

**The California Commission
on Health and Safety
and Workers' Compensation**



***DRAFT* A Review of Disability Evaluation Delays
and Supplemental QME Reports**

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March 2010

COMMISSION ON HEALTH AND SAFETY AND WORKERS' COMPENSATION

DRAFT A Review of Disability Evaluation Delays and Supplemental QME reports

Delays in summary ratings of Qualified Medical Examiner (QME) reports are a concern to some stakeholders. This memo is produced in response to that concern.

INTRODUCTON

As described to us by Schools Insurance Authority, it can take over a year for the Disability Evaluation Unit (DEU) to issue a rating on a Qualified Medical Evaluator (QME) report for an unrepresented worker. The delay is a problem because it prevents the parties from closing the claim and it fosters dissatisfaction on all sides. The problems are compounded when there is a deficiency in the report which requires clarification or correction by the QME, but the claims administrator is not allowed to request a supplemental report until the DEU has issued the rating. For example, if a QME has used the wrong legal standard for apportionment so that the report receives an unapportioned 20% disability rating, the worker may be expecting this award for many months before the supplemental report can be obtained to show that the correctly apportioned rating will only be 10%. This situation is certain to provoke dissatisfaction and it is likely to promote litigation.

RESEARCH RESULTS

We set out to quantify the delay in obtaining DEU ratings. Frank Neuhauser, of UC Berkeley Survey Research Center, analyzed a database of all summary ratings and consultative ratings issued in a 16-month period from September 2008 through December 2009. Summary ratings are issued on QME reports in unrepresented cases. Consultative ratings are issued in represented cases. The analysis excluded formal ratings, which are issued in response to rating instructions from a workers' compensation judge after a permanent disability issue has been submitted to the judge for decision. The DEU data contain the date the report was received by DEU and the date the rating was issued by DEU. This memo summarizes the time parties waited for a DEU rating.

Across the 16 months of ratings examined, the ratings were prepared an average of 104 days after the DEU received the medical-legal reports. The mean and median waiting times are shown in Figure 1.

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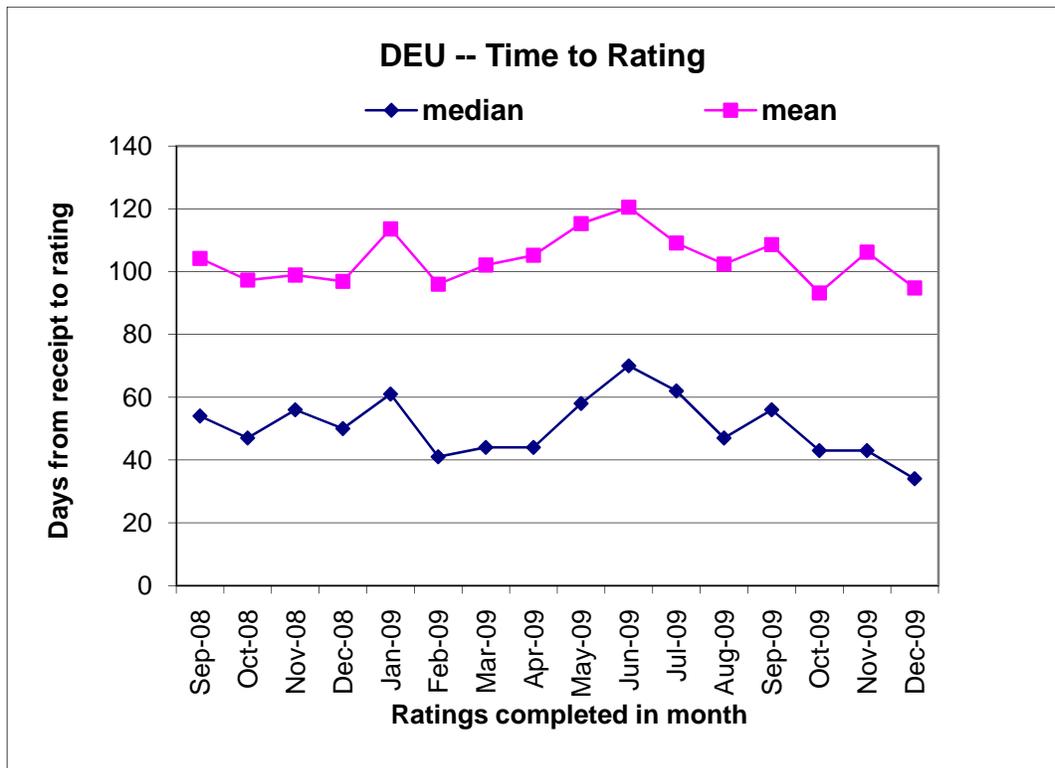


