

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

**CNY Excavating & Concrete, LLC., and
MICHAEL T. HELMER and CELESTE
WITCHLEY, as officers and/or managing
members of CNY Excavating & Concrete,
LLC.,**

**DEFAULT
REPORT
&
RECOMMENDATION**

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 the Mohawk Valley
Water Authority**

Prevailing Wage Rate
PRC No. 2019016087
Case ID: PW072020003809
Oneida County

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

Pursuant to a Notice of Hearing issued on January 12, 2022, a hearing was held on March 3, 2022 in Albany, New York and by videoconference with Utica 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 CNY Excavating & Concrete, LLC and Michael T. Helmer ("Prime") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving the installation of 1550 feet of 8" water main from Oxford Road to the new tank site on Snowden Hill Road, located in New Hartford, NY ("Project") for the Mohawk Valley Regional Water Board d/b/a Mohawk Valley Water Authority

(“MVWA” or “Department of Jurisdiction”), a corporate municipal instrumentally of the State of New York..

HEARING OFFICER

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

APPEARANCES

The Bureau was represented by Department Counsel, Jill Archambault, (Elina Matot, Senior Attorney, of Counsel)

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

Celeste Witchley was represented by Saunders Kahler LLP (Michael D. Callan, Esq., of Counsel).

FINDINGS AND CONCLUSIONS

On January 21, 2022, the Department duly served a copy of the Notice of Hearing on Prime, via regular and certified mail, return receipt requested. The regular mail envelope was not returned to the Department. The Notice of Hearing scheduled a March 3, 2022, hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

Prime failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, Prime is in default in this proceeding.

By letter dated March 1, 2022, Saunders Kahler LLP, Ms. Witchley’s attorneys, provided Department Counsel and the Administrative Adjudication Unit with a Settlement Agreement between Michael T. Helmer and Celeste Witchley, dated November 9, 2017, indicating that, in consideration of the recitals contained in the agreement and other good and valuable consideration, Michael T. Helmer shall retain one hundred percent (100%) membership interest in CNY Excavating & Concrete, LLC by virtue of the consent to transfer of membership interest by Celeste Witchley to Michael T Helmer on or about July 1, 2015, and Celeste Witchley shall have no rights or liabilities

regarding any real or personal property, accounts receivable, equipment, property or tax obligations of in CNY Excavating & Concrete, LLC effective July 1, 2015. (Section 1 (c) of Exhibit No. 1 to HO Ex.5/Ex. R-1). Based on this Settlement Agreement, Department Counsel made an application to withdraw the claims asserted against Celeste Witchley in the Notice of Hearing for personal liability for any underpayment of wages and for her being an officer or a managing member of in CNY Excavating & Concrete, LLC. (T. 8-9). This application was granted as Celeste Witchley was not an officer, director, shareholder, or member of CNY Excavating & Concrete, LLC at the time of the project and she has no personal liability or responsibility for any underpayment of wages as alleged by the Department in the Notice of Hearing. (T. 9).

The Notice of Hearing alleges that Prime underpaid wages and supplements to its workers.

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

The Project was subject to Labor Law article 8; and

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

Prime willfully underpaid \$18,142.71 to its workers for the audit period weeks ending 4/4/2020 to 7/24/2020; and

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

Michael T. Helmer is the sole managing member of Prime and owned or controlled at least one hundred per centum (100%) membership interest in Prime; and

Michael T. Helmer knowingly participated in the violation of Labor Law article 8.

On October 8, 2020, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$50,000.00 and produced at the Hearing an Acknowledgment from the Department of Jurisdiction that \$50,000.00 was withheld and remaining on contract for Prime as of 2/8/2022. (DOL Ex. 14A).

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

RECOMMENDATIONS

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

DETERMINE that Prime underpaid its workers \$18,142.71 on Project PW072020003809, PRC No. 2019016087; and

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

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

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

DETERMINE that Michael T. Helmer is the sole managing member of Prime and owned or controlled at least one hundred per centum (100%) membership interest in Prime and

DETERMINE that Celeste Witchley was not an officer, director, shareholder, or member of CNY Excavating & Concrete, LLC at the time of the project and she has no personal liability or responsibility for any underpayment of wages as alleged by the Department in the Notice of Hearing; and

DETERMINE that Michael T. Helmer knowingly participated in the violation of Labor Law article 8; and

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

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

ORDER that the Bureau compute the total amount due (underpayment of \$18,142.71, interest at 16% from date of underpayment and 25% civil penalty); and

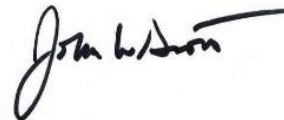
ORDER that Department of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at: State Office Building Campus, Bldg. 12, Room 130, Albany, NY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

ORDER that if the withheld amount is insufficient to satisfy the total amount due, Prime, 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: August 9 2023,
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Scott", with a long horizontal flourish extending to the right.

John Scott, Hearing Officer