BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

CARRIE A. ZANOLINE, ) No. TAC 26-04
                      ) Petitioner,
vs.                  )
LOOK MODEL AGENCY, a California corporation, ) DETERMINATION OF
                      ) CONTROVERSY
Respondent. )

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on January 19, 2005, in San Francisco, California, before the undersigned attorney for the Labor Commissioner, assigned to hear the matter. Petitioner, CARRIE A. ZANOLINE, appeared through her counsel, Sarah Wright; Respondent, LOOK MODEL AGENCY, appeared through its president, George Kollock. Based on the evidence presented at this hearing and on the other papers on file in this mater, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1. At all times relevant herein, LOOK MODEL AGENCY (hereinafter "LOOK," or Respondent) was licensed by the State
CARRIE A. ZANOLINE (hereinafter “ZANOLINE,” or Petitioner) is a fashion model, and was represented by LOOK from May 2001 to September 8, 2003, when LOOK received a letter from her terminating the relationship. During the period of representation, LOOK obtained many modeling jobs for ZANOLINE.

LOOK and ZANOLINE never entered into a written contract. However, ZANOLINE understood that LOOK charged a 20% commission on all of her earnings in connection with modeling jobs obtained by LOOK.

On April 8, 1985, the Labor Commissioner approved LOOK’s schedule of fees, under which “the maximum rate of fees due this talent agency for services rendered to the artist is 20% of the total earnings paid to the artist managed by this talent agency.” This schedule of fees remained in effect at all times relevant herein.

On September 5, 2003, LOOK issued a check to ZANOLINE in the amount of $2,640.00 in payment for a modeling assignment. Three days later, LOOK received written notification from ZANOLINE terminating representation. LOOK immediately placed a stop payment on this check, without any sort of notice to ZANOLINE. Ultimately, by letter dated September 18, 2003, ZANOLINE’s bank notified her that LOOK had stopped payment on this check. Meanwhile, ZANOLINE had written several checks against her own account that did not clear due to insufficient funds as a result of not having the funds from LOOK’s check in her account. As a result of checks that ZANOLINE issued in
reliance on the check that LOOK had stopped payment on, ZANOLINE incurred the following bank charges during the period from September 17 to October 6, 2003: $27 per check for NSF return check fees for a total of 15 NSF checks, six separate overdraft fees of $30 each, three separate overdraft charges of $5 each, a $5 check return fee, and $4 in charges for phone banking calls to discuss the problem, for a total of $609.00.

5. On September 22, 2003, LOOK provided ZANOLINE with another check in the amount of $2,640.00, replacing the check on which payment had been stopped. According to LOOK’s president, George Kollock, payment had been stopped on the previous check because it was an advance of modeling fees for a job for which the customer had not yet paid LOOK, and stopping payment was the only way LOOK could protect itself if the customer were to fail to pay LOOK for the work ZANOLINE had performed, in that since ZANOLINE had terminated the representation agreement, there would be no additional jobs in the future against which LOOK could credit the advance. Kollock testified that as soon as LOOK received the payment from this customer, LOOK issued the replacement check to ZANOLINE.

6. LOOK’s normal practice is to issue checks to the models it represents, based on amounts received from customers less LOOK’s 20% commission on such earnings, twice a month, on the 5th and the 20th day of each month. Kollock testified that LOOK’s standard practice is to pay the model her modeling earnings (less LOOK’s commission) within 30 days of receipt of these payments from the customer of the modeling services, and that LOOK takes appropriate steps to collect payment from any customer who fails
to make prompt payment for those services. Records presented at
the hearing show that there were some instances where modeling
fees were paid to ZANOLINE four or five months after completing a
modeling job, but no evidence was presented as to when the
customers actually paid LOOK for these modeling services.

7. LOOK issued advances to ZANOLINE, and other models upon
request, for work performed but for which LOOK had not yet
received payment. LOOK charged an additional 5% commission for
such advances. This 5% commission had never been approved by the
Labor Commissioner in a schedule of fees. There were many
occasions in which ZANOLINE requested, and received, an advance
from LOOK on her modeling earnings. Neither party at the hearing
presented records showing the exact number of times that such
advances were made, the amounts advanced, or the amounts
collected by LOOK based on its 5% commission charged in
connection with these advances.

