14, we believe DWC is responsible for taking actions within its control to mitigate the decline. For instance, as we discuss on page 15, DWC has not updated the rates on its medical-legal fee schedule as state law requires, which could help it attract and retain QMEs.

As the entity responsible for overseeing QMEs and administering the QME selection process for California's workers' compensation system, we would expect DWC to have proactively studied or engaged a contractor to study why doctors are leaving the QME process, rather than merely encouraging such a study.

①

②

③

④ Contrary to DWC's assertion, DWC's data is sufficient to demonstrate the linkage between replacement panels and delays in resolving workers' compensation disputes and injured workers' access to benefits. As we state on page 12, if a workers' compensation case required one replacement panel because of an unavailable QME, the case was delayed by more than two months nearly half of the time. Therefore, these injured workers are not able to see a QME within 60 days of their initial panel request, thus delaying resolution of their disputes.

⑤ DWC's disagreement with our conclusions regarding the effects of replacement panels is misplaced. As we mention on page 13, replacement panels may delay injured workers' access to their workers' compensation benefits and increase costs for employers. DWC argues that because the number of denied workers' compensation claims accounted for 11.3 percent of total reported injuries, the number of injured workers who may not have access to medical care is relatively small. However, in each case when an injured worker does not have access to medical care, the health impact on that injured worker can be significant.

We also disagree with DWC's argument that delays in seeing a QME should not result in a delay of permanent disability benefits. When an injured worker disputes a treating physician's finding regarding the existence or extent of permanent disability and QME unavailability delays resolution of this dispute, the final resolution of the permanent disability status can also be delayed.

Further, as we mention on page 13, the acting president of an attorneys association stated that some workers postpone treatment until they make it through the initial QME process because of the uncertainty of eventual benefit payouts or reimbursements. We also state that we are concerned that delays of medical treatment could lead to greater temporary or permanent disability and that a prolonged process may increase overall costs to employers.

⑥ DWC appears to mischaracterize our report: we do not conclude that updating the fee schedule *will end the persistent decline in the number of QMEs*. As we indicate on page 15, updating the rates of the medical-legal fee schedule could help DWC attract and retain QMEs.

⑦ We disagree with DWC's assertion that it currently has policies and procedures in place for both its reappointment and discipline processes. Early during our audit when we asked it for relevant policies and procedures, DWC told us that its staff accomplished QME appointments and reappointments, as well as appeals of denials, pursuant to the department's regulations, but it did not provide us with policies and procedures. It was not until nearly six months later when DWC provided us with written policies and procedures for investigating and disciplining QMEs. Because DWC provided these documents well after we had concluded fieldwork for the audit

and because DWC told us that its staff followed the department's regulations, we did not assess whether DWC staff actually followed these policies and procedures. Moreover, DWC did not provide us with written policies and procedures regarding appointing and reappointing QMEs. We therefore stand by our recommendations that DWC should develop and implement written policies and procedures regarding its reappointment and discipline processes.

We disagree with DWC's statement that it does not take disciplinary action based on allegations. As we mention on page 19, we believe *violations* remain *allegations* until an administrative law judge files a proposed decision or the QME declines to participate in the hearing process.

⑧

DWC's comment that we failed to cite any legal authority to support our conclusion that its use of the reappointment process to impose discipline could result in the denial of due process is wrong. As we indicate in Figure 5 on page 18, state statutes and DWC's own regulations for investigations and discipline and for reappointments include due process steps for QMEs. We also state on page 19 that DWC in effect used the reappointment process to impose discipline on QMEs without a hearing.

⑨

Furthermore, we believe that the Roth and Paramount cases that DWC cites do not conclusively support its argument that an applicant does not have a right to a hearing before DWC denies a QME application. In both cases, the courts found that because neither plaintiff had a vested property interest, those plaintiffs were not entitled to due process. However, state law imposes on DWC a mandatory duty to reappoint QMEs if they meet specific legal criteria. In our view, this mandatory reappointment right may trigger due process rights and require DWC to provide a QME with notice and a fair hearing before it strips the QME of his or her right to reappointment because of alleged regulatory violations DWC identified during the QME's term.

We agree with DWC's statement that its accusation process and statement of issues process, which it should use for discipline and reappointment, respectively, should not be conflated. However, as we depict in Figure 5 on page 18, DWC conflated its investigation and discipline process and its reappointment process in certain instances. We specify on page 19 that DWC denied QME reappointments on six occasions based on allegations of misconduct during their terms; neither had an administrative law judge yet heard their cases nor had the QME declined to participate in the hearing process.

⑩

DWC's statement regarding activities that former QMEs can perform is misleading. DWC's regulations only explicitly authorize former QMEs to issue supplemental reports for unrepresented

⑪

employees. DWC's interpretation that its current regulations authorize former QMEs to both issue supplemental reports for represented employees and sit for depositions is unsupported by the plain language of its regulations. Even if DWC's interpretation of its regulations is appropriate, these two activities make up less than 40 percent of a QME's activities. According to the 2018 annual report of the California Commission on Health and Safety and Workers' Compensation, the testimony and supplemental reporting activities made up only 0.6 percent and 37 percent of statewide QME activities, respectively. We therefore stand by our conclusion that DWC's denial of reappointments limits QMEs ability to earn income.

- ⑫ Contrary to DWC's statement, our report takes no issue with DWC's proactive efforts to settle alleged violations with QMEs. In fact, we point out on page 20 that, of the 13 billing-related cases we examined from 2017 and 2018, DWC issued warnings or settled the complaints for nine before the QME was due for reappointment or soon thereafter. However, we also point out on that page that we identified four other instances from that time when DWC denied the QMEs' reappointments based on alleged overbilling violations, which did not adhere to its regulatory process for disciplining QMEs.
- ⑬ DWC's comment that the "return of a 'Request for Hearing' form is not a request to schedule a formal hearing" is incorrect. This form, which the QME signs and dates, states clearly, "I hereby request a hearing ... to permit me to present my defense to the charges contained in said Accusation." Submission of such a request should be sufficient for DWC to begin the process of scheduling a hearing.
- ⑭ DWC misinterprets our report: we do not say that it used the setting of a hearing as a tactic for negotiation or that it refused to set hearings for physicians. As we discuss on page 21, DWC was slow to request and schedule hearings QMEs requested after it denied their reappointment appeals, or it did not schedule requested hearings at all. We also state that QMEs had an incentive to settle with DWC so they could resume providing QME services and earn income from those services.
- ⑮ DWC's comment that it "will assess and update the existing process as appropriate" is misleading. As we state on page 22, state law requires DWC to continuously review the timeliness and quality of QME reports by reviewing a random selection of reports and those reports alleged to be incomplete or inaccurate. It also requires DWC to submit an annual report that summarizes the results of the reviews and recommend improvements to the QME system. DWC's failure to perform the reviews or prepare the annual reports in the 12 years since 2007, as required by law, clearly demonstrates it has no such process to comply with this law.