

IN THE MATTER OF

ADESTA COMMUNICATIONS, INC.,  
F/K/A MFS NETWORK TECHNOLOGIES, INC.  
Prime Contractor

and

BULL'S EYE CUSTOM DRILLING, INC.  
Subcontractor

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  
97-0374C

IN THE MATTER OF

ADESTA COMMUNICATIONS, INC.,  
F/K/A MFS NETWORK TECHNOLOGIES, INC.  
Prime Contractor

and

C.J. TELECOMMUNICATIONS, INC.  
N/K/A HARDROCK HDD, INC,  
Subcontractor

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.

Prevailing Rate Case  
97-0374D

IN THE MATTER OF

ADESTA COMMUNICATIONS, INC.,  
F/K/A MFS NETWORK TECHNOLOGIES, INC.  
Prime Contractor

and

TITANIC UNDERGROUND CONTRACTORS CORP.,  
Subcontractor

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.

Prevailing Rate Case  
97-0374F

IN THE MATTER OF

ADESTA COMMUNICATIONS, INC.,  
F/K/A MFS NETWORK TECHNOLOGIES, INC.  
Prime Contractor

and

P.D. RICCI, INC.  
Subcontractor

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.

Prevailing Rate Case  
97-0374E

IN THE MATTER OF

ADESTA COMMUNICATIONS, INC.,  
F/K/A MFS NETWORK TECHNOLOGIES, INC.  
Prime Contractor

and

COMMCORP, INC.,  
Subcontractor

Prevailing Rate Case  
97-0374H

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 C. Gardner  
Commissioner of Labor  
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on December 10, 2007 in Albany, 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 Bull’s Eye Custom Drilling, Inc.; C.J. Telecommunications, Inc., N/K/A Hardrock HDD, Inc. (“C.J. Telecommunications”); P.D. Ricci, Inc.; Titanic Underground Contractors Corp.; and Commcorp, Inc. (“Subcontractors”, “Respondents”), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract involving the provision of material, labor and equipment necessary to design, engineer, furnish, and install a fiber optic infrastructure along the New York State Thruway Authority rights of way (“Project”) for the New York State Thruway Authority (“Department of Jurisdiction”).

## **APPEARANCES**

The Bureau was represented by Department Counsel, Maria Colavito (Tsvi J. Gold, Senior Attorney, of Counsel).

The Subcontractor, Titanic Underground Contractors Corp., appeared by its attorneys, Rider, Weiner & Frankel, P.C. (Jeffrey S. E. Sculley, of counsel). An Answer to the charges incorporated in the Amended Notice of Hearing was served by and on behalf of Titanic Underground Contractors Corp. and non-party Kim L. Russe on December 6, 2007 (HO Ex. 7). The Subcontractor, C.J. Telecommunications appeared by and through its principal, Jeffery L. Patrick. Correspondence, which was deemed an answer on behalf of C.J. Telecommunications was received on September 4, 2007 (HO Ex. 3). There was no appearance by or on behalf of the Subcontractors Bull's Eye Custom Drilling, Inc.; P.D. Ricci, Inc.; and Commcorp, Inc.

## **HEARING OFFICER**

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

## **ISSUES**

1. Did the Subcontractors pay the rate of wages and/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. Should a civil penalty be assessed and, if so, in what amount?

