LAW1199.COM NEWSLETTER™

2019 ★ ISSUE #13

safetyofficerattorneys.com ★ www.law1199.com ★ **SCOTT A. O'MARA, THOMAS I. HAMPTON**
BETH A. WILLIAMS, DANIEL J. PALASCIANO & JOSEPH P. HEATHMAN

CALIFORNIA STATE AUDITOR'S FINDINGS

BY: SCOTT A. O'MARA

California State Auditor Elaine M. Howle, C.P.A., issued a report dated 11/19/19 to the Governor of California, President Pro Tem of the Senate, and the Speaker of the Assembly. In this report, she reported:

> "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."

These findings by the California State Auditor clearly established there is a delayed recovery for many California injured workers because of the delay in receiving medical benefits and/or payment for time off work. This also has resulted in added expenses for employers involved in these disputes.

A major point was the lack of an adequate number of available QMEs for injured workers to utilize. The California State Auditor noted that "from fiscal years 2013-14 through 2017-18, the total number of QMEs decreased by 12 percent" while "requests for QMEs increased 37 percent". This obviously is a significant problem.

The California State Auditor further commented that the 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". If there is a lack of availability of a QME for a case, it could "delay the case two months, and this occurs nearly half the time".

In the California State Auditor's "Summary of Recommendations", dated 11/19/2019 she states:

> "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."

These findings by the audit performed by the California State Auditor are reflective of the fact that updating and modifications of the Workers' Compensation system are indeed necessary for the system to function properly — as opposed to the dysfunction which currently exists on many occasions.

The proposed legislation changes in *Newsletter 2019, Issue #3* on www.LAW1199.com is currently offered, along with additional modifications regarding the updating of the QME, UR and IMR process. These Legislative modifications will expedite medical care and provide doctors with compensation appropriate for the lengthy and in-depth analysis in which they must engage, either for treatment or forensic evaluations.

As set forth in *Newsletter 2019, Issue #3* on the www.LAW1199.com website, there are modifications which will greatly assist in correcting many of the overburdened responsibilities that are placed either upon the worker, treating doctor and/or QME evaluators.

A system in which Utilization Review doctors determine injured workers' medical needs without ever seeing their patients, and without having any obligations regarding the medical determinations they make, is a flawed system which results in many failures.

The next element, of course, is Independent Medical Review, the only avenue of appeal for Utilization Review denials. The IMR protocol involves doctors, whose identities are never revealed, thereby precluding any challenges to their determinations, which most often — more than 80% of the time — simply uphold the UR denials. Not only are IMR doctors protected by a veil of secrecy, they also are not required to be licensed in the state of California and, like UR doctors, they never see their patients.

It is a terrible irony that Utilization Review and Independent Medical Review were originally thought to provide a vehicle to expedite treatment to injured workers. Unfortunately, the unseen consequences of these protocols have produced just the opposite results, as reflected by the state audit done by the California State Auditor.

The concept that injured workers have been forced to give up their right to present to a judge evidence regarding the medical necessity for the treatment which has been recommended for them — and instead be forced to go through Independent Medical Review, where their case will be rejected more than 80% of the time — continues to delay or deny treatment which injured workers need, causing harm not only to the workers, but also to their families and their employer as well.

The involuntary removal of the right of injured workers to go before a judge and present their case — a byproduct of the legislative enactment of 2012/2013 — and instead force them to go through the UR/IMR process was not an act of justice, but one of harm.

Injured workers should have the right to weigh and measure Utilization Review and Independent Medical Review and then make their own decision as to whether they want to participate in those protocols. If they do, then that is their choice — it would not be something forced upon them.

The audit issued by the California State Auditor on 11/19/19 is in line with the need to comply with the California Constitution in providing care to injured workers. Also, the need for modification of the present system identified by the California State Auditor regarding reasonable compensation for the QMEs is a necessity to enable the system to bring in and maintain a roster of competent forensic evaluators.

As noted above, the audit indicates that the total number of QMEs actually decreased by 12% over a four-year period (2013-14 to 2017-18) in which requests actually increased 37%. The California State Auditor stated:

> "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."

Again, the approaches originated in 2012/2013 were thought to be good and have merit, but we have now learned that forcing workers to use the UR/IMR process is not a solution, but rather a problem. As reflected in the California State Auditors findings of 11/19/2019 and the California Supreme Court's Decision issued on August 23, 2018 where one of the Justice Mariano Florentino Cuellar opined regarding the failure of UR and IMR, stated: "Even now those safeguards and remedies may not be set at optimal levels, and the Legislature may find it makes sense to change them." (See *Newsletter 2019, Issue #10* on the website www.LAW1199.com).

♦♦

LAW1199.COM NEWSLETTER™
THE LAW OFFICES OF
SCOTT A. O'MARA

2370 Fifth Ave.
San Diego, CA 92101-1611

4344 Latham St. – Ste. 250
Riverside, CA 92501-1766

1-800-LAW-1199
(1-800-529-1199)
951-276-1199
www.law1199.com

NOTICE: *Making a false or fraudulent Workers' Compensation claim is a felony subject to up to 5 years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.*

♦♦