

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

CENTRAL CITY ROOFING CO., INC.,
and
JAMES T. PIPINES, STELLA Y. PIPINESS, WILLIAM A.
PIPINES, TOM PIPINES, TISHA PIPINES, JAMES HANAVAN,
and
MARK J. LOUNSBURY
as officers and/or shareholders of
CENTRAL CITY ROOFING CO., INC.,
and its successors or substantially owned-affiliated entities
PYRAMID ROOFING & SHEET METAL CO., INC.,
and
CENTRAL CITY ENTERPRISES, LTD.

Prime Contractor

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 Altmar-Parish-Williamstown Central School
District

**REPORT
&
RECOMMENDATION**

Prevailing Rate Case
PRC No. 2007007692
Case ID: 06 20100013988
Oswego County

To: Honorable Mario J. Musolino
Acting Commissioner of Labor
State of New York

Pursuant to an Amended Notice of Hearing issued on September 30, 2013, and following several adjournments of the initially scheduled hearing dates, a hearing was held on May 13, 14 and 15, 2014, by videoconference between Albany and Syracuse, 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. Following the conclusion of the hearing, the parties submitted Proposed Findings of Fact and Conclusions of Law (“Proposed Findings”), which were received on August 4, 2014.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Central City Roofing, Inc. ("Central City"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving roof replacement (the "Project") for Altmar-Parish-Williamstown Central School District ("School District").

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Elina Matot, Senior Attorney, of Counsel). The Respondents were represented by Matthew E. Ward, Esq.

ISSUES

1. Did Central City 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 Central City to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any willful underpayment involve the falsification of payroll records?
4. Are Pyramid Roofing & Sheet Metal Co., Inc. and Central City Enterprises, Ltd. "substantially owned-affiliated entities"?
5. Are James T. Pipines, Stella Y. Pipines, William A. Pipines, Tom Pipines, Tisha Pipines, James Hanavan, and Mark Lounsbury, shareholders of Central City who owned or controlled at least ten per centum of the outstanding stock of the Central City?
6. Are James T. Pipines, Stella Y. Pipines, William A. Pipines, Tom Pipines, Tisha Pipines, James Hanavan, and Mark Lounsbury, officers of Central City who knowingly participated in a willful violation of Labor Law article 8?
7. Should any period of the time for which interest would otherwise be assessed on any underpayments of prevailing wages and/or supplements be reduced?
8. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The Parties

Central City is an active New York business corporation, which has been incorporated in New York since 1922 (T. 139; Dept. Ex. 16). The company has been in business since 1877 and has been performing public work projects since 1979 (T. 139, 288, 512). Since 1980, Central City has averaged about two public work contracts a year, and since 1990 has performed 20 to 25 public work contracts (T. 237, 287, 296, 479, 513-514). Central City is wholly owned by Central City Enterprises, Ltd. (“Central City Enterprises”), a New York business corporation incorporated in 1982 (T. 461-462; Dept. Ex. 17). The New York State Department of State reports James T. Pipines as the chief executive officer of both Central City and Central City Enterprises (T. 139, 142; Dept. Exs. 16, 17). James T. Pipines, William A. Pipines, Thomas Pipines and Theresa Pipines are the current shareholders of Central City Enterprises (T. 464; Resp. Ex. N). James T. Pipines is president and William A. Pipines is the secretary/treasurer of Central Cities Enterprises (T.466-467; Resp. Ex. O). James T. Pipines is the president of Central City, and he has held that title since 1983 (T. 453, 455-456, 501; Resp. Ex. K). William A. Pipines is the secretary and treasurer of Central City (T. 285, 455; Dept. Ex. 4; Resp. Ex. K). At the time the Project was performed, James Hanavan, now retired, was the vice president of Central City (T. 237, 456). Mark Lounsbury has been the Comptroller of Central City since 1995; the position of comptroller is not an official corporate office of Central City (Resp. Ex. K); and Mr. Lounsbury has never been an officer or shareholder of Central City or Central City Enterprises (T. 416-418). There is no evidence that Thomas Pipines or Tisha Pipines played an active role in the affairs of Central City (T. 148-149; Dept. Ex. 19, pp. 13-15).