## PRELIMINARY STATEMENT

On August 14, 2007, the Department duly served a copy of the Amended Notice of Hearing (HO Ex. 1) on Bull's Eye Custom Drilling, Inc.; C.J. Telecommunications; P.D. Ricci, Inc.; Titanic Underground Contractors Corp.; and Commcorp, Inc., via regular and certified mail, return receipt requested. A signed certified mail return receipt card evidencing receipt of the document by C.J. Telecommunications and Commcorp, Inc. was entered into evidence as Hearing Officer Exhibit 2. As further evidenced by Hearing Officer Exhibit 2, the certified mailings to Bull's Eye Custom Drilling, Inc., P.D. Ricci, Inc., and Titanic Underground Contractors Corp. were returned as undeliverable or unclaimed. However, there is no evidence that the first class mail sent to these Respondents was returned to the Department. The Amended Notice of Hearing scheduled a September 19, 2007 hearing and required that the Respondents serve an Answer at least 14 days in advance of the scheduled hearing. This initial hearing date was adjourned and rescheduled for December 10, 2007 (HO Ex. 4). The Respondents, Bull's Eye Custom Drilling, Inc.; P.D. Ricci, Inc.; and Commcorp, Inc., failed to serve an Answer to the allegations contained in the complaint or to appear at the hearing. I find that the Subcontractors Bull's Eye Custom Drilling, Inc., P.D. Ricci, Inc., and Commcorp, Inc., are in default of this proceeding, and their default is an admission of all allegations in the Amended Notice of Hearing, including the basic allegation of liability. [*See, Rokina Optical v. Camera King*, 63 N.Y.2d 728, 730 (1984)]. Respondents C.J. Telecommunications and Titanic Underground Contractors Corp. served Answers and participated in the hearing.

The Subcontractor Titanic Underground Contractors Corp., by its attorneys, Rider, Weiner & Frankel, P.C. (Jeffrey S. E. Sculley, of counsel) and Subcontractor, C.J. Telecommunications, by and through its principal, Jeffery L. Patrick, fully participated in the hearing on December 10, 2007. Subsequent to the hearing, the matter was adjourned to allow the C.J. Telecommunications and Titanic Underground Contractors Corp., an opportunity to discuss this case with Department Counsel to see if the case could be settled or to determine when post-hearing proposed findings of fact and conclusions of law would be served. The Department and Titanic Underground Contractors Corp. entered into a Stipulation resolving all issues raised in the Amended Notice of Hearing

relative to Titanic Underground Contractors Corp., which was incorporated into an Order and Determination of the Commissioner of Labor dated July 15, 2008 and duly filed in the Office of the Commissioner of Labor on August 5, 2008.

As of the date of this Report and Recommendation, the Department's case against C.J. Telecommunication has not settled, and the undersigned has received no post-hearing submissions from C.J. Telecommunications or any request that the time within which to serve this document be extended.

**The Bureau Investigation**  
**GENERAL APPLICABILITY TO ALL RESPONDENTS**

As more particularly set forth below, the Bureau received complaints from employees of each of the Respondents alleging underpayments of wages and supplements. The Bureau commenced investigations of these complaints, which included requesting the production of certain enumerated documents from the Respondents and the Department of Jurisdiction (Dept. Exs. 4, 13, 19, and 26). Although the Bureau did receive certain payroll records from Subcontractor P. D. Ricci, Inc., (Dept. Ex. 20; T. 134-135), there was no response received from the remaining Subcontractors, Bull's Eye Custom Drilling, Inc.; C.J. Telecommunications; and Commcorp, Inc. (T.43, 75, and 154).

The Bureau did receive the prime contract, entitled an "Agreement for Services Relating to the Design, Construction, Marketing and Maintenance/Operation of a Fiber Optic Infrastructure Along the New York State Thruway Authority Rights of Way", between the New York State Thruway Authority and the Prime Contractor, Adesta Communications, Inc., F/K/A MFS Network Technologies, Inc. (Dept. Ex. 5). Additionally, the Bureau received a Subcontract Agreement between the Prime Contractor and First South Utility Construction, Inc, Subcontractor (Dept. Ex. 6). Both the prime contract (Dept. Ex. 5 at pg. 10) and the subcontract (Dept. Ex. 6 at pg. 5) identify the Project as a public works project. These contracts are applicable to all named Respondents (T. 62). The Department did not produce any contracts between First South

Utility Construction, Inc. and the Subcontractors named as Respondents in this action. The Department also did not produce any evidence tending to indicate that the Respondents had knowledge that the Project was a public works project or that the Respondents had any prior public works experience or history of violations of Article 8 of the Labor Law. There is also no evidence in the record tending to indicate that these Respondents did not perform the work on the Project as alleged in the Notice of Hearing.

