WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MELVIN GARCIA GALDAMES, *Applicant*

vs.

VINYL TECHNOLOGY, INC.;
SEDGWICK 14442 ORANGE, *Defendants*

Real Parties in Interest:

Mesa Pharmacy, Mesa Pharmacy, Inc.,
and Mesa Pharmacy Irvine, *Lien Claimants*

Adjudication Number: SAU9997873
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Lien claimants Mesa Pharmacy, Mesa Pharmacy, Inc., and Mesa Pharmacy Irvine (collectively referred to herein as Mesa)[1] seek reconsideration of Findings of Fact (Findings) issued by a workers' compensation administrative law judge (WCJ) on June 27, 2003. The WCJ found that John Garbino exercised de facto control of Mesa under Labor Code[2] section 139.21, subdivision (a)(3) (section 139.21(a)(3)).

Mesa contends that Mr. Garbino did not control Mesa under section 139.21(a)(3) because there is no evidence that he was "a current officer or a director of the entity, or a 'shareholder with a 10 percent or greater interest in the entity.'" In addition, Mesa contends that the Significant Panel Decision in *Villanueva v. Teva Foods, 84 Cal. Comp. Cases 198* (2019) 84 Cal.Comp.Cases 198 [2019 Cal.Wrk.Comp. LEXIS 13], was incorrectly decided and therefore cannot be used to establish that Mr. Garbino controlled Mesa under section 139.21(a)(3); and, that even if *Villanueva* were correctly decided, this case is distinguishable from the type of fraudulent concealment of

[1] Mesa admits that Mesa Pharmacy, Mesa Pharmacy, Inc. and Mesa Pharmacy Irvine are the same entity. (Petition for Reconsideration, p. 1, fn. 1.)

[2] All further references are to the Labor Code unless otherwise noted.

ownership found in *Villanueva*. Finally, Mesa contends that there were no grounds for the WCJ to apply an adverse evidentiary inference against Mesa for its failure to produce its Board of Directors meeting minutes (BOD minutes), because the WCJ did not establish that the failure to produce the BOD minutes was "willful" under WCAB Rule 10670, subdivision (c) (WCAB Rule 10670(c)).

Carriers filed an Answer to Petition for Reconsideration (Answer), contending that the WCJ correctly found that the witness testimony in this matter lacked credibility and that the witnesses contradicted each other; and, considering the totality of the record, the evidence indicates that the information regarding ownership and control in Mesa's publicly filed documents was false; that there was sufficient evidence to apply an adverse inference against Mesa as to corporate formalities because they admitted documents existed in support, but refused to produce them; that Mr. Garbino had de facto control over Mesa pursuant to *Villanueva*; that *Villanueva* was correctly decided given that he legislative history and purpose of sections 4615 and 139.21 is to eliminate fraud in the California workers' compensation system; and, that to adopt Mesa's position would be to allow providers convicted of criminal, fraudulent, or abusive behavior to use sham corporate documents to disguise their actual control and ownership of entities.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), wherein it was recommended that petition be granted for the sole purpose of admitting the Arizona Board of Pharmacy records into evidence as Exhibit O, but otherwise denied.

We[3] have reviewed the entire record in this matter, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. For the reasons set forth in the Report, which we adopt and incorporate herein,[4] we affirm the Findings, but grant reconsideration to take judicial notice of Exhibit O, the Arizona Board of Pharmacy records identified during the September 29 and October 1, 2020 trials.

It is our decision after reconsideration to amend the WCJ's Findings to add findings of fact that John Garbino was an "officer or a director" of Praxsyn Corporation and that he controlled Mesa under section 139.21(a)(3) as an "officer or director" of Praxsyn. The Findings are amended pursuant to the substantial evidence in this record as set forth in the Report that Mesa was the alter

[3] Prior decisions of the Appeals Board have issued in this matter from the same panel except that another commissioner has been substituted in for Marguerite Sweeney as she is no longer a Commissioner of the Appeals Board.

[4] See Report attached at the end of our decision. Please note that the Report was left substantially complete, and all mistakes therein are from the original.

ego of Praxsyn and thus, these two corporations are treated as one (see *De La Rosa v. County of L.A. Dep't of Children & Family Servs*. (2018) 83 Cal.Comp.Cases 1721, 1728 and fn. 5 [2018 Cal.Wrk.Comp. P.D. LEXIS 327] quoting *Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1104–1105 [2016 Cal. App. LEXIS 623].))

For the foregoing reasons,

IT IS ORDERED that lien claimants' Petition for Reconsideration of the Findings of Fact issued by a workers' compensation administrative law judge on June 27, 2003 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the request for judicial notice made on September 29, 2020 of Exhibit O, consisting of records from the Arizona Pharmacy Board identified during trial on October 1, 2020, is hereby **GRANTED** pursuant to Evidence Code section 452, subdivision (c).

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued by a workers' compensation administrative law judge on June 27, 2003 is **AFFIRMED** except it is **AMENDED** as follows (amendment in bold):

FINDINGS OF FACT

Mesa Pharmacy did not maintain itself in such manner as to be a legal entity as a corporation. The putative officers, owners and directors of the business offered differing and oftentimes conflicting accounts of what positions they held, what their duties consisted of and what their ownership interest were.

Mesa was unable or unwilling to produce the minutes of the Board of Directors. As such the court asserts an adverse **inference** that they indicate either that Mesa was being run as a shell with no corporate formalities observed allowing for Garbino to assert control, or that Garbino was in fact in de facto control of Mesa **(see Cal. Code Regs., tit. 8, § 10670(d), Evid. Code, § 413).**

Various conflicting legal documents, filed in different jurisdictions, list different people in the exact same position during concurrent time periods.