Figure 1 Mean and Median Time to Rating

The analysis demonstrates the difference in waiting time for attorney-represented cases (consultative ratings) and unrepresented cases (summary ratings). Across the 16-month period, the average was 129 days for cases without attorneys and 84 days for cases with attorneys. The median for cases without attorneys was 96 days. In other words, half of all unrepresented cases were rated within about three months of receipt of the report, and half took longer. Because the statistical mean (129 days) is more than a month later than the median (96 days), there must have been a number of cases which waited much longer than four months for their ratings. This is consistent with the stories of waiting over a year for some ratings.

Figure 2 shows month-by-month figures for the mean and the median, for consultative ratings and summary ratings. The patterns refute complaints that the delays have been growing longer. After growing longer in the first six months of 2009, the delays generally grew shorter in the second six months. By December 2009, every parameter except the mean time to rating for unrepresented cases had improved over December 2008. The mean time to rating for unrepresented cases stood at 119 days in December 2009.

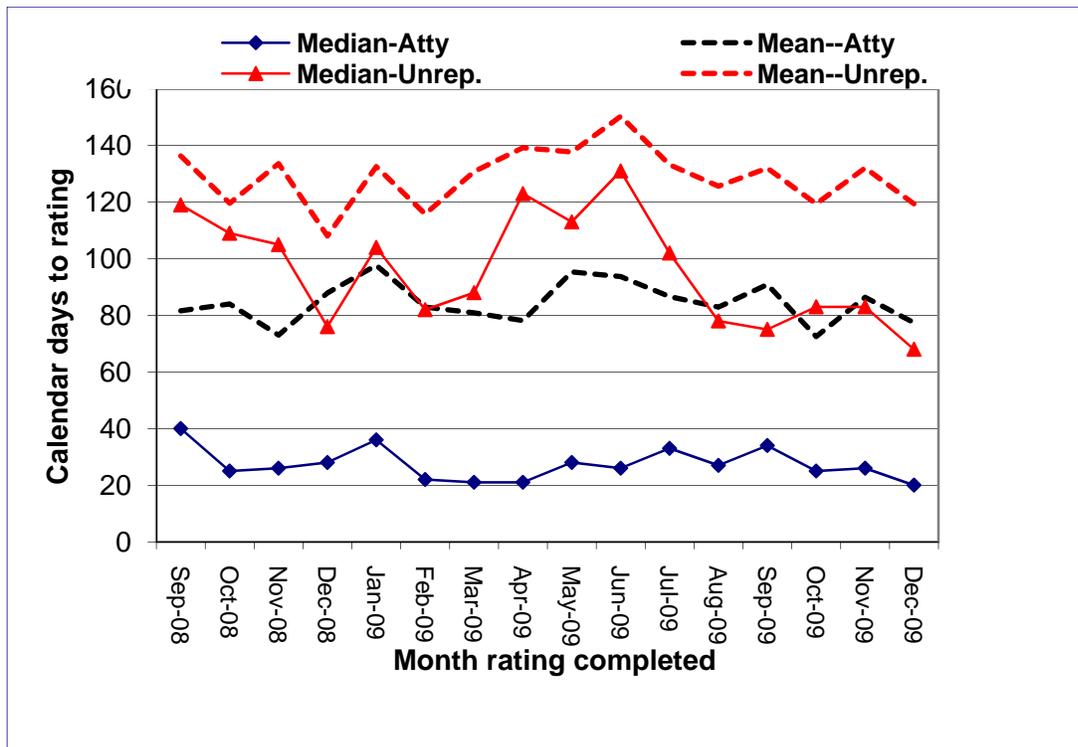


Figure 2 Time to Rating, unrepresented versus represented cases

The shorter times for rating in represented cases can be only partially attributed to walk-in ratings, which are offered almost exclusively to attorney-represented cases. The Manager of DEU has pointed out that DEU gives priority to ratings in cases that are set for a type of settlement conference called a Rating MSC. These almost exclusively apply to attorney-involved cases. These two factors are believed to account for most of the difference in median and mean turnaround times for represented cases compared to unrepresented cases

EMBARGO ON SUPPLEMENTAL REPORT REQUESTS

The regulation that prevents obtaining a supplemental report to correct or clarify the initial QME report is found in 8 Cal. Code of Regulations, Section 36(e):

“After a Qualified Medical Evaluator has served a comprehensive medical-legal report that finds and describes permanent impairment, permanent disability or apportionment in the case of an unrepresented worker, the QME shall not issue any supplemental report on any of those issues in response to a party’s request until after the [DEU] has issued an initial summary rating report.... A party wishing to request a supplemental report pursuant to subdivision 10160(f) ... based on the party’s objection to or need for clarification of the evaluator’s discussion of permanent impairment, permanent disability or apportionment, may do so only by sending the detailed request, within the time limits of subdivision 10160(f), directly to the DEU office where the report was served by the evaluator and not to the evaluator until after the initial summary rating has been issued.”

