

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
DAVID S. ERWAY, JR. D/B/A ERWAY'S	:
LANDSCAPING & POND DESIGN,	:
	:
Petitioner,	:
	:
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	:
issued June 19, 2009,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 09-231

RESOLUTION OF DECISION

APPEARANCES

Seth L. Hibbert, Esq. for the Petitioner.

WHEREAS:

1. On August 21, 2009 the Board received a petition in the above-referenced matter mailed by the Petitioner on August 20, 2009 appealing two Orders issued by the Commissioner of Labor (Commissioner) on June 19, 2009.
2. Labor Law § 101 provides that a petition for review must be filed with the Board no later than sixty days after the issuance of the Order to be reviewed. The date of filing pursuant to Board Rules of Procedure and Practice 65.5 (d) (12 NYCRR 65.5 [d]) was the date of mailing, August 20, 2009. The Orders to be reviewed were issued on June 19, 2009. Therefore, the petition was untimely as the time to appeal expired on August 18, 2009.
3. By letter dated September 11, 2009, the Board requested that the petitioners file a written explanation for the untimely petition.
4. By fax dated September 14, 2009, the Petitioner's attorney wrote the Board advising that there was no intent on the part of the Petitioner to delay his submission and that "in calculating the time to submit a response, the additional five (5) day allowance for


5. matters served by mail was added to the time to respond” as is the customary practice under the Civil Practice Law and Rules.
6. In the *Matter of Business Credit Corp.* PR 08-061 (December 17, 2008), we held under identical circumstances that:


While it is correct that under certain circumstances the Civil Practice Law and Rules (CPLR) allows for an additional five days when service of a paper is done by mail (*see e.g.* CPLR 2103), such provisions are not applicable here where the issue is filing and not service, and the Board’s Rules of Procedure and Practice are explicit that “[w]here a period of time prescribed by these rules (except in the case of petitions required to commence a proceeding) is measured from the service of a paper, and service is by mail, five (5) days shall be added to the prescribed period. (Board Rules 65.3 [c] [emphasis added]).

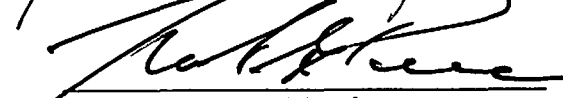
7. Accordingly, there is no provision for an additional five days for the filing of a petition with the Board and the petition in this matter must be dismissed as untimely.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 19 of the Labor Law, dated June 19, 2009, and the Order under Article 19 of the Labor Law, dated June 19 2009, are hereby affirmed; and
2. The petition is hereby dismissed.

  
 Anne P. Stevason, Chairman

  
 J. Christopher Meagher, Member

  
 Mark G. Pearce, Member

  
 Jean-Grumet, Member

Dated and signed in the Office  
 of the Industrial Board of Appeals  
 at New York, New York, on  
 October 21, 2009.

ABSENT  
 LaMarr J. Jackson, Member