STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

Arcon Construction & Management Services, Inc.; and Paul J. Winnie, as a shareholder of Arcon Construction & Management Services, Inc.;

REPORT
and
RECOMMENDATION

Prime Contractor,

and

American Glass Company of Albany, Inc.; and David E. Abbott, as an officer and/or shareholder of American Glass Company of Albany, Inc.; and its successor or substantially owned-affiliated entity DAVID ABBOTT & SON, INC.;

Subcontractor,

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 Village of Colonie, a New York State Municipal Corporation.

Prevailing Wage Rate
PRC No. 2012009140
Case ID: PW012014002071
Albany County

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

Pursuant to a Notice of Hearing issued on October 26, 2015, a hearing was held on January 7, 2016, in Albany, New York. The purpose of the hearing was to provide the parties with 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 American Glass Company of Albany, Inc. (“AGC”), complied with the requirements of Labor Law article

8 (§§ 220 *et seq.*) in the performance of a contract involving renovations and additions to the existing firehouse located at the Village of Colonie, on Central Avenue, Albany, NY ("Project") for the Village of Colonie ("Department of Jurisdiction" "Colonie").

At the conclusion of the hearing, the parties were given until on or before March 18, 2016 to submit Proposed Findings of Fact and Conclusions of Law.

HEARING OFFICER

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

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Elina Matot, Senior Attorney, of Counsel).

Arcon Construction & Management Services, Inc. ("ARCON") was represented by The Breakell Law Firm, P.C. (Jennifer Wojeski, Esq.).

AGC, David E. Abbott, and David Abbott & Son, Inc. were represented by Tabner, Ryan & Keniry, LLP (Willaim F. Ryan, Jr., Esq).

ISSUES

1. Did AGC 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 by AGC to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Should a civil penalty be assessed and, if so, in what amount?
4. Is David E. Abbott a shareholder of AGC who owned or controlled at least ten per centum of the outstanding stock of the Prime?
5. Is David E. Abbott an officer of AGC who knowingly participated in a willful violation of Labor Law article 8?

6. Is David Abbott & Son, Inc. a "substantially owned-affiliated entity" of AGC?

7. Whether, pursuant to Labor Law § 223, ARCON, as prime contractor on the Project is liable for non-compliance or evasion by AGC of its obligation to pay prevailing wages and/or supplemental benefits.

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau on a Project involving public work performed by AGC.

On or about January 23, 2013, ARCON entered into a contract with the Village of Colonie to furnish material, labor, tools, and equipment necessary for the renovations and additions to the existing firehouse located at the Village of Colonie, on Central Avenue, in Albany, Albany County, New York. The project manual for the Project indicated that this was a public work project subject to prevailing wages, and a copy of the applicable prevailing wage schedule was enclosed (T. 40, 41, 44, 45; DOL Ex. 3, 4, 6, 7).

On or about February 6, 2013, ARCON entered into a contract with AGC for the performance of work in connection with the Project. The scope of the work delineated in Article 8 of the subcontract indicated that AGC would furnish material, labor, tools, and equipment necessary for the furnishing and installation of store front aluminum windows and frames, furnishing and installation of aluminum doors, door frames, and window frames, and all glazing (DOL Ex. 6). The subcontract further provided that the subcontract documents included the Albany County Prevailing Wage Schedule, and the agreement documents between ARCON and Colonie, which included the Prime Contract, as well as the specifications as contained in the project manual and architectural drawings which included the prevailing wage schedule (T. 50, 51, 52, 53, 54; DOL Ex. 4, 5, 6).

Division 08 of the project manual listed the types of openings to be installed on the Project which included tubular metal doors, frames, storefronts, and glazing. (DOL Ex. 5). The architectural drawings also showed that a tubular metal door and storefront windows were to be installed on the Project (AGC Ex. 1, DOL Ex. 5). The drawings for the Project listed the specific size of the tubular metal door to be installed as 36 inches by 86 inches which was less than 125 square feet, and not wider or higher than 13 feet (AGC Ex. 1).

According to the Department's analysis, the contract involved the employment of workers in the glazier and ironworker classifications (T. 60, 61; DOL Ex. 7). AGC determined that the work performed by its workers on the Project was the type of work classified as glaziers (AGC Ex. 4; DOL Ex. 7).

On or about July 1, 2013, the Bureau issued Prevailing Wage Rate Schedule ("PWRS") 2013 for Albany County. The PWRS detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers, and mechanics performing work on the Project from July 1, 2013 through June 30, 2014 (T. 56, 62, 63; DOL Ex. 7).

