

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

KONG MING LEE, FEE YIN LEE AND BLUE
BUTTERFLY FASHION, INC.,

Petitioners,

DOCKET NO. PR 10-293

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19, and an Order
Under Article 19 of the Labor Law, both dated January
20, 2011,

INTERIM
RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Franklin N. Meyer, Esq., for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jeffrey G. Shapiro of Counsel), for respondent.

WHEREAS:

On May 18, 2011, petitioners Kong Ming Lee, Fin Yin Lee, and Blue Butterfly Fashion, Inc. (together, petitioners) filed a motion pursuant to Board Rule 65.17 (b) to strike certain items in respondent Commissioner of Labor's (Commissioner) demand for a bill of particulars (demand). On June 2, 2011, the Commissioner opposed the motion and cross-moved for an order pursuant to Rule 65.17 (d) directing Petitioners to file a more fully responsive bill of particulars. Petitioners filed a reply affirmation on July 7, 2011 in further support of their motion to strike and in opposition to the Commissioner's cross-motion.

The Board grants the respective motions in part, denies them in part, and modifies the Commissioner's demand as follows. Petitioners shall serve a supplemental bill of particulars by March 5, 2012.

STATEMENT OF THE CASE

The petition in this matter was filed with the Board on March 9, 2011 and seeks review of two orders issued by the Commissioner against petitioners on January 20, 2011.

The first order (wage order) directs petitioners to pay to the Commissioner overtime wages owed 21 employees listed in the order in the total amount of \$386,819.70, with interest continuing thereon at the rate of 16% to the date of the order in the amount of \$59,135.79, liquidated damages at the rate of 25% in the amount of \$96,704.98, and a civil penalty of \$386,819.70, for a total amount due of \$929,480.17.

The second order (penalty order) directs petitioners to pay a civil penalty of \$2,000.00 (Count 1) for failure to keep and/or furnish true and accurate payroll records for its employees, and \$2,000.00 (Count 2) for failure to issue wage statements to its employees, for a total amount due of \$4,000.00.

The petition asserts in paragraphs (e) (1)-(12) that the orders should be reversed because: (1) they set forth "incorrect dates as to the periods worked" by person[s] alleged; (2) set forth "incorrect job titles" of persons alleged; (3) set forth "incorrect amounts due" for the persons alleged; (4) refer to persons who are "exempt from the law/regulation alleged" and "misidentify the employer"; (5) the employees "were paid in accordance with applicable law, rule, and regulation"; (6) the employer "maintained and furnished true and accurate records" and "furnished wage statements" to employees; (7) the amount alleged as "underpayment of wages is incorrect"; (8) the "claimed demand for interest is incorrect"; (9) there is no legal basis for imposition of liquidated damages since at all times the employer "acted in good faith and believed it was in compliance with law"; (10) there is no legal basis for imposition of civil penalties since the employer "was never previously found to be in violation of law, rule, or regulation governing payment of wages, benefits, or supplements" and "did not commit any violation that was willful or egregious"; (11) the imposition of civil penalties for "alleged first time record keeping/wage statement violations are violative of Labor Law § 218", and; (12) there is no legal basis for imposition of civil penalties "in light of the good faith of the employer, the absence [of] any previous violations; its compliance with legal requirements, its small size; the nature of the alleged violations and etc."

On April 6, 2011, the Commissioner filed an answer denying the material allegations of the petition and interposing as an affirmative defense that the Commissioner's calculation of wages are in all respects reasonable and valid. The Commissioner served and filed a demand for a bill of particulars requesting that petitioners provide information and records particularizing the allegations of the petition. Petitioners provided the particulars demanded, with the exception of the items listed below, which they object to and move to strike on the grounds that they are open-ended demands for evidentiary documents and information that do not particularize a pleading. The Commissioner opposes the motion and requests an order directing service of a fully responsive bill of particulars on the grounds that the items are reasonable demands for particulars of petitioners' pleadings.