Garbino, who plead guilty to Medicare fraud, was the only significant revenue stream for Mesa. But for him, the company would never have grown beyond its inception as a corner pharmacy. He drove the expansion and because of this the company did what he told it to.

The court therefore finds that Garbino was in de facto control of Mesa Pharmacy under Labor Code §139.21(a)(3).

The court also finds substantial evidence in the record that Praxsyn Corporation was not merely a separate parent corporation to Mesa Pharmacy, but rather, that Mesa Pharmacy was the alter ego of Praxsyn Corporation, i.e., that they were one and the same. (See *De La Rosa v. County of L.A. Dep't of Children & Family* Servs. (2018) 83 Cal.Comp.Cases 1721, 1728 and fn. 5 [2018 Cal.Wrk.Comp. P.D. LEXIS 327] quoting *Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1104–1105 [2016 Cal. App. LEXIS 623].)

The court therefore finds that as a director of Praxsyn Corporation, Garbino "controlled" Mesa Pharmacy under Labor Code section 139.21, subdivision (a)(3) as an "officer or director."

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 22, 2023

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

MESA PHARMACY
OD LEGAL, DIR ANTI-FRAUD UNIT, LOS ANGELES
THE RONDEAU LAW FIRM
MOKRI, VANIS & JONES, LLP
PEATMAN LAW GROUP

AJF/abs

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

Division of Workers' Compensation

Workers' Compensation Appeals Board

CASE NUMBER: SAU9997873

MELVIN GARCIA GALDAMES,

-vs.- **VINYL TECHNOLOGY, INC.; DIR AFU;**

In the matter of MESA PHARMACY

WORKERS' COMPENSATION JUDGE: Amy Britt
DATE: August 2, 2023

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Identity of Petitioner: Mesa Pharmacy, Mesa Pharmacy, Inc.; Mesa Pharmacy Irvine
...

Date of Issuance of Decision: June 27, 2023

MESA PHARMACY has filed a timely Petition for Reconsideration, objecting to said decision(s) in the following particular(s):

Petitioner(s) contend(s) that the undersigned erred as:

1. That in issuing the Findings of Fact, the Trial Judge acted without or in excess of her powers;
2. That the evidence submitted in the above-captioned matter does not justify the Findings of Fact; and,
3. That the Findings of Fact do not support the ultimate decision in the above-captioned matter by the Trial Judge.

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FACTS ON DISPUTED ISSUES AS FOUND BY THE COURT

Mytu Do, aka Julie Do, and Benny Leo Birch, aka Ben Birch, met as she was a house flipper and he contracted as her landscaper. Summary of Evidence *[hereinafter SoE]* 5/16/19, p.11, ln. 22-23, p. 12, ln 6-9. Ben Birch has a Federal conviction for Bankruptcy Fraud. SoE 5/16/19, p. 20, ln.15-16.

At some point they came up with the idea of opening a pharmacy: Pharmacy Development Corporation (PDC). SoE 5/16/19, p. 14, ln. 1-2; p. 21, ln. 20-21. Ms. Do's testimony indicated that she thought Mesa Pharmacy and PDC might have been two different entities, but didn't know which might have been the subsidiary of the other. SoE, 5/16/19, p. 18, ln. 18-20; p. 19, ln.12-15. Ben Birch testified, initially, that he wasn't certain that there were separate corporations for PDC and Mesa, but then testified PDC was the top corporation and all the Mesa iterations were under that umbrella. SoE 5/16/19, p. 21-22, ln. 13-2. Under crossexamination by Mesa's counsel, Ben Birch testified that PDC was set up as the corporation with Mesa, Inc. as its asset along with four other subsidiaries which were each different pharmacy locations. SoE 5/16/19, p. 27, ln.3-11. Ms. Do claimed not to know how the company was created, but she did know she didn't put any money into it, nor did her son, Andrew. SoE 5/16/19, p. 12, ln. 3-6, ln. 17-20. Ben Birch indicated that he was the only one who put up any capital for the venture. SoE 5/16/19, p. 21, ln. 11-13. Ed Kurtz claimed that he was the one who incorporated PDC in Nevada, its sole director and shareholder, and that he was never part of Mesa.

Ms. Do claimed not to be aware of having an ownership interest in PDC/Mesa and stated that Andrew Do did not have an ownership interest. SoE 5/16/19, p. 13, ln. 1-3, ln. 4-5; p. 17, ln. 1-2. Ben Birch's testimony contradicted this. SoE 5/16/19, p. 21, ln. 17- 20. However, she did testify that they put Andrew Do's name on all the paperwork. They formed Mesa in 2005 or 2006, approximately two to three years after Andrew had graduated from pharmacy school. SoE 5/16/19, p. 14, ln. 1-3. None of the Mesa physical locations ever made any money so they closed all but Mesa 7 by 2011. SoE 5/16/19, p. 16 ln 10-12.

She only occasionally received money from Mesa 7 after that as Mesa wasn't doing well financially. SoE. 5/16/19, p.14, ln. 20-21; p.15, ln. 19-21, ln. 24-25. She insisted that the money she received was salary, not dividends, and she didn't know who actually owned Mesa. SoE 5/16/19, p.19, ln. 7-9, ln. 10-11.

She was the one who made Andrew the Pharmacist in Charge without having to consult

anyone. SoE 5/16/19, p 16, ln. 19-23.When Ben Birch put his son-in-law Ed Kurtz in place of Andrew as CEO it was presented to her as done deal. SoE. 5/16/19, p. 17, ln. 3-8. Mr. Kurtz claimed he was only on the PDC BOD not that of Mesa. To Ms. Do's knowledge here were no board of director meetings and as far as she knew there was no board. SoE. 5/16/19, p. 14, ln. 10-17. Ben Birch claimed there was a BOD and that both of the Dos were on it. SoE 5/16/19, p. 22, ln. 19-23. However, he couldn't actually recall having any BOD meetings, instead stating they "probably" happened. SoE 5/16/19, p. 22, ln. 15-17.

