

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

IRWIN CONSTRUCTION CORP
and its substantially owned-affiliated entities
IRWIN CONTRACTING OF LONG ISLAND, INC.

and

IRWIN INDUSTRIES LLC
Prime Contractor

and

A. ULIANO & SON LTD
and ANTHONY ULIANO
as an officer and shareholder of
A. ULIANO & SON LTD

**REPORT
&
RECOMMENDATION**

Prevailing Rate Case
04-0093 Suffolk County

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.

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

Pursuant to a Notice of Hearing issued in this matter, hearings were held on April 1 and 2, 2009 and May 11 and 12, 2010, in Garden City, New York. 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 A. Uliano and Son, Ltd, ("Subcontractor") and Anthony Uliano as an officer and shareholder of Subcontractor, which was a subcontractor of Irwin Construction Corp. and its substantially owned-affiliated entities, Irwin Contracting of Long Island, Inc., and Irwin

Industries LLC (“Prime”), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a contract involving the capital improvement projects, additions and alterations at the Syosset High School (“Project”) for the Syosset Central School District (“Department of Jurisdiction”).

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito, Marshall H. Day, Senior Attorney, of Counsel.

Subcontractor appeared with its attorney, Neil A. Miller, Esq.; during the course of the hearing, Mr. Miller ended his representation of Subcontractor; Subcontractor was represented for the remainder of the proceeding by Alan B. Pearl, Esq.

Prime did not appear for the hearing and did not file an Answer to the charges incorporated in the Notice of Hearing.

ISSUES

1. Did Subcontractor pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality “willful”?
3. Did any willful underpayment involve the falsification of payroll records?
4. Are Uliano and Sons, Inc. and A. Uliano Construction “substantially owned-affiliated entities”?
5. Is Anthony Uliano a shareholder of Subcontractor who owned or controlled at least ten per centum of the outstanding stock of the Subcontractor?
6. Is Anthony Uliano an officer of Subcontractor 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 public work performed by Subcontractor on the Project. The Project involved a public work contract between Prime and the Department of Jurisdiction in Nassau County.¹ Prime and the Department of Jurisdiction entered into the contract to perform capital improvement projects, additions and alterations at the Syosset High School (PRC No. 04-0093) on or about March 21, 2005 (Dept. Ex. 7).

The bid specifications for the Project provided that Prime and Subcontractor were obligated to comply with all requirements of Labor Law §220, et seq. (DOL Ex. 8; Tr. p. 71).

The Department issued a Prevailing Wage Schedule for Nassau County, which schedule contained the prevailing rates of wages and supplements to be paid or provided to workers on this Project on January 8, 2004 (DOL Ex. 8).

Prime entered into a subcontract with Subcontractor for work on the Project on or about April 22, 2005 (Dept. Ex. 9).

The subcontract was signed by Anthony Uliano as President of A. Uliano and Son, Ltd. (Dept. Ex. 9).

The subcontract required Subcontractor to perform certain work on the Project, including demolition, removal and grading; installation of fill; hand digging of a foundation; building drainage; and removal of excess fill (Dept. Ex. 9).

On or about July 1, 2004, the Department issued the Prevailing Wage Rate Schedule (“2004 Schedule”) for Nassau County, which schedule contained the prevailing rates of wages and supplements to be paid or provided to workers on public work projects (Dept. Ex 10).

On or about July 1, 2005, the Department issued a subsequent Prevailing Wage Rate Schedule (“2005 Schedule”) for Nassau County, which schedule contained the

¹ Although the Department references Suffolk County several times in its Proposed Findings of Fact and Conclusions of Law, it is clear from the record – and public documents– that Syosset High School is in Nassau County.

prevailing rates of wages and supplements to be paid or provided to workers on public work projects (Dept. Ex 11).

A special unit within the Bureau, designated the Strike Force, initiates investigations into public work projects without relying upon complaints (Tr. pp 24-26).

On July 20, 2005, the members of the Strike Force visited the Project and interviewed four workers, Juan Roberto Conoz, Venancio Lemus, Jose Menor, and John Bradley, writing information they received from the workers on Department forms (DOL Ex. 2, 3, 4, 5; Tr. pp. 28, 29, 515 - 522).

The workers identified themselves as employees of Uliano (Dept. Ex. 2, 3, 4, 5; Tr. p. 516).

