STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

ARC ROOFING CONSTRUCTION CORP.
Prime Contractor
and
GLENN SCUDERI,
Individually as an Officer and as one who owns or controls ten percent or more of the shares of
ARC ROOFING CONSTRUCTION CORP.

for a determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to, or provided for, the laborers, workers and mechanics employed on a public work project for the Mount Vernon City School District.

DEFAULT REPORT & RECOMMENDATION

Prevailing Rate Case
Case No. 2009005773
PW082009006739
Westchester County

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

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on February 1, 2011 and April 14, 2011, in Albany, New York, and via videoconference at White Plains, 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 ARC Roofing Construction Corp. (“Prime”), and Glen Scuderi, individually and as one who owns ten per cent or more of the shares of Prime, complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a contract involving maintenance and repair of various school buildings (“Project”) for the Mount Vernon City School District (“Department of Jurisdiction”).

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito, Richard Cucolo, Senior Attorney, of Counsel.

Prime and Glen Scuderi appeared *pro se* and did not file an Answer to the charges incorporated in the Notice of Hearing. On the first day of the hearing, Mr. Scuderi produced a letter that he claimed was from his attorney, Joseph Goubeaud, Jr. The letter was dated January 14, 2011 and addressed to the Hearing Officer at 120 Bloomingdale Road, White Plains, New York, and copied to Department Counsel Maria Colavito, both of whose addresses were not in White Plains, but in Albany, New York, as set forth in the Notice of Hearing. In the letter, Mr. Goubeaud requested an adjournment of the proceeding. The letter was never received by the Hearing Officer or by the Department attorney. Although a Postal Service Return Receipt showed that Mr. Goubeaud had received the Notice of Hearing, the letter was not sent to the Hearing Officer at the correct address, nor was it sent to the Department attorney. The Department's attorney noted that he had, on multiple occasions prior to the hearing, attempted to contact Mr. Goubeaud, and had never received a response.

The request for an adjournment was denied and Mr. Scuderi was informed that he and his attorney would be able to review the first day of hearing's transcript and appear to present their direct case on a subsequent date. Mr. Goubeaud never contacted the Hearing Officer concerning the hearing. At the second day of the hearing, Mr. Scuderi appeared without counsel and did not request an adjournment. Mr. Scuderi submitted Proposed Findings of Fact and Conclusions of Law *pro se* after the hearing concluded.

ISSUES

1. Did Prime pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure by Prime to pay the prevailing rate of wages or to provide the

supplements prevailing in the locality "willful"?

3. Is Glen Scuderi a shareholder of Prime who owned or controlled at least ten per centum of the outstanding stock of the Prime?
4. Is Glen Scuderi an officer of Prime who knowingly participated in a willful violation of Article 8 of the Labor Law?
5. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned an investigation by the Bureau of a project involving public work performed by Prime for the Department Of Jurisdiction in Westchester County (DOL 3, 5).

The Project consisted of roofing work and repairs on various school buildings (DOL 3).

Instead of a single Project contract, Prime performed work for the Department of Jurisdiction pursuant to a series of Purchase Orders for a period of approximately two years 2007 to 2009 (DOL 4, 13).

On or about July 1, 2006, the Bureau issued a Prevailing Wage Rate Schedule for Westchester County ("Schedule 1") (DOL 5).

Schedule 1 set forth the prevailing rate of wages and supplements to be paid or provided to workers performing work on the Project from July 1, 2006 through June 30, 2007. For the classification of roofer, Schedule 1 required the payment of wages in the amount of $36.33 per hour and supplements of $21.57 per hour (DOL 5).

On or about July 1, 2007, the Bureau issued a Prevailing Wage Rate Schedule for Westchester County ("Schedule 2") (DOL 6).

Schedule 2 set forth the prevailing rate of wages and supplements to be paid or provided to workers performing work on the Project from July 1, 2007 through June 30, 2008. For the classification of roofer, Schedule 2 required the payment of wages in the amount of $33.33 per hour and supplements of $23.97 per hour (DOL 6).

On or about July 1, 2008, the Bureau issued a Prevailing Wage Rate Schedule for Westchester County ("Schedule 3") (DOL 7).

Schedule 3 set forth the prevailing rate of wages and supplements to be paid or provided to workers performing work on the Project from July 1, 2008 through June 30, 2009. For the classification of roofer, Schedule 3 required the payment of wages in the amount of $37.50 per hour and supplements of $25.34 per hour (DOL 7).

On or about April 30, 2009, the Bureau received a written complaint from a worker on the Project alleging underpayments by Prime (DOL 1).

On or about May 21, 2009, the Bureau requested Prime to provide it with payroll records and supporting payroll documentation for Project (DOL 2).

On or about June 9, 2009, the Bureau received three additional complaints from workers on the Project alleging underpayments by Prime (DOL 1).

The Bureau did not receive any payroll records from Prime in the course of the investigation (T. 25).

On or about July 21, 2010, the Bureau received a communication from attorney Joseph Goubeaud, Jr., with what was purported to be a "recap" of the hours worked on various jobs which may or may not have been part of the Project (DOL 8). This document showed hours worked by roofers and laborers.

The investigator received copies of invoices submitted by Prime to the Department of Jurisdiction for the Project from both the Department of Jurisdiction and Prime (T. 26, 50).

The investigator determined that all workers on the Project should be classified as roofers, consistent with Bureau policy and the collective bargaining agreement for roofers in effect in the locality where the work was performed (DOL 14, T. 27, 28).

The investigator conducted interviews with the four workers who submitted complaints and determined that they were employees of Prime who performed work on the Project (DOL 9).

Workers on the Project testified that they worked on all of the jobs that were a part of the Project and that they worked full days when on the job (T. 52).

The four workers on the Project who filed complaints testified that they were hired by Prime and performed work as employees on the Project for Prime at various locations for the hours shown in the Department's audit, that they received an hourly wage in cash that was less than the prevailing rate of wages in the applicable Schedules, and that they did not receive any supplemental benefits (T. 70 -75, 96 - 102, 129 - 135, 150 - 155).

Glen Scuderi stated that Prime had no employees and that the workers on the Project were independent contractors or the employees of independent contractors (T. 195).

Prime had no documentation that it hired independent contractors for the Project (T. 194, 195).

Prime did not notify the Department of Jurisdiction that it was using subcontractors on the Project (T. 195).

Prime did not submit certified payrolls to the Department of Jurisdiction during the course of the Project (T. 195).

In the absence of certified payrolls or other payroll records, the investigator prepared an audit based upon the purchase orders and worker testimony (T. 27).

The investigator prepared an audit for the period week ending May 5, 2007 through week ending March 28, 2009 which found underpayments of wages and interest for four workers on the Project in the amount of $27,444.64.

. Prime is a business incorporated in New York State on September 27, 1999 (DOL 12).

Glenn Scuderi is the sole officer and shareholder of Prime (T. 66, 67).

On or about May 14, 2009, Glen Scuderi filed a form with the Westchester County Department of Consumer Protection, which form identified Scuderi as the sole

owner, officer, or partner, and the highest ranking official, of ARC Services, a business engaged in the home improvement business (DOL 16; T. 187, 188).

Flavio Suarez, one of the workers on the Project, submitted a worker's compensation claim as an employee of ARC Services for an injury which occurred on or about October 19, 2009 (DOL 17).

Glenn Scuderi stated under oath that Suarez never worked for ARC Services (T. 195).

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

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

The Department Of Jurisdiction, a public entity, is a party to the instant public work contract, and Article 8 of the Labor Law applies. Labor Law § 220 (2); and *see Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). Although certain contracts were performed pursuant to work orders rather than formal contracts, ancillary contracts are covered by Labor Law § 220. *See, Matter of Pyramid Company of Onondaga v Hudacs*, 193 A.D.2d 924 (3d Dept. 1993).

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as "classification." *Matter of Armco Drainage & Metal Products, Inc. v State of New York*, 285 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York,* 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor,* 34 A.D.3d 905, 906 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.'" *Matter of Nash v New York State Dept of Labor,* 34 A.D.3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor,* 154 A.D.2d 117, 120 (3d Dept. 1990), *affd* 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v Beame,* 15 N.Y. 103, 109 (1965). Workers are to be classified according to the work they perform, not their qualifications and skills. *See, Matter of D. A. Elia Constr. Corp v State of New York,* 289 A.D.2d 665 (3d Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

The Department classified the workers on the Project as roofers pursuant to the practice in the locality, as evidenced by the collective bargaining agreement in effect in that locality. The classification of roofer is correct for the workers on the Project.

