

STATE OF NEW YORK: DEPARTMENT OF LABOR
-----X

In the Matter of

PIAZZA, INC. and JOHN PIAZZA as officer and/or
shareholder of PIAZZA, INC.

Prime Contractor

and

DENNIS ADAMS CONTRACTING, INC.
and DENNIS ADAMS as officer and/or shareholder
DENNIS ADAMS CONTRACTING, INC.

Subcontractor

for a determination pursuant to Article 8 of the Labor Law
as to whether prevailing wages and supplements were
paid to or provided for the laborers, workers and mechanics
employed on a public work project for the
White Plains School District (Project)
-----X

DETERMINATION
&
ORDER

Prevailing Wage Rate
PRC No. **2013007808**
Case ID: **PW08 2014008061**

WHEREAS a hearing was held in the above-captioned matter; and

WHEREAS the Hearing Officer submitted the annexed Report & Recommendation dated
September 5, 2019:

NOW, upon review of the entire record, and upon reading the Hearing Officer's Report &
Recommendation, and due deliberation having been had thereon, it is

ORDERED that Respondents' motions to dismiss are denied, and

ORDERED that the Hearing Officer's findings of fact and conclusions of law be, and
hereby are, adopted; and

ORDERED that the Hearing Officer's recommended determinations and orders be, and hereby are, adopted, and they shall constitute the final **Determination & Order** of the Commissioner of Labor as if fully set forth herein.

Dated: ~~December, 2019~~
Albany, New York



Roberta Reardon,
Commissioner of Labor
State of New York

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REPORT
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RECOMMENDATION

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PRC No. **2013007808**
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To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing (HO 1)¹ issued on January 19, 2016, a hearing was held on February 29, 2016, in Albany, New York and by videoconference in White Plains, New York. Hearings continued throughout 2016, 2017, and 2018, concluding on July 17, 2018, for a total of thirty-seven hearing days and almost six thousand pages of transcript². Proposed Findings of

¹ In this Report and Recommendation, exhibits shall be identified as follows: Hearing Officer Exhibits – “HO X;” Department Exhibits – “DOL X;” Respondent Exhibits – “R X.”

² It is unusual for a hearing of this type to result in a transcript of the size that was created. Unfortunately, a significant portion of the transcript consists of extended speeches on the record by Respondents Counsel concerning the Department, its investigation, the quality of its employees and other matters. On multiple occasions the Hearing Officer was required to reprimand Respondents Counsel and remind him that such harangues were inappropriate and did nothing to move the matter forward.

Fact and Conclusions of Law were submitted by December 3, 2018³. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Dennis Adams Contracting, Inc. ("Sub"), a subcontractor of Piazza, Inc. ("Prime"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving the replacement of the roof on the Ridgeway Elementary School building ("Project") for the White Plains City School District ("Department of Jurisdiction").

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz, Erin Hayner, of counsel.⁴

Prime and Sub appeared, both represented by attorney Saul D. Zabell. Prime and Sub filed an Answer to the charges incorporated in the Notice of Hearing. (HO 3)

ISSUES

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

³ Department Proposed Findings of Fact and Conclusions of Law are referred to as "Department Proposed Findings;" Respondents' Proposed Findings of Fact and Conclusions of Law are referred to as "Respondents Proposed Findings."

⁴ The first attorney representing the Department was Jeffrey Shapiro. Upon his departure from the Department, Mr. Shapiro was replaced by Marshall Day and Freddy Kaplan. Messrs. Day and Kaplan were in turn replaced by Ms. Hayner.

4. Is Don Adams Roofing a “substantially owned-affiliated entity” of Sub?⁵
5. Is Dennis Adams a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of the Sub?
6. Is Dennis Adams an officer of Sub who knowingly participated in a willful violation of Labor Law article 8?
7. Should a civil penalty be assessed and, if so, in what amount?
8. Did the Department spoliage evidence and, if so, what impact does such action have upon the evidence in the record?
9. Should Prime’s and Sub’s motions to dismiss for various grounds be granted?

