STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

WELLIVER MCGUIRE INC.,
Prime Contractor,

JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, 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 laborers, workers and mechanics employed on a public work project known as the remodeling of the Chemung County Transportation Center in Elmira, New York.

AMENDED REPORT & RECOMMENDATION

Prevailing Rate Case
Case No. 97-04996
Chemung County

IN THE MATTER OF

JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, INC.,

Prime Contractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for laborers, workers and mechanics employed on a public work project known as the capital improvements to the Elmira Heights Central School District located in Elmira Heights, New York.

Prevailing Rate Case
Case No. 00-04307 A
Chemung County

IN THE MATTER OF JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, INC., Prime Contractor, for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for laborers, workers and mechanics employed on a public work project known as the district wide additions and alternations to various schools and a new bus garage in the Watkins Glen School District located in the City of Watkins Glen, New York.	Prevailing Rate Case Case No. 99-08637 A Schuyler County
IN THE MATTER OF JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, INC., Prime Contractor, for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for laborers, workers and mechanics employed on a public work project known as the alteration and additions to the Ernie Davis Middle School located in Elmira, New York.	Prevailing Rate Case Case No. 96-06228 B Chemung County

IN THE MATTER OF JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, INC., Prime Contractor, for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for laborers, workers and mechanics employed on a public work project for the window construction associated with various additions and alterations to city schools located throughout the City of Hornell, New York.	Prevailing Rate Case Case No. 01-00709 D Steuben County
IN THE MATTER OF THE QUANDEL GROUP, INC., Prime Contractor, and JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, 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 laborers, workers and mechanics employed on a public work project known as the Cayuga Green Parking Deck in Ithaca, New York.	Prevailing Rate Case Case No. 06-001463 A Tompkins County

IN THE MATTER OF JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, INC., Prime Contractor, for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for laborers, workers and mechanics employed on a public work project known as additions and alterations of four public schools located throughout the City of Trumansburg, New York.	Prevailing Rate Case Case No. 99-07476 A Tompkins County
IN THE MATTER OF R.J. ORTLIEB CONSTRUCTION COMPANY, INC. Prime Contractor, and JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, 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 laborers, workers and mechanics employed on a public work project known as the Surge 1 Facility for the rehabilitation and addition of the Cornell University Forest Home Drive at Plantations Road located in Ithaca, New York.	Prevailing Rate Case Case No. 02-06678 A Tompkins County

IN THE MATTER OF JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, INC., Prime Contractor, for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for laborers, workers and mechanics employed on a public work project known as the construction of the New 278-bed Ontario County Jail, in Canandaigua, New York.	Prevailing Rate Case Case No. 01-07459 A Ontario County
IN THE MATTER OF ANDREW R. MANCINI ASSOCIATES, INC. Prime Contractor, and JOHN F. CADWALLADER, INC., JOHN F. CADWALLADER, J.A. HIRES CADWALLADER AND GREGORY S. OLSON as owners, officers and shareholders of JOHN F. CADWALLADER, INC., and its substantially owned-affiliated entities JOHN F. CADWALLADER INC. d/b/a THE GLASS COMPANY and WINDSHIELD INSTALLATION NETWORK, 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 laborers, workers and mechanics employed on a public work project known as the addition and alteration to the Broadway Elementary School located in the City of Elmira, New York.	Prevailing Rate Case Case No. 02-7227 A Chemung County

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

Pursuant to a Notice of Hearing issued on June 29, 2010, and following adjournments of the originally scheduled dates, an administrative hearing was commenced on April 14, 2011,[1] in Binghamton, New York, and continued thereafter by videoconference between Albany and Binghamton on November 1, 2011; August 14, November 19, 20, and 21, 2013; January 21 and 22, April 1 and 8, May 22, June 25 and 26, July 31, August 12, October 2, and November 6, 10, and 18, 2014. At the conclusion of the hearing, the parties were afforded the opportunity to submit Proposed Findings of Fact and Conclusions of Law ("Proposed Findings"). Following a number of extensions granted on the parties' mutual consent, the Department's and the Respondents' Proposed Findings were received on September 26 and September 27, 2016, respectively.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether John F. Cadwallader, Inc. d/b/a The Glass Company ("Cadwallader" or "Respondent"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of contracts on the following 10 projects: the remodeling of the Chemung County Transportation Center in the City of Elmira, New York ("Project 1"); the capital improvements to the Elmira Central School District at the Cohen Middle School and Cohen Elementary School in Elmira Heights, New York ("Project 2"); the district wide additions and alterations to various schools and a new bus garage in the Watkins Glen School District in Watkins Glens, New York ("Project 3"); the alteration and additions to the Ernie Davis Middle School in Elmira, New York ("Project 4"); the addition and alterations to city schools in Hornell, New York ("Project 5"); the construction of a public

