

1 STATE OF CALIFORNIA
2 DEPARTMENT OF INDUSTRIAL RELATIONS
3 DIVISION OF LABOR STANDARDS ENFORCEMENT
4 William A. Reich, Esq. (SBN 51397)
5 1901 N. Rice Avenue, Suite 200
6 Oxnard, California 93030
7 Telephone No. (805) 973-1244
8 Facsimile No. (805) 973-1251

9 Special Hearing Officer for the Labor Commissioner

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

JAMES ANDERSON,

Petitioner,

vs.

NETWORK INTERNATIONAL MODEL &
TALENT,

Respondent.

CASE NO.: TAC-29080

DETERMINATION OF
CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on September 27, 2013 in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner JAMES ANDERSON (hereinafter "Petitioner") appeared personally and represented himself. Respondent NETWORK INTERNATIONAL MODEL & TALENT (hereinafter "Respondent") appeared by and through its authorized agents Patrick Simpson and Paul Utteu, who also represented the Respondent at the hearing.

Based on the evidence presented at the hearing and on the other papers on file in this matter, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1
2
3 1. Respondent operated a licensed talent agency under its own name.
4

5 2. Petitioner is a model and actor. On January 23, 2012, Petitioner engaged
6 Respondent to act as his agent and represent him in obtaining work in the field of
7 modeling and also in films, television, radio, the theater, and other fields of entertainment.
8

9 3. The parties cemented their relationship by entering into a written
10 representation agreement. The agreement provided that Respondent would be
11 Petitioner's exclusive representative for a period of two years. Under the terms of the
12 agreement, Petitioner agreed to pay Respondent a 20% commission or fee for all
13 engagements entered into to secure Petitioner's services as an artist during the two-year
14 period of representation.
15

16 4. At the time the representation agreement was entered into, Respondent
17 arranged for Petitioner to enter into an agreement with a photographer, Beverly Hills
18 Photo Studio, whereby a photo session was set up to generate a portfolio of photographs,
19 including headshots and full body images, to be used in marketing Petitioner's services as
20 a model and actor. The original cost for this portfolio of photos was \$560.00, although
21 the cost later increased to \$660.00 because Petitioner rescheduled the date of the photo
22 session.
23

24 5. At the hearing, Petitioner testified that when he received the photos he was
25 very dissatisfied with the quality of the product, considering the photos unsuitable for
26 their intended purpose of securing him engagements as a model or actor. Nevertheless,
27 Petitioner selected 10 photos to be used in promoting him as a model and actor; there is,
28

1 however, a dispute as to whether he received only 7 photos or all 10.
2

3 6. After becoming Petitioner's agent, Respondent submitted Petitioner for a
4 project involving Transamerica Insurance. The submission—which utilized one of the
5 photos selected by Petitioner from those provided by Beverly Hills Photo Studio—
6 resulted in an audition, and then in Petitioner being hired to perform in a Transamerica
7 commercial. The pay for the project was \$500.00, with Petitioner entitled to \$400.00
8 after deduction of the 20% representation fee payable to Respondent. Although Petitioner
9 experienced some minor delays and difficulties in getting his money from Respondent, he
10 did receive the \$400.00 that was due him.
11

12 7. Respondent proceeded to submit Petitioner for a number of other projects,
13 in each instance utilizing one of the photographs selected by Petitioner from the group of
14 photographs that had been provided to him. Many of these submissions resulted in
15 Petitioner being called in for an audition, although ultimately he was not hired for any of
16 these projects.
17

18 8. In May, 2012, while conducting his own independent online search for
19 engagements, Petitioner learned of a project being undertaken by USAA. The project
20 provided that the artist would be paid \$1,000.00, plus an additional 20% if the artist had
21 been submitted by an agent. Petitioner submitted himself to the project, acting on his own
22 without involving Respondent. The submission resulted in Petitioner being auditioned
23 and then hired for the project. However, because the agency contract required that a
24 representation fee be paid to Respondent even though it had not contributed to securing
25 the engagement, Petitioner advised the operator of the project to send his pay to the
26 Respondent.
27
28

1 9. The payment for Petitioner’s work on the USAA project was made around
2 June 26, 2012 by a company known as Team Services, which acted on behalf of its client
3 3 Star Productions. A check made payable to Petitioner for his services, was sent by
4 Team Services to Respondent. Treating Petitioner as an employee, Team Services
5 calculated the amount due as gross pay of \$1,000.00 less withholding of \$274.95 for
6 Federal Income Tax, Social Security, Medicare, State Income Tax, and State Disability.
7 The net check to plaintiff was for \$725.05.

8
9 10. After receiving the \$725.05 check, Respondent deducted \$200.00 for its
10 20% agent’s fee, and then on July 18, 2012 remitted its own check to Petitioner in the
11 amount of \$525.05. When Petitioner attempted to negotiate the check, it was rejected and
12 then dishonored by the bank on which it was drawn. Respondent was notified of the
13 dishonor, but did not generate a replacement check until January 15, 2013. That
14 replacement was a cashier check for \$525.05, which contained the following statement:
15 “PAID IN FULL USAA HEAD PRINT.” After receiving the cashier’s check, Petitioner
16 declined to negotiate it—being unwilling to submit to the condition that negotiation of the
17 check would constitute a waiver of any right Petitioner might have to pursue a claim
18 based on the USAA engagement.

19
20 11. Respondent’s explanation for the bounced check was provided by its
21 representative Patrick Simpson. According to Mr. Simpson, Respondent’s bank,
22 Washington Mutual, had been taken over and absorbed by CHASE bank, and Respondent
23 had inadvertently paid Petitioner with a check from the old Washington Mutual account,
24 which was no longer good. Mr. Simpson also provided Respondent’s explanation for
25 why the replacement cashier’s check was not issued until January 15, 2013. Mr. Simpson
26 stated that during the subject period Petitioner was constantly traveling, that Respondent
27 had no contact information for Petitioner, and that consequently Respondent was unable
28

1 to get a hold of Petitioner. Petitioner vigorously disputed these assertions. No
2 explanation was provided for why the condition of acknowledging payment in full was
3 added to the cashier's check.

4
5 12. As of the date of the hearing, the cashier's check had still not been
6 negotiated or cashed.

7
8 **LEGAL ANALYSIS**

9
10 1. Respondent operated as a licensed talent agency.

11
12 2. Petitioner was an artist who was represented by Respondent.

13
14 3. This case is within the jurisdiction of the Labor Commissioner under Labor
15 Code section 1700.44, subdivision (a).

16
17 4. Petitioner's claims against Respondent can be grouped into three areas of
18 dispute: (a) whether Petitioner is entitled to recoup the costs he incurred for the
19 photographs, (b) whether Petitioner was properly paid for the USAA project and, if not,
20 whether he is entitled to any monetary relief, and (c) whether Respondent's performance
21 under the representation agreement was deficient, thereby excusing further performance
22 on the part of Petitioner. Each of these areas will be addressed in turn.

23
24 **Costs Of The Photographs**

25
26 5. Petitioner contends that he is entitled to recover the \$660.00 he expended
27
28

1 for the photographs he ordered at the direction of Respondent.

2
3 6. As a threshold matter, it should be noted Labor Code section 1700.40,
4 subdivision (b) precludes a talent agency from referring an artist to a photography
5 business in which the talent agency has a financial interest. Likewise, section 1700.40,
6 subdivision (c) prohibits a talent agency from accepting a referral fee or similar
7 compensation from a photography business to which a represented artist is referred. In
8 the present case, however, there was no evidence that Respondent had a financial interest
9 in Beverly Hills Photo Studio, nor was there any evidence that Beverly Hills Photo Studio
10 paid Respondent a fee or other compensation for referring Petitioner. Consequently,
11 these statutory provisions cannot provide the basis for Petitioner recovering the costs of
12 the photos.

13
14 7. Petitioner's primary argument for recoupment is that the photos were of
15 such poor quality and so unsuitable for their intended purpose that he did not receive what
16 he bargained for and therefore should be reimbursed by Respondent for the costs he
17 expended. The evidence presented, however, fails to establish that the photos were of
18 poor quality and unsuitable for their intended purpose. Apart from Petitioner's subjective
19 opinion, which is found to be unpersuasive, there is no evidence that the photos were of
20 poor quality. Moreover, it is apparent that the photographs selected by Petitioner served
21 their intended purpose. In each instance that Respondent submitted Petitioner for a
22 project, it utilized a photo drawn from Petitioner's selection. These submissions resulted
23 in Petitioner being called in for a number of auditions, one of which culminated in
24 Petitioner being hired for the project. In other words, the photos fulfilled their function of
25 eliciting audition invitations for Petitioner from those with an interest in securing the
26 services of an artist. Accordingly, the photos cannot be considered deficient or unsuitable
27 for their intended purpose and Petitioner's contrary assertion cannot provide the basis for
28

1 recovering the costs of the photos from Respondent.

2
3 Proper Payment for USAA Project
4

5 8. It is undisputed, that a minimum—after deducting withholdings and
6 Respondent’s agency fee—Petitioner was entitled to a net payment of \$525.05 on the
7 USAA project. As of the date of the hearing, however, that amount still had not been
8 paid. The original check had been dishonored because it had been written on a defunct
9 account, and the replacement check had justifiably not been cashed because it had
10 conditioned negotiability on a waiver of Petitioner’s right to claim more money was due
11 to him on the USAA project. At the hearing, Respondent stipulated on the record that
12 Petitioner could proceed to cash the replacement cashier’s check and that the condition of
13 waiver on the check was withdrawn, so that Petitioner’s negotiation of the check would
14 not bar Petitioner from asserting any other claims he might have for money due on the
15 USAA project. Petitioner was directed to cash the check following the hearing and to
16 notify the Labor Commissioner after receiving payment. Petitioner has since notified the
17 Labor Commissioner that the check has been negotiated and that he has now been paid
18 the \$525.05.
19

20 9. Petitioner questions the \$274.95 that was withheld from the \$1,000.00
21 payable to Petitioner on the USAA project, an amount classified by Respondent as
22 “taxes.” The evidence at the hearing established that this amount was withheld not by
23 Respondent but by those in charge of the USAA project. The producer on the project was
24 3 Star Productions, and the company handling the payroll was Team Services, 901 W.
25 Alameda Avenue, Suite 100, Burbank, California 91506-2801 (Tel. No. 818-558-3261).
26 In paying Petitioner for the USAA project, Team Services, treated Petitioner as an
27 employee and withheld the following from his wages: \$163.32 in federal income taxes,
28

1 \$42.00 in social security taxes, \$14.50 for Medicare, \$45.13 in state income taxes, and
2 \$10.00 in state disability insurance. Team Services should have issued a W-2 to
3 Petitioner, and the amounts withheld for federal and state income taxes would have been
4 a credit against Petitioner's income tax liability as reported on his federal and state
5 income tax returns. Petitioner would be entitled to a refund of any excess withholdings.
6 As the foregoing makes clear, however, the \$274.95 in tax and related withholdings is not
7 attributable to any impropriety on the part of Respondent.

8
9 10. Petitioner also raises a question regarding the additional 20% that was
10 payable on the USAA project if the hired artist was submitted by an agent. Petitioner
11 suggests that, even though initially he submitted himself for the project, the additional
12 20% might have been paid because Respondent was identified as Petitioner's agent for
13 purposes of collecting the money due for Petitioner's services on the project. At the
14 hearing, the evidence showed that those in charge of the USAA project made a single
15 gross payment of \$1,000.00 for the services rendered by Petitioner, issuing a net check of
16 \$725.05 after deducting \$274.95 in tax and related withholdings. There was no evidence
17 of an additional 20% being paid to Respondent. Absent such evidence, there is no basis
18 for inferring or concluding that Respondent withheld any additional monies due Petitioner
19 in connection with the USAA project.

20
21 11. Labor Code section 1700.25, subdivision (a) provides that funds collected
22 by a talent agent on behalf of an artist must be disbursed to the artist within 30 days of
23 receipt. Subdivision (e)(2) of that section provides that if the failure of a talent agent to
24 disburse funds to an artist within 30 days is "willful," the Labor Commissioner can award
25 the artist interest on the money withheld at the rate of 10% per annum. In the present case,
26 the money collected on behalf of Petitioner around June 26, 2012 should have been
27 disbursed to Petitioner by July 26, 2012. However, Petitioner did not receive free and
28

1 clear access to that money until September 27, 2013, the date of the hearing in this case.
2 This was a delay of almost 14 months.

3
4 It is well established that the word “willful” as used in this statutory context—and
5 in analogous statutory contexts—merely means an intentional and voluntary failure to
6 perform an act that the law requires. There is no need to show malice or an intent to
7 defraud. (*David v. Morris* (1940) 37 Cal.App.2d 269.)

8
9 In the present case, Respondent contends that its failure to timely disburse the
10 funds due Petitioner was excusable and not willful. This contention is rejected. Here, the
11 initial delay in payment was occasioned by Respondent issuing an invalid check on a
12 defunct account. Respondent argues that this was an error triggered by its old bank being
13 replaced by a new bank and by the check writer accidentally picking up and using checks
14 from its old account. From a business that must regularly pay artists moneys that have
15 been collected on their behalf, this explanation of purported clumsiness is neither
16 plausible nor credible. Furthermore, and more significantly, this initial failure was
17 compounded by the issuance of a replacement cashier’s check that could not be cashed by
18 Petitioner without waiving the right to claim that he was due more on the USAA project.
19 The \$525.05 being remitted to Petitioner was indisputably owed. Imposing a waiver of
20 rights requirement as a condition to receiving these unconditionally owed funds was
21 absolutely improper and impermissible. Petitioner justifiably refrained from cashing the
22 check until the hearing in this case. Respondent did not provide Petitioner with a
23 replacement check until January 15, 2013. Its explanation that it was unable to locate
24 Petitioner earlier because Petitioner was always traveling is rejected as lacking in
25 credibility. Moreover, as has already been discussed, the replacement check that
26 Respondent provided contained an improper condition and therefore was not a valid
27 payment at that time. Accordingly, Respondent’s prolonged failure to disburse the funds
28

1 owed to Petitioner is found to be willful within the meaning of Labor Code section
2 1700.25, subdivision (e)(2).

3
4 Petitioner is therefore entitled to recover interest on the sum of \$525.05 at 10% per
5 annum from July 26, 2012 to September 17, 2013. The interest owed to Petitioner is
6 \$60.13.

7
8 Deficient Performance by Respondent

9
10 12. Petitioner contends that, because of the cumulative deficiencies that he
11 ascribes to Respondent's performance as a talent agent, Petitioner should be excused from
12 further performance under the representation agreement with respect to any engagements
13 obtained by or for Petitioner subsequent to the USAA project. At the hearing,
14 Respondent indicated it was agreeable to releasing Petitioner from the agreement with
15 respect to any post USAA project engagements obtained by or for Petitioner.
16 Accordingly, pursuant to stipulation of the parties, it was agreed that the hearing officer
17 would declare the representation agreement extinguished with respect to any engagements
18 obtained by or for Petitioner subsequent to June 26, 2012 and with respect to the further
19 representation of Petitioner by Respondent after that date.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that Respondent NETWORK INTERNATIONAL MODEL & TALENT shall pay to Petitioner JAMES ANDERSON the sum of \$60.13.

IT IS HEREBY FURTHER ORDERED that the agreement between Petitioner and Respondent is declared to be extinguished and of no force or effect with respect to any engagements obtained by or for Petitioner subsequent to June 26, 2012 and with respect to the representation of Petitioner by Respondent after that date.

Dated: *2-4-2015*



William A. Reich
Special Hearing Officer

Adopted:

Dated: *2-4-2015*



Julie A. Su
State Labor Commissioner