STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: SANTOS D. SOTO AND BURNSIDE BEVERAGE CENTER INC., Petitioners, To Reconsider a Resolution of Decision dated December 14, 2009, and Thereafter 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 April 7, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-172 Order to Comply No. 09-00316 RESOLUTION OF DECISION ON APPLICATION FOR RECONSIDERATION

APPEARANCES

Gallet Dreyer & Berkey, LLP, David T. Azrin of Counsel, for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Bates of Counsel, for Respondent.

WHEREAS:

The above proceeding was commenced when the Board received a letter from Petitioner Santos D. Soto (Soto), petitioning for review of an Order under Labor Law article 19 against him and Burnside Beverage Center, Inc. (Petitioners) pursuant to Labor Law § 101 and Part 66 of the Industrial Board of Appeals' Rules of Procedure and Practice (Rules) (12 NYCRR Part 66). The Board received the letter on July 7, 2009, enclosed in an envelope that was postmarked July 2, 2009.

Appearing *pro se* at the time, Soto enclosed a copy of the Order with his letter to the Board. The Order, dated April 7, 2009, assessed civil penalties of $2,000 for findings by Respondent Commissioner of Labor (Respondent) that Petitioners violated Labor Law § 661 and 12 NYCRR §§ 142-2.6 and 2.7 for the period January 1, 2002 through December 20,

2003, by failing to keep and/or furnish true and accurate payroll records for each employee and by failing to give each employee a complete wage statement with every payment of wages. Annexed to the Order was a schedule of minimum wage underpayments totaling $4,071.60; however, an order to comply with Labor Law article 19 was not sent with the letter, only the Order under article 19 and the schedule of underpayments.

By letter dated July 10, 2009, enclosing a copy of the Rules, the Board directed Petitioners to file by August 7, 2009, an amended petition whose contents complied with Rule 66.3 along with a written explanation, supported by proof, of why they contended that the appeal was not untimely. The Board's letter specifically directed Petitioners to, among other things, file complete copies of the order(s) that they wanted the Board to review; state with specificity the facts that they alleged to show that the order was unreasonable and/or invalid; and state their telephone number. When, by December 14, 2009, there had been no response to its July 10, 2009 letter, the Board issued a Resolution of Decision dismissing the petition. On December 15, 2009, the Board served the Resolution of Decision on Petitioners.

On January 18, 2011, Petitioners moved through counsel, pursuant to Rules §§ 65.12, 65.41 (c) and 65.44, to "reopen" the captioned matter and to consolidate it with another proceeding pending before the Board to which Petitioners are parties. Attached to the motion is a complete copy of the Order to Comply with Labor Law article 19 relevant to the instant matter. It totals $16,955.06 and covers minimum wages, interest, and civil penalties. According to the motion papers, on October 19, 2010, the Bronx County Clerk entered the Order as a Judgment against Petitioners.

Petitioners aver in support of the motion that on April 7, 2009, Respondent served the Order on Petitioners and Petitioners' accountant, who promised to handle the matter for Petitioners, but who in July 2009 only first prepared the letter which the Board received in July 2009. Petitioners' moving papers show that Petitioners received the Order on April 9, 2009, and concede that the request to appeal in July 2009 was late. When Petitioners received the Board's July 10, 2009 letter directing that they file a statement explaining why their appeal was not untimely and also file an amended petition, they again asked their accountant to handle the matter, but he again failed them. Then, according to Petitioners' papers, in April 2010 – that is, nine months later – Petitioner Soto suffered a severe heart attack, and his business was officially closed in September 2010.

Petitioners urge that the Board reconsider the Resolution of Decision dismissing their appeal because they have valid claims challenging the reasonableness of the Order; the case should be consolidated with their other matter pending before the Board that raises similar claims; and because absent reconsideration, Petitioner Soto will suffer economic hardship.

The letter enclosing Petitioners' motion papers indicates by a "cc:" that a copy was mailed to a senior labor standards investigator employed by the Department of Labor. By letter dated June 22, 2011, the Board advised Petitioners' attorney that Rule § 65.41 (b) contemplates that a copy of an application for reconsideration would be served on Counsel to the Department of Labor, who represents Respondent in Board proceedings, and that the "proof of service," that the Rule requires be annexed to the application filed with the Board,

would be either an attorney's affirmation or an affidavit. Shortly thereafter, Petitioners complied by filing the required proof of service.

On July 7, 2011, Respondent filed papers in opposition to Petitioners' motion.

We find that Petitioners' explanations for failing to respond to the Board's July 2009 directions – that they relied on their accountant who failed them and that in 2010 Petitioner Soto became very ill – are simply not adequate bases for the Board to reconsider its December 2009 determination dismissing the appeal. In any event, even if the Board were to grant Petitioners' application for reconsideration, which it does not, Petitioners have not established the timeliness of their appeal.

Labor Law § 101 requires that a petition seeking review of an order issued by Respondent "be filed with the board no later than sixty days after the issuance of" the order. *See also,* Rule § 66.2. Petitioners admit that the Order here was issued on April 7, 2009, when Respondent served it on both the Petitioners and their accountant. Accordingly, Petitioners' time to appeal the Order expired sixty days later, or June 6, 2009. The appeal filed in July 2009 was beyond the limitations period. That Petitioners' accountant failed them does not excuse Petitioners from the limitations period or extend it for them. *See, Petition of Anthony Villani and Villani's Lawn & Landscape, LLC,* PR 09-198 (June 23, 2010); *compare, Petition of Jamal Uddin and Jamil MD Uddin and Green Cafe,* PR 09-215 (June 23, 2010).

Given our decision here, it is unnecessary to, and we do not, reach any other issues that the parties may have raised.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

Petitioners' application for reconsideration be, and the same hereby is, denied in its entirety.

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 New York, New York, on
July 26, 2011.

would be either an attorney's affirmation or an affidavit. Shortly thereafter, Petitioners complied by filing the required proof of service.

On July 7, 2011, Respondent filed papers in opposition to Petitioners' motion.

We find that Petitioners' explanations for failing to respond to the Board's July 2009 directions – that they relied on their accountant who failed them and that in 2010 Petitioner Soto became very ill – are simply not adequate bases for the Board to reconsider its December 2009 determination dismissing the appeal. In any event, even if the Board were to grant Petitioners' application for reconsideration, which it does not, Petitioners have not established the timeliness of their appeal.

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J. Christopher Meagher, Member

Jean Grimmet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Rochester, New York, on
July 26, 2011.

would be either an attorney's affirmation or an affidavit. Shortly thereafter, Petitioners complied by filing the required proof of service.

On July 7, 2011, Respondent filed papers in opposition to Petitioners' motion.

We find that Petitioners' explanations for failing to respond to the Board's July 2009 directions – that they relied on their accountant who failed them and that in 2010 Petitioner Soto became very ill – are simply not adequate bases for the Board to reconsider its December 2009 determination dismissing the appeal. In any event, even if the Board were to grant Petitioners' application for reconsideration, which it does not, Petitioners have not established the timeliness of their appeal.

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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
July 26, 2011.