

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

G and A RENOVATION
and
RESTORATION, INC.
Prime Contractor

and

GEORGE KARIDIS
Individually, as one of the five largest shareholders of
G and A RENOVATION and RESTORATION INC.

and
DRAMAR CONSTRUCTION INC.
Subcontractor

and

ANTON DRAGONIDES and LEIDA REYNA,
Individually, as an officer and one of the five largest
shareholders of
DRAMAR CONSTRUCTION INC.

RESPONDENTS

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 AND
RECOMMENDATION**

Prevailing Rate Case
99-03503-B Rockland 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 on June 24, 2008 and August 20, 2008 in White Plains, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work (“Bureau”) of the New York State Department of Labor (“Department”) into whether Dramar Construction, Inc. (“Subcontractor”), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract involving the provision of material, labor and equipment necessary for the replacement of a roof on Building 124 at the Rockland County Children’s Psychiatric Center (“Project”) for the Dormitory Authority of New York (“DASNY,” “Department of Jurisdiction”).

APPEARANCES

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

The Prime Contractor appeared by its principal, George Karidis. The Subcontractor appeared by Anton Dragonides and Joseph Cohen. An Answer to the charges incorporated in the Notice of Hearing was served by and on behalf of the Subcontractor (Hearing Officer Ex. 6). There was no Answer served by or on behalf of the Prime Contractor.

HEARING OFFICER

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

ISSUES

1. Did the Subcontractor pay the rate of wages and/or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality “willful”?
3. Did any willful underpayment involve the falsification of payroll records?
4. Is Anton Dragonides an officer of the Subcontractor who knowingly participated in a willful violation of Article 8 of the Labor Law?
5. Is Leida Reyna an officer of the Subcontractor who knowingly participated in a willful violation of Article 8 of the Labor Law?

6. Is Joseph Cohen an officer of the Subcontractor who knowingly participated in a willful violation of Article 8 of the Labor Law?
7. Was Anton Dragonides one of the five largest shareholders of the Subcontractor?
8. Was Leida Reyna one of the five largest shareholders of the Subcontractor?
9. Was Joseph Cohen one of the five largest shareholders of the Subcontractor?
10. Should a civil penalty be assessed and, if so, in what amount?
11. Is G & A Renovation and Restoration, Inc., the Prime Contractor, responsible under Labor Law §223 for its Subcontractor's failure to pay its employees the rate of wages and/or provide the supplements prevailing in the locality?

FINDINGS OF FACT

The Bureau Investigation

On or about July 8, 1999, DASNY entered into a contract with the Prime Contractor for the replacement of a roof on Building 124 at the Rockland County Children's Psychiatric Center ("Project"). (Dept. Ex. 7, T. 29). The Prime Contractor thereafter entered into a contract with the Subcontractor to perform work on the Project. (See, Subcontractor's Answer, HO Ex. 6 para. 2 and the attached statement of Leida Reyna). In or about January 2001, the Bureau was asked by the Prime Contractor to determine whether the Subcontractor was paying its employees prevailing wages and supplements (T. 51, 113, 114). Thereafter, at the request of the Prime Contractor, the Bureau commenced an investigation of the Project. On July 6, 2001, the Bureau sent a form PW-18, Records Request Notice, dated July 6, 2001, requesting that DASNY, the Prime Contractor, and the Subcontractor furnish certain enumerated documents, including certified payrolls, time records, cancelled payroll checks, proof of payment of fringe benefits, and copies of the contracts for the Project (Dept. Ex. 3, T. 27).

The Bureau received the following documents: the contract between the Department of Jurisdiction and the Prime Contractor for the Project (Dept. Ex. 7); the contractor's compliance reports and application for payment (Dept. Ex. 8); the Project Manual together with the applicable Prevailing Rate Schedule ("PRS") for 1998 (Dept. Ex. 9); the applicable PRS for 1999 (Dept. Ex. 10); the Subcontractor's certified payroll records for the weeks ending September 3,

1999 through October 2, 1999 (Dept. Ex. 11); copies of the Subcontractor's payroll checks (Dept. Ex. 12); the DASNY Daily Construction Reports (Dept. Ex. 13); the DASNY Contractor Daily Attendance Sheets (Dept. Ex. 14, 15); and the DASNY Time and Material Worksheets for the Subcontractor (Dept. Ex. 16). The Subcontractor's Certified Payroll Records that were certified by either Anton Dragonides or Joseph Cohen, identify the employees as roofers and laborers. The Bureau determined that the Subcontractor employed twenty-five (25) workers who performed roofer, painter, laborer, and carpenter work, and failed to pay or provide prevailing wages to these employees in accordance with the applicable PRS (Dept. Ex. 21). The Bureau sent DASNY, the Prime Contractor, and the Subcontractor PW-28, Notices of Labor Law Inspection Findings, dated August 22, 2001 and December 30, 2004, indicating the violations determined on investigation, including the underpayment of wages and supplemental benefits in the amount of \$57,293.16 and \$46,362.41, respectively (Dept. Ex. 4).