UNDERPAYMENT METHODOLOGY

"When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." *Matter of Mid Hudson Pam Corp. v Hartnett,* 156 A.D.2d 818, 821 (3d Dept. 1989) (citation omitted). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting

workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. *Matter of TPK Constr. Co. v Dillon*, 266 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

Prime failed to provide any payroll-related documents to the Department in the course of the investigation. In its supporting papers, Prime alleges that a fire destroyed all of its records. However, such a claim fails to account for Prime's complete failure to provide the Department of Jurisdiction with any payroll related records during the Project, as is required by Article 8.

Furthermore, there is no merit to Prime's contention that the workers were not employees, but were independent contractors. Other than Glenn Scuderi's bald assertion, Prime had no evidence in the form of testimony, subcontracts or other documentation to support its claim that the workers were independent contractors. The direct testimony of the workers was credible; it clearly established an employer-employee relationship between the workers and Prime. Finally, Glenn Scuderi's credibility was undermined by the introduction of unrebutted evidence that one of the workers was employed by ARC Services, which directly contradicted Scuderi's testimony to the contrary.

INTEREST RATE

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, Prime 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) [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 Article 8 of the Labor Law, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately;" – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v Roberts,* 128 A.D.2d 1006, 1006-1007 (3d Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v Hartnett,* 181 A.D.2d 1013,

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

1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 A.D.2d 483, 485 (3d Dept. 1992). The violator's knowledge may be actual or, where he or she should have known of the violation, inferred. *Matter of Roze Assocs. v Department of Labor*, 143 A.D.2d 510; *Matter of Cam-Ful Industries, supra.* An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. *Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 A.D.2d 421.

Prime did not provide any explanation for its failure to obtain a Prevailing Wage Rate Schedule for the Project or to pay the prevailing rate of wages and supplements to its workers. Prime paid its workers in cash and did not provide any payroll or other documents to show that proper deductions from wages had been made. Prime failed to provide the Department of Jurisdiction with weekly payroll records as work on the Project was performed. In light of the above standard, I find that the Prime's actions were willful.

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. "

Glenn Scuderi was the sole owner, shareholder and officer of Prime ARC Roofing Construction Corp. and of ARC Services, a separate construction company. Accordingly, ARC Roofing Construction Corp. and ARC Services should be deemed "substantially owned-affiliated entities."

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any such contractor, subcontractor, successor or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of Article 8 of the Labor Law shall likewise be ineligible to bid on, or be awarded public work contracts, in the event the corporate entity is debarred.

Glenn Scuderi was the sole owner, shareholder and officer of ARC Roofing Construction Corp. and, as such, is subject to this section of the law.

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 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, any history of previous violations and any failure to comply with record-keeping and other non-wage requirements.

The Department failed to provide any information concerning the history of previous violations of Prime, a small construction firm. The gravity of the violation and the attendant recordkeeping violations, which involved failure to pay the proper rate of wages and supplements, failure to keep accurate records and failure to submit records to the Project owner, is serious. Prime did not provide any supporting records to the Department to demonstrate hours worked or proper payment of employees. In light of the above, I recommend a civil penalty in the amount of twenty-five percent of the total amount due.

RECOMMENDATIONS

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

DETERMINE that Prime underpaid wages and supplements due the identified employees in the amount of $27,444.64; and

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

DETERMINE that ARC Services was a substantially owned-affiliated entity of ARC Roofing Construction Corp; and

DETERMINE that Glenn Scuderi is an officer of ARC Roofing Construction Corp.; and

DETERMINE that Glenn Scuderi is a shareholder of ARC Roofing Construction Corp., who owned or controlled at least ten per centum of the outstanding stock of ARC Services; and

DETERMINE that Glenn Scuderi knowingly participated in the violation of Article 8 of the Labor Law; and

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

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

ORDER that, upon the Bureau's notification, Prime shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at WHITE PLAINS (120 Bloomingdale Road, Room 204, White Plains, NY 10605); 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: September 20, 2011
Albany, New York

Respectfully submitted,

Jerome Tracy, Hearing Officer