

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 MICHAEL DERUBERTIS (T/A DERUBERTIS :
 AUTO SERVICES AND SALES), :
 :
 Petitioner, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply with Article 19 of the Labor Law :
 and an Order to Comply Under Article 19 of the :
 Labor Law, both dated September 21, 2010, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 10-382

RESOLUTION OF DECISION

APPEARANCES

Girvin & Ferlazzo, P.C. (Scott P. Quesnel of counsel), for Petitioners.
 Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel), for respondent.

WHEREAS:

This proceeding was commenced when Petitioner filed a petition with the Industrial Board of Appeals (Board) on December 8, 2010, in an envelope post-marked December 7, 2010. By letter dated January 6, 2011, the Board requested Petitioner to explain why the petition was not timely filed. Petitioner responded by letter dated January 26, 2011, stating that the petition was not timely filed due to Petitioner's knee surgery and that he believed that the claim had been previously resolved. The petition was served on the respondent Commissioner of Labor (Commissioner) on February 4, 2011, who moved on February 22, 2011, to dismiss the petition as untimely because it was filed more than 60 days after the orders were issued. Petitioner answered the motion by sworn affidavit on March 22, 2011, and the Commissioner replied on March 24, 2011.

Labor Law § 101 (1) states that:

Except where otherwise prescribed by law, any person in interest of his duly authorized agent may petition the board for a review of the validity of 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.”

Board Rules of Procedure and Practice and Practice (Rules) 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.”

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.”

The order sought to be reviewed was issued on September 21, 2010¹, and any petition for review filed with the Board after November 22, 2010, would be untimely (§ 65.5 and 65.3 [a]; [12 NYCRR 65.5 and 65.3 ([a)] . As the petition was not filed until December 8, 2010, it is untimely unless otherwise excused.

STATEMENT OF THE CASE

Petitioner admits that the petition was untimely filed, but urges the Board to excuse its lateness because he had undergone knee surgery on June 29, 2010, which required him to be out of work for six to eight weeks, and which delayed his review of business correspondence once he returned to work. Petitioner also contends that the Department of Labor (DOL) conducted an earlier investigation of a wage claim by the same claimant, and that Petitioner informed the DOL investigator that he resolved that claim with the claimant. Petitioner argues that because no Order to Comply was issued in the earlier investigation, and because he did not receive any further communication regarding this claim, he assumed that the matter was resolved. However, Petitioner also asserts that a DOL investigator specifically told him that the early claim had been resolved. According to Petitioner, it was not until November 24, 2010, when he received a letter from DOL indicating that no appeal had been filed with the Board challenging the September 21, 2010 orders, that he realized the earlier claim was unresolved.

The Commissioner, citing to *Matter of Pritpal Kochhar*, Board Docket No. PR 10-213 (February 7, 2011), responds that Petitioner’s personal circumstances are not a valid ground for excusing the late filing. She also asserts the Board should not excuse the late filing based on Petitioner’s position that he assumed that the earlier claim had been resolved. The Commissioner argues that Petitioner’s affirmation asserts that he was told (by a DOL investigator) that the earlier claim was resolved, but also asserts that he “assumed” that the claim was resolved because he received no further correspondence regarding it. According to the Commissioner, these are contradictory statements that put both statements “in doubt.”

¹ The Order to Comply with Article 19 of the Labor Law (Wage Order) finds that Petitioner failed to pay Brian Bunting at the minimum wage rate prescribed by Labor Law Article 19 and the implementing regulations at 12 NYCRR Part 141 for the period February 8, 2008 to September 7, 2008. It directs the payment of \$2,547.00 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 \$830.67, and assesses a civil penalty in the amount of \$2,547.00, for a total of \$5,924.67 due and owing.

The Order to Comply Under Article 19 of the Labor Law (Penalty Order) finds that the Petitioner violated Article 19 and 12 NYCRR 141-2.6 by failing to keep and/or furnish true and accurate payroll records and assesses a civil penalty of \$500.00.

