

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

SICOLI CONSTRUCTION SERVICES, INC.
and BENJAMIN SICOLI as shareholder of
SICOLI CONSTRUCTION SERVICES, INC.,

Prime Contractor,

and

ADVANCED SAFETY SPRINKLER, INC.,
And JON DEYOUNG, and GIGI
SCHNECKENBURGER as officers and
shareholders of ADVANCED SAFETY
SPRINKLER, INC.,

Subcontractor.

DEFAULT
REPORT
&
RECOMMENDATION

For a determination pursuant to Article 8 of the
Labor Law as to whether prevailing wages and
Supplements were paid to or provided for the
laborers, workers, and mechanics employed on
a public work Project for the Town of Hamburg.

Prevailing Rate Case
No.: 2013010638
Case ID: PW05 2014009033
Erie County

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To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued on January 16, 2018, a hearing was held on April 3, 2018 and April 12, 2018 in Albany, New York and by videoconference with Buffalo, New York and Rochester, New York on April 3, 2018 and with Buffalo, New

York on April 12, 2018. Following the conclusion of the hearing, Counsel for the Department submitted Proposed Findings of Fact and Conclusions of Law on May 17, 2018. 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 Advanced Safety Sprinkler, Inc. ("Advanced Safety" or "Sub") a subcontractor of Sicoli Construction Services, Inc. ("Prime") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving the provision of all interior fire suppression/sprinkler work associated with the Town of Hamburg Community Center ("Project") for the Town of Hamburg, New York ("Department of Jurisdiction").

HEARING OFFICER

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

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz, (Erin Hayner, Senior Attorney, of Counsel)

Jon DeYoung appeared individually and on behalf Advanced Safety. An undated letter that was mailed to the Commissioner of Labor and received by the Hearing Officer on April 3, 2018, was accepted as an Answer on behalf of Advanced Safety and entered into the record as Hearing Officer Ex. 3. Jon DeYoung was present and participated in the hearing on April 3, 2018. Mr. DeYoung appeared at the April 12, 2018 hearing at the Buffalo, New York hearing location but indicated that he did not wish to participate in the hearing and left the hearing room after being told by the Hearing Officer that the hearing would continue in his absence.

There was no appearance made by, or on behalf of Prime.

FINDINGS AND CONCLUSIONS

On January 23, 2018, the Department duly served a copy of the Notice of Hearing on Advanced Safety, via regular and certified mail, return receipt requested. The regular mail envelope was not returned to the Department. In addition, Attorney Hayner had a conversation with Mr. DeYoung about the hearing prior to the April 3, 2018 hearing date, Mr. DeYoung sent a letter to the Commissioner of Labor prior to the April 3, 2018 hearing date (Hearing Officer Ex. 3), and Mr. DeYoung appeared at the Buffalo, New York hearing site on April 3, 2018 and April 12, 2018. The Notice of Hearing scheduled an April 3, 2018 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

In addition, the Department duly served a copy of the Notice of Hearing on Prime, via regular and certified mail, return receipt requested. The regular mail envelope was not returned to the Department. Prime failed to file an Answer to the charges contained in the Notice of Hearing or appear at the hearing. As a consequence, Prime is in default in this proceeding.

Advanced Safety appeared at the hearing by and through Mr. DeYoung and participated in the hearing on April 3, 2018 by making an opening statement, participating in cross-examination of Department witness, Christopher George, and submitting Respondent's Ex. 1 consisting of a proposal from Advanced Safety to Prime for work on the Project and a Letter of Intent from Prime indicating that it would issue a subcontract to Advanced Safety for the work to be performed on the Project. Respondent's Exhibit 1 was used by Mr. DeYoung during his cross-examination of Christopher George and was made part of the record as Hearing Officer Ex. 4 after Mr. DeYoung left the hearing on April 12, 2018. Since Mr. DeYoung elected to leave the hearing on April 12, 2018, no evidence was offered in Advanced Safety's case-in-chief. The undated letter from Mr. DeYoung (Hearing Officer Ex 3) that was received as Advanced Safety's Answer, merely contained requests to the Department for evidence and statements that can be categorized as general denials of the allegations contained in the Notice of Hearing. As a consequence of the failure of Advanced Safety to offer

evidence that did or could tend to refute the Department's proof, Advanced Safety is in default in this proceeding.

The Notice of Hearing alleges that Advanced Safety underpaid wages and supplements to its workers and that Prime is responsible for Sub's underpayment pursuant to Labor Law § 223.

Prior to the hearing, Prime made direct restitution payments to the Sub's employees in the amount of \$5,646.93 in wages, \$8,742.42 in supplemental benefits, and interest at a rate of 6% per annum calculated through March 21, 2017 in the amount of \$2,232.71 (T. 131, 138; Ex. 14). The direct payments were the result of the Department's Detail of Underpayments (T. 131; Ex. 14).

There were also direct payments made to two employees by Advanced Safety that were added to the certified payrolls after the investigation started and that are reflected in the Department's Detail of Underpayments (T. 137; Exs. 7, 8, 17).

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and an employee of Advanced Safety, and documents describing the underpayments, which supported the Bureau's charges that:

The Project was subject to Labor Law article 8; and

Prime entered into a contract for the Project with the Department of Jurisdiction; and

Advanced Safety entered into a contract with Prime for work on the Project; and

Advanced Safety willfully underpaid \$14,389.35 to its workers for the audit period weeks ending 05/04/2014 to 01/06/2015; and

Advanced Safety falsified its payroll records in connection with that willful underpayment; and

Jon DeYoung is an officer of Advanced Safety; and

Gigi Schneckenburger is an officer of Advanced Safety; and

Jon DeYoung knowingly participated in the violation of Labor Law article 8, and

Gigi Schneckenburger knowingly participated in the violation of Labor Law article 8.

For the foregoing reasons, the findings, conclusions and determinations of the Bureau should be sustained.

RECOMMENDATIONS

Based upon the default of Prime and Advanced Safety in offering evidence contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Advanced Safety underpaid its workers \$14,389.35 on the Project, PW05 2014009033, PRC No. 2013010638; and

DETERMINE that Advanced Safety is responsible for interest on the total underpayment at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment; and

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

DETERMINE that the willful violation of Advanced Safety involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Jon DeYoung is an officer of Advanced Safety; and

DETERMINE that Gigi Schneckenburger is an officer of Advanced Safety; and

DETERMINE that Jon DeYoung knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Gigi Schneckenburger knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Advanced Safety 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 Labor Law article 8; and

ORDER that the Bureau compute the total amount due (underpayment of \$14,389.35, interest at 16% from date of underpayment and 25% civil penalty); and

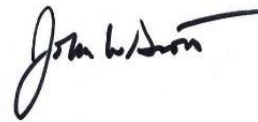
ORDER that Sub shall receive a credit for the \$16,622.06, inclusive of 6% interest calculated through March 21, 2017 that was paid by Prime; and

ORDER that upon the Bureau's notification, Advanced Safety shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at: State Office Building 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: May 29, 2019
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Scott", written in a cursive style.

John Scott, Hearing Officer