Andrew Do was the lead pharmacist. SoE 5/15/19, p. 25, ln. 23-25. He is listed on various documents as holding various positions on the Board of Directors of Mesa. Those documents were verified by Ed Kurtz and they indicated that Mr. Do was at times President, CEO and CFO. SoE 5/21/19, p. 20, ln 6-8. Mr. Do was never aware that he was on the Board. SoE 5/15/19, p. 22, ln. 10-12. Although Mr. Do testified that he "formed" the corporation, (SoE 5/15/19, p. 17, ln. 18-22) he had no knowledge of if there was a board or who was on the board, (SoE 5/15/19, p. 22, ln. 10-12) how much money they did or did not make, (SoE 5/16/19, p. 5, ln. 12-14) who actually ran the day to day operations, (SoE, 5/15/19, p. 20, ln. 18-19) whether there was stock issued and how he ultimately wound up with Praxsyn stock. SoE 5/15/19, p.30, ln. 18-20. He testified at one point that he was the president of Mesa, (SoE 5/15/19, p. 18, ln. 2-3) but then contradicted himself later indicating that this title was "only on paper." SoE 5/15/19, p. 18, ln. 15-16; p. 27, ln. 24-25. As president from 2007 to 2014 he couldn't recall ever attending a meeting, (SoE 5/15/19, p. 22, ln. 13-14) seeing a profit or loss statement or doing more than signing checks. SoE 5/15/19, p. 18, ln. 11-14; p. 22, ln. 13-14.

Ultimately, Mr. Do took the Fifth when asked to testify as to whether he ever signed a contract with TPS to market the products that he prepared as a pharmacist. SoE 5/15/19, p. 19, ln 11-13.

Mr. Do did not believe he had any ability to hire or fire pharmacists, which contradicted

the testimony of Ed Kurtz. SoE 5/15/23, p. 26, ln. 17-18; SoE 5/16/23, p.5, ln. 18-19. Kurtz claimed that he reported to Mr. Do. This contradicted Do's testimony as Do claimed he reported to Kurtz. SoE 5/16/19, p. 8, ln. 9-12. The trial was the first time Mr. Do had seen the license history certification for Mesa Pharmacy and he was surprised to learn of it. SoE 5/15/19, p. 22, ln. 14-17. He didn't know who prepared it. SoE 5/15/19, p. 23-24, ln. 25-2. He was aware that Mesa had several incarnations (the one that merged with PAWS was Mesa 7) and also formed Pharmacy Development Corporation (PDC). SoE 5/15/19, p. 25, ln. 1-6.

In 2012 Mesa and a company owned by Garbino, Trestles Pain Specialists, LLC (TPS) entered into their first contracts with each other…neither side having conducted any due diligence. SoE 5/14/19, p. 7, ln. 8-15; 5/15/19, p. 27, ln. 15-23. TPS had a wholly owned subsidiary, Trestles RX. SoE 5/14/19, p. 18, ln 204. Kurtz negotiated the contracts with TPS/Garbino and brought them in. SoE 5/14/19, p. 10, ln, 3-4. None of the other Mesa players were aware of this business arrangement until the contracts were signed. SoE 5/16/19, p. 6, ln. 5-6; 5/16/19, p. 26, ln. 22-23; 5/15/29, p. 21, ln 20-23.

John Edward Garbino plead guilty to a Federal Felony of Healthcare fraud in the fall 2017. SoE 5/14/19, p. 5, ln. 3-4. He testified that the charges stemmed from the sale of prescriptions through a government program. *Id.* Notably, this is the same type of business which comprised his relationship with Mesa Pharmacy.

Garbino/TPS had contractual business relationships with Ray Riley and David Fish. SoE 5/14/19, p. 13, ln. 23-24. David Fish was convicted, as part of Premier Medical Management, of Workers' Compensation kick-back schemes and permanently suspended from participating in the California Workers' Compensation System. SoE 5/14/19, p. 10, ln 18-19.

As part of the TPS agreement, Mesa was filling prescriptions through TPS contracts for Andrew Robert Jarminski and Craig Chanin, (SoE 5/22/19, p. 10, ln. 4-8) both of whom were charged with involvement in the Workers' Compensation kick- back scheme as part of the First Choice and Landmark Medical schemes. This was in addition to Mesa's already established relationship with Robert Villapania, DC as a referral source for prescriptions. SoE 5/22/19, p. 10, ln. 15-21. Garbino testified that Villapania introduced him to Mesa sometime in 2011. SoE 5/14/19, p. 5, ln. 15-16. This is the same Villapania who was charged in People of the State of

California v. Robert Julian Villapania (Case no. 16CF1360) and who is listed by the DIR on the criminally charged providers list.

Garbino initially met Ed Kurtz, who was related by marriage to the Birch family. SoE 5/22/19, p.11, ln. 1-3. Andrew Do did not meet Garbino or know of the contracts with TPS until he started filling the prescriptions…despite, ostensibly, being president of Mesa. Garbino was under the impression that Ed Kurtz owned Mesa. SoE 5/15/19, p. 12, ln 18-19.