On or about March 31, 2014, the Bureau received a complaint from Kenneth B. Klouse, business representative from D.C. 9 International Union of Painters and Allied Trades, which also represents Glaziers, alleging that based upon payroll records obtained pursuant to the Freedom of Information Law ("FOIL"), AGC was paying its workers the incorrect rate on the Firehouse Project. The rate referenced in the payroll documents was the glazier rate. Mr. Klouse submitted the AGC payroll records along with his complaint (T. 28, 29, 30; DOL Ex. 1).

The Bureau commenced an investigation of the Project (T. 30) and requested that AGC provide it with certified payroll records, time records, benefit plan summaries, cancelled checks, contracts, and other documents relating to the Project (T. 31, 32, 34; DOL Ex. 2).

AGC cooperated with the investigation and provided the Bureau with the requested records that enabled the Bureau to conduct its investigation and complete its audit (T.34, 35).

During the investigation, Bureau Investigator Stephen Oluyede and Senior Investigator Raymond B. Plante met with AGC's owner, David Abbott at the Project work site to discuss the work performed on the Project and the investigation (T. 115). While the work was virtually completed and the investigators did not observe any work being completed by AGC employees other than minor punch list items (T. 114), the investigators and Mr. Abbott viewed the work that was completed and discussed the classifications of work on the Project. The investigators did not specifically observe any AGC workers install any windows or doors at the Project but they did observe metal frames, metal tubes, and windows. The investigators told Mr. Abbott that glazier and ironworker classifications were appropriate for the Project. Mr. Abbott told the investigators the names of the two men who performed the metal frame installation that the Bureau deemed ironwork and the hours they spent on this facet of the Project. (T. 60, 61, 62, 69, 70, 71, 77). The investigators based their determination of what work was ironworker work on what they believed

were the installation of curtain walls and window walls, their observations while at the Project site, and their opinions as to the installation of tubular metal doors (T. 62, 71, 138).

During this on-site meeting, the investigators gave AGC a document that set forth the Department's criteria for the classification of work associated with the installation of metal windows, installation of curtain wall/window wall, and installation of metal framed entrances (AGC Ex. 4; T. 164-165). Pursuant to these criteria the Department classifies the installation of metal entrances as ironworkers except that the installation of "metal entrances with tubular doors in openings not exceeding 125 square feet or 13 feet in height or 13 feet in width is classified as Glaziers" (AGC Ex. 4).

AGC submitted certified payroll records for the Project. Except for the glazier classification utilized by AGC for the two men the Bureau classified as ironworkers, the Bureau accepted the accuracy of these payroll records. The certified payroll records indicate that AGC classified all workers as glaziers and paid them at the correct glazier rate. Relying on the information provided by Mr. Abbott as to which workers performed the metal frame installation and the hours and days they worked, the Bureau determined that there was an underpayment, as these two workers were misclassified and not paid in accordance with the nature of the work they were performing (T. 65, 66, 67, 69, 70, 71; DOL Ex. 8). The Bureau accepted the certified payroll records as accurate with respect to the rest of the workers as they were properly classified as glaziers and paid at the correct glazier rate.

The Bureau relied on the certified payroll records, the prevailing wage schedule, and information provided by Mr. Abbott in preparing the audit submitted into evidence on the Project (T. 75, 76; DOL Ex. 10).

The Bureau determined that during the period starting from week ending November 16, 2013 through week ending January 18, 2014, AGC underpaid prevailing supplements to two workers performing work on the Project in the amount of $855.24 (T. 76-85; DOL Ex. 10, 11). The Bureau based this determination on the type of work performed, the type of window and door installations, the materials utilized, the investigators observations of the completed work while at the Project site, and discussions with Mr. Abbott (T. 60).

On or about May 27, 2014, the Bureau issued to AGC a Notice of Labor Law Inspection Finding notifying AGC of its findings on the Project (T. 91, 92; DOL Ex. 12).

On or about September 17, 2014, the Bureau issued a Notice to Withhold Payment to Colonie, directing that Colonie withhold payments totaling $855.00 from money due or to become due to ARCON on the Project. On September 25, 2014 Colonie confirmed that $855.00 is withheld from payments due to ARCON on the Project.

