

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

PRITPAL KOCHHAR,

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the Labor Law
dated April 13, 2010,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 10-213

RESOLUTION OF DECISION

APPEARANCES

Pritpal Kochhar, *pro se* Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WHEREAS:

The Commissioner of Labor (Commissioner) moves to dismiss the petition for review in this matter on the ground that it is untimely, and on the ground that it does not state a cause of action. Petitioner Pritpal Kochhar, (Petitioner) does not deny that the petition is untimely, but asks the Board to consider personal circumstances and on that basis deny the motion. We grant the motion.

STATEMENT OF THE CASE

The Commissioner issued an Order to Comply with Labor Law Article 19 (Wage Order) and an Order under Labor Law Article 19 (Penalty Order) (together, Orders) against

Petitioner on April 13, 2010.¹ The Petitioner filed a Petition for review of the Orders with the Board, which was postmarked July 2, 2010 and received by the Board on July 6, 2010.² In his Petition, Kochhar stated that he was unable to file his Petition in a timely manner because he incurred a serious injury to his ankle in July 2009, which required four surgeries, the last of which was on April 4, 2010. As a result of the ankle injury, Kochhar stated, "I have not been able to attend to my work, and challenge this order in a timely fashion. I have been in physical therapy until May 25, 2010. In addition, I have had to attend to my 90 year old father's needs; he is in precarious health and needs a great deal of attention." The Board served the Petition on the Commissioner on July 14, 2010, with notice that a response should be filed in accordance with Board Rule 66.5, and this motion, alleging that the Petition is untimely pursuant to Board Rules of Procedure and Practice (Board Rules) 65.13(d)(1)(i) and (iii) (12 NYCRR 65.13 [d] [1] [i] and [iii]) and that it fails to state a cause of action pursuant to Board Rules 66.3(d) and (e) (12 NYCRR 66.3 [d] and [e]), followed. Because we find for the reasons stated below that the Board lacks jurisdiction in this matter, we need not address the issue of whether the Petition fails to state a cause of action.

Rule 65.13 (d)(1)(iii) 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" (emphasis in original) 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."

The Commissioner's motion to dismiss argues that the law is clear that there is a 60-day limitation period to file a petition; the period may not be extended except in narrow circumstances not present here, where there is no issue of improper service, circumstances beyond the control of Petitioner, or anything to do with the actions or inactions of the

¹ The Wage Order finds that Petitioner failed to pay Rosetta Baskerville at the minimum wage rate prescribed by Labor Law Article 19 and the implementing regulations at 12 NYCRR Part 141 for various periods of time between May 15, 2001 through January 1, 2007. It directs the payment of \$20,693.94 for wages due and owing, with continuing interest on the amount due at the rate of 16% calculated to the date of the Wage Order in the amount of \$10,867.44, and assesses a civil penalty in the amount of \$15,520.45, for a total of \$47,081.83 due and owing.

Count 1 of the Penalty Order finds that the Petitioner violated Article 19 and 12 NYCRR 141-2.1 by failing to keep and/or furnish true and accurate employee payroll records and assesses a civil penalty of \$500.00. Count 2 of the Penalty Order finds that Petitioners violated Article 19 and 12 NYCRR 141-2.2 by failing to give each employee a complete wage statement with every wage payment during the period May 15, 2001 through December 31, 2006, and assesses a civil penalty of \$500.00.

² The petition alleges that the Claimant was not an employee.

Respondent; the petition here was filed nearly a month after the 60-day limitation period ended on June 13, 2010; and the Board must therefore dismiss the petition as untimely under Labor Law §101. An attorney's affirmation in support of the motion states that the Orders were issued on April 13, 2010, that sixty days from such date was June 13, 2010, and it is undisputed that Petitioner filed the petition with the Board on July 2, 2010, nearly a month after the expiration of the statute of limitations.

