

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
	:	
SAMUEL MOSCOWITZ,	:	
	:	
Petitioner,	:	
	:	DOCKET NO. PR 17-146
To Review Under Section 101 of the Labor Law:	:	
An Order to Comply with Article 6 of the Labor	:	<u>INTERIM</u>
Law and An Order under Article 19 of the Labor	:	<u>RESOLUTION OF DECISION</u>
Law, both dated July 26, 2013,	:	
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	
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APPEARANCES

Samuel Moscowitz, petitioner pro se.

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

WHEREAS:

This proceeding was commenced when petitioner filed a petition with the Industrial Board of Appeals on September 21, 2017, in an envelope post-marked September 18, 2017. The Board served the petition on respondent Commissioner of Labor on November 28, 2017, and respondent moved on December 28, 2017, to dismiss the petition as untimely. Petitioner responded to the motion on January 21, 2018, and on February 20, 2018, respondent filed its reply.

Labor Law § 101 (1) provides 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.”


Petitioner does not deny that the petition was filed more than 60 days after the date of the orders. He explains that he did not receive the orders when they were mailed to him and his former wife at their home because he left the marital residence in 2012, well before the orders

were mailed. In response, respondent asserts that the orders were mailed to petitioner's residence and last known "place of claimant's employment," and were not returned by the postal service as "undelivered." Respondent also alleges that petitioner had knowledge of claimant's unpaid wages and, in April 2013, sent a partial payment of the wages to claimant's employment agency. Respondent makes no representation that petitioner's former residence was his place of business.

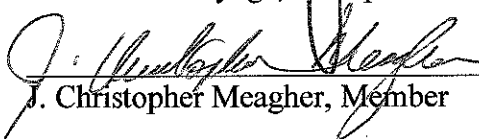
New York Labor Law § 33, entitled "Service of notice," requires that when "the commissioner . . . is required to give notice in writing to any person, such notice may be given by mailing it in a letter addressed to such person at his last known place of business or by delivering it to him personally." In this matter, respondent served the orders by mail to petitioner's home address. Nothing in the record indicates that petitioner's home was his place of business. Respondent's reference to petitioner's alleged awareness of the orders and his purported attempt to pay part of the unpaid wages is not persuasive as neither detail is relevant. The burden of proof on a motion to dismiss a petition as untimely is respondent's (Board Rules of Procedure and Practice [12 NYCRR] § 65.30), and respondent has not met that burden (*Matter of Gambino et al.*, PR 10-150 [interim decision, November 18, 2010]). Service has not been shown to be proper. Accordingly, respondent's motion to dismiss the petition as untimely is denied.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent's motion to dismiss the petition on the ground that it was not timely filed be, and hereby is, denied; and
2. Respondent shall serve and file an answer to the petition within 30 days of the date of this Interim Resolution of Decision.

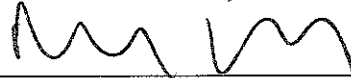


 Vilda Vera Mayuga, Chairperson



 J. Christopher Meagher, Member

 Michael A. Arcuri, Member



 Molly Doherty, Member

Absent

 Gloribelle J. Perez, Member

Dated and signed by the Members
 of the Industrial Board of Appeals
 in New York, New York, on
 June 6, 2018.

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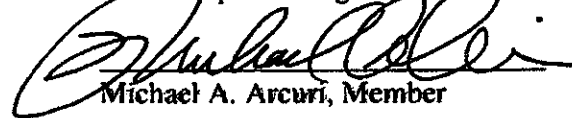
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Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
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