The Bureau presented the audit to Mr. Abbott and on or about August 12, 2014 AGC issued a check to the Bureau for the full underpayment as well as interest at 6% and civil penalty of 20%, with deductions for appropriate taxes. The total gross amount of the underpayment was $1,074.75 and the net amount paid to the Bureau by AGC was $874.33 (T. 85, 86, 87, 88, 90; DOL Ex. 18). The issue of the alleged willfulness of the underpayments was not resolved with this payment (T. 85-86, 90; DOL Ex. 18). Mr. Abbott testified that, while he agreed to pay the amount of the underpayment, he was not in agreement with the Bureau's determination. It was simply cheaper to pay the underpayment than to litigate the case. (T. 190, 193, 194, 196, 197, 199-200).

During the period when the work was performed on the Project, David E. Abbott was an officer and sole owner of AGC (DOL Ex. 14). In his capacity as Treasurer, Mr. Abbott signed the subcontract agreement with ARCON (Dept. Ex. 6); the certified payrolls (Dept. Ex. 9); and the contractor profile (Dept. Ex. 14).

The Department offered evidence indicating that AGC is an experienced public work contractor that has worked on at least five public work projects prior to the subject Project, all of which resulted in stipulations of non-willful underpayments of wages and supplements (Dept. Ex. 17). Two of these stipulations involved an ironworker mis-classification (Dept. Ex. 17; Tr. 103-109).

The Department offered evidence and argued that David Abbott & Son is a substantially owned-affiliated entity or successor of AGC (Dept. Ex. 15; Tr. 98, 99).

ARCON was the prime contractor on the Project and Paul J. Winnie was a shareholder of ARCON owning or controlling at least ten per centum of the outstanding stock, and/or was one of the five largest shareholders of ARCON during the Project. (Dept. Exs. 4, 6, 16; Tr. 40, 41, 46, 52, 92, 100, 101).

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York Constitution, article 1, § 17 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 AD2d 870, 871-872 [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.

The New York State Court of Appeals has adopted a three-prong test to determine whether a particular project constitutes a public works project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 2013 NY Lexis 1731, 2013 NY Slip Op 4842 (June 27, 2013). The Court states the test as follows:

> First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public. *Id.*

The Village of Colonie, a public entity, is a party to the instant public work contract. The contract involving renovations and additions to the existing firehouse located at the Village of Colonie, on Central Avenue, Albany, NY for the Village of Colonie, NY, which required construction-like labor paid for by public funds. Finally, the work product, here improvements to a Village firehouse, is clearly for the use or other benefit of the general public. Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts*, 94 AD2d 532 [1983], *affd* 63 NY2d 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 AD 236, 241 [1954]). Classification of workers is within the expertise of the Department. *(Matter of Lantry v State of New York,* 6 NY3d 49, 55 [2005]; *Matter of Nash v New York State Dept of Labor,* 34 AD3 905, 906 [2006], *lv denied,* 8 NY3d 803 [2007]; *Matter of CNP Mechanical, Inc. v Angello,* 31 AD3d 925, 927 [2006], *lv denied,* 8 NY3d 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 AD3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor,* 154 AD2d 117, 120 [3d Dept. 1990], *affd* 76 NY2d 946 [1990], *quoting Matter of Kelly v Beame,* 15 NY 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 AD2d 665 [1992], *lv denied,* 80 NY2d 752 [1992]). The analysis that the Department generally follows in classifying work includes consideration of a number of relevant factors, including: jurisdiction obtained by a particular union through the collective bargaining process, jurisdictional agreements, past precedent, and the inherent nature and characteristics of the work in question. (*Matter of Lantry v State of New York,* 6 NY3d 49, 55-56 [2005]).

The PW-11 audit in this case includes two workers who were classified by the Department as ironworkers (DOL Ex. 10). As testified to by the Department's investigator, Raymond Plante, these classifications were determined based on the type of work performed, the type of installations, and the materials utilized (T. 60). Mr. Plante testified that he was familiar with the type of work that was performed through his training as an investigator and by meeting with Mr. Abbott at the job site to discuss the Project (T. 60). As the work on the Project was virtually completed when Mr. Plante visited the job site, he testified that he relied on his discussions with Mr. Abbott to determine where on the Project the work he classified as ironworker work was done and the identity of the two workers performing this work (T. 62). The

classification was based on the completed work he visually observed and discussed with Mr. Abbott (T. 62).

When Mr. Plante visited the job site he provided Mr. Abbott and Mr. Spahn, the AGC Project Manager, with a document relied on by the Department in making classification determinations relating to the installation of metal windows, installations of curtain wall/window wall, and installation of metal framed entrances (Responent's Ex. 4; T. 164-165). This document provides the following:

INSTALLATION OF METAL WINDOWS

The installation of metal windows into wood or metal stud construction is classified as Carpenters.

