

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Scott Peterson

and

96-02890

Name of Respondent

Lewis, deRozario & Company, Inc.

John R. Green

Benjamin Hirsh

Timothy E. Nelson

REPRESENTATION OF PARTIES

Scott Peterson ("**Claimant**") was represented by Gene R. Thornton, Esq., Colorado Springs, Colorado.

Lewis, deRozario & Company, Inc. ("**Respondent LDR**"), John R. Green ("**Respondent Green**"), Benjamin Hirsh ("**Respondent Hirsh**") and Timothy E. Nelson ("**Respondent Nelson**") (collectively as "**Respondents**") were represented by James E. Nesland, Esq. and Marc A. Jacuzzi, Esq., Cooley Godward LLP, Denver, Colorado.

CASE INFORMATION

The Statement of Claim was filed on or about July 8, 1996. Submission Agreement of Claimant Scott Peterson was signed on July 3, 1996.

Statement of Answer was filed by Respondents Lewis, deRozario & Company, Inc., John R. Green, Benjamin Hirsh and Timothy E. Nelson on or about August 16, 1996. Submission Agreement of Respondent Lewis, deRozario & Company, Inc. was signed on August 21, 1996 by . Submission Agreement of Respondent John R. Green was signed on August 21, 1996. Submission Agreement of Respondent Benjamin Hirsh was signed on August 21, 1996. Submission Agreement of Respondent Timothy E. Nelson was signed on August 21, 1996.

HEARING INFORMATION

The hearing was held on Monday, April 7, 1997 for two (2) sessions, Tuesday, April 8, 1997 for two (2) sessions and Wednesday, April 9, 1997 for two (2) sessions in Denver, Colorado for a total of six (6) sessions.

CASE SUMMARY

Claimant alleged that Respondents have withheld earned commissions earned in 1994 and 1995 in violation of the Colorado Wage Act (§8-4-101, *et seq.* C.R.S.). Specifically, Claimant alleged that he was recruited and entered into an oral contract which provided that he was to be paid on a draw-versus-commission basis. The commissions in excess of draws were to be paid following the end of the year. Claimant further alleged that a portion of the commissions were paid to him only after he retained counsel. Finally, Claimant alleged that Respondents Green, Hirsh and Nelson were liable pursuant to the terms of the Colorado Wage Act.

Respondents denied the allegations set forth in the Statement of Claim. Specifically, Respondents stated that there are no oral or written agreements which entitle Claimant to receive any compensation in addition to that which he has already received. Respondents stated that since Claimant has not earned, nor is he entitled to any additional compensation, the Wage Claim Act is inapplicable. The following affirmative defenses were asserted by Respondents:

- ▶ the Statement of Claim fails to state a claim upon which relief can be granted;
- ▶ Respondents had a good faith legal justification for denying Claimant the alleged compensation; and
- ▶ Claimant has failed to mitigate his damages.

In their Counterclaim, Respondents alleged that the claims asserted are frivolous and groundless. Respondents further alleged that they would be entitled to attorneys' fees as the prevailing party pursuant to §8-4-114, C.R.S. of the Wage Claim Act.

RELIEF REQUESTED

Claimant requested an award in his favor and against Respondents, jointly and severally as follows:

- ▶ payment in the gross amount of \$44,496.58;
- ▶ a penalty of 50% of the compensation owed pursuant to §8-4-104 (3), C.R.S. of the Colorado Wage Act;
- ▶ interest owed on the 1994 commissions in the amount of \$2,253.19, plus additional per diem interest for each day after January 31, 1996;
- ▶ interest owed on the 1995 commissions after January 31, 1996; and

- ▶ payment for his costs (including filing and hearing session deposit fees), expert witness fees, and reasonable attorneys' fees incurred in this action pursuant to §8-4-114, C.R.S.

Respondents respectfully request that judgment be entered in their favor and against Claimant on all claims asserted by Claimant and that judgment be entered in their favor and against Claimant on their Counterclaim.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Lewis, deRozario & Company, Inc., John R. Green, Benjamin Hirsh and Timothy E. Nelson shall be and hereby are jointly and severally and personally liable for and shall pay to the Claimant Scott Peterson the sum of \$6,810.63 (**six thousand eight hundred ten dollars and sixty three cents**). The Colorado Wage Act provides that if an employer unduly withholds wages from an employee, the employer may be liable to the employee for an amount equal to 50% of the wages withheld. The undersigned arbitrators hold that the employer wrongfully withheld \$13,621.25 in wages from the Claimant from November 2, 1995, until the wages were paid on January 26, 1996.
2. Interest at the rate of 8% per annum is awarded on the above stated sum from and inclusive of November 2, 1995, through the date this award is paid in full.
3. In addition, the undersigned arbitrators award interest on the wages withheld (\$13,621.25) calculated from November 2, 1995, through the date of payment of said wages on January 26, 1996. Interest shall be paid on these monies withheld at the rate of 8% per annum, or \$253.77.
4. Each party shall bear its own costs, expenses and fees, including attorneys' fees incurred in this matter not specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each pre-hearing conference, if any. There were six (6) sessions x \$600 = \$3,600 in forum fees. Pursuant to §10205(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10205(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500 and shall **retain** as forum fees the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant Scott Peterson. Pursuant to Rule 10205(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **assess** the non-refundable filing fee in the amount of \$500. Claimant shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,200 as forum fees. Respondents Lewis, deRozario & Company, Inc., John R. Green, Benjamin Hirsh and Timothy E. Nelson shall be and hereby are jointly and severally liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,800 as the balance due for forum fees.

Pursuant to Rule 10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **assess** the non-refundable member surcharge in the amount of \$300. **Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

/s/ Stanley H. Marks, Esq.
Stanley H. Marks, Esq.
Industry Arbitrator, Presiding Chair

Dated: April 18, 1997

/s/ William J. Klein
William J. Klein
Industry Arbitrator

April 17, 1997

/s/ Scott Steinhauer
Scott Steinhauer
Industry Arbitrator

April 18, 1997