The parties dispute items 3-6, 7 (c), 8 (c), 9 (c), 10 (d) and (e), 11 (c), 12 (a)-(d), 13, 14(c), 15 (b), and 20 of the demand:¹

Item 3: If, in preparing the responses to the subsequent demands, the Petitioners consulted any records other than those otherwise demanded, annex to the response to these demands copies of all such records.

Item 4: If the Petitioners are unable to provide the current address and or telephone number of any person in response to any subsequent demand, provide such person's last known residence and mailing address and/or telephone number, identifying it as such.

Item 5: If, in preparing the responses to the subsequent demands, the Petitioners consulted any source of information other than records, describe, with such particularity as to permit precise identification, that source of information, each demand for which that source of information was consulted and the information provided for each such demand. If such source of information was the recollection of any person, identify such person by name, current residence and mailing address, and telephone number.

Item 6: In regard to all of the subsequent demands, if the Petitioners do not possess any of the information or records demanded, annex to the response to such demand(s) an affirmative statement to that effect. If any such information or records are known by the Petitioners to be in the possession of any other person, identify such person by name, current residence and mailing address, and telephone number.

Item 7: In regard to Item 1 of Paragraph e of the Petition, set forth:

c. If the determination of such periods was based on the Petitioners' review of records, attach a copy or copies of such records to the response to this Demand. If such determination was based upon verbal information provided by, or the recollections of, any person identify, by names, current residence and mailing addresses and telephone numbers, each person providing such information or recollections, the date such information or recollection was provided and the words used by each such person in providing that information or recollection.

Item 8: In regard to Item 2 of Paragraph e of the Petition, set forth:

¹ Items 1-6 of the demand do not seek particularization of any allegations in the petition but set forth terms and conditions applicable to all of the demands. Petitioners state they do not object to items 1 and 2 because "no particulars are demanded" by these items. Item 1 defines the term "records" to mean "any information kept, held, filed, produced or reproduced by, with or for any or all of the petitioners in any physical form whatsoever including but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or disks, rules, regulations, or codes." Item 2 asserts that all demands for records are made pursuant to the Board's decision in *Matter of the Petition of COR Route 31 Company, Inc.*, PR 03-039 (2004).

c. If the determination of such job titles was based on the Petitioners' review of records, attach a copy or copies of such records to the response to this Demand. If such determination was based upon verbal information provided by, or the recollections of, any person identify, by names, current residence and mailing addresses and telephone numbers, each person providing such information or recollections, the date such information or recollection was provided and the words used by each such person in providing that information or recollection.

Item 9: In regard to Item 3 of Paragraph e of the Petition, set forth:

c. If such determination was based on the Petitioners' review of records, attach a copy or copies of such records to the response to this Demand. If such determination was based upon verbal information provided by, or the recollections of, any person identify, by names, current residence and mailing addresses and telephone numbers, each person providing such information or recollections, the date such information or recollection was provided and the words used by each such person in providing that information or recollection.

Item 10: In regard to Item 4 of Paragraph e of the Petition, set forth:

d. Each and every fact, omitting conclusions of fact and law, upon which such exemption is based;

e. If such determination was based on the Petitioners' review of any statute, regulation, and/or case law, provide citations to such statutes, regulations, and/or case law.

Item 11: In regard to Item 4 of Paragraph e of the Petition, set forth:

c. Attach to the response to this demand all records relied upon by the Petitioners to establish the correct identity of each such employer.

Item 12: In regard to Item 5 of Paragraph e of the Petition, set forth:

a. All facts, omitting conclusions of fact and law, by which the Petitioners determined that the employees were paid in accordance with applicable law, rule, and regulation;

b. Identify, by citation, all applicable laws, rules, and regulations by which the employees were paid

c. The manner in which the Petitioners applied such laws, rules, and regulations to determine the amounts to be paid to each employee for each week of that employee's employment;

d. Annex to the response to this Demand all records demonstrating that such amounts were paid to each employee in each week.

