

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

BARBARA WALTUCH (T/A BARBARA
WALTUCH, ESQ.), :

Petitioner, :

DOCKET NO. PR 12-059

RESOLUTION OF DECISION

To Review Under Section 101 of the Labor Law: Two :
Orders to Comply with Article 19 of the Labor Law, :
both dated January 17, 2012, :

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :

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APPEARANCES

Amelio P. Marino, Esq., for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Mathew Robinson-Loffler, of Counsel), for respondent.

WHEREAS:

1. 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 February 22, 2012 and an amended petition on June 7, 2012; and
2. Respondent Commissioner of Labor filed an answer to the amended petition on July 13, 2012; and
3. Upon notice by the Board to the parties issued on February 10, 2014, a hearing was set for February 25, 2014. The Notice of Hearing was sent to petitioner's attorney by fax, email, and regular mail to 163 West 71st Street, New York, New York 10023, counsel's contact numbers and address of record filed with the Board; and
4. By letter received by the Board on February 14, 2014, petitioner's attorney requested an adjournment of the hearing because he had a scheduled court appearance that morning that he could not adjourn. The Board advised the attorney by fax and letter mailed on February 18, 2014 that it required an affidavit of actual engagement from counsel to consider the request. No affidavit was filed; and

5. As the Board did not receive an affidavit of actual engagement, the hearing was convened at 10:00 A.M. on February 25, 2014. The respondent Commissioner appeared with witnesses. Petitioner and her attorney failed to attend or otherwise appear at the hearing; and
6. Pursuant to Labor Law § 103 and Board Rule 65.30, the burden of proof is on petitioner to prove that the orders under review are not valid or reasonable; and
7. Pursuant to Board Rule 65.24, “the failure of a party to appear at a hearing shall be deemed a waiver of all rights” except the right to receive a copy of the final decision and request reconsideration under Rule 65.41. The petition may be dismissed on default unless an “application for reinstatement” of petitioner’s hearing rights is made within five days after the hearing; and
8. On February 25, 2014, the Board received a letter from petitioner’s attorney dated February 21, 2014 seeking an adjournment of the hearing for medical reasons because of counsel’s recent “eye surgery”, with a copy of the Fed Ex overnight receipt indicating a shipping date on February 24, 2014. The letter was not received by the Board’s Albany office until after petitioner’s default and did not enclose any medical verification of the grounds for the adjournment; and
9. By letter faxed and mailed to the parties on March 31, 2014, the Board advised that it would consider petitioner’s request for an adjournment received on February 25, 2014 as an application for reinstatement of hearing rights pursuant to Rule 64. 24 (c), which provides that “The Board upon a showing of good cause, may excuse such failure to appear and in such event the hearing will be reopened”.

The Board noted in its letter that it had received an earlier letter from petitioner’s counsel on February 18, 2014 enclosing documents for discovery and requesting that the “telephone conference” be adjourned to a May date because of his recent “eye surgery”. The letter was dated February 5, 2014. As the reason was not mentioned in counsel’s subsequent letter of February 12th requesting postponement because of a court appearance, and because the letter predated the actual Notice of Hearing, the Board assumed it was no longer pertinent and did not address the issue in its response directing that an affidavit of actual engagement be filed; and

10. The attorneys were directed to file written statements with the Board in further support or opposition to petitioner’s application by April 11, 2014. Petitioner’s attorney was advised that any request for reinstatement must be accompanied by medical verification of the reasons cited in his application; and
11. Respondent’s attorney filed a letter dated April 11, 2014 requesting that the Board deny reinstatement because no “good cause” had been shown. Petitioner’s counsel did not submit written reasons why petitioner’s default should be excused and did not submit medical verification of the reasons cited for the requested adjournment; and
12. By virtue of the above, petitioner has failed to establish “good cause” to excuse the failure to appear at the hearing.

Following the scheduling of the hearing on a date certain, petitioner's counsel made a request to postpone the hearing because he was engaged in court on that date. However, when requested to file documentation to substantiate the actual engagement, counsel failed to do so.

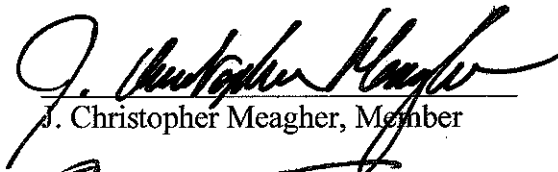
On the day before the hearing, counsel filed a second request to postpone the hearing citing medical reasons for the adjournment by a mailing which could not have been received by the Board until after the hearing had taken place. Petitioner and her counsel failed to attend the hearing without receiving confirmation that the hearing had been adjourned.

Following receipt of petitioner's application to adjourn on medical grounds, and because counsel had made reference to the issue in earlier correspondence before the hearing was set, petitioner was given the opportunity to amplify why the default should be excused and to substantiate the medical condition necessitating the adjournment. Petitioner and her counsel failed to do so.

13. Petitioner has failed to show grounds why reinstatement of her hearing rights should be granted pursuant to Rule 65.24 and the proceeding shall therefore be dismissed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

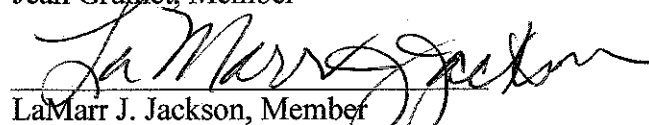
This proceeding be, and the same hereby is, dismissed in accordance with the Board's Rules:



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
May 22, 2014.