

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

10 TERRI L. POMPA,) No. TAC 35-90
11)
12 Petitioner,)
13 vs.) DETERMINATION OF
14) CONTROVERSY
15 ABE HERSHLER, an individual)
16 dba INN CONCERT INTERNATIONAL)
17 TALENT AGENCY,)
18 Respondent.)
19 _____)

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INTRODUCTION

On October 11, 1990, Petitioner TERRI L. POMPA filed a
Petition to Determine Controversy pursuant to Labor Code
§1700.44, alleging, inter alia, that Respondents ABE HERSHLER
and INN CONCERT INTERNATIONAL, INC., breached a contract with
Petitioner by failing to pay her and provide her with adequate
room and board during a concert tour of Southeast Asia. On
November 28, 1990, Respondents filed an Answer to the Petition,
denying Petitioner's allegations. A hearing was held on
July 30, 1991 in Van Nuys, California, before Miles E. Locker,
attorney for the Labor Commissioner. Petitioner was present and

1 was represented by attorney Alan R. Glasser. Respondent Abe
2 Hershler was present and was represented by attorney Mark R.
3 Schwartz. Testimony was received from the Petitioner, the
4 Respondent, and witnesses Dan Gore and Dessie Thigpen. Based
5 upon the testimony and evidence received, the Labor Commissioner
6 adopts the following determination of controversy.

7 FINDINGS OF FACT

8 1. Respondent Abe Hershler, an individual, is a
9 licensed talent agent, doing business as Inn Concert
10 International Talent Agency, which is listed with the Secretary
11 of State as a dissolved corporation.

12 2. On May 23, 1990, Petitioner and Respondent executed
13 a written contract, under which Terri Pompa, a singer and
14 Madonna impersonator, was to perform in a concert tour of
15 Southeast Asia beginning on June 3, 1990 with compensation at
16 \$1,200 per week plus room and board. The pre-printed contract
17 was delivered by Respondent to Petitioner for her signature.
18 Petitioner made no changes to this contract prior to signing.
19 The contract does not specify the duration of the tour or the
20 type of room and board to be provided. The contract does not
21 specify the rate of compensation Hershler was to receive in
22 consideration for procuring employment for the Petitioner.
23 Hershler admitted that he never submitted this contract form,
24 prior to its use, to the Labor Commissioner for approval. The
25 contract only concerns the concert tour of Southeast Asia; it
26 does not contain any provisions requiring Respondent to function
27 as a talent agent on behalf of Petitioner, to use all reasonable

1 efforts to procure other employment for Petitioner, or to
2 otherwise assist Petitioner in the development of her
3 professional career.

4 3. The contract designates Inn Concert International
5 as the "producer" of the concert tour; however, Mr. Hershler
6 testified that he did not produce the shows but rather, acted as
7 a talent agent procuring artists for the shows' promoters. The
8 contract does not name the purchasers who contracted with
9 Respondent to engage Petitioner's artistic services. Hershler
10 testified that the shows were produced by World Wide
11 Entertainment, Inc., a company based in the Philippines.

12 4. Prior to leaving for Southeast Asia, Petitioner
13 received promotional materials from Respondent which expressly
14 indicated that performances were scheduled through early August
15 1990. Petitioner's uncontradicted testimony establishes that
16 prior to executing the contract, Hershler advised her that the
17 tour was scheduled to continue for ten weeks.

18 5. Petitioner's uncontradicted testimony establishes
19 that Hershler agreed to pay for her round trip airfare from Los
20 Angeles to Japan, and for all travel costs in Southeast Asia, as
21 shows were scheduled for Japan, Thailand, Taiwan and the
22 Philippines. Petitioner flew from Los Angeles to Japan on
23 June 3, 1990, using a round trip ticket that had been provided
24 by Respondent. The return portion of the ticket was kept by
25 Dessie Thigpen, Hershler's girlfriend, business partner and road
26 manager for the tour. During the tour, the performers'
27 passports were under the custody and control of Ms. Thigpen or

1 Denny Ski, the president of World Wide Entertainment, Inc. Both
2 Thigpen and Ski traveled with the performers during the tour.

