

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of  
JAMES L. RHEIN;  
Prime Contractor,

DEFAULT  
REPORT &  
RECOMMENDATION

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 Town of Wallkill in Middletown, New York.

Prevailing Wage Rate  
PRC No. 2015010220  
Case ID: PW01 2016006276  
Orange County

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

Pursuant to a Notice of Hearing issued on January 24, 2018, a hearing was held on April 11, 2018 in Albany, 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 James L. Rhein (“Respondent”) complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in

the performance of a public work contract involving sidewalk and curb installation (“Project”) for the Town of Wallkill (“Department of Jurisdiction”).

### **APPEARANCES**

The Bureau was represented by Department Counsel Pico Ben-Amotz, Dawa Jung-Acosta, of Counsel.

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

### **FINDINGS AND CONCLUSIONS**

On January 31, 2018, the Department duly served a copy of the Notice of Hearing on Respondent via regular and certified mail, return receipt requested, on the last known addresses of Respondent (Hearing Officer Ex. 2, 3). The certified mailings were returned as unclaimed (Hearing Officer Ex. 4). Two of the three regular mail envelopes were not returned to the Department. The Notice of Hearing scheduled an April 11, 2018, hearing and required the Respondent to serve an Answer at least 14 days in advance of the scheduled hearing.

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

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

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

The Project was subject to Labor Law article 8.

Respondent entered into a contract for the Project with the Department of Jurisdiction.

Respondent performed the work set forth in the contract for the Project.

Respondent failed to provide certified payrolls to the Department of Jurisdiction. Respondent failed to respond to the Department’s requests for records. The Department’s witness testified that he learned from the Department of Jurisdiction that Respondent James L. Rhein stated to a representative of the Department of Jurisdiction that Respondent James L. Rhein performed all of the work on the Project by himself. Based upon un rebutted testimony

from the Department's witness, I find the hearsay statement by James L. Rhein that he performed all of the work on the Project not credible. I further find that Respondent needed the assistance of other workers to complete the Project.

In the absence of certified payrolls or other documents from Respondent, the Department used the records provided by Respondent to the Department of Jurisdiction, along with construction industry standards, to prepare a reasonable estimate of the time needed to construct the sidewalks that were the subject of the Project, the number of workers needed to perform the work, the hours worked, the classifications of the workers, and the wages required pursuant to the Prevailing Wage Rate Schedule in effect at the time of the Project. The Department determined that the Project required a total of 294 workers' hours.

As the Department received no information from Respondent concerning the identity of workers on the Project, it relied upon payrolls prepared by Respondent for a comparable sidewalk installation project, for the same Department of Jurisdiction, performed four months later, to determine the number of workers on the Project and their names. Using the four workers identified in Respondent's payrolls from the later project, the Department divided the time worked on the Project (294 hours divided by four workers) to arrive at 73.5 hours of work for each worker over a two week period.<sup>1</sup>

Based upon its estimates of the workers and the hours needed to complete the Project, the Department calculated an underpayment by Respondent of \$17,052.24 to 4 workers for the audit period week ending May 2, 2014 through the week ending May 9, 2014.<sup>2</sup>

Respondent James L Rhein is an unincorporated business owned by James L. Rhein, who knowingly participated in the violation of Labor Law article 8.

No monies were withheld on the Project.

Respondent had no prior history of violations, was uncooperative with the investigation, and violated the Labor Law by failing to provide certified payrolls, properly classify its workers

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<sup>1</sup> It is possible that Respondent worked on the Project, which would affect the allocation of work hours to the four workers the Department assumes worked on the Project. However, Respondent repeatedly refused to cooperate with the Department's investigation and failed to appear at the hearing. The Department was therefore obligated to prepare its best estimate of the work performed, hours needed, and workers' identities. As the Department's assumptions are unrefuted and reasonable, I accept them in this Report and Recommendation.

<sup>2</sup> The Department takes the position, as set forth by its witness, a public work wage investigator, that because Respondent failed to provide any evidence of wage payments, Respondent did not pay *any* wages to workers on the Project.

and pay them the prevailing rate of wages and supplements required by law. Respondent's business consisted of Respondent and possibly four employees.

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

### **RECOMMENDATIONS**

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

DETERMINE that Respondent underpaid wages and supplements to four workers \$17,052.24 on the Project; and

DETERMINE that the failure of Respondent to pay the prevailing wages or supplements was a "willful" violation of Labor Law article 8; and

DETERMINE that James L. Rhein was the owner of Respondent contractor James L. Rhein who knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Respondent 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 Respondent be assessed a civil penalty in the amount of 25% of the underpayment and interest due; and

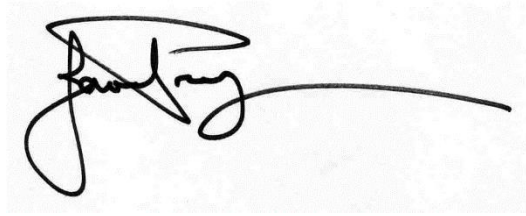
ORDER that the Bureau compute the total amount due (underpayment of \$10,251.01, interest at 16% from date of underpayment and 25% civil penalty); and

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

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

Dated: March 9, 2018, 2018  
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jerome Tracy", with a long horizontal flourish extending to the right. The signature is set against a light gray, textured background.

Jerome Tracy, Hearing Officer