**The Bureau Investigation**  
**BULL'S EYE CUSTOM DRILLING, INC.**

The Bureau received three complaints from employees of Bull's Eye Custom Drilling, Inc. On November 10, 1997, the Bureau received a complaint from Marlin Freeman (Dept. Ex. 1; T. 35-37) wherein Mr. Freeman indicated that he worked for Bull's Eye Custom Drilling, Inc. as a laborer, welder and machine operator during the period of week ending January 11, 1997 through week ending May 3, 1997. Mr. Freeman alleged that he was underpaid wages and supplements.

A complaint was received from Ron Pogose on March 24, 1998 (Dept. Ex. 2; T. 37-40). Mr. Pogose alleged that he worked for this employer as a truck driver and operator during the period of week ending July 12, 1997 through week ending October 18, 1997. Mr. Pogose alleged that he was underpaid wages, not paid overtime wages, and he did not receive any wages for three weeks of work.

A third complaint was received from Scisro Knight, Sr. on November 12, 1997 (Dept. Ex. 3; T. 40-41). Mr. Knight alleged that he worked for Bull's Eye Custom Drilling, Inc. as a machine operator and laborer and that he did not receive his wages for his last week of work, October 13, 1997 through October 18, 1997.

After receiving the complaints, the Department served a form PW-18, Payroll Records Notification (Dept. Ex. 4) on Respondent Bull's Eye Custom Drilling, Inc., requesting payroll records on the Project. The Respondent did not provide any payroll records (T. 43, 58).

The Department prepared an audit indicating the Respondent Bull's Eye Custom Drilling, Inc. underpaid the three complaining employees a total of \$28,369.20 in wages and supplements during the period of week ending 1/11/97 through week ending 10/19/97 (Dept. Exs. 9, 10; T. 66). The Department based its assessment of the hours worked on the hours reported by the employees on the claim forms (Dept. Exs. 1, 2, 3; T. 63,65). The rates of pay used in the audit were derived using the applicable Prevailing Wage Rate Schedules (Dept. Exs. 7, 8; T. 66). Finally, the Department based any credit to the employer indicated in the audit on the amounts paid to the employees as indicated in the claim forms (T. 67).

### **P. D. RICCI, INC.**

The Bureau received a complaint from one employee of P. D. Ricci, Inc., Ronald N. Richardson, on November 10, 1997 (Dept. Ex. 17; T. 129). Mr. Richardson indicated in his complaint that he worked for P. D. Ricci, Inc. as an operator filling the lubricating machine with mud and feeding the drilling rods (T. 130). Mr. Richardson indicated that he was paid an hourly rate of \$6.00, but that he was underpaid, was not paid for overtime work, and he was not paid for all of the hours he worked ( Dept. Ex. 17).

The Department also received copies of pay stubs from Douglas W. Ashbery, another employee of P. D. Ricci, Inc. (Dept. Ex. 18; T. 131).

After receiving the complaints, the Department served a form PW-18, Payroll Records Notification (Dept. Ex. 19) on Respondent P. D. Ricci, Inc., requesting payroll records on the Project (T. 134). The Respondent did provide payroll records (Dept. Ex. 20; T.134-135) that consisted of paychecks, ledger sheets, and some classifications (T. 135).

The Department prepared an audit indicating the Respondent P. D. Ricci, Inc. underpaid six employees a total of \$75,218.62 in wages and supplements during the period of week ending 8/2/97 through week ending 3/21/98 (Dept. Exs. 22, 23; T. 141). The Department based the classifications of the workers on discussions with the employer about the actual work the employees performed on the Project and the claim form (T. 138-139, 144). The Department based its calculation of the hours worked by the



employees on the claim forms and the payroll records (Dept. Exs. 17, 18; T. 139). The rates of pay used in the audit were derived using the applicable Prevailing Wage Rate Schedules (Dept. Exs. 21; T. 140). Finally, the Department based the credit to the employer on actual payments to the employees as indicated in the payroll registries and cancelled checks (Dept. Exs. 18, 20; T. 140).

