

LEO O'BRIEN AND LEO O'BRIEN RACING STABLE, LTD.

Docket No. PR 09-388

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
In the Matter of the Petition of:

LEO O'BRIEN AND LEO O'BRIEN RACING
STABLE, LTD.,

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the Labor Law
and an Order under Article 19 of the Labor, both
dated September 16, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR 09-388

RESOLUTION OF DECISION

APPEARANCES

Leo O'Brien, *pro se* Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa Wasyl of Counsel, for Respondent.

WHEREAS:

The Commissioner of Labor (Commissioner) moves to dismiss the petition for review in this matter on the ground that it is untimely. Petitioners Leo O'Brien and Leo O'Brien Racing Stable, Ltd., (Petitioners) do not deny that the petition is untimely, but ask the Board to consider personal circumstances and on that basis deny the motion. We grant the motion.

STATEMENT OF THE CASE

The Commissioner issued an Order to Comply with Labor Law Article 19 (Wage Order) and an Order under Labor Law Article 19 (Penalty Order) (together, Orders) against

Petitioners; the Orders are dated September 16, 2009.¹ On December 28, 2009, Petitioners filed a petition for review of the Orders with the Board.² The Board served the petition on the Commissioner, and this motion followed.

The motion is brought pursuant to Board Rules of Procedure and Practice (Rule) 65.13 (d) (1) (iii), which states that “[w]ithin thirty (30) days after the receipt of a Petition, [the Commissioner] may . . . move for an order dismissing the Petition where it appears that . . . the Petition fails to comply with the provisions of either Section 101 [of the Labor Law] or the Board’s Rules.”

Labor Law § 101.1 provides in relevant part that “any person in interest . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner. . . Such petition shall be filed with the board no later than sixty days after the issuance of such . . . order.” Similarly, Rule 66.2 (a) states that “[r]eview may be had only by filing a written Petition with the Board . . . no later than 60 days after the issuance of the . . . order objected to.” The Rules emphasize that “[t]ime periods prescribed by statute cannot be extended” (emphasis in original) (*see* “Note” following Rule 65.5); define “filed” as “receipt at the Board’s office” (Rule 65.5[c]); state that in the case of a pleading, a postmark within the time period prescribed by the Rules “shall be deemed timely filed” (Rule 65.5[d]); and provide that no time for delivery shall be added to the limitations period for filing a petition (Rule 65.3 [c] and [d]). In computing time periods, Rule 65.3 provides that

“the day from which the designated period begins to run shall not be included [and] the last day of the period . . . shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.”

The Commissioner argues that the law is clear that there is a 60-day limitation period to file a petition; the period may not be extended except in narrow circumstances not present here; the petition here was filed more than 60 days after the Orders issued; and the Board must therefore dismiss the petition as untimely under Labor Law § 101 and Rule 66.2 (a).

¹ The Wage Order finds that Petitioners failed to pay certain employees at the minimum wage rate prescribed by Labor Law Article 19 and the implementing regulations at 12 NYCRR Part 142 for various periods of time between March 8, 2008 through December 26, 2008. It directs the payment of \$8,729.30 for wages due and owing, with continuing interest on the amount due at the rate of 16% calculated to the date of the Wage Order in the amount of \$1,210.18, and assesses a civil penalty in the amount of \$4,364.65, for a total of \$14,304.13 due and owing.

Count 1 of the Penalty Order finds that the Petitioners violated Article 19 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate employee payroll records and assesses a civil penalty of \$1,500. Count 2 of the Penalty Order finds that Petitioners violated Article 19 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every wage payment during the period January 1, 2008 through August 21, 2008, and assesses a civil penalty of \$500.

² The petition alleges that Petitioners paid their employees in accordance with Article 19, that the Orders are based on erroneous assumptions, and that the Commissioner’s methodology in calculating employees’ regular rate of pay is flawed.

An attorney's affirmation in support of the motion states that the Orders were issued on September 16, 2009, and it is undisputed that Petitioners filed the petition with the Board on December 28, 2009.

Petitioners respond to the motion with an unsigned statement:

"The petitioners are not attorneys and are not familiar with New York State Labor Law and Board Rules. The petitioners were called out of town during both November and December 2009 to attend the funerals of Leo O'Brien's sister and their son in laws father respectively. This on top of continued treatment of Joan O'Brien (Leo O'Brien's wife) for cancer had unfortunately taken priority over this issue."

Applying the relevant law to the facts here, Petitioners' time to file their petition expired November 16, 2009. (Sixty days from September 16, 2009 was Sunday, November 15, 2009. Accordingly, the last day to file was the 61st day from September 16, 2009.)

We note that the Orders state:

"If you are aggrieved by this Order, you may appeal within 60 days from the date issued to the Industrial Board of Appeals as provided by Section 101 of the Labor Law. Your appeal should be addressed to the Industrial Board of Appeals, Empire State Plaza, Agency Building #2, 20th Floor, Albany. NY 12223."

We also note the following paragraph of the Orders:

"In the event that any wages due, interest thereon and or any civil penalties assessed are not paid *within 60 days following the service of a certified copy of this Order upon the employer, and no petition has been filed by the employer with the Industrial Board of Appeals for review of this determination*, said Order may be filed with the County Clerk . . . and the Clerk shall . . . enter judgment. . . ." [Emphasis added.]

The Petitioners' explanation that the petition was filed late because they are not attorneys and are not familiar with the Labor Law or the Board's Rules does not justify their untimely filing, particularly in light of the fact that the filing time period is clearly stated multiple times in the Orders. Nor do Petitioners' personal problems permit the Board to extend the filing deadline.

Accordingly, the petition must be dismissed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

This proceeding be, and the same hereby is, dismissed in accordance with Labor Law § 101 and the Board's Rules of Procedure and Practice.



Anne P. Stevason, Chairman



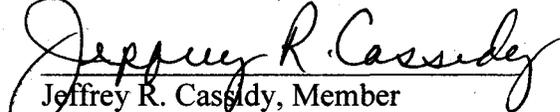
J. Christopher Meagher, Member



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.