STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

LINPHILL ELECTRICAL CONTRACTORS, INC.
Prime Contractor

and

LINVAL BROWN, Individually,
as President and one of the five largest shareholders of
LINPHILL ELECTRICAL CONTRACTORS, INC.

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

REPORT
&
RECOMMENDATION

Prevailing Rate Case
05-00771 Westchester County

To: Honorable Colleen C. Gardner
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was commenced on November 25, 2008, in White Plains, New York, which continued on multiple days thereafter until conclusion on September 17, 2009. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Linphill Electrical Contractors, Inc. (“Linphill”) complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a contract involving additions and alterations at the Nellie Thornton High School (“Project”) for the Mount Vernon City School District.

After the hearing and record were closed, the parties served Proposed Findings of Fact and Conclusions of Law ("Proposed Findings"), which were received from the Department on April 29, 2010 and from Linphill on May 17, 2010.

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Richard Cucolo, Senior Attorney, of Counsel). Linphill and Linval Brown appeared at the hearing with their attorney, Carolyn V. Minter, Esq., who withdrew from representation on March 11, 2010, after the close of the hearing but before the submission of post-hearing Proposed Findings.

ISSUES

1. Did Linphill pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. What rate of interest should be assessed on any underpayment?
3. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
4. Did any willful underpayment involve the falsification of payroll records?
5. Is Linval Brown a shareholder of Linphill who owned or controlled at least ten per centum of the outstanding stock of the Linphill?
6. Is Linval Brown an officer of Linphill who knowingly participated in a willful violation of Article 8 of the Labor Law?
7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau into whether Linphill paid the prevailing rate of wages and supplements required to be paid on the Project. On or about September 28, 2006, Linphill entered into a contract with Mount Vernon City School District to furnish labor, tools and equipment necessary for the Project, which was

located in Westchester County (Ex. 5, 12). The Project involved electrical work (T.168-209; Dept. Exs. 5, 12, 20).

The Bureau Investigation

On September 19, 2007, the Bureau received complaints from employees on the Project alleging that they were underpaid (Dept. Exs. 1, 2). [1] In response to the complaints, the Bureau commenced an investigation of the Project (T. 16; Dept. Ex. 4, 10). On or about September 26, 2007, the Bureau requested that Linphill furnish payroll records relating to the Project (Dept. Ex. 4). In response to the Bureau's request for payroll records, both Linphill and the Mount Vernon City School District furnished payroll records for the Project (Dept. Ex. 14). None of the complainants was reported as an employee on the certified payrolls (T. 26, 38-39, 45; Dept. Ex. 14).). The Bureau investigator confirmed with the Project Manager that the complainants worked on the job, including weekends (T. 38-39). The employees also provided logs of days and hours of work and cancelled checks with their complaint forms (T. 19-20; Dept. Exs. 1, 2). The complaints alleged that the respective complainants performed tasks that would fall within the trade classification of electrician (T. 41-44, 168-209; Dept. Exs. 1, 2, 20). [2] The complainants reported that they were paid at a daily rate of $100.00 a day, which was corroborated by the checks they submitted (T. 56; Dept. Exs. 1, 2, 3). In the absence of certified payrolls for the complaining employees, the Department relied on their complaints, logs and cancelled checks to perform an audit (T. 53-57). After the hearing was commenced, the Bureau received an additional complaint from an employee who alleged that she performed electrical work on the Project, typically on Saturdays and two or three nights during the week, for which she was paid $90.00 a day (T. 327-329; Dept. Ex. 24). After further investigation of the validity of that complaint, the Bureau determined that she was also underpaid on the Project and added her to the final audit (T. 369, 375-376; Dept. Ex. 28).

[1] The Bureau received additional complaints on April 3, 2008, and December 17, 2008 (Dept. Exs. 3, 24).
[2] The initial complaints described work tasks that included the installation of new lighting; removal of electrical boxes and circuits; the installation of boxes, smoke and duct detection, strobes and forms, and pulling wire, for a fire alarm system; pulling new circuit and switches to electrical panel, connecting new lights and wiring new breaker panels (Dept. Exs. 1, 2).

In preparing the audit, the Bureau accepted the employees' allegations of days and hours worked reported in their complaints and logs, and the rate they said they were paid for that work (T. 53-57, 369, 375-376). The audit then compared the amount they should have been paid pursuant to the relevant prevailing rate schedules for the hours worked against what they were actually paid (*Id.*).[3] On that basis the audit determined that for week-ending October 6, 2006 through week-ending February 9, 2008, Linphill underpaid four workers $215,237.39 (Dept. Ex. 28). On or about September 26, 2007, the Bureau issued Notices to Withhold payment on the contract to the Mount Vernon City School District, which has acknowledged that it is withholding the sum of $106,292.40 (Dept. Ex. 8).

Respondents' Defense

In its defense, Linphill called two witnesses and produced, for the first time, daily worksheets which purport to show all hours of work, public and private, performed by Linphill during the period October 2006 through September 2007 (T. 468; Resp. Ex. 2). It maintains that that the complainants only worked on the Project when they were reported in the worksheets (T. 510).

Linphill's first witness, David Dixon, testified that the complainant Desmond Stewart worked with him at an apartment in Mount Vernon, New York, for three months, May through July 2007, when he was supposedly working on the Project, and that Everton Christie and Shadene Hall were also there also, doing clean-up work, morning to afternoon, every day during this period (T. 409-414). Mr. Dixon never worked on the Project (T. 424). The work at the apartment involved the sheet rocking of a three bedroom apartment (T. 419). It simply is not credible that it would take four people working full time three months to complete the sheet rocking of a three bedroom apartment. Mr. Dixon's testimony is not credible.

Linphill's second witness, Vihert Dacres, laid the foundation for Linphill's daily work sheets (T. 446-460). He testified that he completed these records for every day he

[3] Prevailing Wage Rate Schedule ("PRS") 2006 for Westchester County, which covered the period July 1, 2006 through June 30, 2007, required that workers employed in the electrician classification be paid a minimum of $41.25 an hour in wages and $27.30 in supplements, for a total hourly rate of $69.55. PRS 2007 for Westchester, covering July1, 2007 through June 30, 2008, required a minimum of $42.75 an hour in wages and $29.03 in supplements, for a total hourly rate of $71.78.

worked, recording the hours worked, the tasks performed and the men with him (T. 449-454). These purported exculpatory records, first produced in Linphill's defense in September 2009, despite being the subject of a records production demand in September 2007, were received to show all work performed by Linphill between October 2006 and September 2007 (T. 468). In rebuttal, the Department produced union remittance reports and Linphill's weekly payroll reports submitted to Electrical Workers' Local 3 covering the periods in question (Dept. Exs. 32, 33). The hours reported in the certified payrolls, which were certified by Linval Brown, Linville's president, to be true and accurate, are not consistent with the hours reported to the union and neither of those reports is consistent with the daily work sheets, which even with respect to Mr. Dacres are demonstrably incomplete, inaccurate and false since the daily work sheets fail to report weeks of Mr. Dacres's work that Linphill itself reported to the union (T. 526, 536-537; cf. Dept. Exs. 14, 32,33, & Resp. Ex. 2; see, Dept. Proposed Findings of Fact and Conclusions of Law, Appendices 1 & 2). [4] Neither Mr. Dacres testimony, nor the daily work sheets, is credible.

Linphill also asserts that the Bureau did not properly classify the work (Linphill's Proposed Findings, p. 1, 5, and the second unnumbered page). It stated to the Bureau (T. 45), and maintains in its post hearing submission, that the claimants did not perform the work of electricians (Linphill's Proposed Findings, p. 1, 5, and the second unnumbered page). The claimants' complaints and testimony identified specific tasks they performed which a business manager of the electricians' local union testified are tasks covered by the electricians' collective bargaining agreement and are therefore properly classified as