### **COMMCORP, INC.**

The Bureau received a complaint from one employee of Commcorp, Inc., Robert Gambee, on September 11, 1998 (Dept. Ex. 25; T. 150). Mr. Gambee indicated in his complaint that he worked for Commcorp, Inc. as a cable installer and an equipment operator (T. 152). Mr. Gambee complained that he was underpaid wages on the Project (Dept. Ex. 25; T. 152). Attached to the claim form were the claimant's pay stubs for the period of week ending 2/8/98 through week ending 3/29/98.

After receiving the complaints, the Department served a form PW-18, Payroll Records Notification (Dept. Ex. 26) on Respondent Commcorp, Inc., requesting payroll records on the Project (T. 153-154). The Respondent did not provide any payroll records in response to the Department's request (T.154, 158).

The Department prepared an audit indicating the Respondent Commcorp, Inc. underpaid the claimant a total of \$2,322.65 in wages and supplements during the period of week ending 2/8/98 through week ending 3/29/98 (Dept. Exs. 29, 30; T. 160). The Department based the classification of the work performed by the claimant on information provided by the claimant (T. 158). The Department based its assessment of the hours worked by the claimant on the hours reported on the claim form and the payroll records provided by the claimant (Dept. Ex. 25; T. 158). The Department introduced the applicable Prevailing Wage Rate Schedules containing the corresponding prevailing wage rates that were used by the Department in the audit (Dept. Exs. 27, 28; T. 160). The Department gave the Respondent Commcorp, Inc. credit for the wages paid to the claimant as indicated in the claim form and the attached pay stubs (T. 159).

**FINDINGS AND CONCLUSIONS REGARDING BULL'S EYE CUSTOM  
DRILLING, INC., P. D. RICCI, INC., and COMMCORP, INC.**

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of Bureau of Public Work Wage Investigator Philip A. Wills, supporting the Bureau's charges that Bull's Eye Custom Drilling, Inc. underpaid \$28,369.20 in wages and supplements to its three employees for the audit period week ending 1/11/97 to week ending 10/19/97 (Dept. Exs. 9 and 10; T. 66); that P. D. Ricci, Inc. underpaid \$75,218.62 in wages and supplements to its six employees for the audit period week ending 8/2/97 to week ending 3/21/98 (Dept. Exs. 22 and 23; T. 141); and that Commcorp, Inc. underpaid \$2,322.65 in wages and supplements to its one employee for the audit period week ending 2/8/98 to week ending 3/29/98 (Dept. Exs. 29 and 30; T. 160).

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. *See, CNP Mechanical, Inc. v. Angello*, 31 A.D.3d 925 (3<sup>rd</sup> Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, based upon this statutory mandate, Bull's Eye Custom Drilling, Inc., P. D. Ricci, Inc., and Commcorp, Inc. are responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

The Department produced sufficient credible evidence indicating that the employees of these three Respondents that are identified in the respective audits worked as installer/operators, operators/boring machine, and electric equipment/electric traffic control. Investigator Wills testified that the employees were classified based upon the nature of the work performed as evidenced by the employees' claims and information provided by the Respondents (T. 138, 139, 144, 158). Investigator Wills testified that he considered a combination of the available payroll records, pay stubs, and the employee complaints as the basis for the hours and days worked that were imputed to the employees in the audit (T. 63, 65, 139, 158). Mr. Wills further testified that the actual wages received by the employees that were used as a credit for the Respondents were determined by looking at the available payroll records, paystubs, and the employees'

claims (T. 67, 140, 159). The underpayments in wages and supplements were calculated by multiplying the hours worked by the employees by the prevailing wage and supplement rates contained in the applicable Prevailing Wage Rate Schedule, and giving the Respondents credit for the actual wages paid to the employees as reflected on the available payroll records, pay stubs, and employees' claims.

The Department produced no credible evidence to support the finding that the underpayments in wages and supplements were willful. There is no evidence that any of the Respondents were experienced public work contractors that should have known that their employees should have been paid prevailing wages on the Project. Additionally, there is no evidence in the record, such as the contracts between the Prime Contractor and the Respondents that would allow a finding of actual knowledge that the employees should have been paid prevailing wages on the Project.