MATERIAL INCLUDED IN THE RECORD

On May 25, 2018, pursuant to an Order to Show Cause, Sub obtained an Order from State Supreme Court which required the Hearing Officer to strike all testimony, and any exhibits received in evidence pursuant to such testimony, of four Department witnesses (“Order 1”). (*Dennis Adams Contracting, Inc. v. New York State Department of Labor, et al.*, Supreme Court of the State of New York, Westchester County, Index No.: 3181-15, May 25, 2018) On the final day of this hearing, Department counsel referenced litigation undertaken by the Department to challenge Order 1. (T. pp. 5712, 5713, 5715, 5716) Prior to the submission of Proposed Findings of Fact and Conclusions of Law by the Parties, Acting State Supreme Court Justice Cacace issued an Order that vacated Order 1 in all respects. (*Dennis Adams Contracting, Inc. v. New York State Department of Labor, et al.*, Supreme Court of the State of New York, Westchester County, Index No.: 3181/15)

Additionally, the Department’s first witness, Jose Fernando Alvarez Navarro, stated during testimony that he suffered from memory problems and was unable to recall events that were the subject of the hearing. (T 371 – 373, 4601, 4602) The Department then stipulated that it would not rely upon the testimony of Mr. Alvarez or upon the documents introduced as a result

⁵ In the Notice of Hearing the Department did not allege that Sub falsified its payrolls or that Don Adams Roofing was a substantially owned-affiliated entity of Sub. However, in its Proposed Findings of Fact and Conclusions of Law (“DOL Proposed Findings”) in paragraphs XI and XII the Department argues that both allegations have been proved. In its Conclusion, the Department does not request findings that these allegations occurred.

of that testimony, including Department Exhibits 1, 1A and 1B. (T 375) The Department now asserts in Department Proposed Findings p. 8, para. 26, that by calling Navarro as a rebuttal witness, Respondents “mooted” the stipulation to not use any testimony or documents entered into the record pursuant to Navarro’s testimony. The Department’s assertion is unsupported by any statute or case law. However, regardless of the worth of the Department’s assertion, based solely upon the testimony of Navarro, I find him, and documents in evidence as a result of his testimony, not credible⁶.

Accordingly, based upon the above, the record of this proceeding consists of the full testimony set forth in the transcripts and all documents received in evidence, with the proviso *exception* that I accord no weight to the testimony of Jose Fernando Alvarez Navarro or documents entered into evidence pursuant to that testimony.

FINDINGS OF FACT

On or about August 22, 2013, the Department of Jurisdiction requested a prevailing wage rate schedule for the Project. (DOL 12, 15)

On or about May 22, 2014, Prime entered into an agreement with the Department of Jurisdiction for work paid for with public funds, which included upgrades at, among other locations, the Ridgeway Elementary School (“Project”). (DOL 10)

On or about July 2, 2014, Prime entered into an agreement with Sub Dennis Adams Contracting, Inc., for roofing work at the Ridgeway Elementary School. Dennis Adams is the sole owner and President of Sub; Don Adams Roofing is a DBA of Sub. (DOL 13) Pursuant to this agreement, Sub was notified that all work on the Project was subject to prevailing wage requirements. (DOL 11, 51)

The roofing work consisted of the removal of old roofing and installation of a new roof. (DOL 10, 51; R 10)

The Bureau’s investigation of the Project began when a Bureau employee saw work being performed. (T 2241)

⁶ This finding does not prevent the use of other credible evidence set forth in the record when determining whether Navarro performed work on the Project.

DEPARTMENT WITNESSES
TESTIMONY OF LOUIS MORELLA

Bureau Investigator Louis Morrella and another Bureau investigator were assigned to investigate the Project. (T 2231, 2241)

Investigator Morrella testified that he and his partner visited the Project site on October 31, 2014. (T 2542, 2543)

While at the Project site, Investigator Morella interviewed Daniel Joya.⁷ Investigator Morella completed an Employee Site Questionnaire (“Joya Questionnaire”) during the interview. Investigator Morella recorded on the Joya Questionnaire that Mr. Joya worked for “Dennis Adams;” that he had worked on the Project for five months; that all workers on the Project worked the same hours; that all workers received a one-half hour meal period; that work began at 7 a.m. and ended at hours that varied from five to seven; that the Project was a “big job” involving a flat roof, the removal of gravel and an old roof and insulation, and the installation of a new “rubber roof;” that he received \$120 per day as his rate of pay in cash; and that on the day of the interview there were two workers on the Project site. (DOL 54; T 2542, 2543)

On the day of Morella’s Project site visit, he observed Juan Ramon Morazan working on the roof. Mr. Morazan was either cleaning or installing a roof drain. (T 2564 – 2568) Mr. Morazan responded to the Employee Site Questionnaire (Morazan Questionnaire) as well, stating that he worked for “Dennis Adams Contracting;” that he had worked on the Project for five months; that all workers on the Project worked the same hours; that work began at eight a.m. and went until five but sometimes later; that the Project involved roofing work; and that he received \$100 per day regardless of the hours worked. (DOL 55; T 2564 – 2568)

The Department received multiple claim forms from workers, including forms from Daniel Joya, Marcos Antonio Lopez Gutierrez, Hector Cruz Cruz, Hussein Zepeda Mendoza, Bruno Alfonso Diaz Arechiga, Juan Ramon Morazan, and Jose Lopez Gutierrez. (DOL 2, 3, 4, 5, 6, 7, 8) Morella used multiple sources to create Department Exhibit 45 (“August 2015 Audit”). These included certified payrolls and checks received from Sub, complaint forms, and

⁷ When sworn at the hearing, the witness identified himself as Daniel Antonio Joya Guevara. He was referred to by Mr. Morella as Daniel Joya and is identified with that name in this Report and Recommendation.

claimant logs⁸. (T 2258, 2259, 2596, 2597) The Department stipulated to the fact that certified payrolls submitted by Adams were accurate with regard to the days and hours shown for the workers on the certified payrolls. (DOL 17A, 17B, 18 – 20, 22 – 42; T 3594) The scope of the Project warranted the designation of “roofer” for workers on the Project, with the exception of certain work that could be classified as “laborer.” (DOL 11, 51, 35; T 2628) Morella used the prevailing wage rate schedule in effect at the time of the Project to determine the required wages and supplements. (DOL 15; T 2597, 2598) If the workers were not listed in Sub’s certified payrolls, Morella used the hours and days listed by the claimants in their claim forms and logs to create the August 2015 Audit. (T 2631)

During the course of the hearing, Morella determined that the information provided to the Department by the claimants was not true or accurate. (T 3696, 3703) Morella also determined that the August 2105 Audit did not most accurately reflect the days and hours worked by the claimants. (T 3710)

Respondents Counsel introduced Respondent Exhibit 11, Department Form PW-11 Detail of Underpayments printed on January 25, 2017 (“January 2017 Audit”⁹), after it was identified as a document created by Mr. Morella. (T 2770, 3672) The Department did not object to the receipt into evidence of Respondent 11.¹⁰ (T 2770). Morella created the January 2017 Audit to determine if any underpayments were due on the Project. (T 2770). The January 2017 Audit found a total underpayment of wages and supplements on the Project to be approximately \$100,000.00 less than the underpayment of wages and supplements found in the August 2015 Audit. (T 3673) The January 2017 Audit concerned twenty-one workers on the Project, including Daniel Joya and Juan Ramon Morazan¹¹. (R 11). Even though Morella testified that he visited the Project site on October 31, 2014, and observed Joya and Morazan on the site, the January 2017 Audit did not show any hours worked on that date for Joya or Morazan. (R 11).

⁸Inconsistencies abound when these documents are compared; for only one example, for the day of July 5, 2014, claimant Daniel Joya’s work log shows him not present on the Project but instead working at a location in Connecticut. The August 2015 Audit shows Joya present on the Project for 10 hours. (DOL 2C, 44)

⁹ Dates used to identify the various audits introduced during the hearing are taken from the date printed on each page of the document in the bottom left-hand corner.

¹⁰ Contrary to the Department’s assertion in Department Proposed Findings p. 18, para. 63, the Department did not object to the introduction of Respondent 11 as a document created solely for settlement purposes – or for any other reason - at the time of its receipt into evidence. The Department’s argument that the January 2017 Audit was improperly received into evidence is rejected.

¹¹ The audit identifies Mr. Joya as Daniel/Antonio Goya/Guerrera and Mr. Morazan as Juan/Ramon Moracan.

