

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

DUSTIN DIMISA AND INTERCONTINENTAL
CAPITAL GROUP, INC.

Petitioners,

DOCKET NO. PR 11-339

To Review Under Section 101 of the Labor Law: An
Order to Comply With Article 6 of the Labor Law
and an Order Under Article 6 of the Labor Law, both
dated August 25, 2011,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Offit Kurman, P.A. (Ari Karen of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel),
for the respondent.

WHEREAS:

This proceeding was commenced when the petitioners filed a petition with the Industrial Board of Appeals (Board) on October 27, 2011. The petition was served on the respondent Commissioner of Labor (Commissioner) on December 1, 2011. The Commissioner moved on December 21, 2011 to dismiss the petition as untimely because it was filed more than 60 days after the order was issued.

Labor Law § 101 (1) states that:

“Except where otherwise prescribed by law, any person in interest or his duly authorized agent 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.”

The orders sought to be reviewed were issued on August 25, 2011, and therefore, any petition for review filed with the Board after October 24, 2011 would be untimely (Board Rules of Procedure and Practice 65.5 and 65.3 [a]; [12 NYCRR 65.5 and 65.3 (a)]). As the petition in this proceeding was not received by the Board until October 27, 2011, in an envelope shipped on October 26, it was untimely.

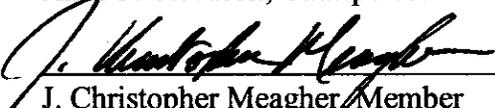
The petitioners allege that their due process rights were violated, because the orders were not served on the attorneys for the petitioners although they had appeared in the matter (see e.g. *Matter of Paul Coppa*, PR 08-072 [interim decision March 25, 2009]; Executive Law § 168). However, the Commissioner attached an affidavit of service to her motion showing that copies of the orders were served by regular mail on the petitioners' attorneys on August 25, 2011¹. As a mere denial of receipt is not sufficient to overcome the presumption of regularity of the mail (see *News Syndicate Co. v Gatti Paper Stock Corp.*, 256 NY 211 [1931]; *National Ins. Co. v Murray*, 46 NY2d 826 [1978]; cf. *Matter of Gonzalez*, 47 NY2d 922, 923 [1978]), the petitioners' defense that their attorney was not served with the orders is not persuasive. Accordingly, the petition must be dismissed as untimely.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

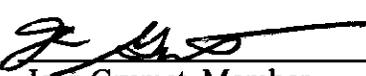
The Commissioner of Labor's motion to dismiss the petition for review is granted in its entirety, and the petition for review be, and the same hereby is, dismissed.



Anne P. Stevason, Chairperson

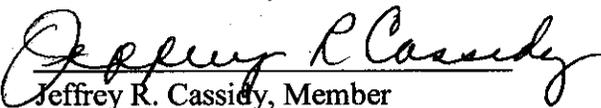


J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 30, 2012.

¹ We note that the affidavit of service indicates service on the same law firm representing the petitioners on this motion, although not the same attorney.

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The petitioners allege that their due process rights were violated, because the orders were not served on the attorneys for the petitioners although they had appeared in the matter (see e.g. *Matter of Paul Coppa*, PR 08-072 [interim decision March 25, 2009]; Executive Law § 168). However, the Commissioner attached an affidavit of service to her motion showing that copies of the orders were served by regular mail on the petitioners' attorneys on August 25, 2011¹. As a mere denial of receipt is not sufficient to overcome the presumption of regularity of the mail (see *News Syndicate Co. v Gatti Paper Stock Corp.*, 256 NY 211 [1931]; *National Ins. Co. v Murray*, 46 NY2d 826 [1978]; cf. *Matter of Gonzalez*, 47 NY2d 922, 923 [1978]), the petitioners' defense that their attorney was not served with the orders is not persuasive. Accordingly, the petition must be dismissed as untimely.

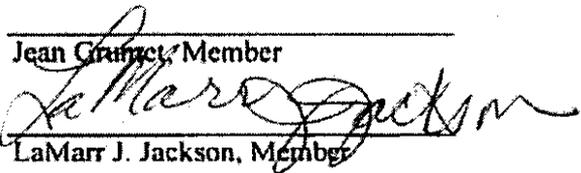
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Commissioner of Labor's motion to dismiss the petition for review is granted in its entirety, and the petition for review be, and the same hereby is, dismissed.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Granger, Member



LaMarr J. Jackson, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 4, 2012.

Jeffrey R. Cassidy, Member

¹ We note that the affidavit of service indicates service on the same law firm representing the petitioners on this motion, although not the same attorney.