[1] Prior to the commencement of the actual hearing, the Department attorney originally handling the case met in Binghamton with representatives of Cadwallader and the Prime contractors in an effort to settle these cases. That culminated in a stipulation with two of the prime contractors, Welliver-McGuire, Inc. ("Welliver") and Andrew R. Mancini Associates, Inc. ("Mancini"), being placed on a separate record on the morning of April 14, 2011. Those stipulations were to be subsequently reduced to writing. After those stipulations were placed on the record, the hearing was then opened to adduce evidence in all of these cases. The transcript of the stipulation placed on the record that morning was never produced by the court reporting service, and was apparently lost. On November 1, 2011, in satisfaction of the terms of settlement, Affidavits the Department required in connection with the settlement of the prime contractors addressing compliance with the civil penalty waiver requirements of 12 NYCRR 221.1 were received into evidence as Hearing Officer 10 and 11 (T. 177-178; HO 10 [Welliver McGuire, Inc.], 11 [Andrew R. Mancini Associates, Inc.]). Hearing Officer 10 also enclosed a copy of the certified settlement check in the amount of $6,404.70 (HO 10). Also received in evidence that day as Hearing Officer 12 was the Stipulation of Settlement with the third prime contractor, The Quandel Group, Inc., which resolved its liability with the Department concerning Project 6 (T. 180-183; HO 12). The final settlement with the prime contractor R.J. Ortlieb Construction Company Inc. and Cadwallader, pertaining to Project 8, was placed on the record on April 8, 2014, and the Project 8 matter was at that time withdrawn (T. 1485-1486).

park and a seven-story 700-space parking garage in Ithaca, New York ("Project 6"); the addition and alterations to four public schools throughout Trumansburg, New York ("Project 7"); the rehabilitation and addition of a Surge 1 Facility for the Cornell University Forest Home Drive at Plantation Road in Ithaca, New York ("Project 8");[2] the construction of the new 278-bed Ontario County Jail and associated work at the County Complex Drive in Canandaigua, New York ("Project 9"); and the addition and alteration to the Broadway Elementary School in Elmira, New York ("Project 10").

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.

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Elina Matot, Senior Attorney, of counsel). Cadwallader, John F. Cadwallader, J.A. Hires Cadwallader and the Windshield Installation Network, Inc. were represented by Coughlin & Gerhart LLP (Joseph J. Steflick, Jr., Esq., of counsel). There was no appearance made by or on bealf of Gregory S. Olsen. Other than the appearances noted in footnotes 1 and 2 herein, none of the Prime Contractors participated in this hearing.

ISSUES

1. Did Cadwallader pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure by Cadwallader 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 the Windshield Installation Network, Inc., a "substantially owned-affiliated entity" of Cadwallader?

[2] Project 8 involved the prime contractor R.J. Ortlieb Construction Company, Inc. ("Ortlieb"). During the hearing, Ortlieb, Cadwallader and the Department entered into a stipulation, with Cadwallader agreeing to pay the updated interest since the 2011 stipulation signed by Ortlieb was calculated, with language to that effect being placed on the record on April 8, 2014. As a result, the Department withdrew its case with regard to Project 8 (T. 1484-1486).

5. Are John F. Cadwallader, J.A. Hires Cadwallader and Gregory S. Olsen shareholders of Cadwallader who each owned or controlled at least ten per centum of the outstanding stock of the Cadwallader?

6. Are John F. Cadwallader, J.A. Hires Cadwallader and Gregory S. Olsen among the five largest shareholders of Cadwallader?

7. Are John F. Cadwallader, J.A. Hires Cadwallader and Gregory S. Olsen officers of Cadwallader who knowingly participated in a willful violation of Labor Law article 8?

8. Should any period of the time for which interest would otherwise be assessed on any underpayments of prevailing wages and/or supplements be reduced?

9. Should a civil penalty be assessed and, if so, in what amount?

HEARING OFFICER SUBSTITUTION

Gary Troue was designated as Hearing Officer and conducted the hearing in this matter. Subsequent to the hearing, Jerome Tracy was substituted as Hearing Officer and prepared the report to the Commissioner based upon the record in this proceeding.

FINDINGS OF FACT

The hearing concerned ten separate investigations made by the Bureau on ten separate Projects involving work performed by Cadwallader. Although there are ten separate Projects, the nature of the work performed by Cadwallader on each is similar, as is the basis of the Bureau's determination that Cadwallader underpaid prevailing wages and supplements. The work generally involved window installation. When such work involves the installation of preglazed windows into masonry openings, the Bureau classifies such work as ironworker work (Dept. Ex. 9). When such work involves the separate functions of the installation of a metal frame into a masonry opening, followed by the glazing of a glass pane into that frame, the Bureau classifies framing installation work as ironworker work and installation of the glass into the frame as glazier work (Id.). Cadwallader classified most of the work performed on these Projects as glazier or laborer work (see, e.g. Dept. Ex 8). The Bureau determined that a substantial amount of the work involved the installation of preglazed windows and determined that Cadwallader

underpaid its workers by misclassifying that work as glazier or laborer work, which classifications have lower prevailing rates than the prevailing ironworker rate. The Bureau also determined that Cadwallader failed to fully pay its workers the prevailing supplemental benefits required for this work and falsified its payroll records by certifying that it had in fact done so. Finally, the Bureau determined that in some instances, Cadwallader failed to pay overtime rates for overtime work. The specifics as they pertain to each Project follow.

