

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

MARTIN GOONETILLEKE A/K/A SHAWN :
GOONETILLEKE A/K/A SHANTHIPA :
GOONETILLEKE AND DVD DEPOT INC., :

DOCKET NO. PR 10-018

To Review Under Section 101 of the Labor Law: :
Two Orders to Comply With Article 6 of the Labor :
Law and an Order Under Article 19 of the Labor :
Law, all dated January 23, 2009, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :
Respondent. x

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APPEARANCES

Alan B. Pearl & Associates, Alan B. Pearl of Counsel, for Petitioners.

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

WHEREAS:

This proceeding was commenced when the Petitioners filed a petition with the Industrial Board of Appeals (Board) on January 19, 2010 seeking review of three orders that Respondent Commissioner of Labor (Commissioner or Respondent) issued on September 17, 2009.

On March 1, 2010, the petition was served on the Commissioner, who on March 5, 2010 moved to dismiss the petition as untimely. The Petitioners did not respond to the motion.

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 September 17, 2009, and therefore, any petition for review filed with the Board after November 16, 2009 would be untimely (Board Rules 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 January 19, it was untimely.

Petitioners' assert that their delay in filing the petition is excusable because Respondent served the orders on Petitioners' prior counsel and because Petitioners' facsimile machine was not working. The Commissioner argues that, though Petitioners' current counsel was not served, service of the orders complied with the requirements of Labor Law § 33, as well as Executive Law § 168. Section 33 provides that service of an order on a person be by mailing to his last known address or by personal delivery and that service on a corporation may be on any officer or agent “upon whom a summons may be served” under the NY CPLR. Respondent has submitted three affidavits of service by mail to establish compliance with labor Law § 33. Specifically, the affidavits affirm mailings to Petitioners' various places of business and last known address.

Executive Law § 168 requires that when a Petitioner is represented by counsel, and that counsel has filed a notice of appearance, such counsel must be sent a copy of all written communications sent to the petitioner. Respondent has submitted two affidavits that affirm proper mailings to Petitioners' two known counsel. Respondent argues that Petitioners' failure to inform her of the change in counsel is the fault of Petitioners alone and is not excuse for the untimely filing. The Board agrees.

Where, as here, the Commissioner acted in accordance with the governing law, service will be found proper. The fact that Petitioners failed to notify the Commissioner of the change in counsel was within the control of Petitioners. This is in accordance with the Board's decision in *Petition of Jay Nordin and Xtreme Home Design Inc.* (IBA docket No. PR 09-076 [December 14, 2009]). Petitioners' argument that their facsimile machine was not in working order is irrelevant.

The Board does not have jurisdiction over this matter because the petition was untimely filed and may not review the Petitioners' substantive allegations.¹ Accordingly, the petition must be dismissed as untimely.

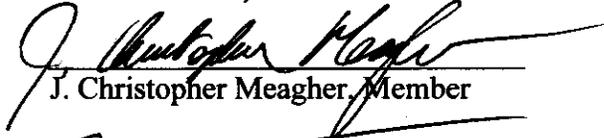
¹ Petitioner Goonetilleke has another matter pending before the Board, IBA Docket No. PR 10-012. Within the current petition a request was made that the two matters be joined together. Because this petition is being dismissed, Petitioner's request is moot.

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, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

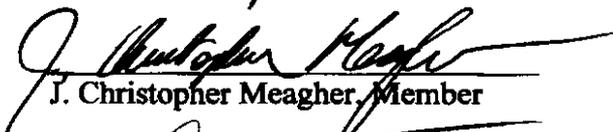
Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 20, 2010.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

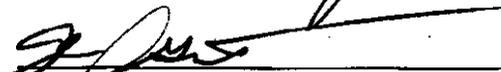
The Commissioner of Labor's motion to dismiss the petition for review is granted in its entirety, and the petition for review be, and the same hereby is, dismissed.



Anne P. Stevason, Chairman



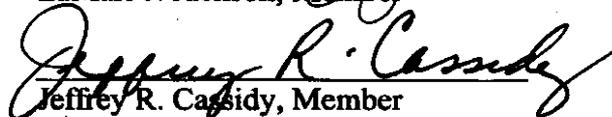
J. Christopher Meagher, Member



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