

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 VICTOR QUBRUSI, :
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 Petitioner, :
 :
 To Review Under Section 101 of the Labor Law: An :
 Order to Comply With Article 19 of the Labor Law :
 and an Order Under Article 19 of the Labor Law, :
 both dated January 6, 2011, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 11-076
RESOLUTION OF DECISION

APPEARANCES

Hoffmann & Associates (Andrew S. Hoffmann of counsel), for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS 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 11, 2011 in an envelope post-marked March 8. The petition was served on the respondent Commissioner of Labor (Commissioner) on March 21, 2011. The Commissioner moved on April 22, 2011 to dismiss the petition as untimely because it was filed more than 60 days after the order was issued, and for failing to state a cause of action upon which relief can be granted. Because, as discussed below, the petition was untimely, we do not need to decide whether a proper cause of action was stated.

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 January 6, 2011, and therefore, any petition for review filed with the Board after March 7, 2011 would be untimely (Board Rules of Procedure and Practice 65.5 and 65.3 [a]; [12 NYCRR 65.5 and 65.3 (a)]).

The Petitioner argues that the petition was mailed on March 7, 2011, and was therefore timely under the Board Rules 65.5 (d) (12 NYCRR 65.5 [d]) (emphasis added) which states that “[a]ny pleading post-marked within the time provided for by these rules shall be deemed timely filed.” We disagree.

The Petitioner’s attorney submitted an affidavit from his legal assistant which states:

“On March 7, 2011 . . . I placed three copies [of the petition] in an envelope with postage affixed, in a United States Postal Service Mailbox located in the lobby of our office building.”

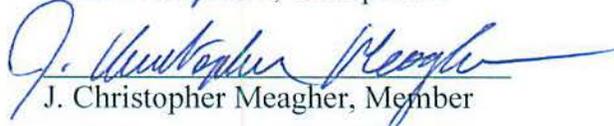
However, the petition was received by the Board in an envelope that was post-marked on March 8, 2011. Inspection of the post-mark indicates that it is not a United States Postal Service post-mark, but rather a Pitney Bowes postal machine post-mark. Therefore, the petition was either not mailed on March 7, 2011, as the Petitioner avers, or it was mailed on March 7, 2011, with an incorrect post-mark. In any event, the Board Rules are clear that the Board looks at the date of the post-mark, not the date of alleged mailing, when determining whether a petition has been timely filed. The petition was received by the Board in an envelope post-marked one day after the final day of the statute of limitations. Therefore, the petition is untimely and 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, Chairperson



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 Albany, New York, on
October 11, 2011.