Item 13: In regard to Item 6 of Paragraph e of the Petition, attach to the response to this demand all true and accurate records that the Petitioners maintained and furnished and all wage statements furnished to employees.

Item 14: In regard to Item 7 of Paragraph e of the Petition, set forth:

c. If such determination was based on the Petitioners' review of records, attach a copy or copies of such records to the response to this Demand. If such determination was based upon verbal information provided by, or the recollections of, any person identify, by names, current residence and mailing addresses and telephone numbers, each person providing such information or recollections, the date such information or recollection was provided and the words used by each such person in providing that information or recollection.

Item 15: In regard to Item 8 of Paragraph e of the Petition, set forth:

b. If such determination was based on the Petitioners' review of records, attach a copy or copies of such records to the response to this Demand. If such determination was based upon verbal information provided by, or the recollections of, any person identify, by names, current residence and mailing addresses and telephone numbers, each person providing such information or recollections, the date such information or recollection was provided and the words used by each such person in providing that information or recollection.

Item 20: To the extent not previously demanded, attach to the response to these demands a copy of all records consulted, referenced or referred to in preparing a response to these demands.

GOVERNING LAW

A. Bill of Particulars

While the Board is not bound by the CPLR, we take guidance from the rules of civil practice in appropriate circumstances when applying the Board's Rules. The purpose of a bill of particulars is to amplify a pleading by setting forth in greater detail the nature of the allegations and what the party making them intends to prove (*Northway Engineering, Inc v Felix Industries, et al.*, 77 NY2d 332, 336 [1991]). It is designed to "offer a more expansive statement of the pleader's contentions rather than the evidence upon which they rest" (Siegel, *New York Practice* § 238, note 1 at 401 [4th ed. 2005].) A bill of particulars is intended to "limit the proof and prevent surprise at trial" (*Id.* at 400.) It is not to be used as a means to obtain disclosure of evidence or the identity of witnesses (Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3041:2.)

The Board's Rules require that a petition seeking review of an order issued by the Commissioner of Labor state "clearly and concisely the grounds upon which the matter to be reviewed is alleged to be invalid or unreasonable, omitting conclusions of fact or law"; set forth with particularity any "rule or regulation" in issue; and state "any other material or relevant facts" (Rules 66.3 (d), (e), and (f).)

Rule 65.17 permits a party to demand a bill of particulars from the other party of the "claims or contentions" set forth in the petition or other pleading. The Board has previously held that it is an appropriate use of a bill to request production of documents "to particularize the claims or contentions of a pleading" (*Matter of Petition of COR Route 31 Company, Inc.*, PR 03-039 [2004]. We have also held that the purpose of a bill is "to help prepare and to prevent surprise at hearing" (*Matter of New York State Thruway Authority/New York State Canal Corporation*, PES 07-004 at 17 [2008] [*citing Rensselaer Polytechnic Institute*, 30 AD3d 881 [3d Dept 2006] [Commissioner directed to file supplemental bill setting forth documents, materials, authorities, laws, rules, and regulations relied on to support determination that employer violated safety and health requirements].) Like the CPLR, the Board's Rules differentiate a bill of particulars from discovery. Discovery of evidence by deposition or interrogatories is not allowed except by order of the Board (Rule 65.18.)

B. Recordkeeping Requirements

Article 19 of the Labor Law, known as the "Minimum Wage Act," defines "[e]mployee," with certain exceptions not relevant to this appeal, as including "any individual employed or permitted to work in any occupation (Labor Law § 651 [5])." Labor Law § 661 requires employers to maintain payroll records for employees covered by the Act and to make such records available to the Commissioner:

"Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time. . ."

