STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

PAUL VIGOA, *Applicant* vs. BEVERLY HILTON HOTEL; ARGONAUT INSURANCE CO.; CNA INSURANCE *Defendants.*	Case No. MON 213718 **FINDINGS AND AWARD AND ORDER**

LAW OFFICES OF GEORGE BERGER
By: George Berger, ESQ.
Attorneys for Applicant

KEGEL, TOBIN & TRUCE
By: W. Joseph Truce, Esq.
Attorneys for Defendants

The above-entitled matter having been heard and regularly submitted, the Honorable **James J. Castranova**, Workers' Compensation Judge, now finds, awards and orders as follows:

FINDINGS OF FACT

1. Applicant did not sustain injury arising out of and occurring in the course of his employment during the period 1990 to and including June, 1996, as alleged.

2. Applicant actually, reasonably and necessarily incurred costs for the purpose of proving a contested claim in connection with the liens of Harvey Alpern, M.D. and ARS Photocopy Service. Said liens to be paid in accordance with Labor Code Sections 5307.6, 4626 and 5307.1, with jurisdiction reserved in event of a dispute over value.

3. Applicant did not reasonably and necessarily incur costs for the purpose of proving a contested claim, nor obtain medical treatment which was reasonably required to cure or relieve from the effects of an industrial injury in connection with the lien of the 4600 Group for Kaiser.

CASE NO. MON 0213718

PAUL VIGOA	VS.	BEVERLY HILTON HOTEL, ARGONAUT INSURANCE CO.
JUDGE:		JAMES J. CASTRANOVA
DATE OF INJURY:		1990 to June 1996

OPINION ON DECISION

INJURY AOE/COE

The applicant has the burden of proof in establishing injury AOE/COE, that is, was proximately caused by a specific or cumulative injury in the course of his employment. Peter Kiewit & Sons v. I.A.C. (McLaughlin) (1965) 234 C.A. 2d 831, 30 CCC 188. In the case at hand the issue is credibility. The applicant testified to a completely different set of facts than the three defense witnesses. In addition, all of the evidence, except for the applicant's testimony, supports the defense witnesses' version of what occurred.

The applicant testified that he reported to work on time on June 23, 1996. Furthermore, he testified that he left his car in a parking lot next door to the hotel because he was not feeling well and might leave. The applicant testified that he was observed in the cafeteria by Mr. Kay, a co-worker, between 2:00 p.m. and 2:30 p.m.

Anne Ceruti, the hotel's Human Resource Director, conducted an investigation. Initially, Mr. Kay told her that he did see the applicant in the hotel's cafeteria. Later, Mr. Kay voluntarily told Ms. Ceruti that he had not seen the applicant that day in the cafeteria but had been asked by him to lie.

To be frank, this trier of fact is surprised that neither side subpoenaed Mr. Kay to testify. Mr. Kay 's testimony would have confirmed or refuted the testimony of both the applicant and/or Ms. Ceruti. Instead, this trier of fact must look at the remaining evidence to determine who is telling the truth.

This trier of fact is influenced by the parking ticket and time cards. This trier of fact finds it hard to believe that the applicant would park his car in a neighboring lot when the hotel parking lot was almost as close. The hotel parking lot is in a patrolled building. The parking lot of Trader Vic's is outside in an unsecured lot. The applicant alleges he arrived at work about 1:55 p.m. The applicant was supposed to be at work no later than 2:00 p.m. The applicant then failed to clock in although all of the evidence indicates that the applicant would have to walk past the time clock and the security guard to get into the hotel. During the next hour the

applicant testified that he went to the banquet room but saw no one. Since he was feeling ill the applicant went to the hotel cafeteria to drink tea before going to the men's locker room to recuperate. After that the applicant went back to the banquet room and saw two waiters and two waitresses. He did not see Urs, the other banquet captain, until 2:55 p.m.

According to the testimony of both Ms. Ceruti and Cecilio Ramirez, no one saw the applicant on June 23, 1996 until either Mr. Ramirez found him in the banquet office downstairs or Urs saw the applicant in the banquet room. The defendants allege that both sightings occurred after 3:00 p.m. The applicant alleges that Urs saw him before 3:00 p.m.

Mr. Ramirez was called at home around 2:30 p.m. and informed that no one could find the applicant. Mr. Ramirez lives approximately 20 minutes from the hotel. That would place the time he "found" the applicant no earlier than 2:50 p.m. Allowing for time to get into the hotel from the parking lot, talking to Urs, and conducting a search would place the time well after 3:00 p.m.

Despite the fact that there was a search by his supervisor, the officer on duty and others for the applicant in the hotel, if the applicant is to be believed, he managed to walk by everyone unnoticed and move his car. This is even more astonishing since at 3:09 p.m. the situation had become hectic in getting the banquet ready for the event. Yet amidst this bustle, the applicant remembers to move his car, leaves the hotel and then clocks in for the first time. (The hotel's parking records, Exhibit C, indicate that the applicant entered the hotel garage at 3:05 p.m.) Similarly, the applicant did not punch his time clock until 3:09 p.m. Clocking in is not an act that would take much time. Presumably, the applicant would have clocked in as soon as he arrived whether he felt ill or not. (There is hearsay testimony from Ms. Ceruti that the applicant told Urs he thought he was supposed to start work at 3:00 p.m. that day and not 2:00 p.m. No weight was given to that testimony given the hearsay involved.)

To be blunt there is simply too much the applicant would have this trier of fact overlook, ignore and/or rationalize. His version of what occurred is simply not believable. What the facts do indicate is that the applicant was late for work, got caught and tried to concoct a story which is not plausible.

This trier of fact has focused in on the above scenario, because the applicant was suspended without pay for falsifying documents in connection with this episode. This gave the applicant a motive to get even with the hotel. The remainder of his claim, i.e., stress on the job, is inconsistent with his continued requests for more

working hours. One would expect a request for less hours, not more. In addition, the record indicates another motive for the applicant's filing of this claim. He was suspended earlier that year for failing to bill for liquor at one of the banquets which totalled a $1,979.00 loss to the hotel. The applicant testified no other banquet captain was ever suspended for making a similar mistake. Ms. Ceruti testified that no banquet captain ever made a mistake of that magnitude.

The actions taken by the employer are justified under the circumstances. As a result, Dr. Gillis' medical opinion makes far more sense than that of Dr. Alpern. Dr. Alpern based his opinion on the applicant's history to him. As stated above, this trier of fact does not find that history to be true. In short, the applicant has failed to meet his burden of proof on the issue of injury.

MEDICAL-LEGAL

Applicant incurred reasonable and necessary medical-legal expenses payable by defendants as follows: to ARS Photocopy Service and Harvey Alpern, M.D., in amounts to be adjusted by the parties or determined herein upon the filing of a petition and supporting documents.

JAMES J. CASTRANOVA
Workers' Compensation Judge

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