

OUTSTANDING TRANSPORT, INC.

Docket No. PR 09-316

Ms. Schleimer's statements cannot be considered an extension of the statutorily mandated statute of limitations. Moreover, Respondent argues that while Ms. Schleimer mistakenly provided an incorrect date, her statement also advised Petitioner that review may be requested by filing an appeal within sixty days from the date of the order, which was October 26, 2009.

GOVERNING LAW

Labor Law § 101 (1) provides that a petition to review an order of the Commissioner must be filed with the Board "no later than sixty days after the issuance of such . . . order." Board Rule of Procedure and Practice (Rule) 66.2 (12 NYCRR 66.2), entitled "How Review to be Commenced," provides that "[r]eview may be had only by filing a written Petition with the Board at its Albany office, no later than 60 days after the issuance of the . . . order objected to." Rule 65.5 (12 NYCRR 65.5), entitled "Filing and Docketing," notes that "[t]ime periods prescribed by statute cannot be extended" [emphasis in original].

DISCUSSION

The petition was timely filed.

Petitioner argues both that the filing date of October 27, 2009 was timely as it was filed on that date in reliance on the date provided by an agent of the Commissioner, and that the petition was otherwise timely filed.

Regarding Petitioner's first argument, Petitioner notes the September 4, 2009 letter of Ms. Jennie L. Schleimer, a Supervising Labor Standards Investigator for the Commissioner, which directed counsel for Petitioner that "**if your client is aggrieved, a review of the Order may be requested by filing a petition with the Industrial Board of Appeals . . . within sixty (60) days of the date of the order** (or October 27, 2009)." Petitioner argues that it relied on the date of October 27, 2009, and as it was provided by an agent of the Commissioner, she should be equitably estopped from gaining from the ambiguity for which she is responsible.

In support of this position, Petitioner cites *Mundy v Nassau County Civil Serv. Commn.*, 44 NY2d 352 (1978) and *DeNicola v Scarpelli*, 112 AD2d 421 (2nd Dept 1985). In *Mundy*, the Court of Appeals held that, with regard to an ambiguity as to the start of the statute of limitations in a CPLR Article 78 proceeding, "when an administrative body itself creates ambiguity and uncertainty . . . affected [parties] should not have to risk dismissal for prematurity or untimeliness by necessarily guessing" when the statutory time begins to run. *Mundy*, 44 NY2d at 358. "Under these circumstances, 'the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court.'" *Id.*, quoting *Matter of Castaways Motel v Schuyler*, 24 NY2d 120, 126-27 (1969). Similarly, in *DeNicola* the start of the limitations period for filing a CPLR Article 78 proceeding was unclear because the petitioner received a decision with an incorrect date. The petitioner relied on the incorrect date, and the Second Department held that, even though the ambiguity was created inadvertently by the respondent, "any error regarding the actual filing date is not attributable to the petitioner and she should not be

precluded thereby from obtaining judicial review of the determination.” *DeNicola*, 112 AD2d at 422.

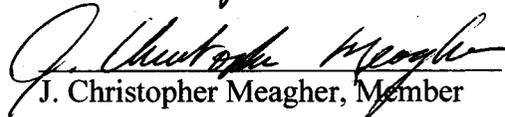
These cases are analogous to the instant proceeding, where Respondent has created ambiguity in the expiration of the statute of limitations, and as such, the ambiguity will be resolved in favor of Petitioner, who will not be precluded from obtaining review by the Board. Given the record before the Board, the petition is accepted as timely filed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

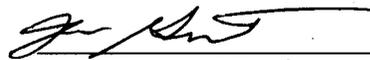
1. Respondent’s motion to dismiss the petition as untimely filed is denied; and
2. Respondent is directed to file an answer to the petition with the Board in accordance with Rule 66.5 (12 NYCRR 65.5).



Anne P. Stevason, Chairman



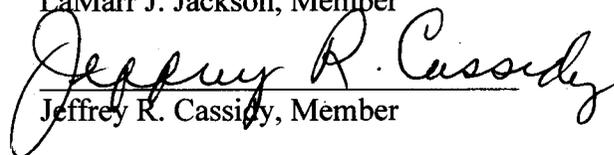
J. Christopher Meagher, Member



Jean Grumet, Member

Absent

LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
May 26, 2010.