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.

The Department has produced no credible evidence to support the finding that the Respondents falsified payroll records. Additionally, the issue of falsification of payroll records was not affirmatively raised in the Notice of Hearing. Accordingly, the record and the pleadings do not support a finding that the Respondents falsified payroll records.

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.

Bull's Eye Custom Drilling, Inc., P. D. Ricci, Inc., and Commcorp, Inc. underpaid their employees. However, there is no evidence of bad faith, prior violations or even evidence that these Respondents knew that this was a public work project. P.D. Ricci, Inc. cooperated with the Bureau by providing the payroll records that were requested at

the commencement of the investigation. (Dept. 20; T. 134-135) Bull's Eye Custom Drilling, Inc. and Commcorp, Inc. failed to produce any payroll records. (T. 43, 154) Under these circumstances, based upon the facts of these cases, no civil penalty is warranted against Respondent P. D. Ricci, Inc. However, based upon the failure of Respondents Bull's Eye Custom Drilling, Inc. and Commcorp, Inc. to keep records or produce these records when requested by the Bureau, a civil penalty of 10% is warranted against both Bull's Eye Custom Drilling, Inc. and Commcorp, Inc.

### **The Bureau Investigation**

#### **C. J. TELECOMMUNICATIONS, INC., N/K/A HARDROCK HDD, INC.**

The Bureau received a complaint from James Claus, an employee of C.J. Telecommunications, dated May 28, 1998 (Dept. Ex. 11; T. 68), wherein Mr. Claus indicated that he worked for C.J. Telecommunications setting steel pipe to be welded; pulling off duct; operating a backhoe, Vermeer directional drilling machines, and Ingersol Rand directional drilling machines; and performing machine and truck maintenance (Dept. Ex. 11). Mr. Claus listed the hours he worked during the period of week ending 7/8/97 through 10/21/97, indicated that he was paid \$600.00 per week salary, and complained that he was underpaid wages and overtime (Dept. Ex 11; T. 69, 71, 73). Mr. Claus also gave the Department copies of his earning statements (Dept. Ex. 12; T. 72).

After receiving the complaint, the Department served a form PW-18, Payroll Records Notification (Dept. Ex. 13) on Respondent C.J. Telecommunications, requesting public work payroll records from the Project. C.J. Telecommunications did not provide any payroll records (T. 73, 75).

### **CLASSIFICATION**

Investigator Wills testified that he classified Mr. Claus as an equipment operator teledata as indicated on the applicable Prevailing Wage Rate Schedule (Dept. Ex. 14),

based upon the description of work contained in the complaint (T. 77). Mr. Wills used the equipment operator wage rate for the Department's audit (T. 77).

The classification of the employee as an equipment operator teledata has not been disputed by C.J. Telecommunications through the production of any evidence at the hearing. The Department prepared an audit indicating C.J. Telecommunications underpaid Mr. Claus a total of \$5,367.52 in wages and supplements during the period of week ending 7/8/97 through week ending 11/11/97 (Dept. Exs. 16, 17; T. 80, 81). The Department based its assessment of the hours worked by Mr. Claus solely on what was reported on his claim form (Dept. Exs. 11, 12; T. 78). The rates of pay used in the audit were derived using the applicable Prevailing Wage Rate Schedules (Dept. Exs. 7, 8; T. 66). Finally, the Department based any credit to the employer on the amounts paid to the employees as indicated in the claim form (T. 67).

I find that the record contains sufficient credible evidence to support the Bureau's determination that the C.J. Telecommunications' employee was employed as an equipment operator teledata during the duration of the subject Project and to support the methodology employed by the Bureau to calculate the hours worked by the employee, the prevailing rates of pay, and the underpayment.

