

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: JOE TRUCE

DATE: February 5, 2004

RE: FINDINGS OF CREDIBILITY OF WITNESSES BY
WORKERS' COMPENSATION JUDGES

Since the opinion of the Supreme Court in Garza v. WCAB (1970) 3 Cal. 3rd 312; 35 CCC 500, a workers' compensation judge's finding on credibility has usually been binding on the Appeals Board as well as the Appellate Courts. This has always been an extremely difficult issue for defense attorneys in general, as liberal workers' compensation judges tend to always find the testimony of the applicant to be credible - even when faced with conflicting evidence in the evidentiary record.

Therefore the Board's decision in Jose J. Hidalgo v. Workers' Compensation Appeals Board 68 CCC 1727 came as quite a shock, as the Board reversed the "findings of credibility" made by a liberal workers' compensation judge, the Honorable Russell G. Zarett of the Van Nuys WCAB.

In Hidalgo, Judge Zarett found that the applicant had sustained industrial injuries to his back, upper extremities and hands, and issued a continuing temporary disability award.

However, in defendant's Petition for Reconsideration, defendant argued that the applicant's testimony was not credible, as the applicant had provided several inconsistent accounts of the alleged injury and that the medical reports of the applicant's primary treating physician, Dr. Sperling, did not constitute substantial evidence on which to base an award.

In his report on defendant's Petition for Reconsideration, Judge Zarett indicated "that the applicant's testimony was credible with respect to his being injured while pulling a load of paper with a manual pallet jack that became stuck in a crack in the cement floor..." Judge Zarett went on to indicate that he found the medical reports of Dr. Sterling "to be far more persuasive than the opinion of defendant's QME..."

In rejecting the opinion of Judge Zarett and granting defendant's Petition for Reconsideration finding that the applicant did not sustain an industrial injury, the Board noted as follows:

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"In concluding that the record did not contain such evidence of considerable substantiality - evidence that supported a finding that applicant was not a credible witness regarding the alleged industrial injury - the WCAB indicated that applicant's account of the 'mechanism of his accident, of what he did after the accident, and of his injuries' varied in material respects and served to impeach his credibility..."

The Board went on to note that the applicant's credibility was further "damaged by false testimony at an 11/15/01 deposition in which he denied previous automobile accidents and indicated that he had never been convicted of a felony..." The Board noted that the evidence showed that the applicant had, in fact, been involved in an automobile accident in April of 1998 and that he had been convicted of a drug related felony in 1980.

The Hidalgo case points up the importance of taking a comprehensive deposition from the applicant and also checking all medical records and/or medical reports to see if the applicant has given inconsistent versions as to the mechanism of the alleged industrial injury.

WJT:dab