Pyramid Roofing & Sheet Metal Co., Inc. (“Pyramid”) is a New York Business corporation incorporated in 1972 (T. 143; Dept. Ex. 18). The New York State Department of State reports Stella Y. Pipines as its chief executive officer (T. 144; Dept. Ex. 18). Stella Pipines, the mother of James T. Pipines, is the sole shareholder, director, president, secretary and treasurer of Pyramid (T. 349, 352, 355-356; Resp. Ex. J). Jon Pilowa is the vice president of Pyramid Roofing Company (T. 168-169, 348-349). Mr. Pilowa is not, and was not, an owner, officer or employee of Central City or Central City Enterprises (T. 351-352, 521). Mr. Pilowa and Mrs. Pipines had authority over all contracts and employment decisions (T. 350). Pyramid provided its employees to Central City in order for Central City to perform roofing contracts (T.

150-153, 244, 292). At Mr. Pipines request, Pyramid provided the workers that Central City employed on the Project (T. 292, 294, 407-408, 410-412, 519-521). Mr. Pilowa supervised the workers on the Project (T. 356-357, 407, 522).

The Investigation

On or about May 22, 2008, Central City entered into a contract with the School District to perform a roof replacement at a high school building located in Parish, Oswego County, New York (T. 76-79; Dept. Ex. 4). The Project Manual contained Prevailing Rate Schedule (“PRS”) 2007 for Oswego County, which was effective from July 1, 2007 through June 30, 2008 (T. 85-86; Dept. Ex. 5). The Project Manual expressly advised Central City that the PRS was updated annually effective July 1, and that the annual determination became effective on that date regardless of whether the determination had been received by the contractor (T. 82-83; Dept. Ex. 5). Effective July 1, 2008, the Bureau issued PRS 2008 for Oswego County, which updated and detailed the amount of wages and supplements which were to be paid to workers on the Project (T. 88-89; Dept. Ex. 8).

On March 22, 2010, the Bureau received a complaint from the Sheet Metal Workers Union Local 58 complaining that Central City was not paying the prevailing rate of wages and supplements required to be paid on the Project (Dept. Ex. 1). In response to that complaint, the Bureau commenced an investigation (T. 69-70).

On or about May 20, 2010, Central City was ordered to produce to the Bureau, among other things, certified payroll records detailing the days and hours employees worked on the Project, their work classifications, and the hourly rates paid and supplements provided to them (Dept. Ex. 2; T. 70-73). Certified payroll records were produced by Central City, which disclosed that Central City paid its workers according to the rates established in the 2007 PRS for Oswego County, rather than the updated 2008 PRS, and that it generally classified the hours worked in the roofer classification, with some sheet metal work (T. 98-116; Dept. Ex. 10). No operator hours were reported (T. 116, 172; Dept. Ex. 10).

The Bureau accepted the days and hours of work reported in the certified payrolls, and generally accepted the classifications utilized; however, based on employee interviews and an interview with the School District Director of Facilities, the Bureau determined that some operator work was performed by Ryan Ernestine, for which he was paid exclusively at the lower

roofer rate (T. 101-103, 109-110, 120-121; Dept. Ex. 10). Specifically, when interviewed, Mr. Ernestine claimed that in an eight hour day, he would be operating equipment for all but the last hour of the day, when he would go up on the roof to assist in making the roof weather tight for the overnight period (T. 121). In preparing the audit, as the payroll records failed to record the time Mr. Ernestine worked operating equipment, the Bureau accepted the amount of hours Mr. Ernestine claimed he worked in that classification (T. 121-122, 125-127; Dept Ex. 11).

On the basis of Central City employing the incorrect 2007 rates, and its misclassification of Mr. Ernestine's operator hours, the Bureau determined that Central City underpaid 26 workers \$8,280.84 in wages and supplements for the period week ending July 6, 2008 through week ending May 24, 2009 (T. 116-130; Dept. Exs. 11, 12).¹ The Bureau issued a Notice to the School District to withhold \$19,987.50 on the contract, which the District acknowledged and confirmed that it was withholding that amount (Dept. Ex. 14).²

During the hearing, testimony was adduced disputing the extent of hours Mr. Ernestine claimed he worked as an operator. The Department's Investigator testified that although three co-workers confirmed that Mr. Ernestine worked as an operator, none could provided information on the days and hours he worked in that classification (T. 126). The school District's Director of facilities testified that he probably worked on average about two hours a day as an operator (T. 32, 36, 48-49). Central City produced its two Project supervisors, both of whom testified that Mr. Ernestine did not operate every day and that when he did it typically involved a morning lift of materials that would take 15 to 20 minutes to accomplish (T. 259, 267-268, 305-306, 362- 364, 364-394).

Willfulness

The Bureau investigator testified that during an investigative meeting with Mr. Pipines, Mr. Pipines admitted that he knew the rates in the specification book were incorrect, but he

¹ The Bureau accepted the sheet metal hours as classified by Central City and determined that there was no underpayment with respect to the rate actually paid for work in that classification (T. 113-115). It appears that Central City used an incorrect higher rate from the 2007 PRS that resulted in no underpayment on what was required to be paid pursuant to the correct 2008 rate (*Id.*).

² Although the School District's counsel advised the Bureau prior to the acknowledgement that nothing was being withheld, as it believed nothing further was owing to Central City as the result of Central City's failure to satisfy all obligations under the contract, it appears that after unsuccessfully litigating the issue, the District then acknowledged that it is withholding \$19,987.50 on the contract (T. 136-138, 210-214; Dept. Ex. 14, 15).

nevertheless directed his staff to pay those rates because those were the rates specified in the specifications book (T. 215-222). Mr. Pipines disputes that characterization of what was said at the meeting (T. 487-490, 492-493). He claims the Bureau investigators essentially advised him that he used the wrong rate in relying on the specifications book, he responded that the rate in the book should have been the correct one, and, although he realized he was responsible for paying the correct rate, before paying he wanted to find out who was responsible for the wrong rate in the book – the Department or the architect, and offered to pay in trust until the matter could be sorted out with his attorney (*Id.*).³ The Bureau investigator’s account of that June 14, 2011 meeting was reduced to writing in a letter to Central City’s attorney dated March 7, 2012 (Resp. Ex. B). It stated that Mr. Pipines said he told his staff to pay the rate specified in the specifications book for the Project, and that he knew that the rate was the incorrect (*Id.*). Mr. Lounsbury, who was also at the meeting, had no recollection of Mr. Pipines stating that he directed his staff to pay the rates in the specification book on the Project, or of him stating that he knew the rates in the specification book were wrong and should have been the 2008 rates (T. 426-427). He further testified that believes he would have recalled such statements being made (T. 427).

Mr. Pipines testified that he did not review the specifications book or the wage schedule in the book until well after the Project was completed (472-474, 493-494); that he did not review the labor rates proposed in the bidding documents (T. 470); that he relied on Mr. Hanavan to set the proposed labor rates (T. 470-471); and that he assumed Mr. Hanavan used the rates in the specification book as that was Central City’s custom and practice (T. 474, 509). Mr. Pipines never instructed anyone not to use the rates in the updated PRS 2008 (T. 477). If he was aware of the updated rates he would have paid them (T. 525-526). He was not aware that any updated wage schedule was issued and was not aware that Central City was doing anything illegal by paying the rates based on the schedule found in the specifications book (T. 477-478).

Mr. Hanavan testified that Mr. Pipines didn’t direct him to use the wage rate in the specifications book on the Project; that using those rates is what was always done – it was standard practice (T. 246-247, 282). The practice to pay according to the rates in the

³ Mr. Pipines’ mistaken assumption was that someone caused the incorrect PRS to be included in the specification book, which in turn caused Central City to pay the incorrect rates (T. 526). This evidences a lack of understanding that wage schedules are updated annually effective July 1, and that it is the contractor’s responsibility to ensure they are using the correct rates for time period the work is actually performed.

specification book came from Mr. Pipines (T. 287, 304). Mr. Hanavan testified that he estimated the job, as always, by looking to the rate schedule in the book (T. 248, 297). He never actually read the portion of the schedule that stated the rates were effective from July 2007 to June 2008 and that all updates would be available at the Department's website (T. 250). He didn't believe it necessary to look any further into rates as they were already in the book – he didn't purposely ignore the existence of the paragraph notifying that rates were updated annually (T. 251). Nevertheless, if he was aware of the requirement; he would still have done nothing as “the rate schedule was already in the book” (T. 251).⁴ He instructed Mark Lounsbury to pay the men on the Project in accordance with the rate schedule found in the specifications book (T. 255-256, 304). He thought they were the current rates and was not aware they could change during the course of the Project (T.256). He did not knowingly choose not pay the rates in the 2008 PRS and was not aware that Central City was doing anything illegal by paying wages based on the schedule in the specifications book (T. 258). Mr. Pipines was never asked what rates should be paid on the Project (T. 256).

With regard to Mr. Ernestine, Mr. Hanavan testified that he did operate an all terrain fork lift that was used to lift material to the roof (T. 259). He would not operate every day, and when he did it would be once or twice in day for 15 to 20 minutes (T. 267-268, 305-306). As Central City did not believe Mr. Ernestine was qualified as an operator, and as the time spent lifting material to the roof was *de minimis*, he did not believe he had to be paid an operator rate (T.314, 343-344). Mr. Pilowa testified that he supervised the men on the Project, including Mr. Ernestine (T. 357); that Mr. Ernestine did run the all-terrain lift that was used mainly to haul material to the roof on an as needed basis (T. 358); that the operation of lifting a pallet of materials to the roof would take 15-20 minutes (T.364); and that a lift would occur once a day or less (T. 362- 364).⁵

⁴ This response is in part premised on the fact that he testified that Central City did not have internet access at this time, but further evidences a continuing lack of understand that the rates a contractor pays must be updated annually. It appears that Mr. Hanavan believed that a project was assigned a rate schedule that would be applicable for the duration of the Project, and if that schedule was in the book, there was no need to further research a rate – he was unaware that a new schedule containing updated rates would be issued (T. 300-301).

⁵ Utilizing the time sheets and daily progress reports, Mr. Pilowa gave a more detailed estimate of the daily time Mr. Ernestine worked in the operator classification (T. 364-394).

Falsification of Payroll Records

The Department maintains that Central City's failure to (1) update the prevailing wage rates reported in its certified payrolls in accordance with PRS 2008; and (2) its failure to report any operating rates in the certified payrolls, when it placed heavy equipment on the job, constituted the willful falsification of payroll records (T. 170-173). The Bureau accepted that the certified payrolls accurately report what Central City actual paid its employees (T. 107-109). The Bureau investigator, on cross examination, conceded that he did not believe that Central City, through the documentation it provided the Bureau, which would include the certified payrolls, was attempting to conceal any violation of the prevailing wage law (T. 208-209).

The certified payrolls were prepared by Mark Lounsbury (T.419). As comptroller, Mr. Lounsbury was responsible for payroll. (419, 440-441). Mr. Lounsbury had no prior construction experience and, prior to working for Central City, had no experience with the prevailing wage law (T. 419). He was trained to prepare certified payrolls by William Pipines (T. 442). When he began, he was instructed to use the PRS that was in the specifications book (*Id.*). That is what he did on every public work project (*Id.*). On the Project, he calculated the wages to be according to the rate sheet Mr. Hanavan provided him at the beginning of the Project (T. 419-420). This was Central City's custom and practice (T. 420, 442). He did not know rates could change during the course of a project or that a new schedule would issue (T. 442-423). He was not instructed by Mr. James Pipines what rates to pay on the Project (T. 422). He did not believe that Central City was doing anything illegal by paying in accordance with the schedule contained in the specifications book (T. 424). He signed the certified payrolls, which was part of his job as comptroller, to prepare and sign the certified payrolls (T. 438-439, 440; Dept. Ex. 10). He agreed that the certified payrolls have no operator hours; he relied on time sheets Mr. Hanavan provided him (T. 439-440). He would have no personal knowledge of what classifications of work were performed on the Project as he was not on the construction site (T. 444).

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

The New York State Constitution, article 1, § 17, mandates the payment of prevailing wages and supplements to workers employed on a public work project. 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 (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 New York State Court of Appeals has adopted a three-prong test to determine whether a particular project constitutes a public work project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538 (2013). The Court stated 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.*

Since the School District, a public entity, is a party to the contract which required construction-like labor paid for by public funds; and since the work product, a roof replacement on a public school, is clearly for the use or other benefit of the general public, Labor Law article 8 applies. Labor Law § 220 (2); *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538.

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 (1st Dept. 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 (3d Dept. 2006), *lv denied*, 8 NY3d 803 (2007); *Matter of CNP*

Mechanical, Inc. v. Angello, 31 AD3d 925, 927 (3d Dept. 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*, 180 AD2d 881, 881-882 (3d Dept. 1992), *lv denied*, 80 NY2d 752 (1992).

The Bureau generally accepted Central City’s classification of the work. The sole exception pertained to Mr. Ernestine’s operation of the all-terrain fork lift. Regardless of whether Mr. Ernestine possessed the qualifications and skills Central City deem necessary to be considered an “operator,” the time he spent operating the forklift was required to be paid at the operator rate. *Matter of D. A. Elia Constr. Corp v. State of New York*, 180 AD2d 881, 881-882.

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 (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 AD2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v. Sweeney*, 251 AD2d 169, 169-170 (1st Dept. 1998).

With the exception of the operator hours the Bureau assigned to Mr. Ernestine, the Bureau accepted the days and hours of work, and the classification of those hours, as reported in the certified payrolls. With regard to the issue of Mr. Ernestine’s operator hours, based on the

testimony adduced concerning the work required to be performed with the all-terrain fork lift, it does not appear reasonable to assume that he actually operated that piece of equipment 7 hours a day. As no record were kept of the actual hours of operation, it is impossible to assign days and hours of work in that classification with any precision. The Respondents' witnesses testified that Mr. Ernestine operated approximately 15-20 minutes a day, and not every day. The school district director of facilities, while conceding that Mr. Ernestine did not operate every day, testified that he operated on average approximately 2 hours a day. As the school district's director of facilities is not an interested party, and therefore appears to have a more independent perspective; and as the inability to determine the exact hours result from Respondents' failure to maintain the records they are required by law to maintain, it is most reasonable to accept the director of facilities estimate of two hours per day, and the audit should be revised to adjust the operator hours accordingly.

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).

Labor Law § 220 (8) requires that a hearing on a compliance investigation be conducted expeditiously. Although the courts have consistently sustained agencies in not dismissing administrative proceedings brought to vindicate important public policies based upon extensive delay *Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 624 (1994); *Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v. Sweeney*, 224 AD2d 989 (4th Dept. 1996), *affd* 89 NY2d 395 (1996), the courts have both endorsed and directed agencies to exclude interest from an award for that period of time attributable solely to the agency's unreasonable delay. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928, *lv denied*, 8 NY3d 802; *Matter of Nelson's Lamplighters, Inc. v. New York State Department of Labor*, 267 AD2d 937, 938 (3d Dept. 1999); *Matter of M. Passucci General Constr. Co., Inc. v. Hudacs*, 221 AD2d 987, 988 (4th Dept. 1995); *Matter of Georgakis Painting Corp. v. Hartnett*, 170 AD2d 726, 729 (3d Dept. 1991).

Respondents contend that the lapse of time between June 2011, when the investigative meeting was held with Bureau investigators at Respondent's office, and the March 2013 Notice of Hearing, was attributable solely by the Department and constitutes unreasonable delay (Resp. Proposed Findings p. 8). It further contends adjournments granted to the Department in the hearing commencement from September 2013 to May 2014 constituted delay that was attributable solely to the Department (Respondents' requested and were granted an adjournment of the originally scheduled hearing, which resulted in the September hearing date) (*Id.*). That June 2011 meeting was apparently somewhat contentious and Mr. Pipines himself stated that he was not then prepared to resolve the matter without consulting with counsel, who was then on vacation, and without seeking to determine who responsible for what he believed to be the wrong schedule being published in the specifications. It also appears further consideration was to be given as to whether the Bureau would pursue a willful finding in connection with a settlement.⁶ There were also issues about outstanding responses to Bureau records requests.⁷ So it appears that as of June 2011 further investigation and negotiation was contemplated between the parties. It is not clear from the record what transpired thereafter, but appears the parties actively exchanged correspondence concerning the investigation between at least February 2012 and May 2012, at which time the Bureau produced its audit of alleged underpayments.⁸ Ten months thereafter a hearing Notice issued; prior to which time the Bureau presumably determined the matter would not be settled short of hearing and referred the matter u to the Department's Counsel's Office for review and action. After the hearing notice issued, none of the adjournments sought were opposed.