When questioned concerning the inconsistency between his testimony concerning his observation of Joya on the Project site on October 31, 2014, and the fact that Joya was not shown to be working on that same date on the January 2017 Audit, Morella stated that Joya didn't work according to Joya's log form. (DOL 2D, R 11; T 2777 – 2779)

Later in the hearing Department counsel stipulated on the record with Respondents' counsel that, at least so far as the January 2017 Audit was concerned, no workers were present on the Project on October 31, 2014, the only day that the Department's witness testified he visited the Project site. (T 5168, 5171) When cross-examined concerning discrepancies between the August 2015 Audit and the January 2017 Audit submitted in support of Sub's case, in response to the question "So the audit that was introduced as Exhibit 44... is not what you believed to be the most accurate audit, correct?" Morella answered "Yes." (T 2820 – 2824)

TESTIMONY OF DANIEL JOYA

Joya completed a complaint form and submitted it to the Department. (DOL 2B) Joya also prepared and submitted to the Department a log of days worked, money earned, locations worked, and sometimes hours worked, for the period January 2014 through December 2014. (DOL 2C) Joya stated that the hours worked shown on the third page of his claim form would be accurate if five to ten minutes for lunch were deducted for each day. (DOL 2B; T 481, 482) Joya used the pay envelopes received from Sub to enter the amounts earned in his log. (DOL 2C, 2D; T 492, 493) Joya did work on different sections of the roof while on the Project, first removing gravel and the old roof, then placing a base down. (T 707, 713, 714, 740 – 743) The gravel removed from the Project was sometimes taken to another school by Joya with other workers. (T 720 – 722) Joya arrived at the Project work site on work days at approximately 8:15 a.m.; somedays he and other workers stopped to eat, arriving at the Project later. (T 584, 585) Joya acknowledged that he could not state the exact time he arrived to work on the Project each day (T 585) Joya also stated that the work hours he listed on Exhibits 2B and 2C were not accurate. (T 897, 898) Joya give conflicting answers concerning the time needed to load gravel, travel from the Project site, unload gravel, and return to the Project site; he could not explain why he gave different answers to the same question or which answer was more accurate. (T 937, 940) Joya also stated that he did not work on the Project on October 31, 2014, in direct contradiction of the testimony of the Bureau investigator. (T 1315)

TESTIMONY OF BRUNO DIAZ ARECHIGA

Arechiga stated that he worked on the Project from July to October¹². Arechiga performed various jobs including taking off the old roof, cleaning up the materials, removing screws, laying down insulation, and installing the new roof. (T 1943 – 1949) The number of workers on the Project varied, with from 20 to 23 workers on weekends. (T 1949) Arechiga was paid \$100.00 per day, Monday through Saturday, and double that amount on Sundays. (T 1951, 1952) During the time the Project was underway, Arechiga also worked on private projects for Sub. (T 1953, 1954) Arechiga submitted a claim form to the Department in support of his claim. (DOL 6)¹³ The times Arechiga began and ended work on the Project, and the amount of time it took him to get to and from the Project from Sub's shop were not the same as those testified to by Joya. (T1994 – 1996) Arichega was unsure of the days or weeks worked on the Project. (T 2031 – 2033) Arechiga stated that he did not work on the Project before July 10, 2014. (T 2048) Arechiga did not work on the Project on July 4, 5, and 6. (T 2053 – 2055)

TESTIMONY OF JUAN RAMON MORAZAN

Morazan did not remember the name of the Ridgway school, or the city it was located in. (T 2114) Morazan stated that while working on the Project he removed gravel, welded, cleaned, applied caulking, glue and rubber, and applied insulation. (T 2115, 2117 – 2119) During the period the Project was being worked on, Morazan also worked on other projects for Sub. (T 2122) While working on the Project, Morazan received \$100.00 per day, and \$200.00 on Sunday, from Sub. (T 2122) Morazan submitted a claim form to the Department concerning the Project. (DOL 7)¹⁴ Morazan gave conflicting testimony concerning the days he worked on the Project. (T 2153 – 2155)

RESPONDENTS WITNESSES

TESTIMONY OF MARY PETERSEN

¹² Department counsel did not ask for the year the work was performed; in the absence of an objection by Respondents' counsel, I have assumed he meant the year 2014, when the Project was performed.

¹³ Department 6 is a form that has been translated into Spanish; answers to the questions were written by the claimant in Spanish. Although Department Counsel agreed to provide the Hearing Officer with a certified translation of the form (T 1979, 1980), he failed to do so. Accordingly, I provide no weight to this document.

¹⁴ As happened with Department 6, Department 7 is written in Spanish, and was received in evidence with the assurance from Department Counsel that he would submit a certified translation. (T 2142) The Department again failed to provide a translation, and so I accord Department 7 no weight.

Petersen is an administrative assistant for Sub. (T 4664) Petersen was responsible for keeping track of employee hours worked and the payroll on the Project. (T 4666, 4667) Petersen completed Sub's certified payroll for each week worked on the Project. (T 4667, 4668) Supervisors on the Project reported worker names and hours for the Project to Petersen. (T 4669) Petersen then created Sub's certified payrolls. (T 4698) Petersen provided requested materials to the Bureau; she was never told by the Bureau that the materials were insufficient or that additional materials were required. (T 4704) On some certified payrolls, Petersen included more than the Project workers and times if another public work project was being simultaneously performed by Sub. (T 4718 – 4720) Sub engaged in various private sector projects during the same period as the Project. (R 18 – 23) Petersen created a document based upon Sub's records that set forth the days, hours, and locations claimed by the claimants and those actually worked by the claimants; the Department had no objection to its introduction. (R 26; T 4757 – 4759, 4760 - 4770) Joya told Petersen on multiple occasions that he wanted to work on the Project because it paid more money than Sub's other projects; Petersen told Joya that he could not work on the Project. (T 4768 – 4770) Petersen created documents that compared hours and days of work on the Project claimed by the claimants with days when no work was performed because of the delivery of materials, weather, and other reasons, showing no work on the Project by the claimants. (R 27 – 32) Petersen also stated that Joya worked on the Project for a day or two. (T 4824). Morella never questioned Petersen about the materials concerning the Project prepared and sent to him by Petersen. (T 4782 - 4784)

TESTIMONY OF CHARLES SULLIVAN

Sullivan, a supervisor on the Project, arrived there with other workers between 7:30 and 8:00 a.m. and left at 4:30 or 5:00 p.m. (T 4967, 4994, 5000) Sullivan kept track of the hours of workers on the Project for Sub. (T 5000) Joya worked on the Project at the beginning in some capacity driving a truck or moving gravel for two or three days. (T 4983 – 4985) Claimant Navarro "might have" been on the Project site performing some limited work such as picking up or dropping off machinery, but he was never on the roof. (T 4982) Sub did not have workers on the Project every weekend. (T 4992)

TESTIMONY OF ADDITIONAL EMPLOYEES OF SUB

Kenneth Laibowitz worked for Sub as a supervisor on the Project in 2014. (T 5046, 5047) When supervising, Laibowitz called in names and hours of workers on the Project to Petersen. (T 5066)

Jack O'Malley worked for Sub as a supervisor of residential projects in 2014. (T 5377) O'Malley provided the days and hours worked by Sub's employees to Petersen. (T 5378, 5379) Joya worked every day on projects O'Malley supervised in the summer of 2014. (T 5382, 5383) Joya didn't work on the roof on the Project; Joya resented the fact that workers on the Project earned higher wages. (T 5388 – 5391, 5402, 5403) Bruno Arechiga worked with Laibowitz on residential projects in 2014. (T 5393, 5394) Joya occasionally accompanied Laibowitz to the Project to remove debris at the end of the day. (T 5410, 5411)

William Bove supervised several of the claimants during 2014; they did work on private projects for sub and did not work on the Project. (T 5546)

Phil Rosvold also stated that, other than Hussein Zepeda Mendoza, none of the claimants worked on the Project; instead they worked for Sub on private projects in 2014. (T 5584 – 5586)

TESTIMONY OF DENNIS ADAMS

Adams was the subcontractor on the Project. (T 5625) None of the claimants worked on the Project. (T 5627) Joya and Navarro raised the issue of higher pay for workers on the Project than on private projects. (T 5632 - 5634) The claimants worked on private projects, not on the Project. (T 5665 – 5677)

SPOILIATION TESTIMONY

Early in the investigation Morella shredded two incomplete original claim forms he received, for a total of four pages. (T 5302 – 5304) Morella did not remember the specific information contained within the forms. (T5313) The laptop Joya used to create documents was unavailable and destroyed at some point. (T 610 – 640)

FACTORS AFFECTING PENALTY

There is no evidence in the record that Sub violated the Labor Law prior to the Project. Sub provided the Department with certified payroll records that were annotated to assist the

investigator. (DOL 17A – 42) The Department acknowledged in its Notice of Hearing that Sub complied with the documents request issued by the Bureau.

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York State Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work projects¹⁵. This constitutional mandate is implemented through Labor Law article 8. Labor Law §§ 220, *et seq.* “Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing ‘supplements’ paid in the locality.” (*Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 [1999]). Labor Law § 220.2 establishes that the law applies to a contract for public work to which the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law is a party. 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.