3 6. Petitioner remained with the tour for five weeks,
4 from June 3, 1990 until July 7, 1990, when she flew back to Los
5 Angeles from Manila using a one-way ticket that had been
6 purchased for her by a friend at a cost of \$878. The return
7 portion of the open-end round trip ticket which Respondent had
8 purchased for Petitioner, and which Respondent ultimately cashed
9 in after Petitioner had returned to the United States, was worth
10 \$656.50. Petitioner testified that she left halfway through the
11 tour because Respondent was delinquent in making the weekly
12 \$1,200 payments, had stopped providing her with meals or meal
13 money and had repeatedly failed to provide her with adequate
14 lodging.

15 7. Generally, two shows featuring Petitioner and two
16 other celebrity impersonators were scheduled for each night. In
17 addition to these shows at local night clubs, Petitioner and the
18 other performers were responsible for publicizing their daily
19 shows by participating in caravans around each city and by
20 appearing on local radio and television shows. During her five
21 weeks with the tour, Petitioner performed at every show that was
22 produced except for one of the two shows held on June 6. During
23 another show, about three weeks later, Petitioner collapsed
24 after finishing two songs out of an eight song set. On both of
25 these occasions, Petitioner was physically unable to perform,
26 the first time because of exhaustion from jet lag and next
27 because of a flu-like illness.

1 8. There is no credible evidence to support
2 Respondent's assertion that Petitioner's performances were
3 inadequate. Respondent's claim that Petitioner was overweight
4 and therefore unconvincing as a Madonna impersonator is belied
5 by the photographs of Petitioner, looking very much like
6 Madonna, while on tour. Celebrity impersonator Dan Gore, who
7 also performed on the tour, testified that he was unaware of any
8 complaints about Petitioner's performing abilities.
9 Respondent's assertion that Petitioner offended the audience
10 during a performance in Bangkok by allegedly making comments
11 about the size or genuineness of her breasts quite frankly lacks
12 any credence in view of Madonna's reputation for widely
13 publicized and uninhibited discussion of her sexuality. The
14 comments Petitioner was alleged to have made are entirely
15 appropriate for a performance striving to closely impersonate
16 Madonna's on-stage persona. Finally, Respondent's assertion
17 that Petitioner's illness resulted from her use of tranquilizers
18 is unsupported by any sort of competent medical opinion. Dessie
19 Thigpen testified that she observed Petitioner taking xanax, a
20 mild prescription tranquilizer, once before boarding the
21 airplane in Los Angeles and once more midway through the 12 hour
22 flight to Tokyo. These the only occasions when Ms. Thigpen
23 observed Petitioner using any type of drug. Ms. Thigpen's
24 conclusionary testimony notwithstanding, these observations
25 obviously do not establish "excessive" or "improper" use of
26 drugs. However, Petitioner's assertion that the illness she
27 suffered in the Philippines was caused by the inadequate food

1 and lodging provided to her is equally speculative and unproven.

2 9. Respondent failed to prove that Petitioner was at
3 fault or in any way responsible for the cancellation of any
4 scheduled shows. A memo faxed to Respondent, dated July 25,
5 1990 and signed by Denny Ski, asserts that four bookings in
6 Japan were lost the very first week of the tour because of the
7 promoter's unhappiness with Petitioner's supposedly overweight
8 appearance; that additional bookings were cancelled in the
9 Philippines because of Petitioner's illness; and finally, that
10 the tour sponsor for six shows in Thailand, Pepsi Cola,
11 cancelled the final four performances because of their anger
12 with the on-stage remarks Petitioner is alleged to have made
13 during the performance in Bangkok. The memo asserts that
14 Petitioner was responsible for over \$30,000 in lost bookings.
15 For several reasons, we find this hearsay evidence to be
16 patently unbelievable. To begin with, the timing of this memo
17 (written two weeks after Petitioner sent a demand letter to
18 Respondent alleging that he had breached the contract between
19 them) strongly suggests that it was solicited by Respondent from
20 his business partner in attempt to negate any liability owed
21 toward Petitioner. If indeed the producer lost four bookings
22 because of Petitioner at the very outset of the tour, there
23 would be no logical reason for failing to take any steps to find
24 a replacement Madonna impersonator until forced to do so by
25 Petitioner's return to the United States five weeks later.
26 Moreover, the fact that each show consisted of separate
27 performances by three different celebrity impersonators makes it