PROJECT 1

CHEMUNG COUNTY – TRANSPORTATION CENTER REMODEL

Welliver McGuire, Inc ("Welliver") entered into a prime contract with the County of Chemung to remodel the Chemung County Transportation Center located in Elmira, New York (T. 477). Welliver entered into a subcontract with Cadwallader to provide window installation on the Project (Id.). The work Cadwallader performed involved the installation of aluminum frames into masonry openings followed by the installation of glass into those frames (T. 469, 762-763). That involved work in both the ironworker classification and the glazier classification (T. 470, 487; Dept. Ex. 9). Pursuant to the relevant prevailing rate schedule ("PRS"), a glazier was to be paid $16.36 an hour in wages and $4.68 an hour in supplemental benefits (T. 477; Dept Ex. 7). An ironworker was to be paid $20.70 in wages and $8.64 in supplemental benefits (T. 478; Dept Ex. 7).

On or about July 7, 1999, the Bureau received a union complaint concerning payment irregularities on Project 1, which was followed by employee complaints on October 26, 1999 and January 12, 2000 (Dept. Exs. 1, 2, 3). Based on those complaints, the Bureau commenced an investigation of Project 1. On or about November 4, 2002, the Bureau requested that Cadwallader provide, among other things, payroll records, time records and contracts for Project 1 (T. 472; Dept Ex. 5). Cadwallader did not provide any records in response to that request (T. 473). The Union complaint did attach a copy of the Cadwallader certified payrolls that the union obtained from the County of Chemung (T. 474-476). The certified payrolls classified the work performed in the glazier and laborer classifications (T. 502; Dept. Ex. 8). The payrolls were certified by Gregory Olsen as vice president (T.502).

In July 2013, the Bureau assigned Investigator Theresa Martin to Projects 1 through 5 as the original investigator, Fran Majewski, retired (T. 399-400). At that time, Investigator Martin

reviewed the file and the existing audit in the computer system (T. 401-403). She determined that there were essentially three issues involved concerning classification, overtime and supplemental benefit payments (T. 403). Investigator Martin compared the existing audits (Dept. Ex. 10, 11) against the certified payrolls and other information and made modifications to the existing audits (T. 404). Those modifications resulted in revised audits being received into evidence (T. 483-493; Dept. Exs. 10A, 11A). She also spoke with employees Steve Scribner and Richard Wardwell concerning Project 1 (T.462-471, 480-481).

In preparing the final audit on Project 1, Investigator Martin accepted the days and hours worked, and the wages paid, as reported in the Cadwallader certified payrolls (T. 496-498). She determined that the work performed fell within the ironworker and glazier classifications (T. 487). Lacking any accurate information from Cadwallader as to the actual time spent in either of those classifications, she determined that it was reasonable to divide the regular hours equally between the ironworker and glazier classifications and assign the glazier classification to overtime work (T. 487-488, 495, 500-501, 504). As both glaziers and ironworkers are responsible for their own cleanup, she lacked any information evidencing tasks being performed within the laborer classification and assigned no time to work in that classification (T. 502-503).[3]

The audit then compared the amount that should have been paid according to the relevant PRS against what was actually paid according to the certified payrolls and determined that Cadwallader had underpaid nine (9) workers prevailing wages and supplements on Project 1 (T. 498-499; Dept. Exs. 10A, 11A). Specifically, the audit determined that Cadwallader underpaid $680.20 in wages and $2,431.08 in supplemental benefits to nine workers for the period week ending August 1, 1998 through week ending November 21, 1998 (Dept. Ex. 11A).

The Bureau issued a Notice of Labor Law Inspection Findings to Cadwallader and Welliver on January 3, 2003, and again on March 16, 2007 (T. 446-450; Dept. Exs. 12, 13). On or about June 3, 2003, the Bureau issued a Notice to Withhold Payment to the County of Chemung directing that it withhold payment of $9,675.49 on the prime contract (T.450). No acknowledgment from the County that any money was withheld as a result of that withholding notice was offered in evidence.

[3] The laborer classification would apply only to general clean up (T. 1988). One Cadwallader employee, Richard Wardwell, testified that Cadwallader employees were responsible for cleaning up for themselves; he couldn't recall anyone assigned to do general clean up (T. 840-841).

