STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petitions of: JOSEPH ENNIS, DOCKET NO. PR 11-321 To Review Under Section 101 of the Labor Law: An Order to Comply (11-01049) with Article 6, and an Order under Article 19 of the Labor Law, dated September 29, 2011, Petitioner, DAVID RING, DOCKET NO. PR 11-331 To Review Under Section 101 of the Labor Law: An Order to Comply (11-00281) with Article 6, and an Order under Article 19, dated March 25, 2011; and An Order to Comply (11-01049) with Article 6, and an Order under Article 19 of the Labor Law, dated September 29, 2011, Petitioner, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NOS. PR 11-321 PR 11-331 INTERIM RESOLUTION OF DECISION

APPEARANCES

Moses & Singer, LLP, Shari A. Alexander, of counsel; David B. Feldman, of counsel, for Petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin A Shaw, of counsel), for respondent.

WHEREAS:

Petitioners Joseph Ennis and David Ring filed separate petitions with the Industrial Board of Appeals (Board), which the Board received on October 7, 2011 (Ennis) and on October 21, 2011 (Ring). The Board served the Ennis petition on November 2, 2011 on the Commissioner of Labor (Commissioner, Respondent) and the Ring petition on November 7, 2011. The Ennis petition seeks review of an Order to Comply with Article 6 of the New York State Labor Law that was issued on September 29, 2011 (Order to Comply No. 11-01049). The Ring petition seeks review of an Order

to Comply with Article 6 of the Labor Law issued on September 29, 2011 (Order to Comply No. 11-01049) and one that was issued on March 25, 2011 (Order to Comply No. 11-00281). The March 25th and September 29th Orders were issued against David Ring, Joe Ennis and Globe Mortgage America, L.L.C. (Globe). No petition was filed on behalf of Globe.

The March 25th Order demands payment of $109,510.22 in unpaid wages, interest at the rate of 16.0% in the amount of $27,377.57 and a Civil Penalty of $109,510.22, for a total due and owing of $260,406.39. This Order also includes an Order under Article 19 of the Labor Law in the amount of $500.00 for the failure to keep and/or furnish true and accurate payroll records. The September 29th Order demands payment of $25,123.50 in unpaid wages, interest at the rate of 16.0% in the amount of $5,861.21, liquated damages at the rate of 25% in the amount of $6,280.88 and a civil penalty of $37,685.24 for a total due and owing of $74,950.84. The September 29th Order also includes an Order under Article 19 in the amount of $1,000.00 for the failure to keep and/or furnish true and accurate payroll records.

The Ring petition moves that the Board issue a ruling (1) finding that the March 25th Order was not properly served on petitioner Ring; (2) that the Ring and Ennis petitions be consolidated in one hearing before the Board under 12 NYCRR Part 65.44; (3) staying enforcement of the Orders pending Board adjudication of the petition in accordance with 12 NYCRR Part 66.9 (a); and, that the Board declare the Orders invalid or unenforceable because petitioner Ring is not an "Employer" under Labor Law § 190.3.

The Respondent moves to dismiss that portion of the Ring petition related to the March 25th Orders as untimely filed; opposes consolidation of a hearing of the March 25th and September 29th Orders because of its motion, but moves to consolidate that portion of the Ring petition related to the September 29th Orders and the Ennis petition; and, to allow for an extension of time to file an Answer. Respondent consents to a stay of enforcement of the September 29th Orders as he concedes that the petitions were timely filed in regard to those Orders, but opposes a stay of enforcement of the March 25th Orders because he believes the petition related to those Orders was untimely filed. However, Respondent concedes that petitioners are entitled to a stay if and when the Board finds that the March 25th Orders were timely appealed.

Petitioner Ring opposes Respondent's motion to dismiss that portion of his petition relevant to the March 25th Orders because the petition was timely filed; opposes Respondent's motion opposing consolidation of a hearing related to the March 25th and September 29th Orders as he contends that his petition was timely filed in all regards; and does not oppose the Respondent's request for an extension of time to file an Answer.

The Board finds that petitioner Ring filed a timely petition related to the March 25th Orders; that the Ennis and Ring petitions are to be consolidated; that a stay of enforcement of all Orders be granted until the Board issues a decision and order regarding the petitions; and, that the Respondent be granted an extension of time to file an Answer to the Ring petition until 35 days after receipt of this Interim Resolution of Decision.

STATEMENT OF THE CASE

The March 25th Orders were served to the attention of David Ring at the "Whitehaven Group", 560 Lexington Avenue, 16th Floor, New York, New York" and to his attention at Globe Mortgage America, LLC at 711 5th Avenue, New York, New York. The mailing to 711 Fifth Avenue was returned with the stamp "ATTEMPTED - NOT KNOWN." Ring avers that he is aware of several entities that begin with "Whitehaven," but that they had no relation to Globe and that they operated solely from 350 Fifth Avenue, New York, New York and 711 Fifth Avenue, and did not operate out of 560 Lexington Avenue. Attached to the Ring petition are various New York Department of State, Division of Corporations' documents identifying 350 Fifth Avenue as the location of various Whitehaven enterprises.

Further, Ring states that his last know business address was and is "The Broadsmoore Group, 560 Lexington Avenue, 16th floor, New York, New York." Ring adds that Globe's address for service of process is "Globe Mortgage America, L.L.C., 475 Grand Avenue, Englewood, New Jersey," and that this address can be found at the New York State Department of State/Division of Corporation's website.