1 very unlikely that any one performer's unavailability due to
2 illness would result in cancellation of the entire show.
3 Finally, Denny Ski's assertions about Pepsi Cola's reaction to
4 Petitioner's performance in Bangkok are flatly contradicted by a
5 letter dated August 23, 1990 and signed by Yvonne Symons, an
6 executive with Pepsi-Cola (Thai) Trading Company, the sponsor of
7 the Bangkok performances. In this letter Symons states that she
8 attended each of the three shows that were produced in Thailand,
9 and found nothing offensive about Petitioner's performance.
10 Indeed, Symons states that Petitioner was a "fine performer with
11 an outstanding personality". Moreover, the letter indicates
12 that Pepsi Cola did not cancel any previously scheduled shows,
13 but simply decided that it could not book additional shows
14 because of a lack of time to properly promote any more shows.
15 Since the on-stage comments Petitioner is alleged to have made
16 could not, by any stretch of the imagination, be viewed as
17 offensive in the context of a Madonna impersonation performance,
18 we must credit Symons' account of the events in Thailand over
19 that provided by Respondent. In short, any cancellations which
20 did occur resulted from factors beyond Petitioner's control.

21 10. There is nothing in the contract between
22 Petitioner and Respondent which would indicate that Petitioner's
23 weekly compensation was based upon any set number of shows.
24 There is a line in the contract that states, "number of shows _____
25 per day _____ per week", however, these blanks were not filled
26 in. In contrast, another line in the contract states, "full
27 price agreed upon \$1,200 per week". Petitioner testified that

1 prior to leaving the tour, she was told by both Thigpen and
2 Hershler that as a result of the cancellation of planned shows,
3 she would henceforth be paid on a per-show basis, rather than on
4 a weekly basis. Petitioner testified that this was one of the
5 reasons she left the tour.

6 11. Petitioner received only \$2,800 compensation for
7 the 5 weeks she performed on tour. On May 29, 1990, she
8 received a \$1,000 advance, then was given \$200 on June 14, \$400
9 on June 21, and finally, a check in the amount of \$1,200 dated
10 June 26, 1990 but not received by Petitioner until July 6,
11 1990. Respondent testified that he did not pay her for her
12 final two weeks of performances (actually, she was not paid for
13 2 2/3 weeks of performances) because she failed to live up to
14 her contractual obligations by leaving mid-way through the tour,
15 thereby causing him and the producers to spend additional sums
16 to obtain the services of another Madonna impersonator for the
17 balance of the tour.

18 12. The evidence clearly establishes that the lodging
19 provided to Petitioner during the tour was grossly inadequate.
20 After arriving in Japan at the beginning of the tour, Petitioner
21 was provided with a room that was infested with flies.
22 Petitioner refused to stay at this location. Thigpen then
23 obtained new lodging for Petitioner in a small apartment where
24 the two women shared a bedroom. At this location, there was no
25 bed for the Petitioner, so she was forced to sleep on the floor
26 on a "puffy comforter". Later in the tour, Petitioner was
27 provided a room in a motel, but she had to share this room with

1 Dan Gore, notwithstanding the fact that she had requested and
2 expected to receive her own private room. Petitioner repeatedly
3 voiced complaints about these unacceptable accommodations to
4 Thigpen and to Hershler, to little or no avail. Records
5 submitted by Petitioner show that on June 11, 12 and 13, she
6 paid for her own room at the Royal Hotel in Osaka, at the rate
7 of 37,389 yen per day (room plus tax) equal to \$247.61 per day
8 (at the then exchange rate of 151 yen to the dollar), for a
9 total of \$742.83. Petitioner testified that she decided to pay
10 for her own hotel room at that point because of her disgust with
11 the lodging that had been provided to her. Petitioner's records
12 also show that on June 16 she stayed at the Holiday Inn in
13 Tokyo, at the rate of 18,128 yen per day for room and tax (equal
14 to \$120.05), but the bill is made out to Dan Gore and there is
15 no evidence showing that she paid for this hotel room.

16 13. The evidence also establishes that except for two
17 weeks during which Ms. Thigpen provided Petitioner with \$100 per
18 week of meal money, Respondent failed to provide Petitioner with
19 acceptable meals or any meal allowance. According to
20 Petitioner, bananas were the only item of food provided to her.
21 Respondent testified that the \$100 per week food allowance was
22 not required by the contract but was only provided while touring
23 the Philippines; and that in Japan and Thailand, Petitioner was
24 instead provided with one meal a day because, in Mr. Hershler's
25 words, "board means one meal a day." Records presented by
26 Petitioner establish that during the tour she spent substantial
27 sums of her own money for meals.

1 14. Petitioner alleged that some of the performance
2 venues seemed like "whorehouses" frequented by prostitutes and
3 their customers. Testimony from all witnesses establishes that
4 the performances were held in various nightclubs which were open
5 to members of the public upon payment of an admission fee.
6 There is no reason to doubt Petitioner's testimony that in a
7 conversation with a woman in the audience at one club, the woman
8 stated that she made money by "turning tricks" at the club; and
9 that at this same club, Petitioner was propositioned by some
10 male patrons. However, there is also no reason to doubt Dan
11 Gore's testimony that he never witnessed any acts of
12 solicitation at any of the clubs and that he had no knowledge as
13 to whether there were any prostitutes in the audience. Such
14 differing observations by these two performers compels the
15 conclusion that any unlawful solicitation that did occur was not
16 so visibly open so as to make it obvious to anyone, upon
17 reasonable inquiry, that the nightclub in question was a place
18 of prostitution or a place where the health, safety, or welfare
19 of the performers could be adversely affected.

20 15. Petitioner credibly testified that prior to her
21 return to the United States, she asked tour manager Dessie
22 Thigpen for the return portion of her round-trip ticket and that
23 Thigpen refused to provide the ticket, thereby forcing
24 Petitioner to obtain a more expensive one-way ticket. Thigpen
25 disputed this account, testifying that not only had Petitioner
26 never asked her for the return portion of the round-trip ticket,
27 but that after one of the tour's musicians told Thigpen that

1 Petitioner was thinking of leaving the tour and returning home,
2 Thigpen approached Petitioner and offered her the return ticket
3 for use at any time, an offer which Petitioner purportedly
4 refused. Thigpen's testimony in this area lacks any
5 credibility; it is simply inconceivable that Petitioner would
6 refuse to accept a pre-paid airline ticket for her return
7 flight.

8 16. However, Petitioner failed to prove her allegation
9 that Thigpen and the tour's producer withheld her passport to
10 prevent her from leaving the tour. There is no dispute that on
11 one occasion, probably a few days before Petitioner's return to
12 the United States, Petitioner did ask Thigpen for her passport
13 and Thigpen responded that she did not then know where the
14 passport was. Thigpen testified that she later discovered from
15 the tour's producer that all of the performers' passports had
16 been brought over to the Taiwan Embassy, presumably so that
17 entry visas could be obtained. Thigpen claims that she then
18 relayed this information to Ms. Pompa; Petitioner denies this.
19 Whether or not Petitioner was advised of the reason for the
20 unavailability of her passport, Petitioner admitted that shortly
21 before her return flight to the United States, she did receive
22 the passport, either from Ms. Thigpen or from the producer's
23 associate. In view of the relatively brief delay between
24 Petitioner's request and the delivery of her passport, it cannot
25 be concluded that Respondent improperly withheld the passport.

26 17. By letter to Respondent dated July 10, 1990,
27 Petitioner informed Respondent of her reasons for leaving the

1 tour. In this letter, Petitioner demanded \$2285 for unpaid
2 compensation covering the period she performed on tour plus \$878
3 for the cost of the return ticket. Respondent ignored this
4 demand. In her petition filed with the Labor Commissioner on
5 October 11, 1990, Petitioner requested approximately \$12,000,
6 asserting that she is entitled to payment of \$1,200 per week for
7 the entire ten weeks of the tour, less payments actually
8 received, plus compensation for her out-of-pocket expenses for
9 food, lodging and her return flight ticket. Petitioner also
10 seeks an additional unspecified amount in damages for emotional
11 distress plus an award of punitive damages.

12 CONCLUSIONS OF LAW

13 1. Respondent is a "talent agency" within the meaning
14 of Labor Code §1700.4(a). Petitioner is an "artist" within the
15 meaning of Labor Code §1700.4(b). The Labor Commissioner has
16 jurisdiction to determine this controversy pursuant to Labor
17 Code §1700.44(a).