Kochhar filed an Affidavit in Opposition to the Motion stating that he did not receive the Orders because they were sent to an address where he maintains an office, but due to his ankle injury, he was unable to walk up the stairs to gain access to the office, and was "only able to get mail very infrequently." He also stated that he was physically unable to leave home. Attached to Kochhar's Affidavit were some of his medical records, bills, and photographs documenting his medical treatment from July 2009 to June, 2010. While admitting that his Petition was filed seventeen days late, Kochhar stated that he that he forwarded the Petition to the Board within days after he went to the office for the first time in months. Although the Orders were addressed to the same address provided by Kochhar in his Petition, his Affidavit averred: I never advised the Department of Labor that [the address where the Orders were sent] was an address at which mail for me should be sent. I don't know where [they] got that address..."

An attorney's affirmation in support of the Commissioner's Reply averred that pursuant to Labor Law § 33, the Orders were sent to Petitioner's last known business address, which was the address that Petitioner provided to the NYS Department of State for service of process.

DISCUSSION

A. The Commissioner's Motion to Dismiss was Timely

Kochhar argued that the Respondent's Motion to Dismiss was untimely because it was not filed thirty days from the filing of the Petition on July 6, 2010. Kochhar's contention that his Petition should not be dismissed because the Commissioner also filed its Motion to Dismiss late is unavailing because the Commissioner's Motion was timely.

Board Rule 65.13(c) states that a Motion to dismiss "shall be made by a party within thirty (30) days after service of the Petition..." Board Rule 65.3 allows an additional five days when service is by mail "except in the case of Petitions required to commence a proceeding." The Board stated in *Matter of William M. Capicotto, M.D.*, Board Docket No. PR 09-109 (December 15, 2010) that this thirty five day filing period does not commence until the Commissioner is served with the Petition by the Board. The Board, here, served the Petition on the Commissioner on July 14, 2010 and the motion was filed on August 16, 2010, thirty three days later. We find that the Motion to Dismiss was timely.

B. The Petition is untimely pursuant to Labor Law §101

The Board has allowed petitions filed more than sixty days after the issuance of an order in limited circumstances, such as where service of the order was improper or not calculated to notify a petitioner, or when circumstances are beyond the control of a petitioner, or due to actions or inactions of the Commissioner. See e.g., *Matter of Outstanding Transport*, Board Docket No. PR 09-316 (May 26, 2010) (late filing excused where incorrect information regarding filing period was given to petitioner). The Board, however, may not excuse late filings due to the personal circumstances of petitioners. A recent Board decision, *Matter of Mark Finell, Michael Lamarti, and Craft Marketing, LLC*, Board Docket No. PR 10-110 (November 18, 2010) is analogous to the instant case. In that case, the Board did not have jurisdiction to extend the filing date where the Petitioner was hospitalized for a month as a result of a head trauma and returned to the office but could not attend to most company business until after the sixty day limitations period expired. See, *Matter of Leo O'Brien and Leo O'Brien Racing Stable, LTD.*, Board Docket No. PR 09-388 (May 26, 2010) (funerals of family members and illness of Petitioner's spouse did not excuse late filing); *Matter of Jay Nordin and Xtreme Home Design, Inc.*, Board Docket No. PR 09-076 (December 14, 2009) (filing deadline not extended where the Petitioner was not living at the address where the Petition was sent due to marital problems and threats of physical violence.)

Kochhar stated in his Petition that his physical therapy was completed on May 25, 2010, more that two weeks before the expiration of the 60 day limitations period. The Petitioner's explanation that the Petition was filed late because of his ankle injury and his obligations to his ailing, 90 year old father is not sufficient to extend the filing deadline. Kochhar's argument that the Orders should have been mailed to his home address is unavailing. Labor Law § 33 states: "Whenever the commissioner...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 Commissioner mailed the Orders to the address that Kochhar provided to the New York State Department of State for service of process. It was Petitioner's obligation to have his mail forwarded and/or notify the Department of State of a change of address so that he could receive mail during his year-long convalescence.

Because the Petition was filed late, the Board does not have jurisdiction over this matter and may not review Petitioner's substantive allegations concerning the Order. Accordingly, the Petition must be dismissed as untimely.

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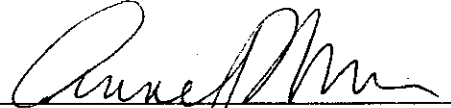
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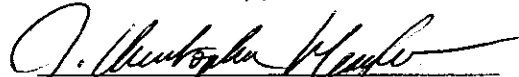
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

This proceeding 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
February 7, 2011.