STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

CORTLAND GLASS CO., INC.,
and
GERALD A. POLLOCK,
as president and shareholder of
CORTLAND GLASS CO., INC.
Prime Contractor – Respondent

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

REPORT
&
RECOMMENDATION

Prevailing Rate Case
01-2405A Ulster County

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

Pursuant to a Notice of Hearing issued in this matter, a hearing was held 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.

This matter was initially commenced by the service of a Notice of Hearing dated February 7, 2007 (Hearing Officer Ex. 1). David H. Kim was originally designated the Hearing Officer to conduct the hearing in this matter. Mr. Kim subsequently transferred from the Administrative Adjudication Office of the Department of Labor and the case was assigned to John W. Scott as Hearing Officer to continue the hearing and report to the Commissioner.

The hearing was held on May 16, 2007, November 14, 2007, November 15, 2007, November 16, 2007, January 18, 2008, September 16, 2008, and October 29, 2008. At the conclusion of the hearing, the parties were provided with 90 days from the receipt of the final transcript within which to serve proposed findings of fact and conclusions of law.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether

Cortland Glass Co., Inc. ("Cortland") complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract involving the installation of aluminum storefronts, glazing, curtain walls and window systems at the Ulster County Community College located at Stone Ridge, New York ("Project") for the County of Ulster (Department of Jurisdiction/Ulster).

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Patricia Rhodes Hoover, Senior Attorney, and Marshall H. Day, Senior Attorney, of Counsel). Respondents, Cortland and Gerald A. Pollock, were represented by Cotter & Cotter, P.C. (David B. Cotter, Esq., of Counsel). Under cover of a December 4, 2008 letter from Mr. Cotter, the Respondents have caused to be filed a "Notice of Withdrawal of Appearance" dated December 4, 2008, by which the Respondents withdrew their appearance in this proceeding.

ISSUES

1. Did Cortland pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. What rate of interest should be assessed on any underpayment?
3. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
4. Should a civil penalty be assessed and, if so, in what amount?
5. Is Gerald A. Pollock responsible for any failure by Cortland to comply with the requirements of Article 8?

FINDINGS OF FACT

GENERAL

On February 16, 2007, the Department duly served a copy of the Notice of Hearing on the Respondents, via regular and certified mail, return receipt requested. Signed Return Receipt cards evidencing receipt of the document by Cortland and Gerald A. Pollock were entered into evidence as Hearing Officer Exhibit 2. The Notice of

Hearing scheduled an April 23, 2007 hearing and required that the Respondents serve an Answer at least 14 days in advance of the scheduled hearing.

The Notice of Hearing alleges that Cortland underpaid wages and supplements to its workers. The Respondents, by and through their attorneys, Cotter & Cotter, P.C. (David B. Cotter, Esq., of counsel) served a Verified Answer dated November 13, 2007 (Hearing Officer Ex. 22). Although the Respondents appeared in this proceeding and fully participated at all hearing dates and conferences, Cortland and Gerald A. Pollock have now withdrawn their appearances and are deemed in default in this proceeding.

On or about August 16, 2000, Cortland entered into a contract with Ulster for the installation of aluminum storefronts, glazing, curtain walls, and window systems at the Ulster County Community College located in Stone Ridge, Ulster County, New York (T. 180 ; HO Exhibit 1; Dept. Exs. 24, 25). On or about July 1, 2001, the Bureau issued Prevailing Wage Rate Schedule ("PRS") 2001 for Ulster County (Dept. Ex. 26). PRS 2001, which covered a portion of the work performed by Cortland on the Project, detailed the amount of wages and supplements that were to be paid employees performing work on public work projects, including the Project, from July 1, 2001 to June 30, 2002 (*Id.*).

At all relevant times, Gerald A. Pollock was the President and 100% shareholder of Cortland (Dept. Ex. 31).

The Bureau Investigation

On July 5, 2001 Paul Mihocko, as President and Business Agent for Ironworkers Local 417, filed a complaint with the Bureau raising issues of misclassification and prevailing rates. Mr. Mihocko specifically alleged that Cortland employed glass installers to install metal frames for their glass (T. 181, 185; Dept. Ex. 13). In addition, on January 18, 2002, Albert W. Hulick, II, on behalf of the Carpenters Union Local 19, filed a complaint with the Bureau complaining that Cortland misclassified its workers and paid glazier's rates when the workers were performing carpenter's work (T. 185, 186; Dept. Ex. 14). As a result of these complaints, the Bureau commenced an investigation (T. 187). On or about July 13, 2001, the Bureau issued a records request notice (form PW-18) to Cortland and Ulster County Community College that required the production of,

among other things, certified payroll records and proof of the payment of supplemental benefits pertaining to the Project (T. 188-191; Dept. Ex. 15). The Bureau received sufficient documents to complete an audit in 2005 (T. 191), including the certified payroll records and employee identification records that were received from Cortland on March 2, 2004 (T. 192, 196; Dept. Exs. 16, 17). The payroll records were certified by Gerald A. Pollock as president, and they covered the period of week ending 2/24/01 through week ending 11/3/01 (T. 194-195).