The Courts have determined that delay of two or three years in the commencement of a hearing after the completion of an investigation, which is attributable solely to the inaction of the Department, constitutes inordinate delay warranting the abatement of interest. *Matter of M. Passucci General Constr. Co., Inc. v. Hudacs*, 221 AD2d 987, 988; *Matter of Georgakis Painting Corp. v. Hartnett*, 170 AD2d 726, 729. The delays involved here were not attributable solely to Departmental inaction, and, most significantly, are not of such an extensive duration as to constitute inordinate delay justifying the abatement of statutorily required interest. *See, Pascazi v. Gardner*, 106 AD3d 1143, 1145-1146 (3d Dept. 2013), *appeal dismissed*, 21 NY 3d

⁶ See, T. 487-490, 492-493.

⁷ Resp. Exs. B, C

⁸ Resp. Exs. A, B, C

1057 (2013), *lv. to appeal den*, 22 NY3d 857 (2013). Consequently, Central City 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) ⁹provides, 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*

⁹ “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.

Industries, Inc. v. Roberts, 128 AD2d 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 AD2d 1013, 1013 (4th Dept. 1992); *see also, Matter of Otis Eastern Services, Inc. v. Hudacs*, 185 AD2d 483, 485 (3d Dept. 1992).

Central City, an experienced public work contractor, knew that the Project was a public work project requiring the payment of prevailing wages and supplements. The prime contract expressly notified Central City that wage schedules were updated annually effective July 1 each year. As such, regardless of whether it actually knew, it certainly should have known of its obligation to obtain and pay the updated rates contained in the 2008 PRS for Oswego County. Its failure to do so constitutes a willful violation of Labor Law article 8.

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. For this section of the law to be meaningful, the term “falsification of payroll records” must mean more than a mere arithmetic error; if it did not, in any case where the certified payrolls did not perfectly match the payments to workers such payrolls could be deemed falsified, and the contractor debarred. The definition of the word falsify generally involves the intent to misrepresent or deceive (“falsify.” *Merriam-Webster*, 2011, <http://www.merriam-webster.com/dictionary/falsify>). In the absence of a statutory definition, the meaning ascribed by lexicographers is a useful guide. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 537-538; *Quotron Systems v. Gallman*, 39 NY2d 428, 431 (1976).

The payroll records produced by Central City truthfully recorded that manner in which it paid its workers. Central City made no effort to deceive the Department as to its payment practice. Although an experienced contractor should have been aware that it was required to pay rates that were updated annual, rather than rely solely on what was published in the specifications book, the testimony in this case established that Central City City’s officers mistakenly believed that it was entirely proper to pay according to the rates published in a project

specification book – and that its practice of doing so was long established. No effort was made to hide that fact. The Bureau investigator conceded that he did not believe that Central City was attempting to conceal any violation of the prevailing wage law. Under the circumstances, the requisite element of intent to misrepresent or deceive is lacking. The willful underpayment did not involve the falsification of payroll records.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some indicia of a controlling ownership relationship exists or as “...an entity which exhibits any other indicia of control over the ...subcontractor..., regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,... power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity.” The Legislature intended the definition to be read expansively to address the realities of whether entities are substantially owned-affiliated entities. *Matter of Bistran Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

Central City Enterprises, as the sole owner of Central City, meets the definition of a substantially-affiliated entity on that basis. Pyramid, by virtue of its sole shareholder’s familial relationship with both Central City’s officers and the shareholders of Central City Enterprises, its sharing of its vice-president in the supervision of workers on the Project, and its providing its employees for hire to Central City on this Project, likewise constitutes a substantially owned-affiliated entity within the expansive meaning of that term under Labor Law § 220 (5) (g). *Matter of Bistran Materials, Inc. v. Angello*, 296 AD2d 495, 497.

