

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**MARK JAMES, *Applicant***

**vs.**

**ALAMEDA SUPERIOR COURT, legally uninsured,  
adjusted by ACCLAMATION INSURANCE MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ11340780, ADJ12409465, ADJ13306184  
Oakland District Office**

**OPINION AND ORDER  
GRANTING PETITION  
FOR REMOVAL  
AND DECISION  
AFTER REMOVAL**

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant the Petition for Removal, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Removal of the decision of July 16, 2021 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of July 16, 2021 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

I CONCUR,

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**SEPTEMBER 17, 2021**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**BOXER & GERSON  
BRUYNEEL LAW FIRM  
MARK JAMES**

*AI/pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.  
CS

**REPORT AND RECOMMENDATION  
ON PETITION FOR RECONSIDERATION**

The parties agreed to an agreed medical examiner to resolve their dispute. Dr. Atkin evaluated applicant one time which resulted in a report dated April 10, 2019. Dr. Atkin evaluated applicant with respect to a claim applicant filed for an October 19, 2017 date of injury to his low back. Dr. Atkin reported that in his opinion the October 19, 2017 date of injury was industrially caused and stated that applicant had yet to reach permanent and stationary status.

After the April 10, 2019 report, this case evolved into another specific date of injury, June 24, 2019 as well as a cumulative trauma claim through October 19, 2017.

Although the parties stayed in communications with Dr. Atkin over the years regarding this case, obtaining 4 supplemental reports addressing causation, the different dates of injuries and apportionment, Dr. Atkin never evaluated applicant after the two new claims were filed.

At some point in time, before this case was finalized, Dr. Atkin decided to end his practice in the worker's compensation field. To his credit, when the parties attempted to schedule an examination with him, Dr. Atkin agreed to issue a supplemental report to address the parties concerns. It is my understanding, based on applicant's representation that Dr. Atkin's office was not willing to schedule an exam for applicant.

The lack of desire to schedule an examination with applicant does not appear to be pandemic related. It appears to be retirement related.

I have no doubt that Dr. Atkin would have re-evaluated the applicant had he not decide to stop doing workers' compensation cases. In fact in his report of June 2, 2020, Dr. Atkin stated his desire for a re-evaluation. Unfortunately the re-evaluation never occurred.

Dr. Atkin did try to finalize the case by issuing a report on September 14, 2020. Unfortunately that report cannot be considered substantial medical evidence since it was done without conducting a physical examination. The last time Dr. Atkin evaluated the applicant was in 2019. At that evaluation applicant was not permanent and stationary. In his report of September 14, 2020, without evaluating the applicant, Dr. Atkin declared applicant permanent and stationary, commented on applicant's level of permanent disability, and commented on causation for to different dates of injuries for which he did not see the applicant.

In order to be considered substantial medical evidence, a medical report needs to be based on correct facts. Evaluating the applicant would be a major factor in obtaining correct facts.

Dr. Atkin did not need to evaluate the applicant in person. He could have indicated a desire to conduct a telemedicine examination. Dr. Atkin's office however advised applicant that the doctor was no longer available for examinations.

In order to be fair to the parties, instead of issuing a decision on causation on the dates of injuries and body parts injured, I decided to start this case from scratch and have the parties address all issues with either a new AME or a panel QME.

Defendant has filed a petition for reconsideration from my decision to replace Dr. Atkin.

Defendant in its petition appears to argue that Dr. Atkin would have been willing to examine the applicant. Defendant suggest that the only reason an exam did not occur was because of the pandemic.

### **RECOMMENDATION**

If defendant is able to schedule an examination with Dr. Atkin to evaluate the applicant, an examination should be scheduled and my order replacing Dr. Atkin should be set aside. On the other hand if Dr. Atkin is no longer available to conduct a physical examination, my decision should stand and the parties should either agree to a new agreed medical examiner or should request a panel qualified medical examiner.

This matter should be returned to me so that I may address the question of Dr. Atkin's availability for an examination.

DATE: 08/04/2021

Lilla J Szelenyi

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE