

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

WAYNE D. MITCHELL A/K/A WAYNE
MITCHELL AND MITCHELL'S REAL ESTATE,
INC.,

Petitioners,

DOCKET NO. PR 18-067

To Review Under Section 101 of the Labor Law:
An Order to Comply with Articles 5 and 19 of the
Labor Law, dated July 9, 2018,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Ronald A. Goldman, Attorney at Law, Brooklyn, for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (Benjamin T. Garry of counsel), for respondent.

WHEREAS:

This proceeding was commenced when petitioners filed a petition with the Industrial Board of Appeals (hereinafter "the Board") on October 23, 2018 in an overnight delivery envelope post-marked October 22, 2018. An amended petition was filed on November 20, 2018. The Board served the petition and amended petition on respondent Commissioner of Labor on November 26, 2018, and respondent moved on December 6, 2018 to dismiss the petition as untimely because it was filed more than 60 days after the order being appealed was issued. Petitioners filed their opposition to the motion on January 23, 2019, stating that petitioners had made "several attempts to serve the petition for review, but the petition was apparently directed to the wrong room in the State Office Campus," and that respondent's motion to dismiss "may be time barred." Respondent did not reply to petitioners' opposition.

As a preliminary matter, the Board disagrees with petitioners that respondent's motion to dismiss "may be time barred." Board Rule § 65.13 (d) requires that a motion to dismiss be filed "[w]ithin thirty (30) days after the receipt of a Petition." (Board Rules of Procedure and Practice [12 NYCRR] § 65.13 [d]). Here, the 30-day period is measured from service of the petition and the amended petition on respondent on November 26, 2018. Respondent's motion was filed 10 days later, on December 6, 2018. Accordingly, Respondent's motion was timely filed.

With respect to the issue of timeliness of the petition, Labor Law § 101 (1) states that:

“Except where otherwise prescribed by law, any person in interest or his duly authorized agent 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.”

The order to be reviewed is dated July 9, 2018. Therefore, any petition for review of that order filed with the Board with a post-mark after September 7, 2018, is untimely (*id.*; Board Rules of Procedure and Practice [12 NYCRR] §§ 65.3 [a] and 65.5 [d]). The letter from petitioners’ counsel that was mailed to respondent’s office, and not the Board, is dated October 15, 2018, which would have been untimely even had it been properly filed with the Board.

Petitioners’ argument that they made “several attempts to serve the petition for review, but the petition was “apparently directed to the wrong room in the State Office Campus” and, thus, the Board should excuse the petition’s untimeliness is also unavailing. The order to comply unambiguously advises petitioners, if they disagree with the order’s findings, that they:

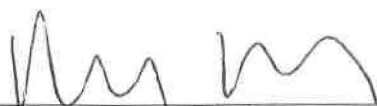
"may appeal to the Industrial Board of Appeals within 60 days from the date issued (above), as provided by Section 101 of the Labor Law. For information on how to appeal, contact the Board by visiting their web site at www.industrialappeals.ny.gov, by calling (518) 474-4785, or by mail to: Industrial Board of Appeals, State Office Building Campus, Bldg. 12, Rm. 116, Albany, NY 12240."

Accordingly, the petition was untimely and must be dismissed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Commissioner of Labor’s motion to dismiss the petition for review is granted, and the petition for review is dismissed.

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
March 6, 2019.


Molly Doherty, Chairperson
J. Christopher Meagher, Member
Michael A. Arcuri, Member
Gloribelle J. Perez, Member

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Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
March 6, 2019.

Molly Doherty, Chairperson

J. Christopher Meagher, Member


Michael A. Arcuri, Member

Gloribelle J. Perez, Member