PROJECT 2

ELMIRA HEIGHTS CENTRAL SCHOOL DISTRICT

On or about August 31, 2001, Cadwallader entered into a contract with the Elmira Heights Central School District ("Elmira Heights CSD") for window and glass replacement at the Cohen Middle School and Cohen Elementary School ("Project 2") located in Chemung County, New York (T. 566; Dept. Ex. 17). Gregory Olsen signed the contract on behalf of Cadwallader as its vice president (T. 567; Dept. Ex. 17). The work Cadwallader performed involved installation of preglazed windows (T. 567-568).[4] The Bureau classifies preglazed window installation as the work of ironworkers (T. 568). The Project extended for a 3-year period and the required prevailing rates for that period were established in Chemung County PRSs 2001, 2002 and 2003 (T. 569; Dept. Exs 18, 19, 20).

For the period May 1, 2001 through June 30, 2002, the prevailing wage for an ironworker was $21.25 (increased by $.75 on May 1, 2002) and the supplemental benefit was $11.59 (T. 570-572; Dept. Ex. 18). For the period July 1, 2001 through July 30, 2003, the prevailing wage rate was $22.00 and the supplemental benefit was $11.59 (T. 572; Dept Ex. 19). For the period July 1, 2003 through June 30, 2004, the prevailing rate was $22.35 and the supplemental benefit was $12.74 (T. 572-573; Dept. Ex. 20).

On or about June 1, 2003, the Bureau received a complaint from a Cadwallader employee alleging that Cadwallader failed to pay the proper prevailing rates of wages and supplements for the work performed on Project 2 (T. 509-511, 573-576; Dept Ex. 15). On or about August 28, 2003, the Bureau initiated an investigation of Cadwallader on Project 2 by serving a Records

[4] A Cadwallader employee, Stephen Scribner, testified that he performed work on Project 2; that the Project involved window installation; that the windows were preglazed; and that they would remove the window glass, install the frame, and then put the glass back in the frame –they were sliders (T. 773-774). J.A. Hires Cadwallader also testified to this procedure of "deglazing" and then "reglazing" [sic] the preglazed window units in connection with Project1, which he testified had to be done due to the weight of the preglazed windows (T. 2595-2597). Another employee on Project 2, Richard Wardwell, testified that they tore frames out, brushed the opening out, and then placed the frames in because they fit into the openings, and they just fastened it to the concrete (T. 827). He didn't recall doing anything else (T. 827). He thought the glass was already in the frame (T. 827-828). On cross examination it was brought to his attention that there was some testimony that glass had to be removed from units brought to the Project and he testified that he recalled that some of the frames were so heavy that they had to take the windows out and put the frame in, and then put the glass back in (T. 848-849). He testified that this happened "[s]ometimes, if they were big and heavy. But the frames and glass, itself, were sliders, like up and down. So when you take them out, you take out the glass, and the frame for the window." (T. 848). The frame that holds the window frame stays in the wall, and then the frame with the glass is picked up and set back in (T. 848-849). The Bureau classified this work as solely the work of ironworkers as it involved preglazed window unit installation (T. 567-568).

Request Notice on Cadwallader and Elmira Heights CSD (T. 511-513, 576; Dept. Ex. 16). In response to that Notice, the Bureau received a copy of the contract from the school district, certified payrolls (but it is uncertain who provided them), some cancelled checks, some proof of payment of fringe benefits, and a copy of the benefit plan (T. 577-580). Specifically, the Bureau obtained information of total benefits paid by Cadwallader from January1, 2003 to December 31, 2003 (T. 580-581). In the course of the Bureau's investigation of Cadwallader on other projects, the Bureau had received supplemental benefit payment information for the years 2001 and 2002, which the Bureau had annualized, as required by regulation, to obtain an hourly supplemental benefit credit for Cadwallader for those two years (T. 581-583). Investigator Martin had obtained the Bureau's spreadsheet for that supplemental benefit credit for the years 2001 and 2002 and applied those credits to the Project 2 audit (T. 582-586). Ultimately, a corrected supplemental benefit spreadsheet was received into evidence (T. 1975; Dept. Ex. 24A). That resulted in the final Project 2 audit being corrected to incorporate the corrected supplemental benefit credits (T.1975-1976; Dept Exs. 25B, 26B).

In preparing the final Project 2 audit, Investigator Martin accepted the days and hours of work reported in the certified payrolls (Dept. Ex. 21), as well as the wages reported to have been paid, but she did not accept the classification of the work (T. 588-589, 607-608). The certified payrolls classified the work as glazier work (T. 611; Dept. Ex.21). Investigator Martin interviewed an employee on the job who told her all of the windows installed on the project were prefabricated (T. 612). She also determined from the specifications that the job called for preglazed windows (T. 613-617, 632-642; Dept. Ex. 17A). The Bureau classifies the installation of preglazed windows as ironworker work, not glazier work (T. 612).

She also reviewed the audit that had been prepared by the prior investigator (Majewski) (Dept. Exs. 25, 26), compared it against the certified payrolls, and concluded that there were underpayments of wages and supplemental benefits, and that some overtime was paid at straight time (T. 591). She agreed with Investigator Majewski's classification of the work as ironworker work, but found some inconsistencies in his audit with the time reported in certified payrolls and made corrections in the final audit to be consistent with the time reported in the certified payrolls (T. 592-599). She also determined that the prior audit failed to pick up a $.75 per hour rate increase, which she corrected (T. 604-605, 609).