18 2. By entering into a written contract with Petitioner
19 without first having secured the Labor Commissioner's approval
20 as to the form of contract, Respondent violated Labor Code
21 §1700.23, which provides that "every talent agency shall submit
22 to the Labor Commissioner a form or forms of contract to be
23 utilized by such talent agency in entering into written
24 contracts with artists for the employment of the services of
25 such talent agency by such artists, and secure the approval of
26 the Labor Commissioner thereof." The Labor Commissioner's
27 approval is required as a means of ensuring that the form of

1 contract is not unfair, unjust or oppressive to the artist.

2 3. The contract between Respondent and Petitioner
3 violates each of the provisions of Title 8, California Code of
4 Regulations, section 12001, which set forth the requisites of a
5 written contract between a talent agency and an artist. Such a
6 contract must include, inter alia, a provision containing a
7 blank space for the insertion of the compensation or rate of
8 compensation to be paid by the artist to the talent agency.
9 Presumably, the shows' producers paid Respondent for furnishing
10 Petitioner's services. Out of this money paid by the producers,
11 Respondent was to provide Petitioner with compensation of \$1,200
12 per week plus room, board and transportation. Respondent's fee
13 consists of the difference between the amount the producers were
14 to pay him for securing Petitioner's services, and the amounts
15 he was to pay to or on behalf of Petitioner. But because of
16 Respondent's failure to comply with the provisions of section
17 12001 of Title 8 of the Code of Regulations, we are unable to
18 determine the amount the producers agreed to pay for
19 Petitioner's services, or the amount Petitioner was being
20 charged for Respondent's fee.

21 4. Respondent's failure to specify his fee does not
22 appear to have been a mere oversight, rather, it is indicative
23 of a scheme to circumvent his fiduciary obligations as a talent
24 agent. The written contract, taken as a whole, is
25 characteristic of an agreement between a producer and an artist
26 rather than that of an artist and agent. Indeed, with respect
27 to this concert tour, Respondent essentially functioned as a

1 co-producer and not as an agent. Respondent's dual role
2 constitutes an impermissible conflict of interest militating
3 against effective representation of artists.

4 5. Labor Code §1700.25 requires a talent agent who
5 receives any payment of fees on behalf of an artist to
6 immediately deposit that amount in a trust fund account and to
7 disburse the funds to the artist, less the agent's commission,
8 within 15 days of receipt. Respondent clearly failed to
9 disburse funds which he had received on Petitioner's behalf. In
10 explaining his failure to fully pay Petitioner for at least the
11 five weeks she performed on the tour, Respondent asserted that
12 he had a right to recoup losses purportedly suffered by him and
13 the producers by withholding the Petitioner's earned fees. But
14 under §1700.25, once the producers made these payments to the
15 Respondent, he was under a statutory duty to hold them in trust
16 for Petitioner and to make timely disbursements to Petitioner.
17 Respondent's use of these funds to reimburse himself and the
18 producers for their purported losses constitutes a flagrant
19 violation of section 1700.25.

20 6. Under the contract, Petitioner was to receive "room
21 and board". As these terms were not defined in the contract, it
22 is now necessary to interpret "room" and "board". It would be
23 unreasonable to interpret "room" as anything but a private room
24 in a clean hotel with a bed and bathroom facilities. Anything
25 less than this should have been spelled out in the contract.
26 Because the contract was prepared by Respondent and presented in
27 finalized form to Petitioner for her signature, any ambiguities

1 must now be resolved against Respondent. Likewise, it would be
2 unreasonable to interpret "board" as anything but three
3 nutritious meals each day, or alternatively, a fixed food
4 allowance in an amount sufficient to enable Petitioner to
5 purchase these meals in restaurants. In determining the meaning
6 of a disputed contract provision, it is appropriate to look to
7 the parties' actions during the period subsequent to execution
8 of the contract and prior to the genesis of the controversy.
9 Here, Respondent's payment of a \$100 weekly food allowance to
10 Petitioner for a period of two weeks provides some evidence of
11 the parties' intentions. On that basis, we conclude that
12 Respondent was obligated to provide Petitioner with a minimum
13 food allowance of \$100 per week.

