

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

PERRY A. CIAMBELLA AND CIAMBELLA HOME :
CARE, INC. T/A FIRSTLIGHT HOME CARE, :

Petitioners, :

DOCKET NO. PR 18-081

To Review Under Section 101 of the Labor Law: :
An Order to Comply with Article 6 and 19 of the Labor :
Law, dated October 1, 2018, :

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Greenan Law Office, West Seneca (Timothy J. Greenan), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (Steven J. Pepe of counsel), for respondent.

WHEREAS:

This proceeding was commenced when petitioners, Perry A. Ciambella (hereinafter "Ciambella") and Ciambella Home Care, Inc. T/A FirstLight Home Care (hereinafter "FirstLight") filed a petition with the Industrial Board of Appeals (hereinafter "Board") on December 5, 2018 in an envelope post-marked December 4, 2018. The Board served the petition on respondent on December 6, 2018. On December 28, 2018, respondent moved to dismiss the petition as untimely. Petitioners responded to the motion on January 28, 2019, and respondent filed her reply on February 11, 2019.

The burden of proof on a motion to dismiss a petition as untimely is respondent's (Board Rules of Procedure and Practice (Board Rules) [12 NYCRR] § 65.30). Labor Law Section 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."

Petitioners do not deny that the petition was filed more than 60 days after the date of the orders to be appealed (hereinafter “orders”). Rather, they oppose the motion to dismiss on the ground of improper service of the orders, alleging, (1) FirstLight was not served at their last known place of business as is required by Labor Law § 33, and (2) respondent failed to serve petitioners’ counsel. In her reply, respondent argues the improper service of FirstLight is not fatal because respondent also served the orders to be reviewed at the address FirstLight provided for service of process. Respondent further argues that should the Board find such service improper, respondent’s motion should still be granted as to Ciambella as there is no defect in service with respect to him. Respondent did not address the issue of service on petitioners’ counsel.

New York Executive Law § 168 provides, in pertinent part, that:

“[w]henever a person is involved as a party in a proceeding before any body or officer exercising quasi-judicial or administrative functions, and an attorney at law has filed a notice of appearance in such proceeding on behalf of such person, a copy of all subsequent written communications or notices to such person in such proceeding . . . shall be sent to such attorney at law, and if any such subsequent written communication or notice is sent to the party in the proceeding, a copy of the same shall be sent to the attorney at law at the same time.”

On April 16, 2018, respondent wrote to petitioners FirstLight and Ciambella advising them both that respondent had determined that FirstLight had violated the Labor Law and demanding payment of the calculated underpayment. Attached to respondent’s letter was a Notice of Labor Law Violation, Case ID # LS09 201005937, identifying FirstLight as the employer and listing Perry Ciambella as “agent” and the “responsible person notified.” In response to the issued Notice of Labor Law Violation, Timothy J. Greenan, Esq. (hereinafter “Greenan”) spoke with senior investigator Paul Appleby (hereinafter “Appleby”) on April 23, 2018 and informed him that he would be representing FirstLight which was later confirmed, in writing, via email on April 27, 2018. The subject line of that initial email, and the subsequent exchanges between Greenan and Appleby, read FirstLight Home Care - Case ID # LS09 201005937. From April 23, 2018 until the end of August 2018, respondent and Greenan attempted to resolve the matter through various email correspondence, telephone calls and in person meetings. Included in their exchanges was respondent’s statements to Greenan that if the matter was not resolved, an order to comply would be issued, noting “if your client is unwilling to pay the amount we assessed, it is because *he* thinks we have applied the law incorrectly, the venue for that is the Industrial Board of Appeals (IBA).” (emphasis added). On October 1, 2018, respondent issued the orders naming, for the first time, both Ciambella and FirstLight as employers. There is no evidence that the orders were served on Greenan.

Executive Law § 168 provides that after Greenan notified respondent that he represented petitioners, respondent had a statutory obligation to send a copy of all subsequent written communications or notices to Greenan, including the orders (*Matter of Paul Coppa and/or Ten’s Cabaret, Inc.*, Docket No. PR 08-072i, at p. 6 [March 25, 2009] (holding that in the absence of service of the order on petitioners’ counsel, as was required by Executive Law § 168, the limitations period did not begin to run where counsel was engaged in extensive communications

and negotiations after the conclusion of respondent's investigation) citing *Matter of Bianca v Frank*, 55 AD2d 642, 644 [2d Dept 1976] *aff'd* 43 NY2d 168, 173 [1977]). We find that respondent did not effectuate service on petitioners as required by Executive Law § 168. In the absence of proper service of the order on petitioners' counsel, the limitations period has not begun to run (*id.*). The Board does not reach the issue of whether FirstLight was otherwise properly served as our decision that respondent failed to comply with Executive Law § 168 is dispositive of the motion.

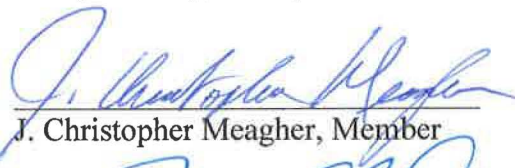
Respondent's motion to dismiss the petition as untimely is denied. Respondent is directed to file her answer within 30 days of service of this order.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The motion to dismiss is denied; and
2. Respondent shall file its answer within 30 days of service of this order.



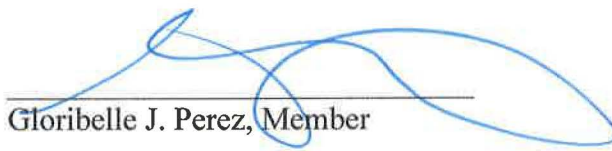
Molly Doherty, Chairperson



J. Christopher Meagher, Member



Michael A. Arcuri, Member



Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on May 29, 2019.