The installation of metal windows into steel, metal, masonry or concrete is classified as Ironworkers.

INSTALLATION OF CURTAIN WALL/WINDOW WALL

The installation of glass and glass-related work such as glass installation, rubber stops, pressure plates, etc. is classified as Glaziers.

Metal supporting framing work is classified as Ironworkers.

The installation of metal panels is classified as Ironworkers.

The installation of pre-glazed glass panels or units into curtain or window wall is classified as Ironworkers.

The installation of plastic material when used as siding is classified as Ironworkers. When the plastic material is installed and the primary purpose is transmission of light, it is classified as Glaziers.

INSTALLATION OF METAL FRAMED ENTRANCES

The installation of metal entrances is classified as Ironworkers except as described in a) and b) below:

a) Metal entrances with tubular doors in openings not exceeding 125 square feet or 13 feet in height or 13 feet in width is classified as Glaziers.
b) The installation of tempered glass doors is classified as Glaziers.

The installation of revolving doors is classified as Ironworkers.

The Bureau Investigator determined the ironworker classification for two of the workers was appropriate based upon the scope of the work that was done and discussions with Mr. Abbott regarding the type of work they performed on the Project (T. 60). AGC classified these two workers as glaziers on the certified payroll records for the entire Project and offered

extensive testimony that the work performed by these two workers was correctly classified a glazier based upon the Department's classification memo since the work at issue involved the installation of storefronts, a window wall system not mentioned in the Department's memo and a tubular metal door that did not exceed the dimensional limits contained in the memo of 125 square feet or 13 feet in height or 13 feet in width which is specifically excluded from the Department's ironworker classification guidelines (Respondent's Ex. 4; T. 165-169). However, AGC's witness Mr. Spahn also testified that the storefronts installed at the Project were aluminum (T. 175, 176) and constituted the installation of metal windows at the Project (T. 175). Mr. Spahn further acknowledged that storefronts can serve as windows (T. 174). Finally, Mr. Spain testified on cross-examination that these metal storefront windows were twenty feet consisting of aluminum panels (T. 177). There is no dispute that the metal storefront window systems were installed into masonry (Respondent Ex. 1) and, as set forth in the architectural drawings (Respondent's Ex. 1), the metal storefront windows are substantial systems that exceed the dimensional exceptions contained in Installation of Metal Windows guidance memo (see, for ex. Respondent's Ex. 1 at section A 5.2).

I find that the record is clear that all the windows installed by Respondent were metal (T 175) and the windows, including the metal storefronts that serve as windows,were installed into masonry. This finding, in and of itself, supports the Bureau's classification of the work as ironworker since the installation of metal windows into masonry is classified as Ironworker (Respondent Ex. 4). Additionally, based upon a review of the relevant architectural drawings, the metal storefront windows installed by Respondent exceed the dimensional limitations contained in the bureau's Installation of Metal Windows memo (T. 142-144, 177; Respondent's Exs. 1, 2, and 4). Therefore, regardless of whether AGC installed curtain walls, window walls or storefronts, AGC installed metal frames into masonry which is work traditionally classified by the Bureau as the work of an ironworker. The Bureau's classification should be sustained.

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 AD2d 818, 821 [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 AD2d 82 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]).

The Bureau accepted AGC's payroll records and relied on them to establish the days and hours worked and the rates paid for wages. The payroll records accurately classified all workers as glaziers except two workers who were not classified based upon the work that they actually performed on the Project. With the exception of the two workers who performed limited ironworker work, the Bureau accepted glazier classification as contained in the certified payroll records for the remaining workers. The Investigator accepted the wage rate paid to all employees as reflected in the certified payroll records as correct once the rates were verified with the applicable PWRS. In summary, the Bureau relied on the certified payroll records, the prevailing wage schedule, and information provided by Mr. Abbott in preparing the audit submitted into evidence on the Project (T. 75, 76; DOL Ex. 10).

In determining the underpayment, the investigator reviewed the certified payroll records and relied upon the information provided by AGC about which two of the workers listed in the payroll records installed metal frames and on which days they did so. The audit is compiled from information provided by AGC and the underpayments result from AGC paying wages and supplements at the glazier rate, when it should have paid at the ironworker rate for these two workers. The underpayment calculation was reasonable based upon the Bureau's classification of this work as ironworker.

