

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

J. PAUL MACPHERSON, III A/K/A PAUL
MACPHERSON AND PLASTICS PROCESSING,
INC., :

Petitioners, :

DOCKET NO. PR 09-336

RESOLUTION OF DECISION

To Review Under Section 101 of the Labor Law: an :
Order to Comply with Article 6 of the Labor Law :
dated July 27, 2009, :

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Damon Morey, LLP, Eric Bloom, Esq. of Counsel, for Petitioners.

Maria L. Colavito, Counsel, New York State Department of Labor, Larissa C. Wasyl of
Counsel, for Respondent.

WHEREAS:

Respondent Commissioner of Labor (Commissioner) moves to dismiss the petition
here on the grounds that it is untimely.

STATEMENT OF THE CASE

The Commissioner issued an Order to Comply with Labor Law Article 6 (Wage
Order) against Petitioners J. Paul MacPherson and Plastics Processing, Inc. (Petitioners) on
July 27, 2009.¹ The Board received Petitioners' petition for review of the Wage Order on

¹ The Wage Order finds that Petitioners failed to pay an employee wages for the period January 1, 2007
through January 26, 2007, and directs that \$2,240.00 be paid to the Commissioner for the wages due, with
\$895.51 continuing interest thereon at the rate of 16%, calculated to the date of the Wage Order. The
Commissioner also assessed a civil penalty of \$2,240.00 against Petitioners, for a total of \$5,375.51 due and
owing.

November 18, 2009, and their amended petition on January 7, 2010. The Board served the petitions on the Commissioner, and this motion followed.

The Respondent's motion is brought pursuant to Board Rules of Procedure and Practice (Rules) 65.13 (d) (1) (iii) (12 NYCRR 65.13 [d] [1] [iii]) which states that "[w]ithin thirty (30) days after the receipt of a Petition, [the Commissioner] may...move for an order dismissing the Petition where it appears that...the Petition fails to comply with the provisions of either Section 101 [of the Labor Law] or the board's Rules."

Labor Law § 101 (1) provides, in relevant part, that "any person in interest...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." Following Rule 65.5, entitled "Filing and Docketing," the Rules note that "[t]ime periods prescribed by statute cannot be extended." Similarly, Rule 66.2 (a) states that "[r]eview may be had only by filing a written Petition with the Board ... no later than 60 days after the issuance of the ... order objected to." Finally, Rule 65.5 (c) provides that "[p]apers shall be deemed filed only upon receipt at the Board's office."

DOL's motion to dismiss, supported by an attorney's affirmation, argues that Petitioners did not file their petition until November 18, 2009, or almost two months after the sixty-day filing period expired and that the petition is therefore untimely. The Commissioner also states that two copies of the Orders were sent to the Petitioners at an address in Williamsville, New York, which was the last known business address of Petitioners, and that one was sent by regular mail and the other by USPS Certified Mail Return Receipt Requested.

Petitioners oppose the motion and through their attorney aver "[t]hat neither the Petitioner[s] ... had occupied the premises at ... Williamsville, New York since June ... 2008" and that "[t]he July 27, 2009 Order was not received by Petitioners until a [then] current tenant ... took notice of the Department of Labor's October 5, 2009 letter and forwarded same to Mr. MacPherson."

Unless otherwise excusable, Petitioners' time to file the petition expired on September 25, 2009, which is the 60th day after issuance of Orders.

Labor Law § 33 states that "[w]henver the commissioner or board or any person affected by the provisions of this chapter is required to give notice in writing to any person, such notice may be given by mailing it in a letter addressed to such person at his last known place of business" The last known address of Petitioner was the address where the Orders were sent. The Board has excused late filings where the service of the order was improper or not reasonably calculated to notify a petitioner. (*See e.g. Matter of Nordin*, PR 09-076 [December 14, 2009]). However, here the Order was sent to Petitioner's last known business address, and Petitioner apparently filed neither a change of address nor otherwise notified the Commissioner of the address change.

We find that the Commissioner's service was reasonably calculated to notify Petitioners of the Order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The petition be, and the same hereby is, dismissed in accordance with Labor Law § 101 and the Board's Rules of Procedure and Practice.



Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

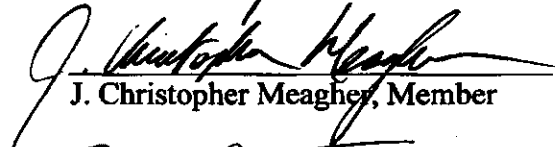
Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 20, 2010.

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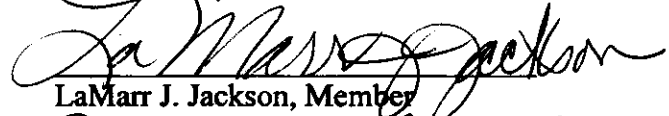
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