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This regulation, effective February 17, 2009, reflects an effort to equalize the power of the claims administrator and the unrepresented injured worker. An underlying concern is that claims administrators sometimes improperly influence a QME's conclusions without the worker having the knowledge or resources to resist those tactics.

COMMENTS AND RECOMMENDATIONS

Labor Code Section 4061(e) requires that the summary rating be issued within 20 days of receipt of the QME report. Based on the data analysis, the Division of Workers' Compensation (DWC) greatly exceeds the statutory timeline. DWC management appears to be working to reduce the delay despite well-known resource constraints. The backlog existed before the furloughs of DWC employees began, but the loss of roughly 15% of working days is adding to the challenges faced by management. Even if the improvement seen in the last six months of 2009 is sustainable, rather than cyclical, we do not anticipate that DWC will consistently meet the statutory timeline in the foreseeable future. An argument could be made that summary ratings should be given greater priority based on the 20-day statutory mandate, but we do not expect a satisfactory solution to emerge from a competition among different constituencies for larger shares of the limited resources. The balance of interests reflected in Rule 36(e) might be appropriate if ratings were issued within three weeks, but may not be appropriate when ratings take an average of four months.

We have been asked how big this problem is as described by the claims administrator. Unfortunately, no data are available to quantify the proportion of QME reports that give rise to requests for supplemental reports.

By the same token, however, no data are available to quantify the extent that claims administrators would mislead QMEs into improperly reducing workers' awards. We only know that it happens often enough to cause concern. The rulemaking file for Rule 36(e) states, "The Administrative Director receives complaints from experienced WCALJ's about claims administrators requesting repeated, serial supplemental reports from evaluators that often advocate a particular interpretation of this complex area of law in the letter to the evaluator."

Faced with credible reports of two problems, might the Administrative Director find a solution that addresses both problems? Would the abuse seen by judges be curbed and the additional delay seen by Schools Insurance Authority be avoided, if claims administrators were allowed to submit a single request for clarification or correction prior to receipt of the summary rating? Would audit penalties for a pattern of misconduct be a better tailored solution than a blanket embargo on supplemental requests? Concurrently, would better guidance for QMEs reduce the legitimate need for supplemental reports or advocacy letters?

In this memo, we do not purport to second-guess the Administrative Director's decision after the full rule-making process that went into Rule 36(e). We do suggest that continuing examination of the rule and its consequences might lead to a solution that accomplishes the stated purposes of Rule 36(e) without significantly adding to the excessive time already required for resolving unrepresented workers' claims.