

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
JEFFREY H. ASTOR AND JEFFCO PLUMBING,	:
INC.,	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor Law,	:
dated January 11, 2008,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 08-056

RESOLUTION OF DECISION

APPEARANCES

Jay A. Marshall, Esq., for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WHEREAS:

On May 2, 2008, Petitioners filed a petition seeking review of an Order to Comply issued by the Commissioner of Labor (Commissioner or Respondent) on January 11, 2008. The Order directs the Petitioner to pay to the Commissioner \$1,600.00 in unpaid wages with interest of \$460.00 and a civil penalty of \$400.00 for a total due of \$2,460.00.

Because Labor Law § 101 (1) provides that a petition to review an order of the Commissioner “shall be filed with the board no later than sixty days after the issuance of . . . [the] order,” and the petition in this matter was filed more than sixty days from the date the Order was issued, the Board wrote to the Petitioners on May 6, 2008 requesting a written explanation of why the Petitioners contend that their petition was not untimely. In response, an affidavit of Petitioner Jeffrey H. Astor (Astor) was filed with the Board on May 27, 2008 stating that Jeffco Plumbing Inc. (Jeffco) was no longer at the address listed on the Order and that neither Petitioner received a copy of the Order until it was faxed to them by the Department of Labor (DOL) on April 19, 2008.

On July 14, 2008, pursuant to Labor Law § 101 and the Board's Rules of Procedure and Practice (Rules) 65.13 (d)(1)(iii) (12 NYCRR 65.13(d)(1)(iii)) Respondent filed a Motion to Dismiss the Petition due to the fact that it was not timely filed since it was filed more than sixty (60) days after issuance of the Order. It argued that Petitioners never informed DOL of a change of address even though they were in telephone contact and that DOL complied with the statutory requirement of Labor Law § 33 to serve the Order at Petitioners' last known addresses. Petitioners filed an Affirmation in Opposition to the Motion on August 6, 2008 and argued that they did not receive the Order, the moving papers lacked an affidavit of service of the Order and in light of the public policy which prefers resolution of disputes on the merits and lack of prejudice to Respondent, the petition should be considered. In Reply, Respondent noted that Rule 65.5 provides that the Board lacks authority to extend the statutory deadline for filing.

A case management conference was held on July 30, 2009 in which both parties participated. Thereafter, Respondent filed an answer to the petition and responded to Petitioner's Demand for a Bill of Particulars. Respondent's answer interposed the affirmative defense that the petition was untimely. In support, Respondent attached copies of the affidavits of service indicating that copies of the order were sent to Jeffco Plumbing, Inc. and Astor at both their business address and Astor's home address and which also included a copy of the 2009 Phone Directory listing Jeffco at the address used by the DOL. The copy of the Order that DOL mailed to Petitioners at their business address by regular mail was not returned; the copy of the Order that DOL mailed to Petitioners at their business address by certified mail was returned with the notation "FORWARDING ORDER EXPIRED" on the envelope; the copies of the Order that DOL mailed to Petitioners at Astor's home address by regular and certified mail were not returned.

On December 16, 2009 an oral argument on the Motion to Dismiss was held by telephone before Anne Stevason, Esq., Chair of the Board. Petitioners requested an opportunity to submit evidence either in person or by affidavit that Astor did not receive the order at his home address. On December 31, 2009, Petitioners filed affidavits of Astor and the only other resident of his home stating that the Order was not received at Astor's home address.

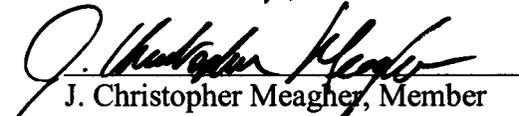
The Board has allowed petitions filed more than sixty days after issuance of orders where service of the order was improper or not reasonably calculated to notify petitioners. Here, Petitioners were served at both their business address and Astor's home address. Although Petitioners may have moved from their business address, they were also served at the home address of Astor, who is president of the corporate petitioner. Here, there is no issue of improper service only that Petitioners did not receive the order. Once DOL produced the affidavits of service by the individual who did the mailing, a statement of non-receipt is insufficient to overcome the presumption of proper mail service and due receipt. (*See, e.g. News Syndicate Co. v Gatti Paper Stock Corp.*, 256 NY 211 [1931]; *National Ins. Co. v Murray*, 46 NY2d 828 [1978]; *cf. In the Matter of Gonzalez*, 47 NY2d 922, 923 [1979] [presumption of mailing and receipt does not arise where "there is neither testimonial or documentary support for the finding that the claimant had been mailed a notice of determination].) DOL properly served Petitioners pursuant to Labor Law § 33. Because the petitions were filed late, the Board does not have jurisdiction over this matter and may not

review the Petitioners' substantive allegations concerning the Order. Accordingly, the petition must be dismissed as untimely.

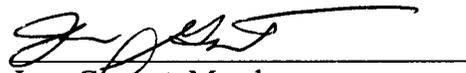
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

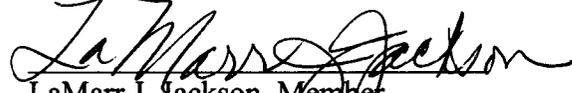
The above proceeding be, and the same hereby is, dismissed in accordance with the Board's Rules.

  
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Anne P. Stevason, Chairman

  
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J. Christopher Meagher, Member

  
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Mark G. Pearce, Member

  
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Jean Grumet, Member

  
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LaMarr J. Jackson, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at New York, New York, on  
March 24, 2010.