Mesa's initial relationship with TPS had issues and the business faltered. SoE 5/15/19, p. 14, ln. 4-7. Mesa could not handle the amount of business that TPS was bringing in. SoE 5/21/19, p. 28, ln. 19-20. They needed financing to expand. In 2013 that was rectified by obtaining financing through parties such as Javlin III. SoE. 5/21/19, p. 17-18, ln. 23-2. Garbino discussed Mesa's business with Javlin and other financers. SoE 5/15/19, p. 11, ln. 18-20. Garbino testified that he was involved in the business meetings with the potential financers, some occurring at Mesa's headquarters and others at dinner meetings. SoE 5/14/19, p. 15, ln. 21-14.; 9/30/20, p. 4-5, ln. 22-18. Kurtz contradicted Garbino as to the level of Garbino's involvement in those meetings, but admitted that he was part of them. SoE 5/21/19, p. 18, ln 8-12, p. 19-20, ln. 23-2. Mr. Shebanow confirmed that Mr. Garbino was part of those meetings. SoE 9/29/20, p. 8,ln. 18-21. Andrew Do, although allegedly Mesa's president, was not involved in any of these meetings. SoE 5/15/19, p. 29, ln. 14-22; 5/21/19, p. 19-20, ln. 23-2. Neither, Mr. Garbino nor Mr. Kurtz could recall if Mr. Do, president of Mesa Pharmacy, was ever present at one of those meetings. SoE 5/15/19, p. 15-16, ln. 24-1; 5/21/19, p. 18, ln. 11-12.

This funding revitalized the Mesa/TPS agreement. SoE 5/14/19, p. 9, ln. 17-20.

Mesa's sales "exploded" in 2014 as a result of the agreement. SoE 5/14/19, p. 24, ln. 13-15.

Garbino testified that TPS brought in most, if not all, of the sales for Mesa during their relationship. SoE 9/30/20, p. 5, ln. 23-25. Mr. Kurtz confirmed that, when Mr. Garbino, entered the picture, Mesa had to purchase more equipment to handle the significant influx of prescriptions he brought into the company. SoE 5/21/19, p. 31, ln. 3-5; 9/30/20, p. 6, ln. 7-9. According to Garbino, he, Riley and Fish had a great deal of input into Mesa's business strategy.

SoE 5/15/19, p. 9-10, ln. 24-3; 5/14/19, p.11, ln. 3-6.Garbino confirmed that he was listed as an officer of Mesa on Exhibit O, but he claimed he didn't know how his name got there. SoE 5/15/19, p. 12, ln. 23-25. Andrew Do testified that he didn't fill out any documents of this sort for Mesa. SoE 5/15/19, p. 25-26, ln. 25-2. Kurtz testified that Do would have been the one to do it. SoE 5/21/19, p. 21, ln. 18-19. Kurtz testified that prior to the contracts with Garbino/TPS Mesa had less than 50 employees, (SoE 5/21/19, p. 11, ln. 13-14; p. 31, ln. 11-13) after that they expanded to, at one point, 140. SoE 5/21/19, p. 31, ln. 8-10. This was in order to deal with the volume of the prescriptions Mr. Garbino brought to Mesa. SoE 5/21/19, p. 31, ln. 9-11.

Mr. Kurtz discussed the expansion of Mesa to a nationwide company with Garbino. SoE 5/21/19, p. 20, ln. 19-20. These were strategic collaborations with Mr. Garbino about Mesa's business strategy. SoE 7/9/19, p. 8, ln. 11-14; 9/30/20, p. 6, ln. 5-7.

Andrew Do testified, then immediately recanted, that Mr. Garbino told him what ingredients should be used in the prescriptions. SoE 5/16/19, p 7-6, ln. 24-2. Mr. Garbino admitted, then immediately recanted, that he had discussions with Mr. Do regarding the compounds and formularies. SoE 5/15/19, ln 3-10.

Garbino did confirm during trial that, as he had testified in his deposition, he had a lot of influence on Mesa – about one-hundred-million dollars' worth. SoE, 5/14/19, p. 11, ln. 4-6. Garbino testified that prescriptions provided through TPS affiliated doctors accounted for a substantial portion of Mesas' business by 2014. This was confirmed by Mr. Kurtz. SoE. 7/9/19, p. 22, 11-13.

In 2014 Garbino became aware that Mesa listed him as an officer in filings with the Arizona Pharmacy Board. He did tell Kurtz that Mesa should expand into other states. SoE 5/21/19, p. 20, ln. 19-20.

In 2013 Mesa, according to Ben Birch, was introduced to the owners of PAWS Airline, Shebanow, which had gone "belly up." SoE 5/16/19, p. 27-28, ln. 24-6. Neither Ben Birch, Andrew Do nor Mytu Do were involved in the merger of PAWS and Mesa to become Praxsyn. SoE 5/16/19, p.28, ln. 6-8; p. 29, ln. 4-5. They just knew they got stock out of the deal. SoE 5/16/19, p. 13, ln. 10-19; p.28, ln, 6-9. Ed Kurtz acknowledged that he was the point-man in

arranging the contracts with Garbino and the merger with PAWS. SoE 5/21/19, p. 9, ln. 22-23. Unlike the putative principles of Mesa, Garbino testified that he was involved in dozens of meetings relating to the merger. SoE 5/15/19, p 13, ln. 16-18. This was confirmed by Mr. Shebanow. SoE 9/29/20, p. 6-7, ln. 23-2. Kurtz testified that there were no written communications with the "principles" regarding the merger with PAWS and the stock transfer agreement with Mr. Garbino. SoE 5/21/19, p. 16, ln. 6-13. Garbino testified that he and Kurtz were involved in forecasting and planning the expansion of Mesa during the merger period. 5/15/19, p. 13-14, ln. 20-2. Andrew Do, still listed as president of Mesa, testified that he had no knowledge of the events surrounding the merger with PAWS and formulation of Praxsyn. SoE 5/15/19, p. 27, ln. 9-15.

Despite still being "president" of Mesa, Andrew Do did not participate in any of the merger negotiations, did not sign the merger contract. SoE 5/16/19, p. 29, ln. 13-15. He was not aware that Mesa had obtained funding from Javlin or any other source. SoE 5/16/19, p. 29, ln. 14-22.

