

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 DENISE PLIEGO AND THAT'S A WRAP AND :
 MORE INC., :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply with Article 19 of the Labor :
 Law, and an Order To Comply with Article 6 of the :
 Labor Law, both dated October 22, 2013, :
 :
 -against- :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 12-105

RESOLUTION OF DECISION

APPEARANCES

Denise Pliego, *pro se* petitioner and for That's a Wrap and More Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Benjamin Garry of counsel) for respondent.

WITNESSES

Denise Pliego, Steve Pliego, for Petitioners.

Yrvashi Aggerwal, Labor Standards Investigator, for Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals ("Board") on May 4, 2012. On July 20, 2012, Respondent moved to dismiss the Petition as untimely pursuant to the Board's Rules of Procedure and Practice section 65.13 (d) (1) (iii). On August 9, 2012, Petitioner filed a response and on September 4, 2012 Respondent filed his reply thereto. An evidentiary hearing on the motion was held on May 30, 2013 in Patchogue, N.Y. before Administrative Law Judge Jeffrey M. Bernbach. Each party was afforded a full opportunity to present documentary evidence and to make statements relevant to the issues.

The order to comply with Article 6 (wage order), which was issued by the Respondent Commissioner of Labor (Commissioner) against Petitioners on October 22, 2009, directs compliance with Article 6 and payment to the Commissioner for wages due and owing to Saverio Alesi in the amount of \$2,757.50 for the time period from August 1, 2008 through September 13, 2008, together with interest continuing thereon at the rate of 16% calculated to date of the wage order in the amount of \$488.34, and assesses a 100% civil penalty in the amount of \$2,752.50 for a total amount due of \$6,003.34. The order under Article 19 of the Labor Law (penalty order), which was issued against the Petitioners on the same date, imposes a \$150 civil penalty against the Petitioners for violating Labor Law section 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about August 1, 2008 through September 13, 2008.

SUMMARY OF EVIDENCE

The Orders to Comply were issued and served on October 22, 2009. Petitioner Denise Pliego entered the hospital on October 26, 2009 for hip replacement surgery and was released on October 30, 2009. On November 16, 2009, after receiving the Orders, Ms. Pliego telephoned the Department of Labor (DOL) and spoke with the investigator and informed her that she was recovering from surgery. Ms. Pliego telephoned DOL again on January 27, 2010 to inform them of her continuing health issues and was told that she should have appealed the October Orders to the Industrial Board of Appeals.

On February 9, 2012, DOL entered judgment on the Orders. After receiving a package from DOL in 2012, petitioner filed the instant petition on May 4, 2012. Ms. Pliego admitted that she took no action regarding the Orders between January 27, 2010 and May 4, 2012.

DECISION AND ORDER

The burden of proof on this motion to dismiss the Petition as not timely filed rests with the Commissioner (Board Rule 65.30). For the reasons set forth below, we find the Commissioner has sustained his burden. The motion is granted and the Petition be, and it hereby is, dismissed.

Board Rule section 65.13(d)(1)(iii) states that the Respondent may move for an Order dismissing the Petition where it appears that “the petition fails to comply with the provisions of either Section 101 or the Board’s Rules.” Labor Law Section 101(1) mandates that a Petition “shall be filed with the Board no later than sixty (60) days after the issuance of [the order in question]” and Board Rule Section 66.2(a) states that “Review may be had only by filing a written petition with the Board at its Albany office, no later than sixty (60) days after the issuance of the...order objected to”.

The Commissioner’s Orders clearly put Petitioners on notice of the 60 day time period within which an aggrieved person must file a Petition with the Board; by stating that:

“If you are aggrieved by this Order, you may appeal within sixty (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, N.Y. 12233, as prescribed by its Rules of Procedure, a copy of which may be obtained from the Board upon request.

Despite receiving the foregoing notice, it is undisputed that Petitioners did not file a Petition with the Board until May 4, 2012 - - almost 2 1/2 years after issuance of the Orders. Viewed in the light most favorable to Petitioners, their opposition to the within motion is comprised of the argument that Petitioner Pliego was disabled at the time the Orders were issued and unable to respond thereto. However, Petitioner Pliego's testimony at the evidentiary hearing, and the medical records she submitted in the support thereof, show that, even if she were to have been unable to respond due to medical issues, any such disability did not extend beyond early 2010. Thus, even were the 60 day filing deadline to be deemed tolled for said period, the Petition still was not filed until more than two years thereafter and, thus, was grossly out of time.


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
November 20, 2013