In 1983, the New York State Court of Appeals established what was, until recently, the test for whether a project was subject to the Labor Law public work provisions. *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). *Erie* involved a construction contract on a project financed by an industrial development agency, and established the now-familiar two-prong test:

- (1) the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and (2) the contract must concern a public works project. *Id at 537.*

In 2013, the New York State Court of Appeals adopted a new, 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 (2013). The Court states this test as follows:

¹⁵ This section derives ultimately from the 1905 amendment of section 1 of article XII of the New York State Constitution of 1894.

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 at 538.*

The Department Of Jurisdiction, a public entity, is a party to the instant public work contract. The contract involved removal of an old roof and installation of a new roof on a public school, which required construction-like labor paid for by public funds. Finally, the work product is clearly for the use or other benefit of the general public. Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts*, 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]).

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as “classification.” (*Matter of Armco Drainage & Metal Products, Inc. v State of New York*, 285 AD 236, 241 [1954]). Classification of workers is within the expertise of the Department. (*Matter of Lantry v State of New York*, 6 NY3d 49, 55 [2005]; *Matter of Nash v New York State Dept of Labor*, 34 AD3 905, 906 [2006], *lv denied*, 8 NY3d 803 [2007]; *Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). The Department’s classification will not be disturbed “absent a clear showing that a classification does not reflect ‘the nature of the work actually performed.’ ” (*Matter of Nash v New York State Dept of Labor*, 34 AD3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor*, 154 AD2d 117, 120 [3d Dept. 1990], *affd* 76 NY2d 946 [1990], *quoting Matter of Kelly v Beame*, 15 NY 103, 109 [1965]). Workers are to be classified according to the work they perform, not their qualifications and skills. (*See, Matter of D. A. Elia Constr. Corp v State of New York*, 289 AD2d 665 [1992], *lv denied*, 80 NY2d 752 [1992]).

Based upon the work described in the Project, the Department assigned the classifications of roofer. To the extent that workers found by the Department to have been underpaid did work on the Project, the classification of roofer is appropriate.

SPOLIATION

Respondents Counsel argued during the hearing – though not explicitly in his Proposed Findings – that destruction of a personal laptop described by Joya and destruction of two incomplete claim forms by Morella constituted spoliation of evidence. Given the thousands of pages of testimony amassed in this proceeding, most of which constitutes the exhaustive cross-examination of these witnesses, and the nature of the materials alleged to have been destroyed, I find that even assuming, arguendo, the destruction occurred as stated, Respondents were not unfairly prejudiced by such actions. The claim of spoliation is dismissed.

MOTIONS TO DISMISS

On multiple occasions during the hearing, Respondents Counsel moved to dismiss the Department’s case. Pursuant to Department regulations, motions to dismiss are preserved on the record for consideration of the Commissioner of Labor.¹⁶ Based upon the record as a whole, I find that the Department’s case, while flawed and incomplete, is not so void of facts as to fail to demonstrate a prima facie case, and does not warrant dismissal by the Commissioner.

UNDERPAYMENT METHODOLOGY

“When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer....” (*Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [1989] (citation omitted)). “The remedial nature of the enforcement of the prevailing wage statutes ... and its public purpose of protecting workmen ... entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate....” *Id.* at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. (*Matter of TPK Constr. Co. v Dillon*, 266 AD2d 82 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]).

¹⁶ 12 NYCRR §701.7 states “The only motion permitted in the course of the hearing shall be a motion to dismiss which shall be preserved on the record, if made, for the consideration of the Commissioner of Labor in issuing an order and determination following the hearing.

The Department's methodology in this matter was, in essence, to accept everything offered by the claimants and nothing offered by Sub. This led to the creation of the August 2015 Audit, which the Department states is "The proper audit to consider..." (Department Proposed Findings, p. 18, para. 63) The Department goes so far as claim that any audits other than the August 2015 Audit that were received in evidence were done so improperly. (Department Proposed Findings p. 49, Section VIII) Department Counsel ignores the fact that the Department did not object to the receipt into evidence of the January 2017 Audit. (T 2770) Department Counsel further fails to address the fact that transmittal information that is a part of Respondent 13 (yet another audit created by the Bureau and claimed by the Department to have been received in evidence in violation of the settlement discussion restriction) was *transmitted from a non-attorney Department employee of the Bureau directly to Respondents Counsel*. Furthermore, neither the transmittal e-mail nor the audit comprising Respondent 13 carries *any* statement that it is for settlement purposes only, nor did Department Counsel introduce evidence to the contrary. Therefore, I find the Department's claim that other audits in the record cannot be considered, to be incorrect.

As set forth above, when an employer fails to keep accurate records, the Commissioner may calculate underpayments using the best available evidence, which then shifts the burden to the employer to show why it is not reasonable to use the Commissioner's calculations. In this matter, there is evidence from the claimants and even from Sub's own witnesses that at least some of the claimants worked on the Project for some – possibly very brief – time. And, as Sub has no record at all of such work, the Commissioner was obliged to take the next step and use the best available evidence to create an audit that shows if any underpayments of prevailing wages and supplements took place. However, it is clear from the record that the Bureau simply accepted everything said by the claimants in this matter with little, if any, examination of the claims, and chose to disregard everything submitted by Sub, which resulted in the August 2015 Audit. The extent to which the August 2015 Audit did not represent the use of the best available evidence was made clear during the testimony of Morella, Joya, and other Department witnesses. In fact, this testimony resulted in Morella agreeing – contrary to the Department's assertions in its Proposed Findings – that the August 2015 Audit was not accurate, and not the best representation of what actually occurred, and the January, 2017 Audit better represented what

actually happened.¹⁷ Sub's response is not some lower estimate, but the assertion that its records were 100% accurate, and that none of the workers contained in the Department's audits worked on the Project or were underpaid. (Respondents Proposed Findings p. 151)

There is no doubt that the investigation in this matter was complex and that Sub and the claimants both have not been fully forthcoming. But it is the responsibility of the Department in circumstances such as these to fairly assess all relevant information and make a reasonable estimate of any underpayments. Though his testimony is far from clear, and regrettably contradictory at times, I find it credible that Morella did visit the Project worksite on October 31, 2014, and that while there, he observed two workers, Joya and Morazan, on the site. I also find credible testimony from Sub's employees that Joya worked for some period of time on the Project, hauling gravel, and that Navarro occasionally appeared on the Project site as well.¹⁸ However, there is also considerable testimony from Sub's witnesses that the claimants did not work on the Project and instead worked on various private projects during the summer and fall of 2014. I also find that the workers on the Project were primarily roofers.

Therefore, I find most reasonable the following findings:

The classification of roofer was not properly applied by Sub, and the underpayments of workers shown on the certified payrolls are most accurately set forth in the January 2017 Audit.

Joya's testimony is replete with contradictions, as are his own records, and the audits created by the Bureau. Given the morass of conflicting statements in which the Department's direct case became entangled, I find it most credible that Joya worked on the Project for the first week as a laborer removing gravel, per the testimony of O'Malley and Sullivan. Joya also worked on the Project site for the equivalent of one day per month from July through September when he accompanied Laibowitz to the Project to clear debris at the end of the day.

Morazan worked on the Project as a roofer for one day – the day Morella stated that he observed him on the Project.

¹⁷ And this is in light of testimony by Morella that, inexplicably, in the January 2017 Audit, he did *not* show the two workers he *actually saw on the Project the one day he visited it*.

¹⁸ As stated previously, I do not find credible any testimony by Navarro or documents received pursuant thereto. However, testimony from Sub's witnesses places Navarro on the Project site for some limited period.

Navarro appeared on the Project site for the equivalent of one full day per month from July through September in his capacity as an operating engineer¹⁹, per the testimony of Sullivan.

The weight of the evidence in the record does not support the Department's allegations that Marcos Antonio Lopez Gutierrez, Hector Cruz Cruz, Hussein Zepeda Mendoza, Bruno Alfonso Diaz Arechiga, and Jose Lopez Gutierrez worked on the Project for any period of time²⁰.

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]).

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]),²¹ 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).

While it has taken a considerable period of time for this matter to arrive at this point, I cannot attribute the length of the investigation or hearing solely to an unreasonable delay caused

¹⁹ The Bureau will determine the appropriate sub-classification of operating engineer based upon his duties as a maintenance and repair person.

²⁰ Insofar as this finding is made based upon the record, I find it unnecessary to address Respondents Counsel's argument that the failure of certain claimants to appear pursuant to subpoenas warrants making a negative inference concerning their claims.

²¹ The lapse of time, standing alone, does not constitute prejudice as a matter of law. *Matter of Louis Harris & Assoc. v. deLeon*, 84 NY2d 698, 702 (1994); *Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 623 (1994); *Cortland Nursing Home v. Axelrod*, 66 NY2d 169, 178-179 (1985)

by the Department. Accordingly, interest must run 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)²² provides, among other things, that when two final determinations of a “willful” failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Labor Law article 8, willfulness “does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately” – it requires something more than an accidental or inadvertent underpayment. (*Matter of Cam-Ful Industries, Inc. v Roberts*, 128 AD2d 1006, 1006-1007 [1987]). “Moreover, violations are

²² “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.

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 [1992]; see also, *Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 [1992]). The violator’s knowledge may be actual or, where he should have known of the violation, implied. (*Matter of Roze Assocs. v Department of Labor*, 143 AD2d 510 [1988]; *Matter of Cam-Ful Industries, supra*) An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

The weight of the evidence in the record, when considered as a whole, supports the finding that the violation by Sub was willful.

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).

While it is clear from the record that Sub failed to meet its obligation to maintain true and accurate payroll records, I do not find, particularly in light of the fact that the most egregious violations alleged by the Department in this matter are unsupported, that such failure rises to the level of falsification as contemplated by this section of the Labor Law

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).

Sub operated as Don Adams Roofing as an alternate name for its business ("doing business as") and such entity is a substantially owned-affiliated entity of Sub.

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 Labor Law article 8 shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

Labor Law §220-b(3)(b)(1) states, in part, "When two final determinations have been rendered against a contractor, subcontractor, successor or any substantially-owned affiliated entity of the contractor or subcontractor, and if 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..." such entities shall be debarred from bidding on or being awarded public work projects for a period of five years from the date of the second willful determination. Insofar as the Commissioner must determine the issue of

willfulness when a hearing is held, it is appropriate to determine, to the extent possible, the facts concerning the entities listed in §220-b(3)(b)(1).

As set forth above, §220-b(3)(b)(1) concerns the parties to which a finding of willfulness may attach, including “the 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 10% of the outstanding stock of the contractor or subcontractor or any successor...” (emphasis added). Dennis Adams was the sole owner and officer of Sub, and was present at the Project as work was performed and, pursuant to his own testimony, was aware of what took place there.

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. The Department did not provide any evidence that Sub had a history of violations of the Labor Law. Sub appears to have been a medium-sized business. The good faith of Sub is hotly debated by the parties, with evidence of considerable compliance submitted by Sub. As such, I do not find that Sub exhibited bad faith during the investigation. The violations are serious. In light of these factors, I find that a penalty of 10% is reasonable.

LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor’s failure to comply with, or evasion of, the provisions of Labor Law article 8. (Labor Law § 223; *Konski Engineers PC v Commissioner of Labor*, 229 AD2d 950 [1996], *lv denied* 89 NY2d 802 [1996]). Such contractor’s responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor’s violation. (*Canarsie Plumbing and Heating Corp. v Goldin*, 151 AD2d 331 [1989]). Sub performed work on the Project as a subcontractor of Prime.

Consequently, Prime, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on this Project.

RECOMMENDATIONS

Based upon the weight of the evidence set forth in the record as a whole, 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 Sub underpaid wages and supplements due the employees identified in the January 2017 Audit, **EXCEPT THAT** there shall be no finding of underpayment for Marcos Antonio Lopez Gutierrez, Hector Cruz Cruz, Hussein Zepeda Mendoza, Bruno Alfonso Diaz Arechiga, and Jose Lopez Gutierrez, **AND FURTHERMORE** that the Bureau shall calculate an underpayment for:

Daniel Joya as a laborer for a period of one week at the beginning of the Project and for an additional one day per month from July through September, as a laborer, less the wages credited to Sub in the January 2017 Audit; and

Juan Morazan for one day as a roofer less the wages credited to Sub in the January 2017 Audit; and

Jose Navarro for one full day per month from July through September as an operating engineer less the wages credited to Sub in the January 2017 Audit; and

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

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

DETERMINE that Don Adams Roofing was a "substantially owned-affiliated entity;

DETERMINE that Dennis Adams is an officer of Sub; and

DETERMINE that Dennis Adams is a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of Sub; and

DETERMINE that Dennis Adams knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Sub be assessed a civil penalty in the amount of 10% 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, interest and 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 120 Bloomingdale Road, Room 204, White Plains, NY 10605.

Dated: September 5, 2019
Albany, New York

Respectfully yours,



Jerome Tracy, Hearing Officer
Administrative Adjudication