Investigator Martin relied on the rates established in the relevant PRSs to determine what should have been paid for the hours worked (T. 608). The audit then compared the amount that should have been paid according to the relevant PRS against what was actually reported paid in the certified payrolls to determine the amount of the underpayment (Dept. Ex. 25B). Utilizing that methodology, the audit determined that Cadwallader underpaid sixteen (16) workers the sum of $11,832.45 (Dept. Exs. 25B, 26B). Specifically, the audit determined that from the period week ending January 9, 2002 through week ending September 6, 2003, Cadwallader underpaid $3,934.20 in wages and $7,898.25 in supplemental benefits to sixteen (16) workers on Project 2 (Dept. Ex. 26B). On or about June 3, 2004, the Bureau issued a Notice to Withhold Payment to Elmira Heights CSD directing the school district to withhold $29,268.33 on the prime contract (Dept. Ex. 30). On or about June 18, 2004, Elmira Heights CSD acknowledged the Notice and advised that it was withholding $9,049.00, which was the amount was remaining on the contract (*Id*.).

PROJECT 3

WATKINS GLEN CENTRAL SCHOOL DISTRICT

On or about September 18, 2000, Cadwallader entered into a contract with the Watkins Glen Central School District ("Watkins Glen CSD") for district-wide additions and alterations to various schools, which mainly involved the installation of aluminum frames into masonry openings, followed by the installation of glass into those openings, at various schools ("Project 3") located in Schuyler County, New York (T. 658-673, 768-769, 1993; Dept. Ex. 34). That type of work falls within the Ironworker and Glazier classifications (T. 714-715).

The Project extended from week ending January 2, 2001 through week ending September 13, 2003 (Dept. Ex. 46B). The required prevailing rates for that period were established in Schuyler County PRSs 2000, 2001, 2002 and 2003 (T. 673-678; Dept. Exs 36, 37, 38, 38A). Pursuant to PRS 2000, which covered the period July 1, 2000 to June 30, 2001, the ironworker wage rate was $20.00 an hour and the supplemental benefit rate was $12.09 an hour. The glazier wage rate was $17.50 an hour and the supplemental benefit rate was $5.50 an hour (T. 673-675; Dept. Ex. 36). Pursuant to PRS 2001, which covered the period July 1, 2001 to June 30, 2002, the ironworker wage rate was $20.50 an hour and the supplemental benefit rate was $12.34 an hour. The glazier wage rate was $17.50 an hour and the supplemental benefit rate was $5.50 an

hour (T. 675-676; Dept. Ex. 37). Pursuant to PRS 2002, which covered the period July 1, 2002 to June 30, 2003, the ironworker wage rate was $21.00 an hour and the supplemental benefit rate was $12.59 an hour. The glazier wage rate was $17.77 an hour and the supplemental benefit rate was $6.73 an hour (T. 676-677; Dept. Ex. 38). Pursuant to PRS 2003, which covered the period July 1, 2003 to June 30, 2004, the ironworker wage rate was $21.00 an hour and the supplemental benefit rate was $12.59 an hour. The glazier wage rate was $18.27 an hour and the supplemental benefit rate was $7.73 an hour (T. 677-678; Dept. Ex. 38A).

On or about December 12, 2001, and July 28, 2003, the Bureau received complaints alleging that Cadwallader was not paying the required prevailing wages and supplements on Project 3 (Dept. Exs. 31, 32). In response to the initial Ironworkers Union complaint (Dept. Ex. 31), the Bureau commenced an investigation by serving a records request on Cadwallader and Watkins Glen CSD (T. 657-658; Dept. Ex. 33). During its investigation, the Bureau obtained a copy of the prime contract signed on behalf of Cadwallader by Gregory Olsen, in his capacity as vice president (T. 658-659; Dept Ex. 34). It also received portions of the contract specifications (T. 659-673, 1993-2001, 2004-2010; Dept. Ex. 35); certified payrolls (T. 678-682; Dept. Exs. 39, 40); daily time records and supervisor's weekly recaps (T. 686-690; Dept. Exs. 43, 43). Investigator Martin also spoke with a Cadwallader employee who worked on Project 3, Mr. Wardwell (T. 2002-2004). Mr. Wardwell said he put in frames and glass and also installed prefabricated windows on Project 3 (T. 2003-2004). The Ironworkers Union complaint stated that the work involved the erection of pre-glazed metal windows, and metal windows and window frames fastened to masonry (T.861; Dept. Ex. 31). Another Cadwallader employee, Patrick Dotts, testified that he worked on the Project and the work involved the installation of aluminum frame work into masonry openings and then the installation of glass into those frames (T.113-114). The same process was followed with doors (Id.). He estimated that 40% of his time would involve the installation of the aluminum framework into the glass opening, 30%installing glass into that framework, and the remainder was caulking prep work for the openings (T. 134).[5]