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 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). Consequently, TADCO is responsible for the interest on

the aforesaid underpayments at the 16% per annum rate from the date of underpayments 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) [1] 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 Labor Law article 8, 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 AD2d 1006, 1006-1007 [1987]). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct

[1] "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 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 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.

engaged in is illegal (citations omitted)." (*Matter of Fast Trak Structures, Inc. v Hartnett*, 181 AD2d 1013, 1013 [1992]; s*ee also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 [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 AD2d 510 [1988]; *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 AD2d 421 [1991]).

It is not in dispute that AGC was involved in five prior public work projects and, therefore, could be considered an experienced public work contractor that is familiar with prevailing wage schedules and that different classifications are appropriate for workers performing different work (T. 101-106, 108-109; DOL Ex. 17). The record also establishes that AGC had been instructed in prior investigations that the installation of metal frames into masonry is to be paid at the ironworker worker rate (T. 104; DOL Ex. 17). However, the work at issue herein primarily involved the installation of storefronts into masonry and this type of window system, although functioning as a metal window is not specifically included in the Department's Installation of Metal Windows directive (Respondent's Ex. 4). This omission in the Department's guidance information could have allowed even an experienced public work contractor to conclude that this type of storefront installation is excluded from the ironworker classification and that the appropriate classification for this work was glazier. In light of this possible ambiguity in the Department's guidance memo that was provided to AGC by the Bureau as instructive on the issue of metal window installation classifications, I find that AGC's failure to pay its workers the correct ironworker rate for the work of installing the metal storefronts and windows was not a willful violation of Labor Law article 8.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one were 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." The Legislature intended the definition to be read expansively to address the realities of whether entities are substantially owned-affiliated entities. *Matter of Bistrian Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

The Department alleges David Abbott & Son, Inc. is a substantially owned-affiliated entity of AGC. In support of this allegation the Department offered a print-out from the New York State Department of State, Division of Corporations, indicating that David Abbott & Son, Inc. has the same address as AGC, is the disclosed recipient for service of DOS process by mail, and is included in the AGC name history (DOL Ex. 15; T. 98-99). The record contains no evidence of any indicia of ownership or control by David Abbott & Son, Inc. over AGC. Additionally, the Department offered no evidence that would establish power or responsibility over employment decisions, power or responsibility over contracts, responsibility for maintenance or submission of certified payroll records, or influence over the business decisions of the relevant entity.

I find that the record contains insufficient evidence to support a finding that David Abbott & Son, Inc. is a substantially owned-affiliated entities of AGC.

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 any officer of the contractor or subcontractor who knowingly participated in the willful violation of Labor Law article 8 shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

In the present case, David E. Abbott was the Treasurer of AGC (DOL Ex.14), and he acted in this capacity when he executed the contract between ARCON and AGC (DOL Ex. 6) and when he certified the AGC payrolls (DOL Ex. 9).

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.

AGC was an experienced public work contractor that had received guidance from the Department on what constitutes ironworker work prior to this project. However, in light of the finding that the underpayment was not willful and that AGC cooperated with the Bureau's investigation, including its voluntary payment of the amount determined prior to the hearing (DOL Ex. 18), a penalty of 20% of the total amount found due is warranted.

LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor's failure to comply with, or evasion of, the provisions of Labor Law article 8. (Labor Law § 223; *Konski Engineers PC v Commissioner of Labor*, 229 AD2d 950 [1996], *lv denied* 89 NY2d 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 AD2d 331 [1989]). AGC performed work on the Project as a subcontractor of ARCON. Consequently, ARCON, in its capacity as the prime contractor, is responsible for the total amount found due from AGC 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 AGC underpaid supplements due the identified employees in the amount of $855.24; and

DETERMINE that AGC 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 AGC to pay the prevailing wage or supplement rate was not a "willful" violation of Labor Law article 8; and

DETERMINE that David Abbott & Son, Inc. was not a "substantially owned-affiliated entity" of AGC;

DETERMINE that David E. Abbott is an officer of AGC who knowingly participated in the violation of Article 8 of the Labor Law; and

DETERMINE that AGC be assessed a civil penalty in the amount of 20% of the underpayment and interest due; and

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

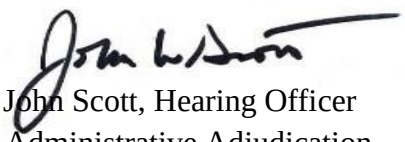
ORDER that Department of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at State Office Building Campus, Bldg. 12, Room 130, Albany, NY 12240.

ORDER that if any withheld amount is insufficient to satisfy the total amount due, AGC, 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: March 6, 2017
Albany, New York

Respectfully submitted,



John Scott, Hearing Officer
Administrative Adjudication