Subsequent to the interviews held at the Project site, the Bureau requested payroll records for the Project from Prime and Subcontractor (Dept. Ex. 6).

The Department also received a complaint form ("Complaint") from Juan Roberto Conoz, one of the workers, on September 8, 2005 (DOL Ex. 1).

The Bureau received Subcontractor's payroll records for the Project, some signed and some unsigned, from Prime and Subcontractor on three different occasions (Dept. Ex. 12, 13, 14).

The Bureau received copies of payroll checks, union benefit fund contributions and payroll service reports for Subcontractor's employees on the Project (Dept. Ex. 15).

The Prime provided the Bureau with its daily construction reports for work performed on the Project (Dept. Ex. 16; Tr. pp. 152 - 154).

The Department of Jurisdiction provided the Bureau with a notebook containing information as to work performed and workers present on the Project (Dept. Ex. 17; Tr. pp. 152 - 154).

The investigator used information concerning worker classification from the Subcontractor's payroll records to see if Subcontractor properly classified the work performed on the Project (Tr. p. 162).

The multiple copies of payroll records were at times internally inconsistent (DOL Ex. 12, 13, 14; Tr. pp. 101, 102). These same records were on occasion also different from Prime's daily construction reports and the Department of Jurisdiction's notebook (DOL Ex. 12, 13, 14, 16, 17; Tr. pp. 142 – 158).

Depending on when the work was performed, the investigator used the 2004 Schedule or the 2005 Schedule to determine the classification of the workers and the hourly rate of wages and supplements required by law to be paid to workers on the Project (Tr. pp. 161 – 163).

The investigator credited Subcontractor for certain payments made to union benefit funds on behalf of some of the workers (Tr. p. 173, 174).

The Bureau investigator used the materials submitted to the Department and information gained from worker interviews to prepare an audit of the Project (Tr. pp. 154 – 157). More specifically, the investigator examined the Project contract and specifications to determine the types of work expected on the Project (Tr. pp. 160, 161). He then used the Subcontractor's payroll records, cancelled checks, supplemental payments to union funds, Complaint, conversations with workers, and any other supporting material to determine the wages paid to workers on the Project (Tr. p. 161, 172 - 173).

The Department audit found underpayments of wages and supplements in the amount of \$3,567.00 underpaid to six workers on the Project (DOL Ex. 18, 19).

A Department investigator fluent in Spanish interviewed Conoz in 2005 and prepared a summary of the interview in which Conoz said that he worked on the Project eight hours per day all of July and most of August and received \$120 per day in cash, and that his hours and those of Menor were similar (DOL Ex. 29 Tr. pp. 478 - 482).

When discrepancies concerning the hours worked by Conoz and Menor arose among the records, the investigator used the Complaint of Conoz and the investigative information obtained from Menor to determine the hours worked (Tr. pp. 235 – 248).

Bradley, Lemus and Conoz signed affidavits prepared by Subcontractor stating the hours they worked and the amount of money and supplements they were paid on the Project (Res. Ex. G).

Conoz stated in his affidavit and testimony that he worked on the Project for only one day, regardless of what may have been put on other documents (Res. Ex. G; Tr. pp. 685, 690)

The affidavit and testimony of Conoz directly conflict with the following evidence concerning the amount of time spent by Conoz on the Project:

- the statement made by Conoz to the Department investigator when he met with Conoz at the Project worksite, in which Conoz said he worked on the Project eight hours a day for the prior week (DOL Ex. 4);
- the complaint form filed with the Department on which Conoz stated he worked on the Project eight hours per day for several weeks in July and August, 2005 (DOL Ex. 1); and
- the statement Conoz made to the Department investigator fluent in Spanish in which Conoz said he worked on the Project eight hours per day for all of July and most of August (DOL Ex. 29).

Lemus stated that he had received payments for supplemental benefits, but could not recall if he received such payments in cash or by check; nor could he recall the number of days he worked on the Project (Tr. pp. 699, 700).

Bradley stated in his affidavit and testimony that he personally hired Conoz and Menor for one day only for the Project, and paid them their wages for the day, because additional laborers required for the work failed to come to work that day (Res. Ex. G; Tr. pp. 622 – 626).

Bradley testified that ninety per cent of the work he performed on the Project was that of a laborer and ten percent was that of an operator (Tr. p. 639). He also stated that work on the Project was not continuous, and that Subcontractor's employees worked on several other projects during the same time that they worked on the Project (Tr. p. 627).

