

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

MANSHUI S. NG AND MLW CO, INC., :

Petitioners, :

DOCKET NO. PR 09-132

To Reconsider a Resolution of Decision dated :
November 18, 2010, and Thereafter To Review Under :
Section 101 of the Labor Law: An Order to Comply :
with Article 19 of the Labor Law and An Order under :
Article 19 of the Labor Law, both dated March 18, :
2009, :

RESOLUTION OF DECISION
ON APPLICATION FOR
RECONSIDERATION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :

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APPEARANCES

Manshui S. Ng, *pro se*, for Petitioners.

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

WHEREAS:

This proceeding was commenced when Attorney Anthony C. Emengo filed a petition on behalf of petitioners Manshui S. Ng and MLW Co., Inc. dated May 10, 2008 with the Board on June 4, 2009 in an envelope post marked June 11, 2009 by a Pitney Bowes postal meter. The Board, recognizing that it could not receive a petition prior to its mailing date, and also recognizing the petition was untimely since it was filed more than 60 days after the orders were issued (Labor Law § 101 [1]) sent a letter to the petitioners' attorney requesting a written explanation as to why the petition was not untimely. Ultimately, the respondent Commissioner of Labor filed a motion to dismiss the petition as untimely. On December 4, 2009 Attorney Emengo filed a Notice of Appearance with the Board along with an Affirmation in Opposition to the motion. A hearing on the motion was thereafter scheduled. The hearing was adjourned at the request of Attorney Valentine Nnebe who had been substituted as the petitioners' counsel after Mr. Emengo was suspended from the practice of law in New York. The Board advised Mr. Nnebe that the hearing would only be

rescheduled if the petitioners filed an offer of proof by October 15, 2010 detailing the evidence to support the petitioners' allegation that the petition was timely filed. The petitioners failed to file an offer of proof and the petition was dismissed by the Board as untimely on November 18, 2010. On January 7, 2011, the petitioners filed a motion to reconsider the Board's decision.

The petitioners allege that the Board's November 18, 2010 decision dismissing the petition as untimely should be reconsidered because of excusable default and law office failure. We disagree. The petitioners argue that they were out of the country and had no notice of the motion hearing and that the Board dismissed the petition because the petitioners did not appear. Irrespective of whether the petitioners were out of the country, notice of the motion hearing was provided to the petitioners' counsel, who obtained two adjournments. Furthermore, the case was not dismissed because of the petitioners' failure to appear in person or by counsel at a motion hearing, but because the petitioners, by their attorney, failed to comply with the Board's instructions to file an offer of proof concerning when the petition was mailed to the Board by Mr. Emengo.

The petitioners also argue that the orders were improperly served on the individual petitioner Ng by mail at his home address in violation of Labor Law § 33. That statute allows the Commissioner to serve an order to an individual by mail at his last known place of business or in person at his home. We do not need to decide whether the orders were properly served, because the allegation was waived when it was not raised by the petitioners' attorneys in response to the Commissioner's motion to dismiss.

For the above reasons, we deny the petitioners' motion for reconsideration.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

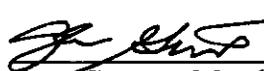
Petitioners' application for reconsideration be, and the same hereby is, denied in its entirety.



Anne P. Stevason, Chairperson



J. Christopher Meagher, Member



Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 9, 2011.

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

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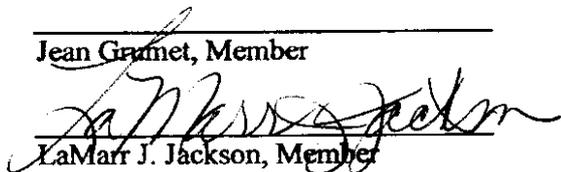
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Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
September 9, 2011.

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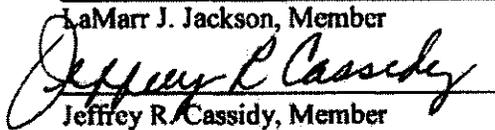
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LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member