The Commissioner's regulations implementing Article 19 provide at 12 NYCRR § 142-2.6:

- "(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
- (1) name and address;
 - (2) social security number;
 - (3) wage rate;
 - (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or

- spread of hours exceeding 10;
- (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
 - (6) the amount of gross wages;
 - (7) deductions from gross wages;
 - (8) allowances, if any, claimed as part of the minimum wage.”

DISCUSSION

Given the purpose of a bill of particulars to amplify the contentions of a pleading and the circumstances where records may reasonably be demanded to particularize such claims, we vacate and or/modify certain items in the Commissioner’s demand in the following respects and direct petitioners to file a supplemental bill of particulars by March 5, 2012.

Items 3-6: We vacate and/or modify certain of the information requested in these items for the reasons described below.

Item 7 (c): Item 7 requested that petitioners particularize the allegation in paragraph (e) (1) of the petition that the order[s] “set forth incorrect dates as to period worked by person[s] alleged.”

Item 7 (a) requested the incorrect dates and 7(b) the correct dates of these periods. In response, petitioners listed the “correct periods” worked by 15 of the 21 individuals listed in the order. The Commissioner does not take issue with this response.

Item 7(c) requested records, if any, from which the determination of these periods of work was based; the names, current residence, mailing address, and telephone number of any person who provided verbal information or recollections upon which the determination was based; the date such verbal information or recollection was provided; and the words used by each such person in providing that information or recollection.

We agree that the request for information identifying persons who may have provided verbal information or recollections supporting the allegations, the dates such information was provided, and the words used in providing it is an improper demand for discovery of evidentiary material. These requests are vacated from the demand and all further items discussed below, along with the information described in items 4 and 5.

We find, however, that the Commissioner’s request for records petitioners relied on as a basis for their contentions that the Commissioner’s determination of hours worked and wages owed is in error is a reasonable request for records that particularize a pleading. Petitioners are required by Labor Law § 661 and 12 NYCRR § 142-2.6 to maintain payroll records of the actual hours worked and wages paid their employees and furnish them on demand to the Commissioner. In the absence of adequate records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the “best available evidence” drawn from employee statements (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d dept 1989].) In a proceeding challenging such determination, it is a

petitioner's burden to submit sufficient proof as to provide an accurate estimate of the hours worked and wages paid (*Matter of Mohammed Aldeen*, PR 07-093 [2008] *aff'd sub nom. Matter of Aldeen v Industrial Board of Appeals*, 82 AD3d 1220 [2d Dept 2011].)

In this case, petitioners challenge the Commissioner's determination of the extent of work performed and assert that the correct periods of work for 15 of the 21 persons listed in the order are less than that found by the Commissioner. Petitioners also challenge the determination of wages owed their employees and claim that the orders set forth incorrect amounts due; the employees were paid in accordance with law; the amount of underpayment is incorrect; and they maintained and furnished true and accurate records and wage statements to their employees. The Commissioner's answer asserts that petitioners failed to produce true and accurate records of the hours and wages paid their employees and that wages were therefore calculated based upon the best available evidence, the information provided by the employees. As petitioners were already required by law to maintain and furnish payroll records to the Commissioner, to avoid surprise at hearing it is reasonable that petitioners particularize these contentions by providing any documents they relied on as a basis for their claims concerning the actual hours worked and wages paid their employees (*Matter of New York State Thruway Authority/New York State Canal Corporation*, *supra* [purpose of bill to avoid surprise at hearing]; *Matter of Bai Buong*, PR 09-289 [2011] [preclusion of payroll records proper where petitioners failed to produce records requested by Commissioner during investigation and when requested to particularize allegation in petition that employees were fully paid wages].)

Petitioners shall file a supplemental bill enclosing copies of any documents or records, including but not limited to payroll records required by 12 NYCRR § 142-2.6, they relied on as a basis for their contentions that the order[s] incorrectly state the periods worked by persons listed in the order and that the correct periods are listed in its response, or if appropriate, affirmatively state that they do not rely on any documents or records for these claims.

We modify all further demands for records supporting petitioners' claims concerning amounts due, payment, records and wage statements, and underpayment in items 9 (c), 12 (d), 13, and 14 (c) in the manner described above. The records described in paragraph 3 of the demand are superfluous, as any records that may be properly requested are encompassed within a demand for any documents or records relied on by petitioners as a basis for their contentions. The request in paragraph 6 for the names, current residence and mailing address, and telephone numbers of persons known by petitioners to be in possession of records is vacated as an inappropriate demand for discovery.

Item 8 (c): Item 8 requested that petitioners particularize the allegation in paragraph (e) (2) of the petition that the order[s] set forth "incorrect job title of persons alleged."

Items 8 (a) and (b) requested the incorrect and correct job title of such persons. In response to both requests, petitioners listed the "correct job titles" of six individuals named in the order. The Commissioner does not take issue with this response.

Item 8 (c) requested records, if any, and the names, addresses, phone numbers, dates, and words used by any persons who provided information or recollections upon which such determination was based.

We vacate the request for identifying information and words used by persons who provided information in support of this claim for the reasons above. We also vacate the request for records for this item and the remaining items concerning misidentified employers and improperly calculated interest. In contrast to records concerning actual hours and wages paid petitioners' employees that are required by law, these contentions go to other employment issues in the case unrelated to the Commissioner's calculation. Petitioners have the burden of proof on these issues at hearing. The Board customarily requests the parties to exchange exhibits at least two weeks before hearing. Should petitioners submit documentary exhibits on these issues and the Commissioner require additional time to formulate a defense, an adjournment may be requested to respond. The Commissioner may also subpoena documents relating to these claims pursuant to Board Rule 65.20. To the extent our decision in *Matter of Petition of COR Route 31, Inc., supra* may suggest that use of a bill to request production of documents is open-ended, we clarify our decision that such production is not unlimited. In the circumstances of this case, disclosure of records supporting claims concerning non-wage calculation issues via a bill of particulars is unduly burdensome and unreasonable. Items 8 (c), 11 (c), and 15 (b) are therefore vacated.

Item 9 (c): Item 9 requested that petitioners particularize the allegation in paragraph (e) (3) of the petition that the order[s] "set forth incorrect amounts due for persons alleged."

Item 9 (a) requested that petitioners particularize each and every fact, omitting conclusions of law, by which they determined that the orders set forth incorrect amounts due the persons named in the order. Item 9 (b) requested that petitioners set forth the manner by which they determined the correct amounts due. In response to both requests, petitioners asserted that "[e]ach employee was paid in compliance with applicable law, rule and regulation and thus no amount is due to any such person. Since no amount is due to any employee no response is due to sub-parts (b) and (c)." As with all of their objections, petitioners also objected that the items are improper requests for discovery of evidentiary information that do not particularize a pleading. The Commissioner does not take issue with this response.

Item 9 (c) requested records, if any, and the names, addresses, phone numbers, dates, and words used by any persons who provided information or recollections upon which such determination was based.

We vacate the request for identifying information and words used by persons who provided information in support of this claim for the reasons above. We modify the demand for records as follows.

Petitioners shall file a supplemental bill enclosing copies of any documents or records, including but not limited to payroll records required by 12 NYCRR § 142-2.6, they relied on as a basis for their contentions that the order incorrectly found amounts due for the persons listed in the order, or if appropriate, affirmatively state that they do not rely on any such documents or records for these claims.

Items 10 (d) and (e): Item 10 requested that petitioners particularize the allegation in paragraph (e) (4) of the petition that the [o]rders “refer to persons who are exempt from the law/regulation alleged.”

Items 10 (a) (b) and (c) requested that petitioners set forth each and every person alleged to be exempt; the law/regulations from which these persons are exempt; and the law/regulations that provide the exemption. In response to these requests, Petitioners listed two individuals named in the order and asserted they “were exempt under 29 USC 213(a) (1), NYS Labor Law Section 651.5(c), 12 NYCRR 142-2.2. & etc.” The Commissioner does not take issue with this response.

Item 10 (d) requested that petitioners set forth each and every fact, omitting conclusions of law, upon which the claimed exemption is based.

Item 10 (e) requested that petitioners provide citations to statutes, regulations, and/or case law if the claimed exemption is based on a review of such authorities.

We agree that petitioners failed to sufficiently particularize the factual basis for this contention beyond the petition’s conclusory assertion that the named individuals “were exempt.” Petitioners shall file a supplemental bill that sets forth with specificity, omitting conclusions of fact and law, any and all facts they contend support their claim that the two named individuals are exempt under the statutes and regulations cited.

We find petitioners sufficiently set forth the authorities supporting the claimed exemption that were requested in item 10 (e).

Item 11 (e): Item 11 requested that petitioners particularize the allegation in paragraph (e) (4) of the petition that the “order[s] ... misidentify the employer.”

Item 11 (a) requested that petitioners set forth each and every employer alleged to have been misidentified. Item 11 (b) requested the correct identity of each employer. In response to both requests, petitioners listed two individuals misidentified as an employer and asserted that “[t]he correct identity of the employer is Blue Butterfly Fashion, Inc.” The Commissioner does not take issue with this response.

Item 11 (c) requested that petitioners provide all records relied upon to establish the correct identity of each employer.

We vacate the demand for records for the reasons above.

Items 12 (a)-(d): Item 12 requested that petitioners particularize the allegation in paragraph (e) (5) of the petition that “[t]he employees were paid in accordance with applicable law, rule, and regulation.”

Item 12 (a) requested that petitioners set forth all facts, omitting conclusions of law, by which Petitioners determined that the employees were paid in accordance with applicable law, rule, and regulation.

Item 12 (b) requested that petitioners identify, by citation, all applicable laws, rules, and regulations by which the employees were paid.

Item 12 (c) requested that petitioners particularize the manner in which they applied such laws, rules, and regulations to determine the amounts to be paid each employee for each week of employment.

Item 12 (d) requested all records demonstrating that such amounts were paid each employee for each week of employment.

Petitioners object to these items in total. We agree that petitioners failed to sufficiently particularize the basis for their contention of proper payment demanded by items 12 (a) and (b) beyond the petition's conclusory assertion that the employees "were paid" and such payment was "in accordance with law, rule, and regulation." The Board's Rules require the petition to set forth the grounds for relief with material and relevant facts, omitting conclusions of law or fact, and identify any rules and regulations in issue with particularity. We also modify the demand for records in item 12 (c).

Petitioners shall file a supplemental bill that sets forth with specificity, omitting conclusions of fact or law, any and all material and relevant facts they contend support their determination that the individuals listed in the order were properly paid in accordance with law, rule, and regulation; identifies with particularity the applicable laws, rules, and regulations by which the employees were paid; and encloses copies of any documents or records, including but not limited to payroll records required by 12 NYCRR § 142-2.6, they relied on as a basis for their contention that the individuals listed in the order were properly paid in accordance with applicable law, rule, or regulation, or if appropriate, affirmatively state that they do not rely on any such documents or records for this claim.

We vacate the Commissioner's request in item 12 (c) that petitioners particularize the manner in which they applied applicable law to determine the amounts to be paid each employee for each week of employment as an inappropriate request for discovery.

Item 13: Item 13 requested that petitioners particularize the allegation in paragraph (e) (6) of the petition that "[t]he employer maintained and furnished true and accurate records and furnished wage statements to employees." The item requested that petitioners attach to their response all such records and wage statements. We modify the demand for records as follows.

Petitioners shall file a supplemental bill enclosing copies of any documents or records, including but not limited to payroll records required by 12 NYCRR § 142-2.6, they relied on as a basis for their contentions that they maintained and furnished true and accurate records and furnished wage statements to employees, or if appropriate, affirmatively state that they do not rely on any such documents or records for these claims.

Item 14 (c): Item 14 requested that petitioners particularize the allegation in paragraph (e) (7) of the petition that “[t]he amount alleged as underpayment of wages is incorrect.”

Item 14 (a) requested that petitioners set forth each and every fact, omitting conclusions of law, by which they determined that the amount determined by the Commissioner as underpayment of wages is incorrect. Item 14 (b) requested that petitioners particularize the manner in which they determined the correct amount of wages. In response to these requests, petitioners stated that they are without knowledge of the faulty information and assumptions used by the Commissioner in computing the underpayment. However, based on the information furnished by the Commissioner, petitioners asserted that it appears it was based on erroneous dates, hours, and days worked and erroneous assumptions about how the individual was paid, among other things. Petitioners further asserted that the employees were paid in accordance with applicable law, rule, and regulation which determined the correct amount of wages paid. As with all of their objections, petitioners also objected that the items are improper requests for discovery of evidentiary information that do not particularize a pleading. The Commissioner does not take issue with this response.

Item 14 (c) requested records, if any, and the names, addresses, phone numbers, dates, and words used by any persons who provided information or recollections upon which such determination was based. We vacate the demand for identifying information and words used by persons providing information in support of this claim for the reasons above. We modify the demand for records as follows.

Petitioners shall file a supplemental bill enclosing copies of any documents or records, including but not limited to payroll records required by 12 NYCRR § 142-2.6, they relied on as a basis for their contention that the amount alleged as an underpayment in the order is incorrect, or if appropriate, affirmatively state that they do not rely on any such documents or records for this claim.

Item 15 (b): Item 15 requested that petitioners particularize the allegation in paragraph (e) (7) of the petition that “[t]he claimed demand for interest is incorrect.”

Item 15 (a) requested that petitioners set forth all facts, omitting conclusions of law, by which Petitioners determined that the amount determined by the commissioner as interest is incorrect. In response to this request, petitioners stated that they are without knowledge of the faulty information and assumptions used by the Commissioner in computing the interest due; there is no interest due because there is no underpayment; and interest is set forth by Labor Law § 218, which does not state the interest assessed by the Commissioner. The Commissioner does not take issue with this response.

Item 15 (b) requested records, if any, and the names, addresses, phone numbers, dates, and words used by any persons who provided information or recollections upon which such determination was based.

For the reasons above, we vacate the request for records, identifying information, and words used by persons who provided information in support of this claim.

Item 20: Item 20 requested that petitioners attach to their response copies of all records consulted, referenced, or referred to in preparing their responses to the demand, to the extent not previously demanded.

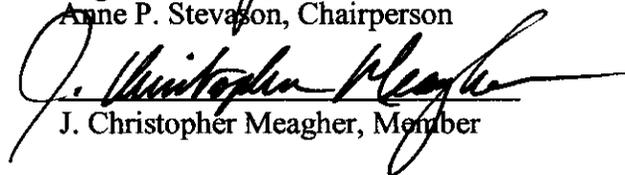
We vacate this item as superfluous since all records properly requested are addressed in the items above.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petitioners' motion to strike certain items in the respondent Commissioner's demand for a bill of particulars and the Commissioner's motion to direct a more fully responsive bill of particulars, are granted in part, denied in part, and the demand is modified for the reasons stated in this decision; and
2. Petitioners shall serve a supplemental bill of the items stated in this decision by March 5, 2012.



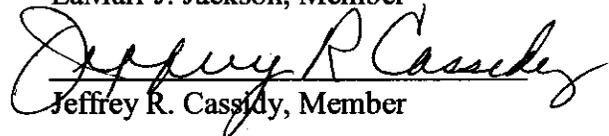
Anne P. Stevason, Chairperson



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
January 31, 2012.