In preparing the final Department audit, Investigator Martin accepted the days and hours reported in the certified payroll to establish the days and hours of work (T. 721, 728). Investigator Martin also accepted the amounts reported paid on the certified payrolls as being the

[5] The task of caulking would fall within the glazier classification (T. 2413).

amounts actually paid to the workers (T. 728). She relied on the Department's supplemental credit spreadsheet to credit the amount of supplemental benefits paid (T. 735-736, 2016-2017; Dept. Ex. 24A). Investigator Martin did not accept the classification of the work used by Cadwallader, which was mostly glazier, since she determined that a substantial part of the work fell within the ironworker classification (T. 720, 723, 726-727, 861, 2010-2015; Dept. Exs. 39, 40). Lacking any accurate information from Cadwallader as to the actual time spent in either of those classifications, she determined that it was reasonable to divide the regular hours equally between the ironworker and glazier classifications, and she applied the glazier classification to the overtime work (T. 724-725, 732).[6] The audit then compared the amount that should have been paid according to the relevant PRS against what was actually paid according to the certified payrolls and determined that Cadwallader had underpaid twenty-two (22) workers prevailing wages and supplements on Project 3 (T. 498-499; Dept. Exs. 10A, 11A). Specifically, the audit determined that Cadwallader underpaid $8,249.79 in wages and $22,938.36 in supplemental benefits to twenty-two (22) workers for the period week ending January 3, 2001 through week ending September 13, 2003 (Dept. Ex. 46B).

On or about June 3, 2004, the Bureau issued a Notice to Withhold Payment to Watkins Glen CSD directing the school district to withhold $128,087.67 on the prime contract (T.859; Dept. Ex. 48). On or about June 14, 2004, Watkins Glen CSD acknowledged the Notice and advised that it was withholding nothing on the contract, since nothing was remaining due on the contract (T.860; Dept. Ex. 48).

PROJECT 4

ELMIRA HEIGHTS CENTRAL SCHOOL DISTRICT –ERNIE DAVIS MIDDLE SCHOOL

It is undisputed that in or about 1997, Welliver McGuire, Inc ("Welliver") entered into a prime contract with the Elmira Heights Central School District ("Elmira Heights CSD") for

[6] An employee, Patrick Dotts, who worked on Project 3 testified that 70-80% of the work involved installing metal frames into masonry openings, followed by the installation of glass into those frames (T. 128). Of that time, he "… couldn't say for certain the exact time spent on each, but approximately 30% on installation of framing, 40% on installation of glass into the framework." (T.129). He then testified 40% metal framework installation, 30% installation of glass into that framework (T. 134) and finally testified "[a]approximately 30-40% framework installation, 30-40% of the time would be installing windows and/or glass into that framework." (T.136). On this basis, Investigator Martin's decision to split the classification time evenly for the performance of these tasks is reasonable, since the testimony reflects that a roughly equal amount of time was spent on each task.

alterations and additions to the Ernie Davis Middle School located in Elmira, New York, and that thereafter Welliver then entered into a subcontract with Cadwallader to provide window installation on the Project.[7] The work Cadwallader performed involved both the installation of preglazed windows into masonry openings and the installation of aluminum frames into masonry openings followed by the installation of glass into those frames (T. 1686). That involved work in both the ironworker classification and the glazier classification (T.887, 1685, 1687, 1701; Dept. Ex. 9). Pursuant to the 1997 Chemung PRS, a glazier was to be paid $16.36 an hour in wages and $4.43 an hour was to be paid or provided as a supplemental benefit (T. 886-889; Dept Ex. 54). An ironworker was to be paid $20.70 in wages and $8.64 in supplemental benefits (Dept Ex. 54). Pursuant to the 1998 Chemung PRS, a glazier was to be paid $16.36 an hour in wages and $4.68 an hour was to be paid or provided as a supplemental benefit (T. 894-895; Dept Ex. 55). An ironworker was to be paid $27.70 in wages and $8.64 in supplemental benefits (T. 895; Dept Ex. 55).

On or about May 27, 1999, the Bureau received a Carpenters Union complaint alleging improper payment of prevailing wages on Project 4 (T. 864-865; Dept. Ex.49).[8] That initial complaint was followed by a January 12, 2000, employee complaint alleging underpaid wages on Project 4 (T. 866-867; Dept Ex. 50). In response to those complaints, on November 4, 2002, the Bureau served a Records Request Notice on Cadwallader and Elmira Heights CSD (T.868-869; Dept. Ex. 51). The records request required the production of, among other things, copies of the contract, certified payrolls, daily time records, cancelled payroll checks, and proof of payment of fringe benefits (T. 869; Dept. Ex. 51). Cadwallader produced nothing in response to the records request notice (T. 870-871, 1660). The Bureau received copies of certified payroll records attached to the aforesaid Carpenter Union complaint (Dept. Ex. 49) and from Elmira Heights CSD (T. 1661-1662; Dept. Exs. 56, 57). On or about July 21, 2004 and August 2, 2004, the Bureau issued withholding and cross-withholding notices to contracting agencies (T. 1672-1674, 1676; Dept. Exs. 62, 63). On or about March 16, 2007, Cadwallader was issued a Notice of