The certified payroll records classified all workers as glaziers (T. 200) and stated that fringe benefits were paid into an approved plan, fund or program (T. 202-230; Dept. Ex. 16). Cortland provided documentary proof verifying that supplemental benefits were paid on behalf of the workers into a Cortland Glass Incorporated open shop plan (T. 205, 213; Dept. Exs. 17, 18, 19, 20). The open shop plan as described by the Bureau's witness, Raymond Plante, Public Work Wage Investigator, was a plan funded by weekly contributions paid by Cortland Glass that provided the workers with supplemental benefits earned that week, such as medical insurance and pension contributions (T. 213; Dept. Ex. 21). The Bureau never questioned the honesty of the documentation provided by Cortland, such as certified payroll records, hours worked or supplemental benefit information (See, for example, T. 199, 214).

The Bureau gave Cortland Glass an annualized credit for all supplemental benefits paid on behalf of Cortland's workers as identified in Department Exhibits 18, 19, 20, 21, and 22, which took into consideration the fact that the workers received supplemental benefits during the calendar year for work performed on both public and private projects (T. 215, 221-229, 262-263; Dept. Ex. 23). As indicated on the certified payroll records (Dept Ex. 16), Cortland paid glazier rates for all hours of work on the Project (T. 265), and Cortland paid all supplemental benefits indicated in Department Exhibits 18, 19, 20, 21, and 22 (Dept. Ex. 16). Cortland was given a credit for the wages paid as indicated in the certified payroll records, which resulted in an overpayment of wages for all workers (T. 263; Dept. Exs. 29, 30). The overpayment of wages was credited against the underpayments of supplemental benefits (T. 263-264). After giving Cortland credit of the overpayment of wages and the annualized credit for supplemental

benefits, Cortland was still found to have underpaid supplemental benefits to its 15 workers in the amount of $17,740.09 (T. 285; Dept. Exs. 29, 30).

Classification

The Project involved the installation of aluminum storefronts, glazing, curtain walls and window systems. In the course of its investigation, the Bureau classified the installation of glass into windows as glazier's work (T.71; Dept. Ex. 2, 3, 4, 5, and 6), the installation of preglazed windows, metal frames into masonry or steel openings as ironwork's work (T.71; Dept. Ex. 2, 3, 4, 5, and 6), the installation of wood window frames into wood as carpenter's work (T.71; Dept. Ex. 2, 3, 4, 5, and 6), and the installation of doors as either the work of carpenters or glaziers (T.71; Dept. Ex. 2, 3, 4, 5, and 6). The Bureau based its glazier, carpenter, and ironworker classifications on the unions' collective bargaining agreements, jurisdictional agreements, historical practices, historical Department recognition, case law precedent, an internal Bureau classification guideline, and the nature of the work performed (T. 68).

The Respondent did not provide the Bureau with any records that indicated a breakdown of the hours its employees spent on the various tasks they performed on the Project. The Respondent did provide the total hours worked on the Project by its workers (Dept. Ex. 22), and the universal classification of all hours worked as glazier's work (Dept. Ex. 16). As a consequence, the Bureau relied on the Engineer-In-Charge ("EIC") reports to determine the nature of the work performed by Cortland's workers that was used as a basis for determining classifications (T. 241-245; Dept. Ex. 1). When the Bureau did not have an EIC report for a given day, the Bureau accepted the glazier classification contained in the certified payrolls for all hours worked during those days (T. 244). The Bureau considered the use of the EIC reports to classify the work as other than glazier's work to be favorable to Cortland, since the use of a glazier's rate for the entire audit would have increased the amount of the underpayment (T. 247).

Respondent produced no witnesses at the hearing. However, through cross-examination and documentary evidence, the Respondent argued that it had long been the practice in the Bureau of using the glazier classification for the type of work in issue

herein. (T.144-145); that the practice had been recognized as proper by the Bureau in prior investigations of Cortland (T.142); and that in at least nineteen prior investigations of glazing contractors, the Department either caused them to pay glazier's wages for window installation or, if they had paid that rate, made no further investigation (T. 144).

