STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 13, 2020

IN THE MATTER OF:
Appeal Board No. 610766

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the determination assessing $1,512.96 in additional contributions due for the period January 1, 2010 through June 30, 2013, based on remuneration paid to the individuals included in the audit as employees; and assessing the employer $756.48 as a fifty percent fraud penalty pursuant to Labor Law § 570 (4). The employer requested

a hearing and objected. The Commissioner of Labor objected that the hearing request was not made within the time allowed by statute.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard. No one appeared on behalf of the employer. By default decision filed May 29, 2019 (019-09301) the Administrative Law Judge overruled the employer's objection and sustained the determination.

The employer applied to reopen the decision of the Administrative Law Judge filed May 29, 2019. Upon due notice to all parties, a hearing was held at which all parties were accorded a full opportunity to be heard. No one appeared on behalf of the employer. By default decision filed September 4, 2019 (019-14134) the Administrative Law Judge denied the employer's application to reopen 019-09301, overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board. By decision filed October 23, 2019, (Appeal Board No. 608282), the Board dismissed the appeal and referred the matter back to the Hearing Section to treat the appeal

as an application to reopen A.L.J. Case Nos. 019-14134 and 019-09301.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor. By decision filed February 13, 2020 (), the
Administrative Law Judge denied the employer's application to reopen A.L.J. Case No. 019-14134 and continued in effect that decision that overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The determination was addressed to the employer and contained a mailing date of January 27, 2015. The employer received the determination shortly thereafter. The determination stated that if one disagreed, one could request a hearing, in writing, within 30 days from the date of this letter. The employer's owner gave the determination to his accountant. His accountant told him that he would take care of the matter. The accountant disappeared and the owner continued receiving letters from the Department of Labor. At some point, the owner obtained a new accountant. On December 10, 2017, the employer requested a hearing.

The employer did not appear at the May 29, 2019 hearing because the owner mixed up the dates and believed the hearing was on a different day. The employer did not appear at the September 4, 2019 hearing because it arrived late to the hearing site due to traffic delays.

OPINION: The credible evidence establishes that the employer did not appear at the May 29, 2019 hearing because the owner believed the hearing was on a different day. The credible evidence further establishes that the employer did not appear at the September 4, 2019 hearing because it arrived late due to traffic delays. Accordingly, we conclude that the reasons for the employer's non-appearances constitute good cause. We next address the Commissioner's timeliness objection.

Under Labor Law § 620 (2), an employer who is dissatisfied with a

determination may request a hearing, but must do so within thirty days of the

mailing or personal delivery of the determination. Under the Board's regulations, a hearing request is deemed timely if postmarked within thirty days of the receipt of such determination. Absent proof to the contrary, a determination is deemed mailed on the date recited on the determination and received by the party to whom it was addressed no later than five business days after the date mailed (12 NYCRR § 461 [2]).

The credible evidence further establishes that the employer received the determination dated January 27, 2015. As there is no evidence of a specific date it was received, it has been deemed to have been received no later than February 3, 2015. However, the employer did not request a hearing until December 10, 2017, more than two years after receipt of the determination. The employer's contention that the delay was due to his accountant's negligence is not persuasive, as the statute is strictly construed and does not contain a provision extending the time in which an employer can request a hearing (See Matter of White, 49 AD3d 932 [3d Dept 2008]; Matter of Rago, 22 AD3d 1002 [3d Dept 2002]). As the employer's August 30, 2012 hearing request was untimely, there is no jurisdiction to reach the merits of the employer's objection to the assessment and fraud penalty. Accordingly, we further conclude that the Commissioner of Labor's timeliness objection should be sustained.

DECISION: The decision of the Administrative Law Judge is reversed.

The employer's applications to reopen 019-14134 and
are granted.

The Commissioner of Labor's timeliness objection is sustained.

The employer's objection is overruled.

The determination, assessing $1,512.96 in additional
contributions due for the period January 1, 2010 through June 30, 2013, based on remuneration paid to the individuals included in the audit as employees; and assessing the employer $756.48 as a fifty percent fraud penalty pursuant to Labor Law § 570 (4), is continued in effect.

JUNE F. O'NEILL, MEMBER