

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

BUENAVENTURA SALAZAR (T/A PAINTING
AND DECORATIONS),

Petitioner,

DOCKET NO. PR 09-382

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 August 21, 2009,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Kaplan Belsky Ross Bartell, LLP, Lewis A. Bartell of Counsel, for Petitioner.

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin A. Shaw of
Counsel, for Respondent.

WHEREAS:

Respondent Commissioner of Labor (Commissioner) moves to dismiss the petition
here on the ground that it is untimely.

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 Buenaventura Salazar (Petitioner) on August 21, 2009.¹ The Board received

¹ The Wage Order finds that Petitioner failed to pay an employee wages for the period April 25, 2006 through
July 1, 2006, and directs that \$7,200.00 be paid to the Commissioner for the wages due, with \$2,446.03
continuing interest thereon at the rate of 16%, calculated to the date of the Wage Order. The Commissioner
also assessed a civil penalty of \$10,800.00 in the Wage Order, for a total of \$20,446.03 due and owing. The
single count of the Penalty Order finds that Petitioner violated Labor Law § 661 and 12 NYCRR Part 142-2.6
by failing to keep and/or furnish true and accurate employee payroll records for the period April 25, 2006
through July 2006 and assesses a civil penalty of \$1500.00.

Salazar's petition for review of the Orders on December 24, 2009, enclosed in an envelope bearing a postal-meter stamp dated December 21, 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) (12 NYCRR 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." 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 motion, supported by an attorney's affirmation, asserts that "[P]etitioner did not file his Petition until December 24, 2009 (sent in an envelope post marked December 21, 2009). The Commissioner submits that the governing statutory and regulatory language and the Orders themselves are clear and unambiguous and that the Petitioner did not file the petition until two months after the sixty-day filing period expired and that the petition is therefore untimely. We find that Petitioner's time to file the petition expired on October 20, 2009, which is the 60th day after issuance of the Orders on August 21, 2009.

Petitioner, through his attorney's affirmation, admits that the petition was untimely, but submits that the "[Order] ...is not reasonably calculated to notify the Petitioner that should he fail to appeal with [sic] 60 days of the order he will be left without any recourse whatsoever."

In support of this position, Petitioner argues that the lack of recourse if the petition is untimely filed is "[v]irtually buried within a five page Order," and that the wording "aggrieved by this Order," which is contained within the Order's filing period notice, is "[u]nclear and confusing." Petitioner also contends that "[t]here is no prejudice to the Commissioner to allow the Petitioner who did not himself understand the significance of the Order an opportunity to pursue his appeal."

We do not find merit in any of Petitioner's arguments.

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 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 . . . in the total amount indicated above with the stated rate of interest from the date hereof until payment.” (emphasis added.)

The failure to file a timely petition inherently implies an adverse consequence, and we reject the argument that it is unreasonable to expect that a petitioner should understand that the failure to file a timely petition results in an abandonment of that petition. Moreover, the Orders state that if no petition has been filed with the Board, the Order may be filed with the County Clerk and a judgment entered, which clearly gives notice of an adverse consequence of a late filing.

We also do not find the filing period “buried” within the Orders, as Petitioner asserts. It is in the same font and font size as the rest of the Orders and is conspicuously included on the last page of the Orders. If Petitioner did not understand any information in the Orders (including the meaning of “aggrieved by,”) the Order provided both a telephone number and address to seek clarification of the requirements governing an appeal.

Finally, Petitioner’s contention that his late filing is excusable because there is no apparent prejudice to the Commissioner, is without merit. Compliance with the filing period is not dependent on whether there is prejudice to the Commissioner.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

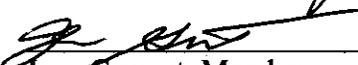
The petition be, and the same hereby is, dismissed in accordance with Labor Law § 101 and the Board's Rules of Procedure and Practice.



Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

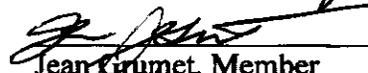
Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 20, 2010.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

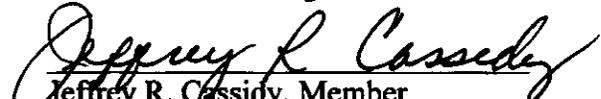
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**Dated and signed in the Office
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at New York, New York, on
October 20, 2010.**