Uliano stated that he was at the Project site on July 20, 2005, the day that Conoz and Menor were hired to work on the Project, and that he stayed for one hour and then left (Tr. pp. 379 – 381). Uliano also stated that he certified payrolls that showed him working six hours on July 20, 2005 when he worked only one (DOL Ex. 14, Tr. pp 379 – 381).

Uliano is the president and owner of Subcontractor and that he has final authority for payroll and personnel issues (Tr. pp 334, 335). Uliano oversaw the Project (Tr. p. 353).

Uliano had experience with prevailing wage projects before working on the Project, and knew that the Project was one on which he was required to pay prevailing wages and supplements (Tr. pp. 346 – 349).

Uliano was sole shareholder and president of Uliano (DOL. Ex. 14; Tr. p. 324).

Uliano was fifty percent owner and vice-president of a business entity identified as A. Uliano Construction (Tr. pp. 327, 328).

Uliano and Sons, Inc., a corporation established pursuant to New York State law, was dissolved on June 21, 2006 (DOL Ex. 33). Angelo Uliano was a fifty percent shareholder and president of Uliano and Sons, Inc. (Tr. pp. 327, 328).

Angelo Uliano, Corp., a corporation established pursuant to New York State law, was dissolved by proclamation on September 27, 1995 (DOL Ex. 35).

Uliano, Inc., a corporation established pursuant to New York State law, was dissolved May 5, 1980 (DOL Ex. 36).

Uliano Enterprises, Inc., is a corporation established pursuant to New York State law (DOL Ex. 34).

Uliano and Sons, Inc. and A. Uliano Construction were businesses engaged in the same kind of work as Uliano (Tr. p. 328).

On August 23, 2004, Uliano and Sons, Inc., entered agreed to a stipulation with the Department finding underpayments of prevailing wages and/or supplements to

workers on a public work project; the stipulation was signed by Anthony Uliano as president of Uliano and Sons, Inc. (DOL Ex. 26).

Jose Menor worked for Uliano and Sons, Inc., and was one of the workers whose underpayment was agreed to by Mr. Uliano in the August 23, 2004 Stipulation (Dol Ex. 26, Tr. p. 377).

The Department issued a withholding notice to the Department of Jurisdiction (DOL Ex. 22).

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 Department Of Jurisdiction, a public entity, is a party to the instant public work contract, Article 8 of the Labor Law applies. Labor Law § 220 (2); and *see, 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 worker classifications were based upon the Project specifications, payrolls and interviews and as such were validly determined.

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).

The Department initiated its investigation by interviewing workers found at the Project site. Further investigation resulted in the receipt by the Department of multiple copies of certified payrolls, other payroll records, and records of Project work site activities prepared by the Prime and the Department of Jurisdiction as well as additional information from workers. Based upon this information, the Department prepared an audit finding underpayments of prevailing wages and supplements.

Subcontractor takes particular issue with the underpayments found for two workers interviewed by the Department on the Project site, Juan Roberto Conoz and Jose Menor, and says they were not employees of the Subcontractor. Subcontractor’s owner Uliano and Subcontractor’s employee Bradley claim that the two individuals were hired directly by Bradley, without the knowledge or approval of Subcontractor, for a single day of work on the Project. Subcontractor points to the payrolls and other records and the testimony of Uliano and Bradley to support its claim.

The inaccuracies, conflicts, and omissions found in Subcontractor’s payroll records, e.g., the record for July 20, 2005 which shows six hours but which Uliano himself admits to be incorrect by as much as five hours, justifies the Department’s reliance upon all available sources of information, including documents other than the certified payroll and the statements of the workers interviewed at the job site.

The testimony of Uliano and Bradley is troubling for several reasons. Uliano admits to having employed – and underpaid - one of the workers in question, Jose Menor, on a prior public work project. While the employer on that project was not Subcontractor, Uliano signed the stipulation as president. He also states that he had overall responsibility for the Project and that he visited the job site. And, Uliano admits

to having certified an incorrect payroll showing him working six hours on a day he admits to having worked one hour.

With regard to Bradley, he remains an employee of Subcontractor. He stated in his testimony that Subcontractor paid into his union benefits account for hours he did not work so that he could maintain his benefit plan. Bradley was present at the Project site on the day that the Bureau investigators arrived and interviewed him, Conoz, Menor, and Lemus, yet he did not claim at that time that he, personally, had hired Conoz and Menor, nor did he say that they were present at the Project site for that day only.