[7] Neither the prime contact nor the subcontract was offered into evidence. Those documents were demanded in a Records Notice Request but Cadwallader provided nothing in response to the request (T. 1660). Certified payroll records provided with a union complaint and a copy of change order evidence that Cadwallader performed work on the Project (Dept. Exs.53, 56, 57). The Elmira Heights CSD application for a prevailing rate schedule (Dept. Ex. 52) and a copy of a select portion of the project specifications evidence the projects existence (Dept. Exs. 51A, 52).
[8] The Bureau determined that no part of the work on this Project involved work in the Carpenter Classification (T. 866).

Inspection Findings, which included a violation for failure to produce certified payrolls (T. 1677-1679). Investigator Martin testified that at the time that Notice was issued, the Bureau lacked sufficient evidence to perform an audit (*Id.*). Ultimately an audit was performed by Investigator Majewski and served on Cadwallader notifying it of the results of the audit (T. 1679, 1683; Dept. Exs. 58, 59). That audit was revised by Investigator Martin to change the original audit from all ironworker classification to a 50-50 split between ironworker and glazier (T.1684). Overtime work was classified as glazier (T. 1696-1697). Investigator Martin's revision was informed by her interview with employee Wardwell concerning the work actually performed and her review of information in the Project Specifications (T. 1685-1687, 1700-1704; Dept. Ex. 51A). She relied on the certified payrolls to determine the names of the employees who worked on the job, the days and hours of work and the wages and supplements, if any, paid (T. 1687).The rates that should have been paid were taken from the relevant wage schedule (e.g., T. 1689). No credit was given for the payment of supplemental benefits on Project 4 as no information was provided by Cadwallader and the Bureau lacked any additional information for this time period (T. 1690, 1694-1695, 1705).

The audit then compared the amount that should have been paid according to the relevant PRS against what was actually paid according to the certified payrolls and determined that Cadwallader had underpaid workers $6,708.39 prevailing wages and supplements on the Project (T. 1698; Dept. Ex. 59A). Specifically, the audit determined that Cadwallader underpaid $906.44 in wages and $5,801.95 in supplemental benefits to Thirteen (13) workers for the period week ending November 15, 1997 through week ending January 9, 1999 (Dept. Ex. 59A).

The Bureau issued a Notice to Withhold $32,580.29 on Project 4 (T. 1666; Dept. Ex. 53). As no funds were available, a Cross-Withholding Notice was issued to the Skyler-Chemung-Tioga BOCES ("BOCES") dated August 2, 2004 (T.1673-1674, 1676). On August 6, 2004, BOCES acknowledged that it was withholding $30,932.94 as a result of that Notice (Dept. Ex. 62). Investigator Martin testified that she believed that, as of the May 22, 2014 date of her testimony, $29,432.94 was actually being held in response to that latter notice (T. 1666, 1674-1675).

PROJECT 5

HORNELL CITY SCHOOL DISTRICT

On or about April 8, 2002, Cadwallader entered into a contract with the Hornell City School District ("Hornell CSD") for window construction associated with additions and alterations to various schools, which involved the replacement of windows with pre-fabricated and pre-glazed windows at various schools located throughout the City of Hornell ("Project 5"), Steuben County, New York (T. 1728-1729, 2092; Dept. Ex. 66). That type of work falls within the Ironworker and Glazier classifications (T. 1763, 2102-2107).

Project 5 extended from week ending August 12, 2002 through week ending September 13, 2003 (Dept. Ex. 78). The required prevailing rates for that period were established in Steuben County PRSs 2002 and 2003 (T. 729-730; Dept. Exs 69, 70). Pursuant to PRS 2002, which covered the period July 1, 2002 to June 30, 2003, the ironworker wage rate was $21.57 an hour and the supplemental benefit rate was $13.82 an hour. The glazier wage rate was $17.77 an hour and the supplemental benefit rate was $6.73 an hour (T. 729; Dept. Ex. 69). Pursuant to PRS 2003, which covered the period July 1, 2003 to June 30, 2004, the ironworker wage rate was $21.57 an hour and the supplemental benefit rate was $15.40 an hour. The glazier wage rate was $18.27 an hour and the supplemental benefit rate was $7.73 an hour (T. 730; Dept. Ex. 70).