The Department determined that the Project included the work governed by the original subcontract, and additional work in the pool room that is referred to in the record and herein as the "extra" work. In preparing the audit of the portion of the Project that was covered by the original subcontract, the Bureau Investigator, Stephen Barber, testified that the issues were misclassification, overtime, and work performed on Saturdays and Sundays (T.142). With respect to this work, the Bureau relied on the certified payroll records and time sheets for the days and hours per day worked by the Subcontractor's employees. The Bureau then used the rates of pay as indicated in the Certified Payrolls and compared these rates to the appropriate roofer rates as contained in the applicable PRS. The Bureau also made adjustments for work performed on Saturdays and Sundays for which the Subcontractor paid the employees at a straight time rate (T.141-142).

The Bureau requested certified payroll records for the extra work in the pool room that was not covered by the original subcontract from the Subcontractor, Dramar Construction, Inc., and DASNY (T. 63), but the Bureau did not receive any payroll records or other documentation to support a finding regarding the wages paid by the Subcontractor to its employees. In the absence of any payroll records, and based upon a lack of complaints from the Subcontractor's employees that they were not paid any amount for the extra work, the Bureau made the assumption that the employees were paid minimum wage of \$5.15 per hour for the extra work and calculated the underpayment using this figure as a credit to the employer (T.60, 64, 66, and

145). The Department did not credit the employer any amount for supplemental benefits for this extra work (Dept. Ex. 21).

CLASSIFICATION

The Bureau of Public Work Investigators, Daniel McCormack and Stephen Barber, testified regarding the Bureau's investigation of the Project and the classification of the Subcontractor's employees. From the information contained in contract documents (Dept. Ex. 7), the documents gathered by the Bureau in the course of its investigation, and the complaint (Dept. Ex. 24), it is apparent that the Subcontractor's employees worked on the Project from week-ending September 4, 1999 through week-ending June 3, 2000 (Dept. Ex. 21). The Bureau also relied on these documents to determine that twenty-five of the Subcontractor's employees who worked on this project performed work that included the removal of flat roofs, removal of asphalt shingles, removal of fascia, assembling of curbs and parapets, installation of curbs and parapets, installation of fascia, and installation of asphalt roofs (Dept. Ex. 24; T.71). In addition, the Investigators testified that the Subcontractor also performed extra work in the pool room that was not covered by the original contract that included setting up scaffolds to use in patching and painting the ceiling inside the pool room (Dept. Ex. 16; T. 72).

Investigator Barber testified that the work that was covered by the initial contract was exclusively roofer work, and that it was a misclassification for the Subcontractor to have considered any of these workers as laborers (T. 152). Mr. Barber testified that he relied on a jurisdictional agreement between the Laborers' Union and the Roofers' Union showing that the assignment of the type of work performed by the Subcontractor, including the removal of an old roof where a replacement roof is to be relaid, as the work of roofers (T. 152-153, Dept. Ex. 26). Mr. Barber further testified that he considered the nature of the work actually performed by the Subcontractor when he determined that all of the Subcontractor's employees were working as roofers who should have received roofers' wages and supplemental benefits for the work covered by the original contract (T. 153).

Mr. McCormack testified that the nature of the extra work performed in the pool room, which included setting up scaffolds and patching and painting the ceiling, required a classification of painter and carpenter (Dept. Ex. 21; T. 72).

The Bureau relied on the certified payrolls, construction reports and time sheets to determine the hours and days worked on the Project by the Subcontractor's employees (T. 140). Additionally, the Bureau relied on the certified payrolls for the rates of pay to be credited to the Subcontractor for the work performed under the initial contract (T. 140). With respect to the work performed pursuant to the initial contract, Mr. Barber testified that any underpayments are the result of the Subcontractor classifying its workers as laborers as opposed to roofers and failing to pay overtime rates for work performed on weekends (T. 142). In calculating the audit, Mr. Barber relied on the Subcontractor's laborer hours as represented in the certified payroll records and applied the appropriate roofer rates to these hours to arrive at the underpayment (T. 141).