PAWS and Mesa merged to become Praxsyn. SoE 5/21/19, p. 31, ln.16 -17. Praxsyn had a board of directors and Kurtz testified that it was the Praxsyn BOD that decided to fire Andrew Do from Mesa – an allegedly independent company. SoE 5/21/19, p.33, ln. 19-21; 7/9/19, p. 17, ln. 7-9. This action contradicted his own testimony that Mesa was a wholly owned, but independent, subsidiary of Praxsyn. SoE 5/21/19, p. 31, ln.16 -17, p. 32, ln. 16-17. Garbino was on the board of directors of Praxsyn for about eight months, (SoE 5/21/19, p. 33, ln. 11-14; 9/30/20, p. 3, ln. 5-7) and it was his testimony that he thought Mesa, PAWS and Praxsyn were all the same (SoE 5/14/19, p. 27, ln. 24-25) and Mesa business was discussed at the Praxsyn Board Meetings. SoE 5/14/19, p. 28, ln. 22-25, p. 29, ln. 2-17. Garbino testified that he had voting rights in Mesa. SoE 5/14/19, p. 35, ln. 3-4 & 10-12. Kurtz confirmed that Garbino had voting rights in Praxsyn of which Mesa was a wholly owned subsidiary. SoE 5/21/19, p. 33, ln. 14. Mr. Shebanow testified that Mesa/Kurtz had nominated Garbino to the Praxsyn Board. SoE 9/29/20, p. 11, ln 3-7.

The court, as part of its duty to inquire as to the facts, requested that Mesa produce its Board of Director's Meeting Minutes. This would have cleared up issues relating to whether

Mesa was acting as a separate corporation, who the officers/directors/majority shareholders were, the circumstances surrounding the merger and involvement of Garbino. Mesa was either unwilling or unable to do so. The court was therefore entitled to, and did, form an adverse inference that those documents contained material adverse to the position of Mesa.

DISCUSSION

1. VILLANUEVA WAS CORRECTLY DECIDED

a. The Purpose of Labor Code §4615 and §139.21

This trial was convened as part of the Special Adjudication Unit to determine the whether John Garbino exercised control of Mesa Pharmacy sufficient to subject them to the stays under Labor Code §4615 and §139.21.

California Labor Code §139.21(a) **states, in relevant part:**

> **(3)** For purposes of this section and Section 4615, an entity is controlled by an individual if the individual is an officer or a director of the entity, or a shareholder with a 10 percent or greater interest in the entity.
>
> **(4)** For purposes of this section and Section 4615, an individual or entity is considered to have been convicted of a crime if any of the following applies:
>
> > **(A)** A judgment of conviction has been entered by a federal, state, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other
> >
> > record relating to criminal conduct has been expunged.
> >
> > **(B)** There has been a verdict or finding of guilt by a federal, state, or local court.
> >
> > **(C)** A plea of guilty has been accepted by a federal, state, or local court.

This definition was expanded by *Villanueva v. Teva Foods* 84 Cal. Comp. Cases 198. In discussing the standard under LC 4615/139.21 of whether an individual was an officer or director of the entity or a shareholder with a 10 percent or greater interest in the entity the court expanded

the definition to cover those in "de facto" control. While in *Villanueva,* the court found that the determination that the charged provider was in absolute control because of deceit, it did change the governing threshold – officer, director ***or 10% shareholder.*** The court indicated that the trial court could look behind the curtain of how an entity held itself out as structured and make a determination that the charged/convicted provider was in controlling the entity in a de facto manner.

This was to prevent fraud on the workers' compensation system, wherein a provider, subject to suspension, could end-run around the statute by creating a straw corporation; where the provider does not seem to have any interest in the shell company, but still derives all the benefits of it.

This is a type of piercing the corporate veil – essentially the doctrine of Alter Ego used in a slightly different manner; instead of moving aside the corporate veil to reach the assets of the officers and shareholders, the court is using it to dismantle the corporate shield and hold the company responsible for the bad actions of its stakeholders. Under that doctrine the court disregards the "fiction" of corporate entity and how it is structured "on paper," to look behind the curtain to see who is actually pulling the strings. While this definition of Alter Ego has been criticized because the corporate entity is not a fiction, but juridical entity with the characteristic of legal "personhood," it is applicable as it limits the exercise of the corporate privilege to prevent abuse. See 13 Cal. L. Rev. 235;51 Harv. L. Rev. 1401;48 So. Cal. L. Rev. 56. The abuse of the entire Workers' Compensation System is what the LC 4615 and LC139.21 proceedings are here to prevent.

At its essence, the alter ego doctrine was created to insure that justice is done. *Mesler v. Bragg Management Co. (1985)* 39 C.3d 290, 301. A court may disregard the corporate entity and treat the fraudulent acts as if they were done by an individual. Where a corporation, such as Mesa, is used by an individual or individuals to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose the corporate entity may be disregarded. See *Shapoff v. Scull (1990)* 222 C.A.3d 1457, 1466, 1469, 1471. Alter ego does not relieve individual guilty actor of liability, rather, it prevents parties with same interest from inequitably using corporate

form to thwart a third party's rights. *Communist Party v. 522 Valencia (1995)* 35 C.A.4th 980, 995; S*haoxing County Huayue Import & Export v. Bhaumik (2011)* 191 C.A.4th 1189, 1199. The issue is not whether Mesa's corporate entity should be disregarded for all purposes, nor whether Mesa's corporate purpose was to defraud. Rather, the issue is whether in this particular case and for purposes of this case "justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form." *Kohn v. Kohn (1950)* 95 C.A.2d 708, 718.

