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