SUBSTANTIALLY OWNED-AFFILIATED ENTITY, SHAREHOLDER AND/OR OFFICER LIABILITY

Labor Law § 220-b (3) (b) (1) further provides that when two final determinations have been rendered against a contractor, within any consecutive six year period, determining that the contractor has willfully failed to pay the prevailing rates, then any substantially owned-affiliated entity of the contractor, or any of the shareholders who own or control at least ten per centum of

the outstanding stock of the contractor, or any officer of the contractor 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 five year period as the corporate entity.

Central City Enterprises, as both the sole shareholder and substantially owned-affiliated entity of Central City, and Pyramid, as a substantially owned-affiliated entity of Central City, are subject to the provisions of Labor Law § 220-b (3) (b) (1).¹⁰ Although both Mr. Pipines and Mr. Hanavan should have known that they were required to update rates annually, it does not appear that either Mr. Pipines or Mr. Hanavan actually understood this and *knowingly* underpaid the workers. The testimony revealed that Mr. Pipines, as President, had no direct involvement in fixing the rates paid on the Project, or any other projects for that matter, as that was the responsibility of Mr. Hanavan, the vice president. Since he had no direct involvement, he could not have made a conscious decision to pay any particular rate, and therefore he could not have *knowingly* participated in the willful violation on this Project. To the extent that he was involved in the long standing policy to pay according to the rates contained in specification books, although he should have known that contractors were required to pay their workers in accordance annually updated rates, and not rely solely on the schedule in the specifications book, it appears that he genuinely believed the policy was in accordance with what the law required. Furthermore, with respect to Mr. Hanavan, although his understanding of what the law required was incorrect, it likewise appears that he genuinely believed that the policy was in accordance with what the law – and that he did not consciously intended to improperly pay the workers. Although William Pipines is an officer of Central City, the record was not developed as to what involvement, if any, he had in the Project. Finally, the record established that Mr. Lounsbury, as comptroller, held no official corporate office that would subject him to the provisions of Labor Law § 220-b (3) (b) (1).

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

¹⁰ No evidence was presented of any prior determination that Central City, its shareholder, officers, or its substantially owned-affiliated entity ever willfully failed to pay prevailing rates.

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. Central City's willful failure to pay the proper rates of pay to twenty-six employees over the entire duration of the Project, its willful misclassification of operator hours, and its failure maintain daily records of the actual time an employee worked in the operator classifications, are serious violations warranting the Department's requested assessment of a 25% civil penalty.

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 the Bureau's audit be revised to adjust the hours Mr. Ernestine worked in the operator classification from seven hours a day to two hours a day; and

DETERMINE that Central City underpaid wages and supplements due the identified employees in the amount of \$8,280.84, subject to the adjustment in operating hours the Bureau is to make to the final underpayment computation for Mr. Ernestine; and

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

DETERMINE that the willful violation of Central City did not involve the falsification of payroll records under Labor Law article 8; and

DETERMINE that Central City Enterprises and Pyramid were "substantially owned-affiliated entities" on the Project;

DETERMINE that Central City Enterprises is the sole shareholder of Central City, owning 100% per centum of its outstanding stock; and

DETERMINE that James Pipines, William Pipines and James Hanavan are officers of Central City; and

DETERMINE that James Pipines, William Pipines and James Hanavan did not knowingly participated in the willful violation of Labor Law article 8; and

DETERMINE that Central City 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

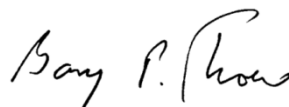
ORDER that Altmar-Parish-Williamstown Central School District remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at State Office Building, 333 East Washington Street, Room 419, Syracuse, NY 13202.

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Central City, 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: April 6, 2015
Albany, New York

Respectfully submitted,

A handwritten signature in cursive script that reads "Gary P. Troue".

Gary P. Troue, Hearing Officer