In Associated Vendors Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838–840. The court listed various factors that, taken alone or cumulatively depending on the situation, would allow a piercing of the veil. Relevant to this action are the failure to maintain minutes or adequate corporate records and the use of a corporation as a mere shell, instrumentality, or conduit for a single venture or the business of an individual or another corporation. Here, while Garbino was not in total control, he was, at times, listed on documents filed with regulatory agencies as an officer or director and was on the Board of Directors for the parent company Praxsyn after the merger. The testimony indicates that Mesa Pharmacy was not following the rules of corporate governance. The witnesses were not credible on who the actual officers and/or directors were as they weren't sure who held what position (such as Andrew Do not knowing he was listed as president of Mesa on certain documents) the recollections were contradictory as to when/who attended/whether there were any BOD meetings. Mesa was unable, or unwilling, to produce Minutes of the BOD to shed any light by contemporaneous, written record of Mesa's actions.

Because of the amount of revenue Garbino drove to Mesa and its subsequent incarnations, and the providers he and his company brought to Mesa resulting Mesa's need to expand and find financing and that expansion led to the merger with the pet transportation company, PAWS, Garbino held the purse strings. He had enough influence on the companies to wind up on the board of directors of the resulting, post-merger company, Praxsyn. Praxsyn's only asset and only source of income was that of Mesa Pharmacy. He testified that he had substantial influence on Mesa Pharmacy. He believed he had a right to sue them when they didn't do what he wanted them to do. All this indicates that he had at least as much, if not more, influence than a 10% shareholder would on Mesa Pharmacy.

Whether to pierce the veil is a question of fact, within the province of the trial court. *Stark v. Coker (1942)* 20 C.2d 839, 846. It is determined under a Preponderance of evidence standard. *Wollersheim v. Church of Scientology Int. (1999)* 69 C.A.4th 1012, 1014. The Preponderance of Evidence standard (California Evidence Code §115) is defined as the need prove only that something is more likely to be true than not. Judicial Council of California Civil Jury Instructions (2023 edition) CACI #200. Here, it is more likely true than not that John Garbino had at least as much influence and control over Mesa as a 10% shareholder and thus had sufficient "de facto" control to attribute his suspension to Mesa Pharmacy.

2. **ADVERSE INFERENCES WERE CORRECTLY TAKEN**

a. Failure to Produce the Minutes of the Mesa Pharmacy Board of Directors and failure of Kimberly Brooks to testify.

A WCJ has not only the ability, but the duty, to develop the record. Under Labor Code, §5708, "[a]ll hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they **shall not be bound by the common law or statutory rules of evidence and procedure**, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. (emphasis added).

i. <u>The WCJ Ordered the production of the Board of Directors' Minutes</u>

The Petition for Recon incorrectly asserts that the court inferred adversely to Mesa for its failure to produce the Board Minutes during discovery. In fact, as part of the duty to develop the record, the WCJ Ordered the Minutes produced and warned that, if they were not, an adverse inference would be taken.

> *"LET THE MINUTES FURTHER REFLECT that the court required that Mesa Pharmacy produce the Minutes of Hearing for the Board of Directors from Mesa Pharmacy, whether quarterly, yearly, or bi-yearly for the period from 2007 to*

2015. If those were in existence, they should be easily obtainable, due diligence would require any subsequent entities to have maintained the records of the prior entities. If they were not produced by 1:30 pm the court warned that an adverse inference would be made as to whether Mesa actually existed as a corporation and had any right to defend itself on a 4615 hearing." SoE 5/16/19, p4, ln1-6.

The court reminded counsel that the crux of this action, as indicated through the Workers' Compensation Appeals Board and Court of Appeals, was piercing the corporate veil on the 4616 cases. SOE 5/16/19, p 4, ln. 13-15. Further, the court warned, "The judge in Workers' Compensation has a right to determine the scope of the hearing as although the main thrust of the trial was 4616, there were indications of a potential fraud perpetrated by Mesa on the WCAB. Mesa's corporate minutes were relevant and necessary to all of that." SOE 5/16/19, p. 4, ln. 19-21.

Only three of the Board Minutes from 2016 were produced…and *Mesa represented to the court that Ms. Kimberly Brooks would be testifying,* on their behalf, about the board of directors meetings other than those. Kimberly Brooks was a party affiliated witness. The court noted, "LET THE MINUTES REFLECT that a discussion was held on the record regarding an update on the Mesa board minutes and the other witnesses. Counsel for Mesa indicated that they had found three meeting minutes from 2016, otherwise, Ms. Brooks would be testifying as to everything else. Ms. Nemat indicated she would be providing the minutes received to the Court and opposing counsel." SoE 5/16/19, p18, ln. 3-7. The only way to cure the lack of the actual minutes was to have the attorney responsible for maintaining them (SoE 9/29/20, p. 10, ln. 11-13; 7/9/19, p17. ln 3-5) to testify as to what may have been in them and why they're not available, which she refused to do absent an order from the court. SoE 7/9/19, p. 24, ln. 10-15.

This is a two part problem for Mesa. First one of not being able to produce the records, and then two the party affiliated person responsible for maintaining those records refused to attend trial and testify (even over video conference) despite the Mesa stating that that custodian would testify about them.

The ability of the WCJ to issue a discovery order compelling a party to produce documents has been upheld. *Garber v. W.C.A.B.* (1999) 64 CCC 248 (*applicant was ordered to produce*

earnings records including current employment records and social-security earnings records). As such, the court was well within its purview to order Mesa to produce the documents that should have been part of their regular business records.

ii. WCJ may make adverse inference based on evidence not produced in response to its request

The issue of whether Mesa was abiding by the rules of corporate governance and thus what outside influences it might be subject to, whether Garbino individually or by Praxsyn where Garbino was a Director, is key to this case.