8. As a supplement to standard modeling fees, LOOK’s models
receive “travel charges” for bookings outside San Francisco, in
amounts that vary based on distance from San Francisco. For
example, models earn a $35 supplement for work performed in
Oakland, and a $150 supplement for work performed in Monterey.
LOOK treated these travel charges the same as standard modeling
fees, deducting a 20% commission on the travel charges as it does
with all other modeling earnings. At some point during the
period in which LOOK represented ZANOLINE, someone on LOOK’s
staff told ZANOLINE that the travel charges were commissionable.

9. There are two specific modeling jobs for which ZANOLINE
only received partial pay from LOOK, by check dated August 20,
2003. First, LOOK still owes ZANOLINE $15 (less its commission, leaving $12 owed) in connection with a modeling job on May 28, 2003 for Clotrain Conui, for which LOOK previously paid ZANOLINE $210, less its commission. Also, LOOK still owes ZANOLINE $25 (less its commission, leaving $20 owed) in connection with a modeling job on June 14, 2003 for Nordstrom, for which LOOK previously paid ZANOLINE $325, less its commission. The $12 shortfall for the first job is inexplicable, and appears to have been the result of a clerical error. The $20 shortfall for the second job is tied to a dispute over whether ZANOLINE was eligible, on that job, for a premium for work performed prior to 9AM. A rate sheet published by LOOK and distributed to all of its models, showing standard fees charged to customers, indicates that a $25 premium is charged for modeling work performed prior to 9AM. ZANOLINE testified that this job was performed prior to 9AM, and that she therefore was entitled to this premium. Although Kollock testified that not every early morning job included this premium, LOOK failed to rebut the inference that the premium was charged, or but for LOOK's negligence would have been charged to Nordstrom, and that it should have been paid, less LOOK's commission, to ZANOLINE.

10. ZANOLINE filed this petition on August 4, 2004, seeking a determination that the following amounts are owed: (1) interest for the period from September 11, 2003 (the date LOOK stopped payment on the $2,640.00) to September 22, 2003 (the date LOOK issued a replacement check), for a total of eleven days interest at 10% per annum on the $2,640.00, to wit, $7.96; (2) damages resulting from stopping payment on this check, based on the
various bank charges that resulted therefrom, plus interest on those bank charges from September 2003 to the present; (3) additional damages resulting from alleged severe emotional distress occasioned by the stop payment order; (4) payment of amounts still owed in connection with the two modeling jobs, performed on May 28, 2003 and June 14, 2003, for which ZANOLINE received partial payment from LOOK on August 20, 2003, with the underpayments consisting of $12 and $20, respectively, for a total of $32 in underpayments; (5) reimbursement for all commissions paid by ZANOLINE for the travel expenses that she earned in connection with jobs outside of San Francisco; and (6) reimbursement of the additional 5% commission that LOOK charged ZANOLINE for any advances, with the amount to be determined by ordering LOOK to provide an accounting of all such sums deducted.

11. LOOK filed an answer on October 7, 2004, denying that any amounts are owed.

LEGAL ANALYSIS

1. Labor Code §1700.4(b) includes “models” within the definition of “artists” for purposes of the Talent Agencies Act (Labor Code §§1700-1700.47). Petitioner is therefore an “artist” within the meaning of Labor Code section 1700.4(b).

2. Labor Code §1700.4(a) defines a “talent agency” as any person or corporation “who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist.” Respondent is therefore a “talent agency” within the meaning of Labor Code section 1700.4(a).
3. The Labor Commissioner has jurisdiction over this controversy pursuant to Labor Code §1700.44(a).

4. Labor Code §1700.44(c) sets out a one year statute of limitations for proceedings brought pursuant to the Talent Agencies Act. This limitations provision precludes Petitioner from recovering for amounts owed as to "any violation which is alleged to have occurred" prior to August 4, 2003. A talent agency's failure to pay an artist for work performed does not ripen into a violation of the Act until the agency unlawfully retains funds that it collected from the third party purchaser of the artist's services (or until the agency fails to take reasonable steps to timely collect such amounts on behalf of the artist). In other words, the violation does not take place on the date the work was performed, but rather, on the date that the agency should have paid the artist for that work. Labor Code §1700.25 provides that a talent agency that receives any payment of funds on behalf of an artist shall disburse such funds to the artist, less the agency's commission, within 30 days after receipt. With these principles in mind, we find that petitioner's claim is timely as to all amounts claimed, except for reimbursement of any commissions that were paid by ZANOLINE, or deducted from payments made by LOOK to ZANOLINE, prior to August 4, 2003.

