

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

JAMES A. GLENNON, JR. DDS,

Petitioner,

To Review Under Section 101 of the Labor Law: An
Order to Comply with Article 6 of the Labor Law
dated December 17, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 10-093

RESOLUTION OF DECISION

APPEARANCES

James A. Glennon, Jr. DDS, *pro se* Petitioner.

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

WHEREAS:

This proceeding was commenced when the petitioner filed a petition with the Industrial Board of Appeals (Board) on March 29, 2010 in an envelope post-marked March 26, 2010. The petition alleged that the petitioner never received the "comply order" dated December 17, 2009 referred to in a collection letter attached to the petition. Because the petitioner did not attach a copy of the order or orders to be reviewed, we sent him a letter dated April 22, 2010 requesting that he file an amended petition with the order or orders attached and set forth the reasons that the order or orders are alleged to be invalid or unreasonable.

The petitioner filed an amended petition on May 7, 2010, again alleging that he never received an order from the Department of Labor and stating that he did "not wish to pay for vacation time and penalties for 12/17/09 order to comply 09-01336 [that he] did not receive." The order was not attached to the amended petition.

The petition and amended petition were served on Respondent Commissioner of Labor (Commissioner) on May 17, 2010. The Commissioner moved on June 21, 2010 to dismiss the petition as untimely and attached a copy of the affidavit of service of the order to

comply which states that an order to comply dated December 17, 2009 was mailed to the petitioner's business address the same day in compliance with Labor Law § 33. The petitioner did not respond to the motion although we advised him in a letter dated July 12, 2010 that his response to the motion was to be filed on or before August 11, 2010.

Labor Law § 101 (1) states that:

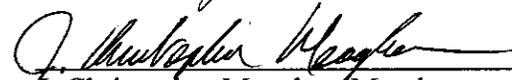
“Except where otherwise prescribed by law, any person in interest or his duly authorized agent may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner. . . . Such petition shall be filed with the board no later than sixty days after the issuance of such . . . order.”

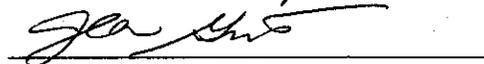
The order sought to be reviewed was issued on December 17, 2009, and therefore, any petition for review filed with the Board after February 16, 2010 would be untimely (Board Rules of Procedure and Practice 65.5 and 65.3 [a]; [12 NYCRR 65.5 and 65.3 (a)]). As the petition in this proceeding was not received by the Board until March 29, 2010 in an envelope post-marked March 26, 2010, it was untimely. Having failed to respond to the Commissioner's motion to dismiss, the Petitioner has offered no grounds for excusing such untimely filing except the allegation in the petition and amended petition that the order was not received. However, such allegation, even if it had been sworn to, is not sufficient to overcome the presumption of proper mail service and due receipt raised by the affidavit of service filed in support of the Commissioner's motion (Matter of Jeffrey H. Astor, PR 08-056 [March 24, 2010]). Accordingly, the petition must be dismissed.

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

Absent
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
November 18, 2010.

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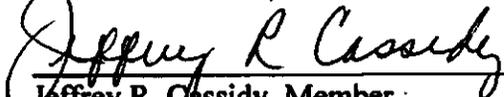
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