

1 per. Appearing as a witness for Respondent was Brian Wilkins.

2 Due consideration having been given to the testimony, documentary evidence, and
3 arguments submitted by the parties, the Labor Commissioner now renders the following decision:

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5 **FINDINGS OF FACT**

6 1. The parties stipulated that APA is a licensed talent agency and was licensed at all
7 relevant times during their relationship. It was also stipulated that Smith is an artist within the
8 meaning of the Act.

9 2. On or about May 1, 2003, Smith entered into an oral talent agency agreement with
10 Pam Wagner, an employee of APA, who had contracted to work exclusively for APA. Smith
11 testified that the contract was entered into at a restaurant and the only people present were herself
12 and Pam Wagner. She testified that Wagner had courted her and proposed that if Smith was not
13 satisfied with her services that Smith was free not to pay Wagner her 10% commission. Smith
14 refused to sign a written agreement due to an unsatisfactory experience with talent agents in the
15 past, but agreed to have Wagner represent her based on the terms that Wagner had proposed.

16 3. Smith worked her first job through Wagner in May 2004 and paid a 10%
17 commission.

18 4. In 2005, Smith was asked to reprise her role as Amanda in the motion picture "Saw
19 II." Smith and her attorney negotiated the contract for "Saw II." The terms of the contract
20 provided that Smith would be paid \$150,000 as compensation for her services on "Saw II." It also
21 provided that Smith would be paid an additional \$100,000 if the movie grossed in excess of \$50
22 million. Smith was paid the \$150,000 through APA, who retained a 10% commission on the
23 payment. Later, after APA terminated the employment of Pam Wagner, Smith received the
24 \$100,000 bonus. Smith did not pay APA 10%, or \$10,000, on the \$100,000 bonus and the
25 commission is the subject of the current Petition. Smith maintained that since APA had nothing to
26 do with procuring her employment on Saw II, had not notified her that Wagner had been fired and
27 had no contacts with any other agents at APA, that she was using the discretion granted her under
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1 the oral agency agreement to not pay the commission on the bonus.

2 5. Petitioner's representative admitted that he was not present at the time that the
3 oral agreement was entered into. However, he argued that he was aware of the terms of the
4 agreement due to the Booking Report and the Payment History which he said indicated that it was
5 the usual artist-agency agreement under which APA was to receive 10% of the artist's
6 compensation. Petitioner submitted the Booking Report, dated May 2, 2005 for Shawnee Smith for
7 the project Saw 2 as Exhibit 2. The Payment History for Smith was submitted as Exhibit 4 and
8 shows payments made to APA for Saw 2 and indicate that APA had been paid 10% on the original
9 \$150,000 of compensation. However, the fact that APA was paid a commission for Saw 2 in part
10 does not contradict Smith's testimony that the terms of the oral agreement gave Smith the discretion
11 to pay or not pay based on her level of satisfaction with her representation.

12 6. Brian Wilkins testified on behalf of Smith and stated that he had a phone
13 conversation with Wagner, at which time Wagner described the arrangement that she had with
14 Smith. Wagner stated that she wanted to prove herself to Smith and therefore, she was not
15 requiring her to sign a written contract and told Smith that she does not have to pay Wagner unless
16 she felt good about her representation.

17 7. By letter dated July 18, 2005, Smith terminated her agency relationship with APA
18 due to the fact that Pam Wagner's employment had been terminated.

19 LEGAL ANALYSIS

20 1. As stated above, Smith is an "artist" within the meaning of Labor Code Section
21 1700.4(b) and Petitioner is a licensed talent agent.

22 2. Petitioner has the burden of proving that it is entitled to commissions.

23 "The burden of proof is found at Evidence Code § 115 which states,
24 '[e]xcept as otherwise provided by law, the burden of proof requires
25 proof by preponderance of the evidence.' Further, *McCoy v. Board of
26 Retirement of the County of Los Angeles Employees Retirement Assn.*
27 (1986) 183 Cal.App.3d 1044 at 1051 states, 'the party asserting the
28 affirmative at an administrative hearing has the burden of proof, including
both the initial burden of going forward and the burden of persuasion
by preponderance of the evidence.' (Cite omitted) 'Preponderance of the
evidence' standard of proof requires the trier of fact to believe that the

1 existence of a fact is more probably than its nonexistence.”
2 *In re Michael G.*, 63 Cal.App.4th 700, 74 Cal.Rptr.2d 642. See also *Robi v. Wolf*, TAC 29-00 at
3 pp. 6-7 and *Behr v. Dauer*, TAC 21-00 at pp. 8-9.

4 3. Petitioner has two hurdles to overcome. First of all, the agreement was verbal and
5 the only parties present were Smith and Wagner. As such, Smith was the only person at the hearing
6 who could competently testify as to the terms of the agreement. Secondly, under Title 8, *California*
7 *Code of Regulations*, Section 12002, Petitioner is only entitled to commissions under an “oral
8 contract” where the commission sought to be charged is procured directly through the efforts or
9 services of the talent agency and is confirmed in writing within 72 hours thereafter.” The Labor
10 Commissioner has discretion to determine whether an oral contract will be void under this
11 provision. In this case, the only evidence presented indicated that Smith and her attorney and not
12 APA, procured and negotiated the agreement for her services on *Saw 2*. Smith was reprising her
13 role from the earlier movie *Saw*, which occurred prior to any agency relationship with APA and,
14 although APA was copied with the contract, there is no evidence that it had anything to do with
15 negotiating the contract. Petitioner has failed to meet its burden.

16 **ORDER**

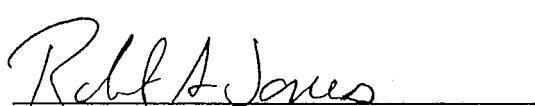
17 For the reasons set forth above, IT IS HEREBY ORDERED that:
18 Petitioner is not entitled to any further commissions from Smith.

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20 Dated: April 25, 2007


ANNE STEVASON
Special Hearing Officer

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23 **Adopted:**

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25 Dated: April 27, 2007


ROBERT JONES
Acting State Labor Commissioner