Further, the Commissioner asserts that Petitioner provided no statement made by the DOL investigator that led him to believe that the matter was resolved. (*See, e.g. Matter of Anthony Villani and Villani's Lawn & Landscape, LLC*, Board Docket No. PR 09-198 [June 23, 2010]). In support of her contention that Petitioner cannot rely on his assumption that claimant's claim had been resolved, the Commissioner argues that the claim for unpaid wages in the first investigation was for \$322.87, while the second was for \$2,547.00, and that "no reasonable person" would assume that resolution of the first claim would satisfy the second.

The Commissioner also states that Petitioner asserts that he did not review the Orders to Comply "when it was initially received at [his] business . . ." because he assumed, or was told, that the matter was resolved, but he also contends he was unaware of the Orders until after the last date for filing, when he received a November 24th letter informing him that he had neither paid the September 21st Orders, nor filed a petition with the Board. According to the Commissioner, these contradictory positions "tax [Petitioner's] credibility," and none of Petitioner's versions provide a basis for the Board to permit a late filing.

Finally, the Commissioner reasons that the Board is without authority to extend the time period for the filing of a petition as the sixty-day time period is statutory (Labor Law 101 (1)), as well as regulatory (Board Rule 65.1).

DISCUSSION

The Petition is Untimely Pursuant to Labor Law § 101.

Though the Board has excused late filings in limited circumstances (*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 has not excused late filings due to the personal circumstances of petitioners. In the *Matter of Pritpal Kochar*, Board Docket No. PR 10-213 (February 7, 2011), the Board held that it did not have jurisdiction to excuse a late filing where the Petitioner attributed the late filing to his physical therapy that extended to within two weeks of the filing deadline. Similarly, in *Matter of Mark Finell, Michael Lamarti and Craft Marketing, LLC*, Board Docket No. 10-110 (November 18, 2010), the Board did not extend the filing period where the Petitioner could not attend to company business until after the filing period because of his incapacitation due to head trauma. *See also, Matter of Leo O'Brien and Leo O'Brien Racing Stable, Ltd.*, Board Docket No. PR 09-388 (May 26, 2010) (family members' funerals and Petitioner's spouse's illness did not excuse late filing), and *Matter of Jay Nordin and Extreme Home Design, Inc.*, Board Docket No. PR 09-388 (May 26, 2010) (filing deadline not extended where Petitioner was not living where orders were sent due to marital problems and threats of physical violence). Here, Petitioner urges us to extend the filing period for similar personal circumstances that we have previously rejected.

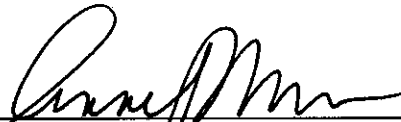
We also reject Petitioner's contention that the Board should excuse the late filing because he either assumed, or was told, that claimant's claim was resolved. Even if the DOL investigator told Petitioner that the claimant's earlier claim was resolved, Petitioner believed that the earlier claim was for \$322.87, while the Orders under review are for a

total of over \$3,000, a difference that should have alerted Petitioner that the earlier claim was not resolved.

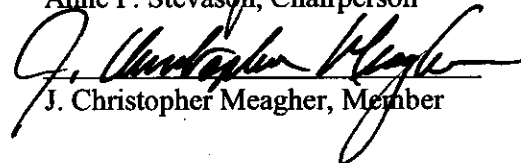
Because the Petition was filed late, the Board does not have jurisdiction over this matter and may not review Petitioners substantive allegations concerning the Orders. Accordingly, the Petition must be dismissed as untimely.

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 Rule of Procedure and Practice.



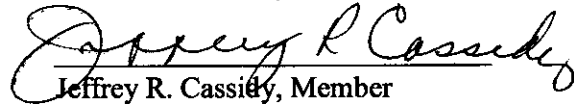
Anne P. Stevason, Chairperson



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
January 30, 2012.

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Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
January 30, 2012.