

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

MANSHUI S. NG and MWL CO., 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 Under Article 19 of the Labor Law,
both dated March 18, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 09-132

RESOLUTION OF DECISION

APPEARANCES

Anthony C. Emengo, Esq., and O. Valentine Nnebe, Esq., for petitioners.

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

WHEREAS:

The petitioners commenced this proceeding by filing a petition dated May 10, 2008 with the Industrial Board of Appeals (Board) on June 4, 2009 in an envelope with a post-mark from a Pitney Bowes postal meter dated June 11, 2009. The petition seeks review of two orders that respondent Commissioner of Labor (Commissioner) issued on March 18, 2009.

The Board, recognizing that it could not receive a petition prior to its mailing date, and also recognizing that the petition was untimely since it was filed with the Board more than 60 days after the orders were issued (*see* Labor Law § 101 [1]) sent a letter to the petitioners on June 25, 2009, requesting a written explanation for the petitioners' contention that the petition was not untimely.

On July 23, 2009, the petitioners' attorney, Anthony C. Emengo, filed a "declaration" asserting that "sometime around midnight on May 10, 2009, or shortly

thereafter [he] personally caused a post pre-paid large envelope containing the petition in this case (original and three copies) to be delivered by United States Postal Service mail in postal location in front of my office in Williamsburg, Brooklyn, New York.” Continuing, Mr. Emengo’s declaration speculates that “the postage meter machine at which the mail was post pre-paid, apparently was either improperly or incorrectly programmed or it malfunctioned, perhaps, during the change of date at midnight, to read an incorrect date of June 11, 2009, a date which is about thirty (30) days after the date of mailing of the package and a date, much later than the date of its receipt by the addressee.” Emengo’s declaration further alleges that he became aware of the “postal mixup” only when the petitioners received a collection notice from the respondent dated June 8, 2010, advising that since the respondent had not received notification from the Board that an appeal had been filed, the matter would be referred to the Attorney General for collection if payment was not made within ten days. Emengo’s declaration states that he is “mindful of the penalties of perjury” and is signed by Emengo, but not notarized.

The petition and declaration were served on the respondent Commissioner on July 29, 2009. The Commissioner moved on November 9, 2009, to dismiss the petition as untimely arguing that Emengo’s declaration did not constitute credible or sufficient evidence as to why the petition was received by the Board on June 4, 2009 in an envelope post-marked June 11, 2009.

The petitioners filed an affirmation in opposition to the respondent’s motion to dismiss that again alleged that a “misadventure in handling mail [was] occasioned at the hands of the United States Postal Service office on the petitioner.” The affirmation in opposition offers no further proof of the mailing date of the petition and supplies merely, as stated in the petitioners’ attorney’s own words “conjectures and extrapolations from possible circumstances.”

In her reply to the petitioners’ affirmation in opposition, the respondent states that based on a personal conversation with a representative of the United States Post Office at 263 S 4th St, Brooklyn, NY 11211 (the post office Emengo stated he mailed the petition from), no mailing services are provided at that location after 5:30 p.m. Monday through Friday, or 4:00 p.m. on Sunday.

The Board scheduled an evidentiary hearing on the respondent’s motion to dismiss for June 11, 2010 which was adjourned at the request of the petitioners to October 1, 2010.

On September 30, 2010 at 3:36 p.m., the Board received a fax from Valentine Nnebe, Esq. requesting an adjournment of the hearing scheduled for October 1, 2010 due to engagement as counsel for the defendant in a criminal trial in Queens County which had commenced on September 29, 2010.

On October 1, 2010, the Board sent a letter to Mr. Nnebe with a copy to the petitioners requesting the petitioners to file an offer of proof by October 15, 2010 detailing the evidence to support the allegation that the petition was mailed on May 10, 2010, and

advising that the hearing would be rescheduled if the offer of proof was sufficient. To date, the petitioners have not filed an offer of proof as requested.


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.”

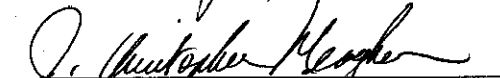
The orders sought to be reviewed were issued on March 18, 2009, and therefore, any petition for review filed with the Board after May 18, 2010 (May 17, which was the 60th day, was a Sunday) would be untimely (Board Rules 65.5 and 65.3 [a] [12 NYCRR 65.5 and 65.3 (a)]). As the petition in this proceeding was not received by the Board until June 4, 2010 with no credible proof of when it was mailed, it was untimely, and the petitioners, having failed to file an offer of proof of the circumstances of the mailing of the petition as requested, have provided no grounds for excusing such untimely filing. 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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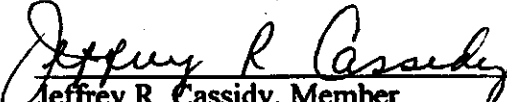
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