

**ANTHONY VILLANI AND VILLANI'S LAWN & LANDSCAPE,
LLC**

Docket No. PR 09-198

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

ANTHONY VILLANI and VILLANI'S LAWN &
LANDSCAPE, LLC,

Petitioners,

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 19 of the Labor Law, both
dated June 26, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 09-198

RESOLUTION OF DECISION

APPEARANCES

Anthony D. Parone, for Petitioners.

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

WHEREAS:

This proceeding was commenced when Petitioners filed a petition with the Industrial Board of Appeals (Board) on July 17, 2009, seeking review of orders to comply that Respondent Commissioner of Labor (Respondent or Commissioner) issued January 20, 2009.

The petition was served on Respondent on November 12, 2009. Respondent moved on December 17, 2009 to dismiss the petition on the ground that Petitioners failed to comply with Labor Law § 101 (1) by filing the petition with the Board more than sixty days after the orders were issued. In response, Petitioners argue that Respondent's motion to dismiss for untimely application was itself untimely pursuant to Board Rules of Procedure and Practice (Rules) § 65.13 (d) (1) ([12 NYCRR 65.13 (d)]).

Board Rule § 65.13 (d) (1) allows for a motion to dismiss to be filed “[w]ithin thirty (30) days after the receipt of a Petition.” As Respondent notes in her reply, Rule § 65.3 (c) allows for an additional five days for service when the period of time prescribed in the rules “is measured from the service of a paper, and service is by mail.” Here the thirty days prescribed by Rule § 65.13 (d) (1) is measured from service of the petition on the Commissioner, which was by mail on November 12, 2009. With the additional five days added for a service by mail, submission of the motion on December 17, 2009 was timely.

Moving to the merits of the motion, Respondent seeks dismissal of the petition, filed more than sixty days after the orders were issued, for Petitioners’ failure to comply with Labor Law § 101 (1).

Labor Law § 101 (1) provides 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.”

In the instant proceeding, the orders sought to be reviewed were issued on January 20, 2009, and therefore, a petition for review would be timely if filed with the Board no later than March 21, 2009. The Board received the petition enclosed in an envelope post-marked July 17, 2009, nearly four months late (*see* Rule § 65.5 [d]). With the petition an affidavit of Petitioner Anthony Villani was submitted which sought to explain the untimely application for review. Without deciding the issue of timeliness, the Board, by correspondence dated July 28, 2009, gave Petitioners the opportunity to “provide a detailed sworn statement that focuses on why it is contended that the petition is not untimely.” Petitioners then supplied two affidavits, one from Petitioner Anthony Villani and a second from his father Ronald Villani, who often does “some office work including answer the phone, etc.”

It was Ronald Villani who first received the January 20, 2009 orders at issue here, and he affirms that upon their receipt he telephoned the Department of Labor (DOL) to explain that the claimant was not an employee of Villani’s Lawn & Landscape, LLC, and that the orders were therefore false and unnecessary. The affidavit of Ronald Villani makes no claims or suggestions that the DOL advised him that the orders were going to be withdrawn, yet he, in his own words, “naturally believed that was the end of the claim.” Anthony Villani similarly affirms that he believed the telephone call to the DOL was the end of the matter, yet provides no statements from the DOL that led him to that conclusion.

The Commissioner, having found that no appeal had been filed within the sixty day statute of limitations, sent Petitioners a letter requesting payment pursuant to the orders. In response, Ronald Villani called the DOL and was advised that a petition must be provided to the Board in writing. Petitioners claim this is the first time that they had heard about the method of appeal.

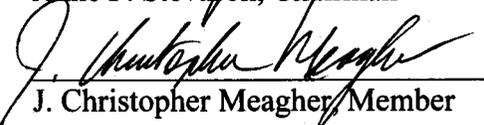
Petitioners' claims fail to address the fact that the orders themselves contain within them the method of appeal to the Board. Clearly stated at the bottom of the order to comply is the following: "[i]f you are aggrieved by this Order, you may appeal within 60 days from the date issued to the Industrial Board of Appeals as provided by § 101 of the Labor Law. Your appeal should be addressed to the Industrial Board of Appeals" Along with this information the orders also provide contact information for the Board so that Petitioners could obtain a copy of the Board's Rules.

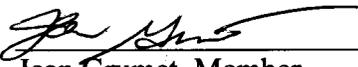
As a final matter, Petitioners argue that, as their counsel was not originally served with the Commissioner's motion to dismiss, the motion should be denied. While the Commissioner did not serve Petitioners' counsel when the motion was filed, service was subsequently made within a reasonable time after the Commissioner was made aware of the fact that Petitioners were represented by counsel. Further, Petitioners' counsel was able to, and did, reply to the Commissioner's motion to dismiss, and the Board gave consideration to the reply, as is evident by the instant decision. Given these facts, as Petitioners were not prejudiced by the subsequent service, their argument for denial of the Commissioner's motion is without merit.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

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

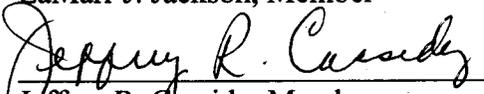


Anne P. Stevason, Chairman

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
June 23, 2010.

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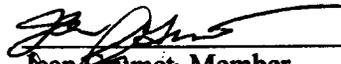
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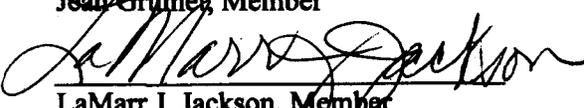
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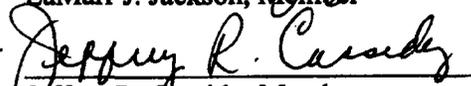
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