

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

ILAN TIOMKIN AND DANNY BASS, :
(T/A HOLY LAND ENTERPRISE) :
(T/A PRESTIGE CAR RENTAL) :

Petitioners, :

DOCKET NO. PR 09-329

RESOLUTION OF DECISION

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 September 17, 2009, :

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Norman B. Skydell, Esq, for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry, Esq. of
Counsel, for Respondent.

WHEREAS:

The above proceeding was commenced by the filing of a Petition for review pursuant to Labor Law § 101 and Part 66 of the Industrial Board of Appeals' Rules of Procedure and Practice (Rules) (12 NYCRR Part 66) on November 16, 2009. Upon notice by the Board to the parties, a hearing was scheduled for November 9, 2010 before Board Member and designated Hearing Officer J. Christopher Meagher, Esq. Petitioners failed to attend or otherwise appear at the hearing.

Pursuant to Rule 65.24, the failure of a party to appear at a hearing shall be deemed a waiver of all rights, except the rights to receive a copy of the decision and request review

under Rule 65.41, unless an application for reinstatement is made within five days after the scheduled hearing. If a timely application for reinstatement is made, the Board upon a showing of "good cause" may excuse the failure to appear and reopen the hearing.

On November 15, 2010, the Board received a letter from Petitioners' attorney stating "I act as counsel [to Petitioners] and request pursuant [to] 65.24 that the matter be rescheduled for hearing. Please advise me of the rescheduled date." No grounds showing "good cause" for Petitioners' failure to appear were alleged in the application.

The Board issued its Resolution of Decision (Decision) on December 15, 2010 denying Petitioners' application and dismissing the Petition for failure of Petitioners to demonstrate "good cause" to excuse their failure to appear at the hearing.

By application filed on February 9, 2011, Petitioners' attorney requested that the Board excuse Petitioners' failure to appear and reschedule a hearing on the grounds that: (1) one of the two Petitioners "was out of the country on an important business trip"; (2) counsel was advised by telephone that "if Notice of Appeal was filed within five business days which it was, no further explanation was required", and; (3) counsel made a request to the Department of Labor's (DOL) representative for "documents that had been tendered by the claimant, they were never received by counsel and as such [he] could not properly prepare for the hearing."

By letter of March 9, 2011, the Board advised the parties that Petitioners' application would be considered an Application for Reconsideration under Rule 65.41. The Commissioner opposes the application because: (1) Petitioners were apprised of the hearing date and if one of them would be unavailable due to a business trip an attempt should have been made to reschedule the hearing pursuant to the Board's Rules; (2) the Commissioner's counsel has no record of any communication from Petitioners or their counsel requesting documents from Respondent's file; (3) the Commissioner's investigation included phone calls, correspondence, and visits with Petitioners sufficient to apprise them of the content of the claim tendered by the claimant; and (4) Petitioners had a legal duty to maintain records of their employees' wages and benefits and should have been able to refute the claim without the need for documents from Respondent's file.

Under Rule 65.41 (a), a party may request reconsideration of a determination or resolution made by the Board "on account of facts or circumstances arising subsequent to the hearing" *or* "on account of consequences resulting from compliance with such determination, resolution, requirement, or order which are claimed to justify reconsideration of the proceeding."

The hearing record in this case establishes that Petitioners' attorney was fully advised by the Hearing Officer to consult Rule 65.24 for the procedures available to apply to reopen the hearing. While Petitioners were on notice of the requirement to show "good cause" in their initial application, the Board nonetheless grants reconsideration to the extent of considering the reasons now offered to excuse Petitioners' default. Upon such reconsideration, we find the reasons insufficient and reiterate our Decision dismissing the

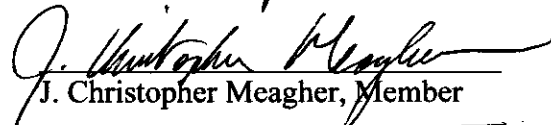
Petition upon a finding that Petitioners failed to demonstrate "good cause" to excuse their failure to appear.

The Board issued the parties a formal Notice of Hearing on June 17, 2010, almost five months before the hearing date scheduled for November 9, 2010. The notice advised in bold face, "If you do not attend the hearing, you risk adverse consequences, including the issuance of a decision finding that you have abandoned your claims and/or defaulted." Petitioners in this case had ample opportunity in advance of the hearing to make a request of the Board pursuant to Rule 65.23 to reschedule the hearing if one of them could not attend. Similarly, Petitioners' attorney had ample opportunity to address any issue over documents requested from the Commissioner that might be necessary to prepare for the hearing, including requesting the Board pursuant to Rule 65.16 to direct Respondent to exchange such information. In the circumstances of this case, the Board finds that Petitioners have failed to demonstrate "good cause" to excuse their failure to appear and reinstate their rights to a hearing.

By virtue of the foregoing, the Board denies Petitioners' Application for Reconsideration and adheres to the Resolution of Decision issued on December 9, 2010.



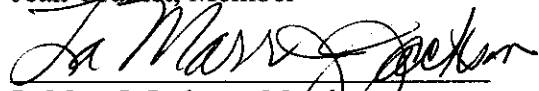
Anne P. Stevason, Chairman



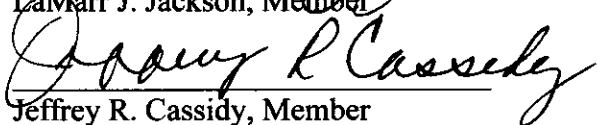
J. Christopher Meagher, Member



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
June 7, 2011.