Underpayment Methodology

As set forth above, the Bureau accepted as true and accurate all records submitted by Cortland relative to hours worked and wages and benefits paid. In preparing its audit, the Bureau relied on the hours listed in the certified payroll records and the other ancillary documents submitted by Cortland to establish the daily hours worked for each employee (T. 260). The Bureau also accepted the wage rate indicated in the certified payrolls for all employees (T. 260). The Bureau also allowed an annualized credit[1] for all supplemental benefits paid to the workers as identified in the certified payroll records and ancillary employee records provided by Cortland (T. 215-229; Dept. Ex. 17, 18, 19, 20, 21, and 22). Where Cortland paid wages in excess of the applicable prevailing wage rate for the classification assigned by the Bureau for the work at issue, the overpayment was credited on a dollar-for-dollar basis against the underpayment supplemental benefits (T. 263-264; Dept Ex. 29, 30).

The Bureau determined the rates that should have been paid for the hours worked in the various classifications in accordance with the rates established in the relevant PRS for the time period in question (T. 260).

The Bureau's audit then compared the amounts that the Bureau determined were actually paid in accordance with the aforesaid methodology against the amounts that should have been paid in accordance with the PRS (Dept Ex. 26). The audit determined that for the period of week ending February 25, 2001 through week ending November 4, 2001, Cortland underpaid prevailing wages and supplemental benefits to 15 employees in the amount of $17,740.09 (T. 285; Dept. Exs. 29, 30).

[1] That hourly credit is derived from a regulatory formula that "annualizes" benefits paid by dividing the total benefits paid by the percentage of public versus private work an employee worked in any given year. 12 NYCRR §202.2 (d).

Department witness, Calvin Norton, acknowledged that staffing difficulties in the Bureau resulted in delays in the investigation during the period of 2001 through 2004 (T. 126-127). In or about March 2004, Investigator Plante was hired by the Department and he concluded the investigation and audit in this matter. (T. 176)

The record contains no evidence that the Bureau successfully withheld or cross-withheld any funds on this Project (T. 285).

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. NY 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.

Since the County of Ulster, a public entity, is a party to the instant public work contract, Article 8 of the Labor Law applies. New York Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v. Roberts*, 94 AD2d 532 (4th Dept. 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 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 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*, 289 AD2d 665 (3d Dept. 1992), *lv denied*, 80 NY2d 752 (1992).

The Bureau's reliance on factors such as collective bargaining agreements, past recognition and practice, the nature of the work, collective bargaining agreements, and decisional precedents as the basis for its classification of the installation of glass into windows as glazier's work; the installation of preglazed windows, metal frames into masonry or steel openings as ironwork's work; the installation of wood window frames into wood as carpenter's work; and the installation of doors as either the work of carpenters or glaziers is supported by substantial evidence and is consistent with the *Lantry* decision. *Matter of Lantry v. State of New York*, 6 NY3d 49, 55-58. Respondent has failed to establish by clear evidence that these classifications do not reflect the nature of the work performed.

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).

There is no evidence indicating that the records provided to the Bureau by Cortland were not accurate relative to the hours worked, and the wages and supplemental benefits actually paid to or on behalf of the workers. The Department produced testimony indicating that the Bureau accepted the records as accurate and, therefore, never requested additional documentation in support of the wages or supplemental benefits paid to or on behalf of Cortland's workers (T. 214). However, Cortland's records were inaccurate relative to classification of the workers that resulted in an underpayment of supplemental benefits. Additionally, the records were not complete in that they did not contain a breakdown of the hours actually worked by Cortland's employees in the several classifications of work. Therefore, the issues in this case involve Cortland's classification of the workers as glaziers and paying wages and supplemental benefits to the workers at the applicable prevailing rate for this classification, and Cortland's failure to determine the hourly cash equivalent of supplemental benefits paid to its workers on an annualized basis pursuant to the regulatory formula contained in 12 NYCRR §220.2(d).

The Bureau's estimation of the percentage of time employees spent in the respective work classifications that were assigned based upon the nature of the work performed was reasonable in view of Cortland's failure to create such records. Cortland has produced no credible evidence to establish either the precise amount of work performed in the different classifications or to negate the reasonableness of inferences drawn from the best evidence available. Where an employer has accepted the benefit of

work that has not been properly compensated due to inaccurate records, he cannot object to damages on the basis of the most accurate calculation possible. *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).

The Bureau's reliance upon Cortland's records to establish the days and hours of work, and the amounts that Cortland actually paid its employees, is reasonable. The application of the prevailing rates required by the relevant PRSs to those hours results in the underpayment that has been determined by the Bureau to be due. That determination is supported by substantial evidence.

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 (3d Dept. 2006), *lv denied*, 8 NY3d 802 (2007). The courts have held, however, that a contractor should not be obligated to pay interest for the period of the Department's unreasonable delay in investigating a complaint or commencing a hearing.[2] *Id.*; *Matter of M. Passucci Gen. Constr. Co. v Hudacs*, 221 AD2d 987, 988 (4th Dept. 1995); *Matter of Georgakis Painters Corp. v Hartnett*, 170 AD2d 726, 729 (3d Dept. 1991).

During the course of the hearing, the Respondents' attorney objected to the Bureau's interest calculation because of the delay in bringing this case to hearing. The record indicates that staffing issues in the Bureau contributed to delay in the prosecution of this case during the period of 2001 through 2004; however, the Bureau also did not receive sufficient documents from Respondent to complete the audit until 2005. I find that the time necessary to complete the investigation and commence the hearing is not unreasonable, as the Respondent's failure to provide the Bureau with relevant records

[2] Labor Law § 220 (7) directs that an investigation should be completed within six months from the filing of a complaint. Labor Law § 220 (8) requires that a hearing thereafter be "expeditiously" conducted. It has long been established that the six month time period is "directory" not mandatory. *Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v. Sweeney*, 224 AD2d 989 (4th Dept. 1996) *affd* 89 NY2d 395 (1996); *Guercio v. Gersosa*, 8 AD2d 250, 255 (1959), *affd* 8 NY2d 1104 (1960).

contributed to the delay. Consequently, the Respondent 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) [3] 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,

[3] "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 five largest shareholders 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 five largest shareholders 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 five largest shareholders 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 five largest shareholders 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), prior to amendment effective November 1, 2002.

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 (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). 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; *Matter of Cam-Ful Industries, supra.*

Cortland paid its employees supplemental benefits on a weekly basis through its open shop plan. (T. 226) The Respondent provided the Bureau with all supplemental benefits paid to its employees that the Bureau added together and considered the total supplemental benefits paid by Cortland to the individual employees. (T. 227) The Bureau determined that Cortland failed to annualize these supplemental benefits it paid into the open shop plan and, in calculating the underpayment, calculated the supplemental benefits that should have been paid to the employees on an annualized basis. (Dept. Ex. 23; T. 229)

It is undisputed that Cortland is an experienced public work contractor that knew or certainly should have known of its obligation to pay supplemental benefits on an annualized basis as required by regulation (12 NYCRR §220.2). In not annualizing the supplemental benefits paid, Cortland refused to conform to Department policy. The State's highest court has found that this type of conduct constitutes substantial evidence of a willful violation of Section 220. *Mater of Tap Elec. Contr. Serv. v Hartnett,* 76 NY2d 164, 170-171. Cortland's failure to annualize the supplemental benefits paid to its employees constitutes a willful violation of the Labor Law.

Cortland's classification of the work on the Project as glazier work was consistent with that found proper in a prior Department Order and Determination. *Matter of Cortland Glass,* PRC Nos. 94-8074A, 94-8074B, 95-0790 (NYSDOL, January 2000). Under these circumstances, Cortland should not be deemed to have willfully violated the statute based on its classification of the work.

Liability of Shareholders and Officers

Labor Law §220-b (3) (b) (1) provides that any shareholders who own or control at least ten per centum of the outstanding stock of a contractor found to have willfully violated Article 8, or any officer of a contractor 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 for the same period as the corporate entity. It is undisputed that Gerald A. Pollack is the sole shareholder of Cortland (Dept. Ex. 31). In that capacity he is subject to the penalty prescribed in Labor Law §220-b (3) (b) (1), regardless of whether he knowingly participated in the violation. It is therefore unnecessary to determine whether, as an officer of Cortland, Gerald A. Pollack knowingly participated in the willful violation as alleged in the Notice of hearing.

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.

In view of Cortland's willful underpayment of more than $17,000.00 in supplemental benefits, the Department's requested penalty of twenty-five percent (25%) of the total amount found due is warranted.

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

RECOMMENDATIONS

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

DETERMINE, that Cortland underpaid its workers $17,740.09 on the Project; and

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

DETERMINE, that Gerald A. Pollock is an officer and the sole shareholder of Cortland; and

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

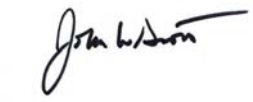
ORDER, that the Bureau compute the total amount due (underpayment of $17,740.09, interest at 16% from March 1, 2004 and 25% civil penalty); and

ORDER, that upon the Bureau’s notification, Cortland shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at the State Office Building Campus, Building 12, Room 130, Albany, NY 12240; and

ORDER, that the Bureau compute and pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: June 28, 2010
Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer

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