### **Willfulness of Violation**

The Department produced no credible evidence to support the finding that C.J. Telecommunications' underpayment of wages and supplements was willful. There is no evidence that C.J. Telecommunications was an experienced public work contractor that should have known that its employees should have been paid prevailing wages on the Project. Additionally, there is no evidence in the record, such as the contracts to which C.J. Telecommunications was a party that would allow a finding of actual knowledge that the employee should have been paid prevailing wages on the Project.

In light of the foregoing, the record supports a finding that there is no willful underpayment of wages or supplements by C.J. Telecommunications to the claimant.

## **Prior History**

The Department has produced no evidence to support a finding of a history of prior violations of a prevailing wage law by C.J. Telecommunications.

## **C.J. TELECOMMUNICATIONS, INC., N/K/A HARDROCK HDD, INC.**

### **CONCLUSIONS OF LAW**

#### **Jurisdiction of Article 8**

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages to workers employed on public work. This constitutional mandate is implemented through Labor Law Article 8. NY 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 (3<sup>rd</sup> 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 State of New York Thruway Authority, a public entity, is a party to the instant public work contract (DOL Ex. 5), Article 8 of the Labor Law applies. New York Labor Law § 220 (2); and *see, Matter of Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 532 (4<sup>th</sup> 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 similarity of 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 Matter of Lantry v. State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v. New York State Department of Labor*, 34 A.D.3d 905, 906 (3<sup>rd</sup> Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v. Angello*, 31 A.D.3d 925, 927 (3<sup>rd</sup> 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 Department of Labor*, *supra*, quoting *Matter of General Electric, Co. v. New York State Department of Labor*, 154 A.D.2d 117 (3<sup>rd</sup> Dept. 1990), *affd.*, 76 N.Y.2d 946 (1990), quoting *Matter of Kelly v. Beame*, 15 N.Y. 103, 109 (1965). The pivotal question then is the nature of the work performed, not the skill level of the employees performing the work. *Matter of Nash v. New York State Dept of Labor*, 34 A.D.3d 905, 906 (3<sup>rd</sup> Dept. 2006). 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 (3<sup>rd</sup> Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

This case involves a construction contract in which C.J. Telecommunications, among other contractors, was to participate in the design, engineering, furnishing, and installing of a fiber optic infrastructure at the New York State Thruway Authority rights of way (DOL Exs. 5, 6). C.J. Telecommunications’ employee, Mr. Claus, reported to the Bureau that his work included operating a backhoe, and a Vermeer directional drilling machine. Mr. Claus also reported that he helped locate and operate an Ingersoll-Rand 106 directional drilling machine. Finally, Mr. Claus indicated that he did all machine and truck maintenance (DOL Ex. 11, T. 77). Based upon the claimant’s statement of work performed, the Bureau classified this work as equipment operator teledata (DOL Ex. 15; T. 77).

In order to successfully challenge the Department’s classification determination, C.J. Telecommunications must demonstrate by competent proof that the Department’s determination was arbitrary, capricious or without legal basis. C.J. Telecommunications

failed to meet this burden. C.J. Telecommunications failed to offer any evidence at the hearing to indicate that the Department's classifications were in error. C.J.

Telecommunications raised the possibility of other classifications in the context of cross-examination (T. 86-89). Additionally, the Respondent argues that the claimant was a salaried employee as opposed to an hourly wage employee (T. 26-27). Considering the nature of the work performed as described by the claimant, and without evidence of jurisdictional agreements or determinations or past practice, I find these arguments are not competent proof that the Department's classifications were arbitrary and capricious. *See, General Electric Co. v. New York State Department of Labor, et al.*, 154 A.D.2d 117 (3<sup>rd</sup> Dept. 1990). I find that the Department's determination that the C.J. Telecommunications' employee was employed as an equipment operator teledata on the subject Project should be sustained as it reflects the nature of the work actually performed and is supported by sufficient credible evidence in the record.

### **Timeliness**

C.J. Telecommunications argued that the action is barred by the applicable Statute of Limitations. The Respondent argues that the Project at issue occurred approximately 10 years before the hearing and the claim was received approximately 10 years before the hearing. The Respondent argues that the applicable Statute of Limitations and §301 of the State Administrative Procedure Act, which requires an adjudicatory hearing to be commenced within a reasonable time, bar this action (T. 21-31). Finally, C.J. Telecommunications argues that it has been prejudiced by the passage of time relative to its ability to retrieve documents (T. 26-27).