As such, the court instructed Mesa to produce the Minutes of the Meetings of the Board of Directors. Mesa was either unwilling, or unable to do so. Either way the result is the same. The rule, even in criminal cases, is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. *Graves v. United States*, 150 U.S. 118. This was adopted in *Postural Therapeutics v. WCAB*, 179 Cal. App. 3d 551 (1986) where a willful suppression of a medical or vocational expert report was shown to exist in violation of these rules, it was presumed that the findings, conclusions and opinions therein contained would be adverse, if produced. Their decision held that, although the Appeals Board is not bound by statutory rules of evidence consistent with California Labor Code §5708, a rebuttable presumption was still created that the evidence intentionally suppressed was adverse consistent with the Evidence Code: "… the classifications and policies of the presumptions found in the Evidence Code have been applied to analyze presumptions in the compensation law. Under this analysis, the rule before us appears to create a presumption affecting the burden of proof. This presumption is established to implement some public policy other than the facilitation of the particular action; here, the policy is to discourage the willful suppression of evidence. This type of presumption requires the party against whom it operates to establish the nonexistence of the presumed fact."

As with the 5th Amendment inference (*discussed infra)*, determination of credibility of witnesses rests with the trial judge. Where circumstantial evidence is in conflict with the direct

testimony of a witness, the credibility of the witness and the weight to be given his testimony are matters within the province of the trier of fact *Garza v. W.C.A.B.* (1970) 35 Cal.Comp.Cases 500. Here the issue is all the witnesses conflict. Kurtz testifies that Garbino didn't influence Mesa while Garbino testified that he had a great deal of influence. Kurtz testified that Andrew Do could fire people, Do testified to the opposite. Not a one of the witnesses could identify a single Mesa board of directors meeting. The judge's findings on credibility are entitled to great weight because the judge has the opportunity to observe the demeanor of the witnesses and weight their statements in connection with their manner on the stand. See *Garza v. W.C.A.B.* (1970) 35 Cal.Comp.Cases 500 (Published); *United Airlines v. W.C.A.B.* (1976) 41 Cal.Comp.Cases 814 (Unpublished). See also *Contra Costa County v. W.C.A.B. (Brown)* (2015) 80 Cal.Comp.Cases 32 (Writ Denied).

In the context of this issues in this trial it was logical for the court to conclude that the reason the parent company (the predominate asset of which is Mesa Pharmacy) wouldn't turn over Mesa board of directors meeting minutes is that they would show Garbino's de facto domination of Mesa's governance.

b. WCJ may make adverse inference based on Andrew Do asserting the Fifth Amendment Right against self-incrimination.

Here, Mr. Do was asked specifically about the contract between Mesa and Trestles - did he ever sign a contract with Trestles Pain Specialists for them to market products that he, as a pharmacist, would prepare for patients. SoE 5/15/19, p.19, line 11-13. He refused to answer.

In the landmark case, *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976), the United States Supreme Court recognized that the Constitution does not prohibit a fact-finder from drawing an adverse inference from a refusal to testify. The Court referenced the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." The adverse inference must relate to a specific question asked and not answered on Fifth Amendment grounds. Also, the inference, if permitted, is limited to the answer to the specific question asked that, had it

been answered, would have been unfavorable to the witness. Finally the inference is permissive, not mandatory, and it must be left to the discretion of the factfinder -- both whether to draw the inference, and, if so, how much weight to give it based on the facts and circumstances of the case. *LiButti v. United States*, 107 F.3d 110, 120-25 (2d Cir. 1997).

The testimony of witnesses, called as adverse witnesses by Liaison Counsel under California evidence Code §773, was often contradictory and confused as to key issues relating to Mesa's corporate status and governance. Kurtz's testimony while seemingly more logical and apparently straightforward, came off as gaslighting when compared to the backdrop of that of his business associates. For instance, he testified that Andrew Do had control over his actions. Andrew Do testified that he was under the authority of Kurtz. When asked to testify about the contract between Mesa and Trestles, Andrew Do refused to testify on the grounds that his answers might incriminate him. The court thus correctly drew an inference that there was something rotten at the core of Mesa's business and that agreement.

3. GARBINO WAS IN CONTROL TO THE EXTENT ANYONE WAS

a. Mesa's Corporate Existence

Here the issue is Garbino's control of Mesa Pharmacy and whether Mesa was acting as its own "person." Under this legal fiction of corporate personhood it could withstand the efforts of one person to influence it to the extent that an officer/director/10% shareholder could. In order to make this determination the WCAB has borrowed the standards used when piercing the veil to attach assets of an individual to satisfy a corporate debt.

Under this doctrine, a court may *disregard the corporate entity* and treat the acts as if they were done by an individual or by a controlling corporation, where a corporation is used by an individual or individuals, or by another corporation, to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose. See *Shapoff v. Scull* (1990) 222 C.A.3d 1457, 1466, 1469, 1471 and *Mesler v. Bragg Management Co*. (1985) 39 C.3d 290, 301.The theory behind this doctrine is that if an entity is following the rules of corporate governance (regular, recorded board of directors meetings, separation of assets, etc.) than it is

less likely to be influenced by corrupted provider in its midst. In order to use the doctrine, the court needs to find that Mesa was dominated or controlled by an individual of another corporation. Here under LC §4615 and §139.21 the standard is that equaling the control of an officer, director or 10% shareholder.

In the present action, given that none of the witnesses are credible regarding Garbino's influence on Mesa before the merger, that something was rotten at the core of Mesa, that postmerger Praxsyn and Mesa were not independent companies and that Garbino was a director on the Praxsyn Board the court could logically conclude that Garbino had at least as much, if not more, influence on Mesa as a 10% shareholder would.

Further the Petition for Recon makes much over the various documents to which witnesses testified not being admitted as evidence.