Moreover, Ring' attorney affirms that Ring's prior counsel spoke with the Department of Labor (DOL) regarding the September 29th orders in August and October, 2011 and that on October 4, 2011, the DOL agreed to re-date and re-serve the March 25th Orders, which they failed to do. Ring argues that DOL's willingness to re-issue the Orders infers its understanding that the Orders were not properly served.

Respondent contends that Claimants asserted that Ring operated his business out of 560 Lexington Avenue, 16th floor and 711 5th Avenue and that each Claimant identified Global "sometimes with the addition of 'Broadsmoore' or Broadsmoore Financial Group'" as the company that employed them. He argues that a claimant also identified both the Whitehaven Group and Broadmoore as operating out of 560 Lexington Avenue and that Ring was "Chairman and President of both." Respondent asserts that the Orders were served on Ring at his last known business address (560 Lexington Ave., 16th floor) and that service should not be invalidated merely because the service identified a different company (Whitehaven) that may have operated out of a different address, especially since the service included Petitioner's name.

Further, Respondent argues that Orders were also served at Globe, 711 5th Avenue, to Ring's attention, a location where Claimants asserted they met with Petitioner to receive direction and supervision. Respondent concedes that the Orders served at this address were returned, but maintains that service was proper because they were served where Petitioner was last known to have conducted business.

Finally, Respondent argues that Petitioner cannot rely on Respondent's assertion that the Orders would be re-addressed, re-dated, and re-issued. He argues that the time to file long passed when this conversation took place, regardless of whether Petitioner's assertion of when it occurred (October 4 or 6), or October 3, 2011 (by examination of Respondent's case log), is accurate. In either case, there could have been no detrimental reliance by Petitioner. Respondent also concedes that he received a phone call from Petitioner's attorney on August 2, 2011, regarding the September 29th matter, which had not yet gone to Orders, but Petitioner's attorney stated that he not been retained for the

March 25th Orders. According to Respondent, therefore there could have been no detrimental reliance by Petitioner.

Labor Law §101(1) requires that a petition "shall be filed with the Board no later than sixty days after the issuance of the order in question," and Board Rule §66.2(a) states that "Review may be had only by filing a written petition with the Board at its Albany office, no later than sixty (60) days after the issuance of the ... order objected to." Board Rule §65.5, by notation, adds that "Time periods prescribed by statue cannot be extended." The petition was untimely filed as it was filed more than 60 days after the issuance of the March 25th Orders, unless otherwise excused.

Petitioner Ring argues that the Orders were not properly served as they were not served at his last place of business, which he argues was the Broadsmoore Group, 560 Lexington Avenue. Though the Orders were served at that address and were called to Petitioner's attention, the Orders were addressed to Whitehaven, which Petitioner claim was unrelated to either Broadsmoore or Globe. Petitioner also argues that Respondent's service at Globe at 711 5th Avenue was also defective as Globe's address was 475 Grand Avenue, Englewood, New Jersey, which is the address that was registered with the NY State Department of State. Petitioner maintains that service at 711 5th Avenue is also shown to be defective by evidence that the Orders were returned to Petitioner as undeliverable ("ATTEMPTED – NOT KNOWN").

The Board has held that "in the absence of proper service . . . , the limitations period [does] not begin to run . . . ." (*Matter of Farhat N. Qureshi and Brite Limousine International, Inc.,* PR 11-070 [interim decision, March 29, 2012]). Proper service requires that service was reasonably calculated to notify petitioners of Orders. We find that the Orders were not reasonably calculated to notify Petitioner of the March 29th Orders and that they were not properly served. We deny Respondent's motion to dismiss the petition as untimely filed.

The Orders were served to the attention of Petitioner at 560 Lexington Avenue, but were addressed not to Global but to the Whitehaven Group, which is not an entity responsible for the Orders. While Petitioner admits that he had a business relation with various Whitehaven entities, we cannot conclude that this establishes that the Orders were properly served. The Respondent's obligation was to serve the Orders either to Petitioner's last business address or by personal service anywhere. (*Matter of Gambino,* PR 10-050 (November 18, 2010). The Whitehaven Group was not part of Petitioner's last business address.

The Orders were also served to Petitioner's attention at Globe, 711 5th Avenue. However, the Orders were returned to the Respondent as undeliverable. Respondent contends the fact that the Orders were undeliverable and returned does not establish improper service, citing to our decision in *Matter of Jeffrey H. Astor and JEFFCO Plumbing, Inc.,* PR 08-056 (March 24, 2010). In *Astor* the Board held that "there [was] no issue of improper service, only that Petitioners did not receive the order." Here there is an issue of improper service as the Orders were served at an address where Global was not located. Global's business address was recorded by the New York State Department of State, Division of Corporations as 475 Grand Avenue, Englewood, New Jersey. Further, Respondent's reliance upon statements allegedly made by Claimants that, at times, they received work orders and control from Petitioner at 711 5th Avenue does not establish it as his last place of business.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent Commissioner of Labor's motion to dismiss the petition of David Ring be, and hereby is denied; and,

2. Respondent Commissioner of Labor be, and hereby is, required to answer the petition within 35 days of the service of this Interim Resolution of Decision upon him.

3. Petitioner's motion to consolidate PR 1~~0~~11-331 and PR 1~~0~~11-321 is granted.

4. Enforcement of the Orders in PR 1~~0~~11-331 and PR 1~~0~~11-321 is stayed pending until determination of the petitions by the Board pursuant to Labor Law § 218.3.

Absent
Anne P. Stevason, Chairwoman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffery R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York on
December 14, 2012.