The Bureau investigation that gave rise to the within proceeding against C.J. Telecommunications was commenced by the receipt of a complaint from James Allen Claus on June 1, 1998. (DOL Ex. 11). Mr. Clause alleged that he did not receive the prevailing wage rate for his employment on the Project. Based upon this complaint, the Bureau commenced an investigation and on June 1, 1998, the Bureau forwarded a PW-18, Records Request Notice, to C.J. Telecommunications and the Department of Jurisdiction (DOL Ex. 13, T. 74, 75). C.J. Telecommunications received this Records



Request Notice as evidenced by the signed Certified Mail Return Receipt card (DOL Ex. 13)

Labor Law §220-b provides for both a two-year limitation period and a three-year limitation period. However, pursuant to this statute, these limitation periods run from the time the work is performed until a complaint is filed. *See, Pav-Lak Contracting, Inc. v. McGowan*, 184 Misc.2d 386 (Sup. Ct. Nassau Cty., 2000). As long as a complaint is filed within 2 or 3 years of when the work was performed, the statute has been adequately tolled.

In this matter, the Bureau initiated the investigation based upon a written complaint from a C.J. Telecommunications employee that was received on June 1, 1998. The Bureau's investigation and audit involved work performed on this public improvement project during the period of week ending July 8, 1997 through week ending November 11, 1997 (Dept. Ex. 21, 16). Since the complaint was filed with the Department within seven months of the last date worked by the complainant, it was clearly filed within the limitation periods set forth in Labor Law §220-b. Based upon the foregoing, these proceedings are not time-barred by the limitation periods contained in Labor Law §200-b.

Finally, the Respondent's reliance on State Administrative Procedure Act §301 is not persuasive. In order to be successful in proving that an employer was deprived of due process by the Department's delay in conducting a hearing, the employer must establish that the delay significantly and irreparably hindered its ability to present a defense. *See, M. Passuci General Const. Co., Inc. v. Hudacs* (4<sup>th</sup> Dept. 1995). C.J. Telecommunications argues that it was only required to retain the payroll records from this project for three years and, therefore, it no longer has access to the documents it needs for a defense ten years after the Project (T. 26). However, C.J. Telecommunications was aware of the investigation less than one year following the completion of the work on the Project by the complainant (See, for example, DOL Ex. 13). C.J. Telecommunications knew or should have known that its records would be important and required in the event of an eventual hearing. Any prejudice caused by the lack of payroll records is due to the acts or omissions of C.J. Telecommunications. Pursuant to the foregoing, I find that C.J. Telecommunications has failed to establish that

it was prejudiced by the Department's 10 year delay in conducting an administrative hearing in this prevailing wage proceeding.

### **Underpayment Methodology**

“[W]hen 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 (3<sup>rd</sup> 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).

In this case, C.J. Telecommunications failed to produce any payroll records and the lack of accurate and complete certified payroll records justified the Bureau's reliance on the information provided by the claimant to determine that he was underpaid during the duration of the Project. The Department's comparison of the rates received by the claimant to the prevailing rates of pay contained in the applicable Prevailing Wage Rate Schedule provided the basis for the determination of an underpayment. The Bureau's method of arriving at an underpayment determination was reasonable and necessitated by the lack of accurate records. The Department's calculation that C.J. Telecommunications underpaid its employee in the total amount of \$5,367.52, in wages and supplements (See, Dept. Ex. 15, 16), should, therefore, 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. *See, CNP Mechanical, Inc. v. Angello*, 31 A.D.3d 925 (3<sup>rd</sup> Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, based upon this statutory mandate, the 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)<sup>1</sup> 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

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<sup>1</sup> “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 five largest shareholders 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 five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has willfully 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 five largest shareholders 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 five largest shareholders 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), prior to amendment effective November 1, 2002.