[4] Mr. Dacres filled out no daily work sheets at all between November 16, 2006 and November 22, 2006, but Linhill reported that he worked 35 hours that week based on the union benefit contribution report for that week. Mr. Dacres filled out no time cards between November 23, 2006 and November 29, 2006, but Linhill reported that he worked 32 hours that week based on the union benefit contribution report for that week. Mr. Dacres filled out a time card on November 30, 2006 representing 5 hours of work for that week, but Linhill reported to the union that he worked a total of 35 hours that week. Mr. Dacres filled out no time cards at all during the week December 6-13, 2006, but the union benefit reports show him that week with 32 hours work. Further, Mr. Dacres filled out no time cards between December 14, 2006 and December 27, 2006, but the union benefit reports show him as having worked 47 hours these two weeks. There are many other inconsistencies or false entries on the time cards which are readily ascertainable by a comparison of Department Exhibits 32-33, Respondent's Exhibit 2 and the certified payrolls (Dept. Ex. 14), or by reference to Appendix 2 attached to the Department's Proposed Findings of Fact and Conclusions of Law. These inconsistencies on the time cards exist not just for Mr. Dacres but also for the four claimants and the other employees of Linphill.

the work of an electrician (T. 168-209). The Bureau investigator likewise testified that tasks Mr. Brown identified the workers performed, which Mr. Brown claimed were in the nature of laborer or carpenter work, such as cutting holes in the floor or walls for wiring or electrical devices, were properly classified by the Bureau as electricians' work (T. 41-44). Linphill produced no witness to contradict the claimants' sworn testimony concerning the tasks they performed at the Project. Their testimony is therefore uncontroverted and credible.

Linphill finally asserts that Everton Christie, Desmond Stewart and Gary McLeary performed work as independent contractors and were provided 1099s (T.45; Dept. Ex. 11; Linphill's Proposed Findings, p. 4). An employer's provision of 1099 forms to individual workers does not determine the independent contractor versus employee status of those workers. In this case, there is no evidence in the record that any of these individuals held themselves out as being in business for themselves, formed any type of business entity, advertised, secured business insurances, signed contracts to perform the involved work, set their own hours, had their own tools, purchased their own supplies, worked independently or in any similar manner work as independent contractors. There is no evidence in the record that would support a finding that any of the claimants performed work as an independent contractor. The Bureau investigator investigated the defense and determined that there was no factual basis to support the claim (T. 45-51).

Corporate Officers and Shareholders

During the period when work was performed on the contract, Linval Brown was a Linphill's president, and in that capacity he certified that Linphill's payrolls were true and accurate (Dept. Exs. 11, 12, 13, 14). I find no evidence in the record regarding the identity of the individuals who owned or controlled at least 10% of the outstanding stock of the corporation.

Prior History

In Linphill's proposal and bid document for the Project, Linphill listed no fewer than seven prior public work projects where Linphill performed work (Dept. Ex. 13).

CONCLUSIONS OF LAW

Jurisdiction of Article 8

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law Article 8. Labor Law §§ 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." *Matter of Beltrone Constr. Co. v McGowan*, 260 A.D.2d 870, 871-872 *(3d Dept. 1999).* Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

Since the Mount Vernon City School District, a public entity, is a party to the instant contract, which involves the employment of workers on a construction project that has a public benefit, Article 8 of the Labor Law applies. Labor Law § 220 (2); *Matter of New York Charter School Association v. Smith*, _NY3d _ (2010); *Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984).

Classification of Work

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the

locality where the work is performed. The trade or occupation is determined in a process referred to as "classification." *Matter of Armco Drainage & Metal Products, Inc. v State of New York*, 285 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor,* 34 A.D.3 905, 906 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.' " *Matter of Nash v New York State Dept of Labor,* 34 A.D.3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor,* 154 A.D.2d 117, 120 (3d Dept. 1990), *affd* 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v Beame,* 15 N.Y. 103, 109 (1965). Workers are to be classified according to the work they perform, not their qualifications and skills. *See, Matter of D. A. Elia Constr. Corp v State of New York,* 289 A.D.2d 665 (3d Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

The credible evidence shows that the workers who are the subject of the audit were engaged in tasks that fall within the scope of the electrician trade and were therefore properly classified as electricians.