5. LOOK had little if any justification for stopping payment on the September 5, 2003 check it had issued to ZANOLINE, and absolutely no justification for failing to immediately notify her of its action in stopping payment. LOOK violated its fiduciary obligations to ZANOLINE by acting in this manner, and
was directly responsible for the ensuing $609 in bank fees incurred by ZANOLINE. Even if this check was an advance issued prior to payment to LOOK from the third party customer, LOOK had no authorization to stop payment. LOOK is therefore obligated to reimburse ZANOLINE for the bank fees resulting from the stop payment on this check, in the amount $609, plus interest at 10% per annum on these fees from September 25, 2003 to the present, in the amount of $121.80, plus interest owed for the eleven days between the date of the stop payment until the issuance of the replacement check, for an additional $7.96 in interest.

6. Emotional distress damages are not awardable under the Talent Agencies Act, and the Labor Commissioner has no jurisdiction to rule on this aspect of ZANOLINE’s claim.

7. ZANOLINE met her burden of proof with respect to her claim that LOOK underpaid her by $32 for work that she performed on May 28 and June 14, 2003, for which she was partially paid on August 20, 2003. She is therefore entitled to payment of this $32 underpayment, plus interest at 10% per annum, in the amount of $6.66.

8. ZANOLINE is not entitled to any reimbursement of the 20% commissions taken on travel expenses, as travel expenses were simply one component of ZANOLINE’s modeling earnings, and LOOK had the Labor Commissioner’s approval to collect 20% commissions on all modeling earnings.

9. ZANOLINE is entitled to reimbursement of the additional 5% commission that LOOK charged for advances (as to such commissions that she paid to LOOK or that LOOK deducted from her earnings after August 4, 2003), as this additional commission had
never been filed with and approved by the Labor Commissioner, as required under Labor Code §§1700.23 and 1700.24. Consequently, LOOK was not entitled to charge this additional commission to ZANOLINE, or to any of the other models it represents. In order to determine the amount owed to ZANOLINE as reimbursement for these commissions, LOOK is obligated to provide ZANOLINE and the Labor Commissioner with an accounting of all such amounts that it collected from ZANOLINE as commissions (either in the form of direct payments from ZANOLINE or deductions from amounts that LOOK paid to ZANOLINE) from August 4, 2003 to the present.

10. Although it is beyond the scope of this petitioner’s claim, it is appropriate for the Labor Commissioner, as the official charged with licensing oversight over talent agencies, to now hold, in no uncertain terms, that we cannot permit a talent agency to charge the artists it represents any fees that have not been approved or authorized by the Labor Commissioner. We therefore expect the Respondent to immediately cease and desist from charging any models any commissions or other fees that have not been approved or authorized by the Labor Commissioner as required under Labor Code §§1700.23 and 1700.24. We take this occasion to warn the Respondent, in no uncertain terms, that its license to operate as a talent agency may be subject to revocation, and any application for renewal of its license may be subject to denial, pursuant to Labor Code §§1700.08 and 1700.21, unless it immediately discontinues the unlawful practice of collecting fees that have not been approved or authorized by the Labor Commissioner (including but not limited to the practice of collecting “extra commissions” for
advances to models), and unless it provides the Labor
Commissioner with an accounting of any such commissions charged
to models within the one year period prior to the service of this
decision, and unless it takes all reasonable steps to reimburse
all such models for such commissions collected, with proof of
payment to be provided to the Labor Commissioner.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that
Respondent LOOK MODEL AGENCY shall take the following steps
within 15 days of the date this decision is served:

1) Pay $777.32 to petitioner CARRIE A. ZANOLINE (consisting
of reimbursement for $609 in bank fees, $32 in underpayments for
two modeling jobs, and $136.32 interest for the bank fees,
underpayments, and unlawful withholding of payments), with proof
of payment to be provided to the Labor Commissioner;

2) Provide ZANOLINE and the Labor Commissioner with an
accounting of all amounts that it collected from ZANOLINE (in the
form of direct payments from ZANOLINE and withholdings from
payments made by LOOK to ZANOLINE) as 5% “extra commissions” for
advances, and any other commissions collected by LOOK that were
not authorized by the Labor Commissioner, at any time from August
4, 2003 to the present, and reimburse ZANOLINE for all such
commissions, with interest at 10% per annum from the date any
such commission was collected to the present.

Dated: 10/12/05

MILES E. LOCKER
Attorney for the Labor Commissioner

TAC 26-04 Decision 10
ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 11/20/05

DONNA M. DELL
State Labor Commissioner