STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DAVID D. D'AMATO AND BUFFALO SECURITY AND INVESTIGATION, LLC, Petitioners, To Review Under Section 101 of the New York State Labor Law: Orders to Comply With Article 6 of the Labor Law issued June 24, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-328 RESOLUTION OF DECISION

APPEARANCES

Brown & Kelley, LLP (Lisa T. Sofferin, Esq. and Ryan J. Mills, Esq. of counsel), for the petitioners.

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

WHEREAS:

This proceeding was commenced when the petitioner filed a petition with the Industrial Board of Appeals (Board) on October 18, 2011. The petition was served on the respondent Commissioner of Labor (Commissioner) on November 7, 2011. The Commissioner moved on December 9, 2011, to dismiss the petition as untimely because it was filed more than 60 days after the order was issued.

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 orders sought to be reviewed were issued on June 24, 2011, and therefore, any petition for review filed with the Board after August 23, 2011 would be untimely (Board Rules of Procedure and Practice 66.3 [a], 65.5 and 65.3 [a]; [12 NYCRR 66.3 [a], 65.5 and 65.3 (a)]). As the petition in this proceeding was not received by the Board until October 18, 2011, it was untimely.

The petitioner's opposition to the motion provides no legally sufficient grounds for the Board to find that the petition was timely filed or to excuse the late filing. The petition filed on October 18, 2011, attached a copy of the Order to Comply of June 24, 2011 that clearly states that any appeal must be made within 60 days of the date the Order is issued. No mention was made in the petition of not receiving the Order until after October 5, 2011. The alleged failure to receive the Order was only first mentioned in petitioner's papers in opposition to respondent's motion to dismiss and are solely premised on petitioner's claim that since he had responded in a timely fashion to three previous Orders to Comply he would have also done so in this instance. We cannot presume that petitioner's late filing could only be due to his alleged failure to receive the original Order in the mail. We only have petitioner's bare claim that he did not receive the Order and that with nothing more is insufficient to override the legal presumption that items sent in the mail are received.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Commissioner of Labor's motion to dismiss the petition for review is granted in its entirety, and the petition for review be, and the same hereby is, dismissed.

Absent
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
December 14, 2012.