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 (3<sup>rd</sup> 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 (4<sup>th</sup> Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v. Hudacs*, 185 A.D.2d 483, 485 (3<sup>rd</sup> Dept. 1992).

A finding of willfulness is supported by substantial evidence where, by virtue of a contractor’s prior public work experience and its officer’s knowledge of the prevailing wage law, the contractor should have known that its actions violated the labor law. *Matter of TPK Constr. Corp.*, 205 A.D.2d 894, 896 (3<sup>rd</sup> Dept. 1994). 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*.

The record contains no evidence of willfulness. There is no evidence that C.J. Telecommunications was an experienced public work contractor in New York or that it knew that the Project was a public work project. Based upon the foregoing, the record does not support a finding that C.J. Telecommunications knew or should have known that this was a public work project subject to the requirements of Article 8 of the Labor Law such that the underpayment of wages constitutes a willful violation of Labor Law §220.

### **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.

Falsification requires the making of a false document. In this context, falsification of payroll records would require the submission of payroll records that would seek to simulate compliance with requirements of Section 220 or conceal violations. There must be a cover up of violations – an effort at deception. *Matter of Chesterfield Associates, Inc.*, PRC 93-0766A, 93-7632A, 94-0005, 93-8189, 95-2663 (July 29, 2002). The mere evidence of an underpayment shown on a truthfully reported payroll record does not create a falsified document, and no falsification should be determined on that ground. *Id.*

The Department has produced no credible evidence to support the finding that C.J. Telecommunications falsified payroll records. Additionally, the issue of falsification of payroll records was not affirmatively raised in the Notice of Hearing. Accordingly, the record and the pleadings do not support a finding that C.J. Telecommunications falsified payroll records.

### **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.

C.J. Telecommunications underpaid its employee. There is no evidence of bad faith, prior violations or even evidence that the Respondent knew that this was a public work project. However, C. J. Telecommunications failed to keep payroll records or to provide these records to the Bureau when they were requested. Under these circumstances, a 10% civil penalty is warranted based on the failure to comply with record keeping.

### **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:

**BULL’S EYE CUSTOM DRILLING, INC.**

DETERMINE that Bull’s Eye Custom Drilling, Inc. underpaid wages and supplements due the identified employees in the amount of \$28,369.20; and

DETERMINE that Bull’s Eye Custom Drilling, Inc. 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 Bull’s Eye Custom Drilling be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

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

ORDER that upon the Bureau’s notification, Bull’s Eye Custom Drilling, Inc. shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Campus Bldg 12 Room 130, Albany, NY 12240; 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.

**P. D. RICCI, INC.**

DETERMINE that P. D. Ricci, Inc. underpaid wages and supplements due the identified employees in the amount of \$75,218.62; and

DETERMINE that P. D. Ricci, Inc. 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

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

ORDER that upon the Bureau's notification, P. D. Ricci, Inc. shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Campus Bldg 12 Room 130, Albany, NY 12240; 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.

### **COMMCORP, INC.**

DETERMINE that Commcorp, Inc. underpaid wages and supplements due the identified employee in the amount of \$2,322.65; and

DETERMINE that Commcorp, Inc., Inc. 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 Commcorp, Inc. be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

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

ORDER that upon the Bureau's notification, Commcorp, Inc., Inc. shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Campus Bldg 12 Room 130, Albany, NY 12240; 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.

**C.J.TELECOMMUNICATIONS, INC., N/K/A HARDROCK HDD, INC.**

DETERMINE that C. J. Telecommunications, Inc. underpaid wages and supplements due the identified employee in the amount of \$5,367.52; and

DETERMINE that C. J. Telecommunications, Inc. 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 C. J. Telecommunications, Inc. be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

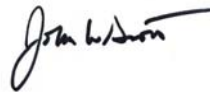
ORDER that the Bureau compute the total amount due (underpayment and interest); and

ORDER that upon the Bureau's notification, C. J. Telecommunications, Inc. shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Campus Bldg 12 Room 130, Albany, NY 12240; 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: June 3, 2010  
Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer