

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

11	JOHNNA XAVIER, an individual on behalf)	No. TAC 2-02
12	of JORDAN XAVIER and JENNY XAVIER,)
13	Minors,)
14	Petitioners,)
15	vs.)
16	MITCHELL AGENCY, INC.,)
17	Respondents.)

18 INTRODUCTION

19 The above-captioned petition was filed on January 17, 2002
20 alleging that MITCHELL AGENCY INC., failed to pay petitioners'
21 wages earned in connection with modeling services performed while
22 represented by the respondent in violation of Labor Code
23 §1700.25(a). Respondent, through its attorney James A. Wattson,
24 filed a Response to the Petition to Determine Controversy on
25 February 4, 2002.

26 A hearing was scheduled before the undersigned attorney,
27 specially designated by the Labor Commissioner to hear this
28 matter. The hearing commenced on August 15, 2002 in San
Francisco, California. Johnna Xavier appeared in propria persona
and as *guardian ad litem* for her minor daughters Jordan Xavier

1 and Jenny Xavier. Respondent was represented by attorney James
2 A. Wattson. The hearing record was held open for twenty (20
3 days), an initial ten (10) days for the Petitioner to submit
4 documentary evidence regarding the date of receipt of previous
5 payments from the Respondent and an additional ten (10 days) for
6 the Respondent to submit any written response to the evidence
7 submitted by the Petitioner. Both parties submitted written
8 evidence to the hearing officer within the deadlines provided.
9 Due consideration having been given to the testimony, documentary
10 evidence and arguments presented, the Labor Commissioner adopts
11 the following determination of controversy.

12
13 **FINDINGS OF FACT**
14

15 1. Respondent MITCHELL AGENCY, INC. was duly licensed as a
16 talent agency by the State of California during 1999 and through
17 September 17, 2001. Respondent has not been licensed as a talent
18 agency by the State of California since September 18, 2001.

19 2. Petitioner JOHNNA XAVIER's minor daughters JORDAN XAVIER
20 and JOHNNA XAVIER were artists who were represented by Respondent
21 for photo shoots for Macy's, Mervyn's and the GAP in 1999 and
22 2000.

23 3. Jordan Xavier was paid by Respondent on March 31, 2000
24 for Mervyn's photo shoots she had done on December 1, 1999 and
25 January 6, 2000 respectively.

26 4. Jordan Xavier was paid on December 10, 1999 for a Macy's
27 photo shoot booked on August 4, 1999.

28 5. Petitioner is seeking payment for the following seven

1 invoices which remain unpaid despite demand:

2	Date Worked	Subject of Shoot	Amount	Store
3	1. 5/25/00	Jenny	\$100.00	Macy's
4	2. 7/5/00	Jenny	\$100.00	Macy's
5	3. 7/31/00	Jenny	\$ 75.00	Mervyn's
6	4. 9/14/00	Jenny	\$150.00	GAP
7	5. 9/29/00	Jordan	\$ 37.50	Mervyn's
8	6. 10/4/00	Jenny	\$ 37.50	Mervyn's
9	7. 10/16/00	Jordan	<u>\$ 50.00</u>	Macy's
10			TOTAL	\$550.00

11 6. Neither party introduced evidence about whether or when
12 Respondent received payment on behalf of minor petitioners on any
13 of these seven invoices.

14 CONCLUSIONS OF LAW

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16 Labor Code § 1700.44(c) requires that a Petition to
17 Determine Controversy be filed within one year of the alleged
18 violation(s). Respondent alleges that the violation occurs when
19 the model has not been paid 30 days after the date the services
20 are performed. However the "net 30 days" on the invoice is the
21 due date for the store to pay the agency, not the date the
22 payment is due from the agency to the artist.

23 Labor Code §1700.25 requires a talent agency to pay funds
24 received on behalf of an artist to the artist, less the agent's
25 commission, within 30 days of receipt. To determine the due date
26 under this code section, it is necessary to know when payment is
27 received by the agency. This information was not introduced by
28 either party. In fact the records reportedly no longer exist,

1 since the talent agency is no longer operating in California.

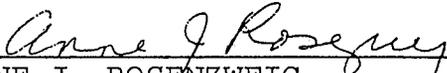
2 As a talent agency, Respondent MITCHELL AGENCY, INC. had a
3 fiduciary duty to Petitioners to obtain timely payment from the
4 stores where Petitioners performed their services. Because of
5 this fiduciary duty and the fact that Respondent introduced no
6 evidence that payment was not received from the stores, it may be
7 presumed that such payments were received by the agency.

8 It is clear from the record that MITCHELL AGENCY, INC.
9 regularly paid invoices much more than 30 days after the services
10 were performed: the only three invoices which Mitchell Agency
11 Inc. has paid to Petitioners were paid 128 days, 85 days, and 108
12 days after the services were performed, respectively. No payment
13 whatsoever has been received to date on the remaining seven
14 invoices, which are the subject of the Petition to Determine
15 Controversy in this case.

16 Since Petitioner had previously waited as long as 128 days
17 for payment of an invoice, it was reasonable for her not to
18 question a delay in payment nor to consider a payment delinquent
19 until at least that period of time had passed since the services
20 were performed. The violations will therefore be deemed to have
21 occurred 128 days after each modeling job. The one year period
22 of limitations provided in Labor Code § 1700.44 (c) accordingly
23 bars all modeling jobs performed on or before September 11, 2000.
24 Therefor, the three invoices for modeling jobs performed by Jenny
25 on May 25, 2000 in the amount of \$100.00, July 5, 2000 in the
26 amount of \$100.00, and July 31, 2000 in the amount of \$75.00,
27 totaling a sum of \$275.00, are barred by the statute of
28 limitations.

1 The Petition to Determine Controversy is deemed timely for
2 the remaining four invoices. Respondent is determined to be
3 liable to Petitioners for payment of these invoices. Respondent
4 Mitchell Agency Inc. shall pay Petitioners within 10 days of
5 receipt of this Determination of Controversy the sum of \$275.00
6 in unpaid earnings representing payment for the following
7 modeling jobs: September 14, 2000 by Jenny for the GAP in the
8 amount of \$150.00, September 29, 2000 by Jordan for Mervyn's in
9 the amount of \$37.50, October 4, 2000 by Jenny for Mervyn's in
10 the amount of \$37.50 and October 16, 2000 by Jordan for Macy's in
11 the amount of \$50.00.

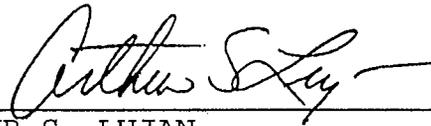
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13 Dated: November 4, 2002



ANNE J. ROSENZWEIG
Attorney and Special Hearing Officer
for the Labor Commissioner

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18 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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20 Dated: NOV, 4, 2002



ARTHUR S. LUJAN
State Labor Commissioner