14 7. Respondent's failure to provide Petitioner with
15 adequate food and lodging, and to make timely payments of
16 Petitioner's compensation of \$1,200 per week, coupled with
17 Respondent's express repudiation of the contract by his
18 unequivocal refusal to continue to pay Petitioner her weekly
19 based compensation, constituted a material breach of contract
20 which, as a matter of law, excused Petitioner from further
21 performance on her part. Prior to Respondent's breach of
22 contract, Petitioner adequately fulfilled all of her contractual
23 obligations and consequently, she is entitled to full recovery
24 of the damages proximately caused by Respondent's breach. An
25 award of damages should, as nearly as possible, provide
26 Petitioner with the benefits she would have received had the
27 contract been fully performed and reimburse Petitioner for

1 expenses she incurred as a direct consequence of Respondent's
2 breach. These damages include the amount of compensation that
3 Petitioner would have earned for ten weeks of performances
4 (\$12,000) less the amount that had been paid to her (\$2,800),
5 leaving a balance of \$9,200 owed. Petitioner is also entitled
6 to recover \$800 for meal allowances, based upon the \$1,000 she
7 should have received for the ten-week tour less the \$200
8 provided. Finally, Petitioner is entitled to reimbursement of
9 the \$742.83 she spent for lodging in Osaka and the \$878 cost of
10 her return ticket to the United States. These damages for
11 breach of contract total \$11,620.83. Pursuant to Civil Code
12 §3287(a) and §3289(b), Petitioner is entitled to interest on
13 these damages at the rate of 10% per year from August 11, 1990
14 to the present, for an additional \$1,614.04.

15 8. Petitioner's demand letter dated July 10, 1990 did
16 not discharge Respondent from any obligations arising under the
17 terms of the parties' written contract. The demand letter
18 cannot possibly be construed as a novation of the contract, as
19 there was no expression of intent to extinguish any pre-existing
20 obligation. Respondent ignored the demand letter, so there was
21 no satisfaction and accord. Consequently, the demand letter
22 does not limit or cap the damages that are owed to Petitioner.

23 9. Punitive damages are never recoverable for breach
24 of contract, no matter how wilful or malicious, except where the
25 wrongful act is also a tort. The Labor Commissioner lacks
26 jurisdiction to award damages in tort, and therefore,
27 Petitioner's claim for unspecified damages for emotional

1 distress and for an award for punitive damages must be denied.

2 10. Petitioner failed to prove her allegation that
3 Respondent violated Labor Code §1700.33, which prohibits a
4 talent agency from sending or causing any artist to be sent to
5 "any place where the health, safety or welfare of the artist
6 could be adversely affected, the character of which place the
7 talent agency could have ascertained upon reasonable inquiry".

8 11. Labor Code §1700.21 provides that the Labor
9 Commissioner may revoke or suspend a talent agency's license
10 when the licensee has violated or failed to comply with any of
11 the provisions of the Talent Agency Act [Labor Code §1700, et
12 seq.]. However, Labor Code §1700.22 provides that a license
13 cannot be revoked or suspended without a hearing conducted in
14 accordance with the Administrative Procedures Act [Govt. Code
15 §11500, et seq.]. Thus, a license cannot be suspended or
16 revoked as the result of a hearing held pursuant to Labor Code
17 §1700.44 to determine a controversy between an artist and talent
18 agency. It is appropriate, however, to use this determination
19 to warn Respondent, in no uncertain terms, that his use of an
20 unapproved contract form which failed to specify his fee and his
21 failure to disburse funds received for Petitioner's services
22 constitute egregious violations of his obligations under the
23 Act. Illegal business practices of this nature could properly
24 result in license revocation.

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DETERMINATION

For the above-stated reasons, IT IS HEREBY ORDERED that Respondent pay Petitioner damages in the amount of \$11,620.83, plus interest in the amount of \$1,614.04, for a total of \$13,234.87.

DATED: 1/2/92

Miles E. Locker
MILES E. LOCKER, Attorney for
the Labor Commissioner

The above Determination is adopted by the Labor Commissioner in its entirety.

DATED: 1/2/92

Victoria Bradshaw
VICTORIA BRADSHAW
State Labor Commissioner