Underpayment Methodology

"When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." *Matter of Mid Hudson Pam Corp. v Hartnett,* 156 A.D.2d 818, 821 (3d Dept. 1989) (citation omitted). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of

inadequate or inaccurate records. *Matter of TPK Constr. Co. v Dillon*, 266 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

Since Linphill's certified payrolls failed to report the days, hours and work classifications of the claimants, and since the daily work sheets submitted in Linphill's defense are incomplete and inconsistent with both the certified payrolls and reports Linphill provided to the union local, the Bureau is entitled to adopt a reasonable methodology to estimate the prevailing rate underpayment. Its reliance on employee complaints, logs, cancelled checks and testimony to establish the employees days and hours of work and contractor payments is reasonable and should be sustained.

Interest Rate

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, Linphill is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

Willfulness of Violation

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation.

This inquiry is significant because Labor Law § 220-b (3) (b) (1) [5] provides, among other things, that when two final determinations of a "willful" failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Article 8 of the Labor Law, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v Roberts,* 128 A.D.2d 1006, 1006-1007 (3d Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v Hartnett,* 181 A.D.2d 1013, 1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v Hudacs,* 185 A.D.2d 483, 485 (3d Dept. 1992). The violator's knowledge may be actual or, where he should have known of the violation, implied. *Matter of Roze Assocs. v Department of Labor,* 143 A.D.2d 510; *Matter of Cam-Ful Industries, supra.*

[5] "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." Labor Law § 220-b (3) (b) (1), as amended effective November 1, 2002.

Linphill is an experienced public work contractor who knew or should have know that the claimants were not properly classified as independent contractors, since they lacked any of the well know indicia necessary to establish that status, and who further knew or should have know that the proper classification of the tasks the claimants performed on this electrical contract were those of an electrician. As such, its failure to pay the prevailing electrician rates for all of the hours the claimants worked on the Project was a willful violation of Article 8 of the Labor Law.

Falsification of Payroll Records

Labor Law § 220-b (3) (b) (1) further provides that if a contractor is determined to have willfully failed to pay the prevailing rates of pay, and that willful failure involves a falsification of payroll records, the contractor shall be ineligible to bid on, or be awarded any public work contract for a period of five (5) years from the first final determination. Linphill's failure to report the claimants on its certified payrolls, based entirely on the utterly meritless position that they were independent contractors, constitutes a falsification by omission of its payroll records. Furthermore, the Linphill's daily work sheets, which are inconsistent with both its certified payrolls and its reports to the union local, demonstrate the intentionally false and misleading nature of the payroll records.

Officer Responsibility

Labor Law § 220-b (3) (b) (1) further provides that any officer of the contractor who knowingly participated in the willful violation of Article 8 of the Labor Law shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity. Linval Brown is the president of Linphill and he knowingly participated in the violation of Article 8 of the Labor Law through, among other things, his certification of its false payroll records. As such, he should suffer the same disability as the corporate entity.

Civil Penalty

Labor Law §§ 220 (8) and 220-b (2) (d) provide for the imposition of a civil penalty in an amount not to exceed twenty-five percent (25%) of the total amount due (underpayment and interest). In assessing the penalty amount, consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations, and the failure to comply with record-keeping and other non-wage requirements. The underpayment of in excess of $200,000.00 to four employees is extremely serious, and when coupled with the Respondent's records falsification, amply warrants the Department's requested penalty of twenty-five percent of the total amount found due.

RECOMMENDATIONS

I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that Linphill underpaid wages and supplements due the identified employees in the amount of $215,237.39;

DETERMINE that Linphill is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment;

DETERMINE that the failure of Linphill to pay the prevailing wage or supplement rate was a "willful" violation of Article 8 of the Labor Law;

DETERMINE that the willful violation of Linphill involved the falsification of payroll records under Article 8 of the Labor Law;

DETERMINE that Linval Brown is an officer of Linphill;

DETERMINE that Linval Brown knowingly participated in the violation of Article 8 of the Labor Law;

DETERMINE that Linphill be assessed a civil penalty in the Department's requested amount of 25% of the underpayment and interest due; and

ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty);

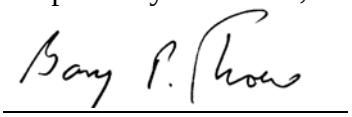
ORDER that Mount Vernon City School District remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605;

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Linphill, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; and

ORDER that the Bureau compute and pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: November 5, 2010
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer