

**PATRIK HARMANCIN CONSTRUCTION
(T/A PATRIK HARMANCIN CONSTRUCTION)**

Docket No. PR 09-256

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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

PATRIK HARMANCIN (T/A PATRIK
HARMANCIN CONSTRUCTION),

Petitioner,

DOCKET NO. PR 09-256

To Review Under Section 101 of the Labor Law:
An Order to comply with Article 6 and an Order under
Article 19 of the Labor Law, both dated July 13, 2009,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

APPEARANCES

Michael A. Fakhoury, Esq., for Petitioner.

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

WHEREAS:

Respondent Commissioner of Labor (Commissioner) moves to dismiss the petition
on the grounds that it is untimely and fails to state any basis upon which the Industrial Board
of Appeals (Board) may find the Orders under review invalid or unreasonable.

STATEMENT OF THE CASE

The Commissioner issued an Order to Comply with Labor Law Article 6 (Wage
Order) and an Order under Labor Law Article 19 (Penalty Order), (together Orders), against

Petitioner Patrik Harmancin (Harmancin or Petitioner) on July 13, 2009.¹ The Board received Harmancin's petition for review of the Orders enclosed in an envelope bearing both a postal meter stamp and a postmark, each with the date of September 12, 2009. The Board served the petition on the Commissioner, and this motion followed.

The motion is brought pursuant to Board Rules of Procedure and Practice (Rules) 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." The motion, supported by an attorney's affirmation, argues that Petitioner mailed the petition on September 12, 2009 or one day later than the 60-day filing period following issuance of the Orders. The motion also argues that the petition fails to state grounds upon which the Board may find that the Orders are invalid or unreasonable, as required by Rule 66.3 (d) and (e).

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." Following Rule 65.5, entitled "Filing and Docketing," the Rules note that "[t]ime periods prescribed by statute cannot be extended." 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." Finally, Rule 65.5 (c) provides that "[p]apers shall be deemed filed only upon receipt at the Board's office."

The Commissioner argues that the governing statutory and regulatory language, and the Order itself, are clear and unambiguous, and that the Petitioner did not file the petition until 61 days after the issuance of the Orders. Accordingly, says the Commissioner, the petition must be dismissed.

The Petitioner, through his attorney's affirmation, contends that the petition was dated and "mailed" on September 10, 2009 when placed in a United States Postal Service drop box. He also argues that Rule 66.2 (a) does not require that the mailing process be completed no later than 60 days, but only that the petition must be filed no later than 60 days. He further argues that under CPLR 2103 (b) (2), or the "mailbox rule," the petition was timely filed. CPLR 2103 (b) (2) provides that "[w]here a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period. . . ."

¹ The Wage Order finds that Petitioner failed to pay an employee wages for the period August 30, 2008 through November 1, 2008, and directs that \$5,100.00 be paid to the Commissioner for the wages due, with \$567.85 in continuing interest thereon at the rate of 16%, calculated to the date of the Wage Order. The Commissioner also assessed a civil penalty of \$5,100.00 against Petitioner, for a total of \$10,767.85 due and owing. The single count of the Penalty Order finds that Petitioner violated Article 19 and 12 NYCRR Part 142-2.6 by failing to keep and/or furnish true and accurate employee payroll records and assesses a civil penalty of \$500.00.

Unless otherwise excusable, Petitioner's time to file the petition expired on September 11, 2009, which is the 60th day after issuance of Orders on July 13, 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 last decretal paragraph of the Orders:

"[I]n 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 the 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.]

Petitioner's argument that the petition was timely filed because it was mailed on September 10, 2009, when placed in a United States Post Office depository, is not supported by the sworn statement of someone who avers to personal knowledge of the petition's mailing. The affirmation of Petitioner's attorney does not state who mailed the petition and, as relevant here, asserts only that "[t]he Petition was dated and 'mailed' on September 10, 2009 [and] [t]he *Petitioner* was submitted by first class mail. . . ." (emphasis added). The assertion is confusing and, regardless of how it is read, does not answer the question of how the affiant knows when and how the petition was mailed. Moreover, the assertion that the petition was mailed two days earlier than the date on the postage meter stamp is implausible and not otherwise explained.

Nor does Rule 65.5 support Petitioner's argument that the petition is timely. It provides that "any pleading *post-marked within* the time provided for by these rules shall be deemed timely filed" (emphasis added). As the envelope enclosing the petition was postmarked September 12, 2009, by the post office, and a postage meter stamp shows the same date, it was postmarked *after* the time provided by the Rules.

Finally, the Petitioner's reliance on CPLR 2103 (b) (2), or the "mailbox rule," is misplaced because the CPLR governs state court proceedings only. "The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges" (CPLR § 101). *See also In the Matter of the Petition of 238 Food Corp.*, PR 05-068 (April 23, 2008). The Board is a quasi-judicial administrative agency within the Executive Department and is governed by its own rules of procedure; the CPLR is not binding on the Board. Here, Rule 65.3 (c) governs and provides that "[w]here a period of time prescribed by these rules (*except in the case of Petitions required to*

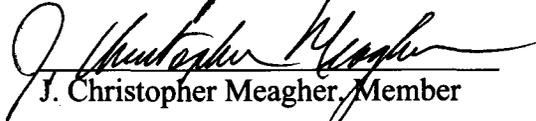
commence a proceeding) is measured from the service of a paper, and service is by mail, five . . . days shall be added to the prescribed period” (emphasis added). Accordingly, Petitioner is not entitled to add five days for mailing to the requirement that his petition be filed within 60 days of the Orders’ issuance.

We find that the petition is untimely and must be dismissed and therefore do not reach the question of whether it states a basis for the Board to find the Orders unreasonable or invalid.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

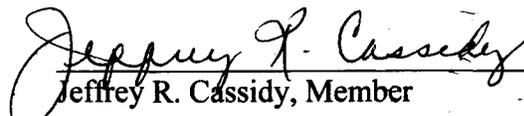
The petition be, and the same hereby is, dismissed in accordance with Labor Law § 101 and the Board’s Rules of Procedure and Practice.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grumet, Member

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.

commence a proceeding) is measured from the service of a paper, and service is by mail, five . . . days shall be added to the prescribed period” (emphasis added). Accordingly, Petitioner is not entitled to add five days for mailing to the requirement that his petition be filed within 60 days of the Orders’ issuance.

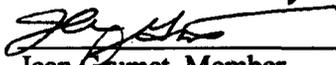
We find that the petition is untimely and must be dismissed and therefore do not reach the question of whether it states a basis for the Board to find the Orders unreasonable or invalid.

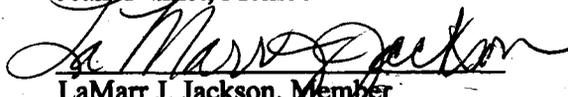
NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

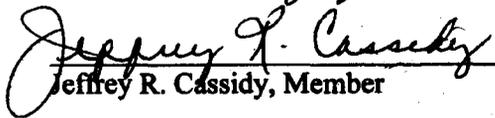
The petition be, and the same hereby is, dismissed in accordance with Labor Law § 101 and the Board’s Rules of Procedure and Practice.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grumet, Member


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.