The Subcontractor argues that the Bureau's classification of its workers as roofers is not appropriate under the circumstances of this case. The Subcontractor offered testimony that representatives from the Department of Labor were present at the commencement of the Project and advised the Subcontractor that workers who worked on the roof were to be paid at a roofer's rate and workers who worked on the ground were to be paid at a journeyman's rate (HO Ex. 6; T. 244-249). The Subcontractor produced business cards received from the Department of Labor employees with the name of the individual they were to call for applicable prevailing wage rate schedules. These business cards also had the phone number for this individual and the wage rates for roofers and journeymen written on them by the Subcontractor's representative, Joseph Cohen. (T. 247-248; Dramar Ex. 3) Further, the Subcontractor argues that it is not reasonable for the Department to consider all of the workers as roofers because DASNY required constant clean-up of the Project site to ensure that sharp objects were not found by the patients at the Rockland County Children's Psychiatric Center (T. 104-105).

Mr. Barber testified to the Department's long-standing policy to classify work involving the removal of an old roof where a replacement roof is to be re-laid, including ancillary clean-up, as the work of roofers (T. 152-153, Dept. Ex. 26). The Bureau argues that the past practice mandates a finding that the work performed by the Subcontractor under the original contract, including all site clean-up work, was roofer work for which the Subcontractor's employees should have received the applicable prevailing wages and supplements for this classification.

It is not in dispute that the Subcontractor also performed work in the pool room that was not included in the original contract. Mr. McCormack testified that the nature of the extra work

performed in the pool room, which included setting up scaffolds and patching and painting the ceiling, required a classification of painter and carpenter (Dept. Ex. 21; T. 72). The Subcontractor does not dispute the Bureau's classification of this work as that of a painter and carpenter. The issue regarding this extra work involves the rate of pay to be credited to the Subcontractor in determining whether there was an underpayment.

The record is clear that the Bureau did not receive any certified payroll records, cancelled checks, or other evidence of payment of wages from the Subcontractor, the Prime Contractor or DASNY for the extra work. Mr. Barber and Mr. McCormack testified that the Subcontractor was the only contractor working on the pool room ceiling and they relied on the job reports or extra work tickets (T. 60) to assign the classifications and the hours worked. In the absence of any payroll records for this extra work, the Subcontractor was given credit for paying only New York State minimum wage of \$5.15 per hour and no credit for the payment of supplemental benefits (Dept. Ex. 21; T. 145). The use of the minimum wage figure was based upon the absence of any payroll records, the lack of any complaints from the Subcontractor's employees that they were not paid any amount for their extra work on the project, and an assumption that these employees would not have worked for the Subcontractor for no compensation. (T. 146)

Mr. Barber testified that he determined the total underpayment of wages and supplements for all contract and extra work to be in the amount of \$43,299.17 (Dept. Ex. 21; T. 146).

The Subcontractor argues that the use of the minimum wage for the extra work is not reasonable. The Subcontractor offered testimony that it failed to retain copies of the certified payroll records for this extra work when they were given to DASNY (T. 256-257). The Subcontractor argues that none of its employees have complained to the Department that they were underpaid, and written statements from the principals of the Subcontractor and an employee were produced indicating that these individuals were fully paid (Resp. Exs. 2a, 2b, and 2c). The Bureau contends that this argument is not compelling as it is the employer's responsibility to maintain accurate payroll records and the Subcontractor did not produce any evidence of actual payment to its employees for the extra work such as cancelled payroll checks. It is noted that the Subcontractor did produce such evidence of payments made to employees for work performed under the contract (See, Dept. Ex. 12). In the absence of credible payroll records, the Bureau is entitled to use the best evidence available to ascertain whether the employees were paid according to the applicable prevailing wage rates. The Bureau argues that the record contains

sufficient credible evidence to support the methodology it employed to calculate the hours worked by the employees, the prevailing rates of pay, and the underpayments.

Falsification of Payroll Records

The Department raised the issue of falsification of payroll records in the Notice of Hearing (HO Ex. 1). However, the Department has offered no evidence to support such a finding and it acknowledged during the hearing that this case does not involve falsification of payroll records (T. 151).

Prior History

The Bureau's witnesses testified that the Subcontractor is an experienced public work contractor who understood that prevailing wages had to be paid on the Project (T. 162). The Subcontractor did not offer any testimony or evidence that would tend to dispute the Bureau's argument that, due to prior public work experience, the Subcontractor had familiarity with the necessity to pay its workers prevailing wages on this Project.