First, testimony is evidence. Various witnesses testified that they weren't aware of those documents being submitted to state and federal agencies. They didn't remember preparing them, although they seem to have signed them, They were surprised that they were listed as corporate officers. And, although hearsay is admissible, the documents and testimony about them wasn't offered to prove the truth of what was in the documents. Rather, they were being offered, and testified to, to show that Mesa either wasn't aware, or didn't care, about who they were representing to government entities about their corporate structure. Again, this shows that at the most charitable sloppy and given everything else that came forward at trial, downright untruthful.

Second, the court may have incorrectly excluded the documents. The Evidence Code includes a provision that it does not apply to special courts or tribunals such as the Appeals Board or to administrative agencies (EvC 300; Comments of Law Rev. Com.). While not designated a significant panel decision the court stumbled upon a case that seems to indicate the documents, as they were copies of those of a state, or other government entity, and appeared to be in order, should have been admitted into the workers' compensation proceedings. *Lopez v. EDCO Floor Co.* 2023 Cal. Wrk. Comp. P.D. LEXIS 163 (not a significant panel decision). The court excluded the document as it was not a certified copy – but this is not the requirement before an administrative law court. Thus, to the extent, that this specific ruling was in error, the

court asks that reconsideration be granted to the extent that the document marked as exhibit O, be admitted. This would do nothing more than bolster the WCJ's decision as it relied on testimony concerning the contents thereof.

Based on all of this Mesa Pharmacy was a fiction – not a legal fiction, just a fiction. It did not exist legally. No effort was given to separate the corporation from those who ostensibly owned/operated it, or *ran business through it.* It was a straw entity, a shell. It therefore has no ability to step back and away from the participants and protect these liens as it lacked any legal existence separate from them.

b. Garbino Produced All The Revenue And Testified That He Had Influence

Garbino testified that he had substantial influence at Mesa Pharmacy: one-hundred-million dollars' worth. It wasn't total control but it was at least as much as that of a 10% shareholder. In fact, when Mesa's governing body took actions he didn't agree with, he did what a shareholder would do and sued them. SoE 5/14/19, p. 12, ln 1-2.

Testimony from Ms. Do, Ben Birch, Mr. Kurtz and Mr. Garbino all confirmed that Mesa Pharmacy was foundering before the contract with TPS/Garbino. They went from having to close locations due to finances, to massive infusions of cash through Garbino physician prescriptions leading to tripling the number of employees on staff.

4. THE COURT'S DECISION IS SUPPORTED BY THE SUM TOTAL OF THE EVIDENCE

One of Mesa's founders, Ben Birch, was a felon convicted of financial fraud against the United States Government (specifically Bankruptcy Fraud). Before Garbino's arrival on scene, Mesa Pharmacy was already doing business with Robert Villapania who is charged with engaging in Workers' Compensation pharmacy kick-back schemes. After Garbino's relationship begins Mesa engages in business with Robert Jarminski and Craig Chanin, both of whom are also charged with pharmacy kick-back schemes in Workers' Compensation. Garbino's silent business

partner was David Fish who has a conviction for workers' compensation fraud. Finally, Garbino, himself, is guilty of Federal Health Care Fraud. There are a great deal of nasty players circling in Mesa's orbit, although this, in and of itself, wouldn't be enough to find control by Garbino.

Then, however, the contract between Mesa and Trestles was so bad that Andrew Do has to take the 5th rather than testify about it.

Also, Mesa did not adhere to the rules of corporate governance, gutting the foundation of any corporate legitimacy. They could not, or would not, produce more than three Minutes of the Board of Directors for a company that existed for at least eight years. Their own attorney, who Mesa represented would be testifying to explain the discrepancy, refused to testify. The founding group can't recall if they ever attended a Board of Directors' Meeting and/or what their positions on that board were, if any. The putative president of the corporation, Andrew Do, admits that he was a figurehead on paper. He had no decision making authority. Ed Kurtz seemed to have his hands in everything. His own testimony is that he entered into contracts with Garbino's company, financiers such as Javlin, and the merger with PAWS. Other Mesa affiliated persons "may" have attended. He just did what he wanted. State documents were being filled out on behalf of Mesa and none of the principles can remember who filled them out and point the responsibility at their compatriots. These documents seem to list whoever seemed most beneficial at the time as owners or directors. The company didn't do anything to preserve the legal fiction of a separate identity.

Garbino testified that, and Kurtz actually admitted that, he had a great deal of influence because of the amount of money he brought in. Mesa was cutting locations and not making money before the contract with Garbino. He arrives with his company TPS and they start raking in *millions of dollars.* They have to expand to three times the size of their prior operations staff and procure equipment just to manage the business Garbino's pushing through their doors. Kurtz strategized, not with Andrew Do the alleged president of Mesa, but with Garbino about how to expand Mesa and take it worldwide. Kurtz nominated Garbino to the Praxsyn Board of Directors as one of Mesa's three slots. Their subsequent falling out does nothing to undercut Garbino's influence during the time they were filling the prescriptions.

As Mesa can't show any operation as an independent entity, control would default, first, to whoever had the most financial impact – Garbino, and second to the post-merger parent

company, Praxsyn. Garbino was on the Board of Directors of Praxsyn. Garbino testified that he saw Mesa and Praxsyn as one and the same. Other witnesses testified that Praxsyn's only asset was Mesa. Praxsyn's Board discussed Mesa's business. Praxsyn's Board fired Mesa's president and pharmacist-in-charge.

From the beginning of his relationship with an already hollow Mesa, Garbino had at least as much control as that of a 10% shareholder. And he absolutely had control as a Director when he sat on Praxsyn's Board which directed Mesa as a puppet and not an independent subsidiary corporation.

CONCLUSION

For all the forgoing reasons the Appeals Board should deny the Petition for Reconsideration, except for the specific purpose of admitting Exhibit O into evidence.

DATE: August 2, 2023

Amy Britt

WORKERS' COMPENSATION JUDGE