

OUTSTANDING TRANSPORT, INC.

Docket No. PR 09-316

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

OUTSTANDING TRANSPORT INC., :

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 :
dated August 27, 2009, :

DOCKET NO. PR 09-316
INTERIM
RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Jeffery D. Pollack, Esq., for Petitioner.

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

WHEREAS:

This proceeding was commenced when Petitioner filed a petition with the Industrial Board of Appeals (Board) on October 27, 2009, seeking review of orders that Respondent Commissioner of Labor (Respondent or Commissioner) issued on August 27, 2009.

The petition was served on Respondent on November 16, 2009. On December 10, 2009, Respondent moved to dismiss the petition on the ground that Petitioner failed to comply with Labor Law § 101 (1) by filing the petition with the Board more than sixty days after the orders were issued.

Petitioner filed papers in opposition to the motion, asserting that the filing date of October 27, 2009, as calculated by Petitioner using an online date calculation program, was timely, and in the event it is found untimely, the Commissioner "should be estopped from arguing the point inasmuch as Petitioner acted in reliance on statements made by Ms. [Jennie] Schleimer, Respondent's agent." Respondent filed a reply to Petitioner's response, arguing

Ms. Schleimer's statements cannot be considered an extension of the statutorily mandated statute of limitations. Moreover, Respondent argues that while Ms. Schleimer mistakenly provided an incorrect date, her statement also advised Petitioner that review may be requested by filing an appeal within sixty days from the date of the order, which was October 26, 2009.

GOVERNING LAW

Labor Law § 101 (1) provides that a petition to review an order of the Commissioner must be filed with the Board "no later than sixty days after the issuance of such . . . order." Board Rule of Procedure and Practice (Rule) 66.2 (12 NYCRR 66.2), entitled "How Review to be Commenced," provides that "[r]eview may be had only by filing a written Petition with the Board at its Albany office, no later than 60 days after the issuance of the . . . order objected to." Rule 65.5 (12 NYCRR 65.5), entitled "Filing and Docketing," notes that "[t]ime periods prescribed by statute cannot be extended" [emphasis in original].

DISCUSSION

The petition was timely filed.

Petitioner argues both that the filing date of October 27, 2009 was timely as it was filed on that date in reliance on the date provided by an agent of the Commissioner, and that the petition was otherwise timely filed.

Regarding Petitioner's first argument, Petitioner notes the September 4, 2009 letter of Ms. Jennie L. Schleimer, a Supervising Labor Standards Investigator for the Commissioner, which directed counsel for Petitioner that "**if your client is aggrieved, a review of the Order may be requested by filing a petition with the Industrial Board of Appeals . . . within sixty (60) days of the date of the order** (or October 27, 2009)." Petitioner argues that it relied on the date of October 27, 2009, and as it was provided by an agent of the Commissioner, she should be equitably estopped from gaining from the ambiguity for which she is responsible.

In support of this position, Petitioner cites *Mundy v Nassau County Civil Serv. Commn.*, 44 NY2d 352 (1978) and *DeNicola v Scarpelli*, 112 AD2d 421 (2nd Dept 1985). In *Mundy*, the Court of Appeals held that, with regard to an ambiguity as to the start of the statute of limitations in a CPLR Article 78 proceeding, "when an administrative body itself creates ambiguity and uncertainty . . . affected [parties] should not have to risk dismissal for prematurity or untimeliness by necessarily guessing" when the statutory time begins to run. *Mundy*, 44 NY2d at 358. "Under these circumstances, 'the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court.'" *Id.*, quoting *Matter of Castaways Motel v Schuyler*, 24 NY2d 120, 126-27 (1969). Similarly, in *DeNicola* the start of the limitations period for filing a CPLR Article 78 proceeding was unclear because the petitioner received a decision with an incorrect date. The petitioner relied on the incorrect date, and the Second Department held that, even though the ambiguity was created inadvertently by the respondent, "any error regarding the actual filing date is not attributable to the petitioner and she should not be

precluded thereby from obtaining judicial review of the determination.” *DeNicola*, 112 AD2d at 422.

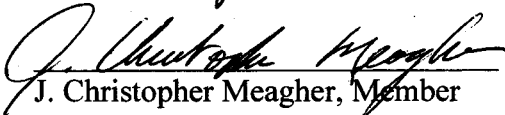
These cases are analogous to the instant proceeding, where Respondent has created ambiguity in the expiration of the statute of limitations, and as such, the ambiguity will be resolved in favor of Petitioner, who will not be precluded from obtaining review by the Board. Given the record before the Board, the petition is accepted as timely filed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent’s motion to dismiss the petition as untimely filed is denied; and
2. Respondent is directed to file an answer to the petition with the Board in accordance with Rule 66.5 (12 NYCRR 65.5).



Anne P. Stevason, Chairman



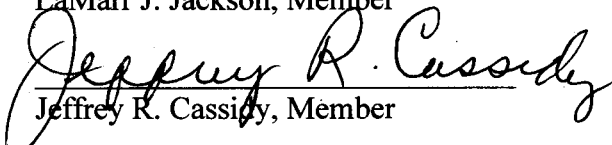
J. Christopher Meagher, Member



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 Albany, New York, on
May 26, 2010.