CONCLUSIONS OF LAW

Jurisdiction of Article 8

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages 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 A.D.2d 870, 871-872 (3d Dept. 1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

Since DASNY, 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); and *see, Matter of Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd.*, 63 N.Y.2d 810 (1984).

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 similarity of 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 Matter of Lantry v. State of New York*, 6 N.Y.3d 49, 55 (205); *Matter of Nash v. New York State Department of Labor*, 34 A.D.3d 905, 906 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v. Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006); *lv denied*, 8 N.Y.3d 802 (2007). The Department’s classification will not be disturbed “absent a clear showing that a classification does not reflect ‘the nature of the work actually performed.’” *Matter of Nash v. New York State Department of Labor*, *supra*, quoting *Matter of General Electric, Co. v. New York State Department of Labor*, 154 A.D.2d 117 (3d Dept. 1990), *affd.*, 76 N.Y.2d 946 (1990), quoting *Matter of Kelly v. Beame*, 15 N.Y. 103, 109 (1965). The pivotal question then is the nature of the work performed, not the skill level of the employees performing the work. *Matter of Nash v. New York State Dept of Labor*, 34 A.D.3d 905, 906 (3d Dept. 2006). Workers are to be classified according to the work they perform, not their qualifications and skills. *See, Matter of D. A. Elia Constr. Corp. v. State of New York*, 289 A.D.2d 665 (3d Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

This case involves a roofing contract in Rockland County, for which the Bureau classified the removal of an existing roof in preparation for the laying of a new roof, together with all ancillary clean-up of the work site, as the work of a roofer. In addition, with respect to the extra work, the Bureau classified the work as the work of a carpenter and painter, which classifications the Subcontractor did not challenge.

In order to successfully challenge the Department's classification determination, the Subcontractor must demonstrate by competent proof that the Department's determination was arbitrary, capricious or without legal basis. The Subcontractor failed to meet this burden. The Subcontractor failed to offer any evidence at the hearing to indicate that the Department's classifications were in error. The Subcontractor classified the majority of the workers listed in the certified payroll records as laborers. At the hearing, the Subcontractor argued that work on the roof was laborer work because it involved removal of an existing roof, and the work on the ground was laborer work because it was clean-up work. I find that this argument, which is inconsistent with the Department's past practice and applicable jurisdictional agreements, not sufficient to support a finding that the Department's classifications were arbitrary and capricious. *See, General Electric Co. v. New York State Department of Labor, et al.*, 154 A.D.2d 117 (3rd Dept. 1990).

The Subcontractor offered testimony indicating that it relied on advice from Department of Labor personnel who were present on the job site at the commencement of the Project that employees working on the roof should be classified as roofers and employees working on the ground should be classified as journeymen. The Subcontractor produced business cards from these Department of Labor employees with notes indicating the prevailing wage rates for these two classifications (Dramar Ex. 3). I do not find this testimony compelling. Initially, the information attributed to the Department of Labor employees is not consistent with the long-standing Bureau practice as testified to by the Bureau Investigators. Additionally, the notations on the business cards merely refer to the prevailing wage rates for these two job classifications and refer the Subcontractor to the proper person in the Bureau from whom it could obtain the applicable prevailing wage rate schedules. Finally, the notes regarding the classifications and wage rates were written by the Subcontractor's representative, Joseph Cohen (T. 248). This evidence is to a large extent self-serving and it does not establish that the Bureau's classifications are arbitrary and capricious. I find that the Department's determination that the Subcontractor's employees were employed as roofers on the work covered by the contract and as painters and carpenters on the extra work should be sustained as it reflects the nature of the work actually performed and is supported by sufficient credible evidence in the record.

Underpayment Methodology

“[W]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer....” *Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 821 (3d Dept. 1989) (citation omitted). The remedial nature of the enforcement of the prevailing wage statutes ... and its public purpose of protecting workmen ... entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate....” *Id.* at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. *Matter of TPK Constr. Co. v. Dillon*, 266 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v. Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

In this case, for the work performed under the initial contract, the Subcontractor misclassified its workers as laborers and failed to pay these workers for overtime and work on weekends. These misclassifications justified the Bureau’s reliance on the certified payroll records for the days and hours worked by these employees and the rates of pay they received from the Subcontractor to determine that all of the Subcontractor’s employees were underpaid during the duration of the Project covered by the original contract. The Department’s comparison of the rates paid to the employees to the prevailing rates of pay contained in the applicable Prevailing Wage Rate Schedule provided the basis for the determination of an underpayment. The Bureau’s method of arriving at an underpayment determination for the work performed on the contract was reasonable.