On top of these factors is the question of timing. Uliano and Bradley would have the Commissioner believe not only that the two workers in question were on the Project site for one day only, but that the one day in question happens to have been the same day on which the Bureau Strike Force from Albany inspected the Project. While coincidences happen in life, given the totality of the facts in this record, I find that the version of facts presented by Uliano and Bradley is not credible.

Furthermore, the testimony of Conoz conflicts with other evidence, specifically, his initial statement to a Bureau investigator on the Project work site, his claim form, and the conversation he had at a later date with the Department investigator fluent in Spanish. In light of this conflict, I find his testimony at the hearing concerning the amount of time he spent on the Project not credible.

Based upon the above, including the suspect nature of the certified payrolls and the questionable nature of certain testimony, I find the overall methodology described by the Department investigator to be valid.

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, Subcontractor 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)² 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

² “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.

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*. An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. *Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 A.D.2d 421.

Uliano was an officer of Subcontractor and experienced with public work projects; he previously signed a stipulation with the Department for a prior public work project, admitted he understood the Project was a prevailing wage project, and failed to accurately prepare and submit certified payroll records. Thus the violation is willful under the meaning of the 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.

Here, Subcontractor failed to accurately reflect the hours and days worked of himself and at least two other workers on the Project. Given the amount of time Conoz and Menor worked on the Project and the amount of money they were paid, such failure to show their hours – along with Uliano’s admission that he deliberately showed more hours for himself than he actually worked on at least one occasion - cannot be characterized as a harmless error, but must instead be seen as a deliberate attempt to violate the prevailing wage law by falsifying the certified payrolls.

Substantially Owned-Affiliated Entities

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some indicia of a controlling ownership relationship exists or as "...an entity which exhibits any other indicia of control over the ...subcontractor..., regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,... power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity.

Uliano was sole owner of Subcontractor; he was also a fifty percent owner and officer of Uliano and Sons, Inc. and A. Uliano Construction, businesses engaged in the same activities as Subcontractor. As such, both Uliano and Sons, Inc. and A. Uliano Construction are substantially owned – affiliated entities as defined in the law.

Partners, Shareholders or Officers

Labor Law § 220-b (3) (b) (1) further provides that any such contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners, or any officer of the contractor or subcontractor 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.

Uliano was the president and sole shareholder of Subcontractor and as such is subject to these provisions.

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 facts in this case, including the good faith of the employer, the gravity of the violation, and the failure to comply with record-keeping requirements, warrant the imposition of a penalty in the amount of twenty-five percent.

Liability under Labor Law § 223

Under Article 8 of the Labor Law, a prime contractor is responsible for its subcontractor's failure to comply with or evasion of the provisions of this Article. Labor Law § 223. *Konski Engineers PC v Commissioner of Labor*, 229 A.D.2d 950 (1996), *lv denied* 89 N.Y.2d 802 (1996). Such contractor's responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor's violation. *Canarsie Plumbing and Heating Corp. v Goldin*, 151 A.D.2d 331 (1989). Subcontractor performed work on the Project as a subcontractor of Prime. Consequently, Prime, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on this Project.

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 Subcontractor underpaid wages and supplements due the identified employees in the amount of \$3,567.00; and

DETERMINE that Subcontractor 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; and

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

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

DETERMINE that Uliano and Sons, Inc. and A. Uliano Construction were “substantially owned-affiliated entities”;

DETERMINE that Anthony Uliano is an officer of Subcontractor; and

DETERMINE that Anthony Uliano is a shareholder of Subcontractor who owned or controlled at least ten per centum of the outstanding stock of Subcontractor; and

DETERMINE that Anthony Uliano knowingly participated in the violation of Article 8 of the Labor Law; and

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

DETERMINE that Prime is responsible for the underpayment, interest and civil penalty due pursuant to its liability under Article 8 of the Labor Law; and

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

ORDER that Department Of Jurisdiction 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 of Public Work, 400 Oak Street, Suite 101, Garden City, NY 11530-6551; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Subcontractor, 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: October 26, 2010
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Tracy', with a long horizontal flourish extending to the right.

Jerome Tracy, Hearing Officer