The Subcontractor failed to provide the Bureau with any payroll records, cancelled payroll checks, bank records, or other evidence to indicate that any wages were paid for the extra work performed in the pool room. The absence of any payroll documents also justified the Bureau in relying on the job reports to assign the classifications and calculate the hours worked. However, in calculating back wages due the employees, the Bureau must rely on the best available evidence in the record. The Bureau determined to give the Subcontractor no credit for

the payment of supplemental benefits based upon the absence of any payroll records for the extra work. However, the Bureau did give the Subcontractor credit for paying New York State minimum wage of \$5.15 per hour based upon the absence of any complaints from the Subcontractor's employees that they were not paid any amount for their work on the project. I find the Bureau's method of calculating the wages paid to the employees for the extra work is not reasonable or supported by any evidence in the record. The Bureau's assumption that the employees must have been paid some amount for the extra work is speculation and cannot be used as a basis to determine a credit to the employer.

It is established that, 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 evidence available. *Matter of Mid-Hudson Pam Corp. v. Hartnett*, 156 A.d.2d 818 (3rd Dept. 1989). However, it is axiomatic that the method relied upon by the Commissioner must be based upon some evidence. In this case, the Subcontractor did not offer any credible documentary or testimonial evidence to show what the employees were paid for the extra work, and the Department also did not offer any evidence gathered during its investigation to show what these employees were paid for this extra work.

I find that the record does not contain any credible evidence to support a finding that the Subcontractor paid its employees the State minimum wage or any wages for the extra work. The Bureau's method of arriving at an underpayment determination for the extra work is not reasonable or supported by any evidence in the record. The Department's calculation that the Subcontractor underpaid its employees in the total amount of \$43,299.17, in wages and supplements (See, Dept. Ex. 21), should, therefore, not be sustained and the Bureau shall recalculate the total underpayment giving the Subcontractor no credit for any wages or supplemental benefits paid to the employees for the extra work performed in the pool room.

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. *See, CNP Mechanical, Inc. v. Angello*, 31 A.D.3d 925 (3rd

Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, based upon this statutory mandate, the Subcontractor is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

Willfulness of Violation

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation. This inquiry is significant because Labor Law § 220-b (3) (b) (1)¹ provides, among other things, that when two final determinations of a “willful” failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Article 8 of the Labor Law, willfulness “does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately” – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v. Roberts*, 128 A.D.2d 1006, 1006-1007 (3d Dept. 1987). “Moreover, violations are considered willful if the contractor is experienced and ‘should have

¹ “When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the 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 willfully 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.

known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v. Hartnett*, 181 A.D.2d 1013, 1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v. Hudacs*, 185 A.D.2d 483, 485 (3d Dept. 1992).

A finding of willfulness is supported by substantial evidence where, by virtue of a contractor's prior public work experience and its officer's knowledge of the prevailing wage law, the contractor should have known that its actions violated the labor law. *Matter of TPK Constr. Corp.*, 205 A.D.2d 894, 896 (3d Dept. 1994). 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 A.D.2d 510; *Matter of Cam-Ful Industries, supra*.

The record makes it clear that the Subcontractor was an experienced public work contractor and it knew that the Project was a public work project. The Bureau argues that, as an experienced public work contractor, the Subcontractor knew or should have known that its employees should have been classified as roofers and paid the prevailing wage rates for regular time, overtime and weekend work that correspond with this classification. The Subcontractor has not disputed its prior public work experience. Additionally, the record contains evidence that the prevailing rate schedules were posted at the work site (T. 271-273), so the Subcontractor should have known the proper rate to pay its workers. However, in spite of this, the Subcontractor did not classify its employees as roofers and pay them the appropriate rates for this classification or the appropriate rates for overtime or weekend work regardless of how the workers were classified by the Subcontractor. Additionally, the record contains evidence that the Subcontractor knew this was a public works project as it maintained payroll records for the work performed under the contract but there is no evidence in the record from the Bureau, the Respondents or DASNY that the Subcontractor maintained similar payroll records for the extra work. Since all aspects of the Project involved public work, the Subcontractor must have known that its failure to maintain payroll records for the extra work was illegal. Based upon the foregoing, the record supports a finding that the Subcontractor knew its employees were not being paid the applicable prevailing wages, including overtime wages, and that this underpayment of wages constitutes a willful violation of Labor Law §220.

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 Subcontractor seriously underpaid its employees, and made no effort to resolve the matter or make restitution after being notified of the Department's investigative findings. Additionally, although the Subcontractor's witness, Joseph Cohen, testified that Department of Labor employees advised him about classification of the employees at the inception of the Project, I do not find that this testimony provides a rational basis for the misclassification of the Subcontractor's employees throughout the entire project. Finally, the Subcontractor failed to produce any mitigating evidence or testimony at the hearing from either Anton Dragonides or Leida Reyna, the individuals who are named as officers and/or shareholders of the Subcontractor, which must be viewed as an indication that any truthful and credible evidence that they could have produced would not have been favorable to their position. It is established that, when a party declines to testify, the trier of fact is permitted to draw the strongest inference against the party that the evidence permits. *Matter of Commissioner of Social Services v. Phillip DeG*, 59 N.Y.2d 137 (1983); *Paruch v. Paruch*, 140 A.D.2d 418 (2nd Dept. 1988). I find that the record supports an inference that any evidence or testimony that could have been offered by the Subcontractor and Anton Dragonides or Leida Reyna would have been unfavorable to them. Based upon the facts of this case, a civil in the Department's requested amount of 25% of the total amount found due is warranted.

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 officer of the contractor or subcontractor who knowingly participated in

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

In the present case, Leida Reyna was identified at the hearing as the principal owner and the President of the Subcontractor (T. 8, HO Ex. 6). Additionally, the Subcontractor has offered evidence that tends to establish that Anton Dragonides was at one time the owner of the Subcontractor (T. 233), and that Joseph Cohen was also a corporate officer of the Subcontractor (Dept. Ex. 29 and 30). I find that the respective positions of authority with the Subcontractor that were held by Anton Dragonides, Leida Reyna, and Joseph Cohen, an entity with extensive public work experience, should have put them on notice that this Project was a public work project requiring the payment of prevailing wage rates. Furthermore, the record contains evidence that all of the payroll checks were signed by Leida Reyna [a/k/a Leida Biaz] (T. 250-252; Dept. Ex. 12), and the payroll records were certified by Anton Dragonides or Joseph Cohen. Based upon the foregoing, the record supports a finding that Anton Dragonides, Leida Reyna, and Joseph Cohen were officers who had knowledge that this was a public work Project requiring the payment of prevailing wages and who knowingly participated in the willful violation of Article 8 of the Labor Law by failing to pay their employees the appropriate prevailing wages. Accordingly, based upon their willful violation of Article 8 of the Labor Law, all of these three individuals shall be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

Liability under Labor Law § 223

Under article 8 of the Labor Law, a prime contractor is responsible for its subcontractor's failure to comply with or evasion of the provisions of this article. Labor Law § 223. *Konski Engineers PC v Commissioner of Labor*, 229 A.D.2d 950 (1996), *lv denied* 89 N.Y.2d 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 A.D.2d 331 (1989). The Subcontractor performed work on the Project as a subcontractor of the prime contractor, G & A Renovation and Restoration, Inc. Consequently, G & A Renovation and Restoration, Inc., in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on this Project.

RECOMMENDATIONS

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

DETERMINE, that the Bureau shall recalculate the amount Dramar Construction, Inc. underpaid the identified employees in wages and supplements without giving the Subcontractor any credit for any wages or supplements paid to the employees for the extra work performed in the pool room; and

DETERMINE, that Dramar Construction, Inc. 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 Dramar Construction, Inc. to pay the prevailing wage or supplement rate was a "willful" violation of Article 8 of the Labor Law; and

DETERMINE, that Anton Dragonides, Leida Reyna, and Joseph Cohen are or were officers of Dramar Construction, Inc; and

DETERMINE, that Anton Dragonides, Leida Reyna, and Joseph Cohen knowingly participated in the violation of Article 8 of the Labor Law; and

DETERMINE, that Dramar Construction, Inc. be assessed a civil penalty in the amount of 25% of the underpayment and interest due; and

DETERMINE, that G & A Renovation and Restoration, Inc., as the prime contractor, is responsible for the underpayment, interest and civil penalty due pursuant to its liability under article 8 of the Labor Law; and

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

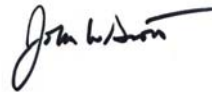
ORDER, that the Department of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER, that if any withheld amount is insufficient to satisfy the total amount due, Dramar Construction, Inc., 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: June 28, 2010
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott", written in a cursive style.

John W. Scott, Hearing Officer