On or about July 28, 2003, the Bureau received a complaint alleging that Cadwallader was not paying the required prevailing wages and supplements on Project 5 (Dept. Ex. 64). On the basis of that complaint, the Bureau commenced an investigation of Project 5 (T. 1713). On or about August 28, 2003, the Bureau served a Records Request Notice on Cadwallader and Hornell CSD (T. 1727-1728; Dept. Ex. 65). The records request required the production of, among other things, copies of the contract, certified payrolls, daily time records, cancelled payroll checks, and proof of payment of fringe benefits (T. 1728; Dept. Ex. 65). In response to the Records Request Notice, the Bureau received, among other things, a copy of the contract, contract specifications and certified payrolls (T. 1728, 2096; Dept. Exs. 66, 67, 71).

In July 2013, Investigator Martin was assigned the case. At that time, the investigative file contained an audit prepared by the prior investigator, Fran Majewski, that relied on the certified payrolls for the days and hours of work and which reclassified all that work in the ironworker classification (T. 2111-2112; Dept. Ex. 77).[9] Based upon Investigator Martins review of the complaint, the contract, and the project specifications, she concluded that the Project

[9] Cadwallader classified the work in the glazier and laborer classifications (Dept. Ex. 71).

involved both the installation of preglazed windows as well separate installation of frames and glass, and thus reclassified the work 50-50 ironworker and glazier (T. 1984-1985, 2091-2104, 2106-2107, 2137; Dept. Ex. 77A).[10]

In preparing the final Department audit, Investigator Martin accepted the days and hours reported in the certified payroll to establish the days and hours of work (T. 2126-2127). Investigator Martin also accepted the amounts reported paid on the certified payrolls as being the amounts actually paid to the workers (T. 2126). She relied on the Department's supplemental credit spreadsheet to credit the amount of supplemental benefits paid (T. 1988-1989, 2137-2140; Dept. Ex. 24A).

The audit then compared the amount that should have been paid according to the relevant PRS against what was actually paid according to the certified payrolls and determined that Cadwallader had underpaid four (4) workers prevailing wages and supplements on the Project (Dept. Exs. 77B, 78B). Specifically, the audit determined that Cadwallader underpaid $459.80 in wages and $1,715.98 in supplemental benefits to four (4) workers for the period week ending August 12, 2001 through week ending March 15, 2003 (Dept. Ex. 78B).

On or about June 3, 2004, the Bureau issued a Notice to Withhold Payment to Hornell CSD directing the school district to withhold $21,731.97 on the prime contract (Dept. Ex. 80). On or about June 16, 2004, Hornell CSD acknowledged the Notice and advised that it was withholding $21,731.97 on the contract (Dept. Ex. 80).

PROJECT 6

CITY OF ITHACA URBAN RENEWAL AGENCY – CAYUGA GREEN PARKING DECK CONSTRUCTION

According to a construction management agreement dated December 19, 2003, between Community Development Properties Ithaca Inc. ("CDI."), a not-for-profit corporation organized and existing under the laws of the State of Delaware, and The Quandel Group, Inc. ("Quandel"), the City of Ithaca transferred fee title to the lands and existing improvements of the Project 6 property to the Ithaca Urban Renewal Agency ("UIRA"), which in turn leased the property to CDI pursuant to a 40-year lease (Dept. Ex. 85, pp. 2-3, 6). Pursuant to the lease, CDI agreed to

[10] Neither of the employees Investigator Martin interviewed worked on Project 5 (T. 1985, 2031, 2089).

undertake the construction of a public park and parking garage on the site for use as general public parking; the Department issued an opinion that Project 6 was subject to Article 8 of the Labor Law (Dept. Ex. 87).[11] CDI engaged The Quandel Group, Inc. ("Quandel"), pursuant to the terms of the aforesaid construction management agreement, to undertake to construct Project 6 located in the City of Ithaca, Tomkins County, New York (T. 999; Dept. Ex. 85, p 4). According to a February 14, 2005, Department Counsel's Office Opinion Letter, finding that Project 6 was a public work project, approval of the construction improvements and alterations contemplated by the lease was retained by UIRA, and, upon lease termination, the improvements would belong to UIRA (Dept. Ex. 87). The Tompkins County Industrial Development Agency ("TCDA") issued revenue bonds to provide funds to CDI for the purpose of undertaking Project 6 (Dept. Ex. 85, p. 2, Dept. Ex. 87).

Cadwallader entered into a subcontract with Quandel to perform all necessary aluminum glass and glazing work at the parking garage (T. 969-971, 1000-1003; Dept. Ex. 86). That type of work falls within the Glazier classifications (T. 971, 2718).

Project 6 extended from week ending December 3, 2005 through week ending January 14, 2006 (Dept. Ex. 90B). The required prevailing rates for that period were established in Tomkins County PRS 2005 (T. 1010-1014; Dept. Ex. 88). Pursuant to PRS 2005, which covered the period July 1, 2005 to June 30, 2006, the glazier wage rate was $19.52 an hour and the supplemental benefit rate was $8.88 an hour (Id.).

On or about December 30, 2005, the Bureau received a complaint alleging that Cadwallader was not paying the required prevailing wages and supplements on the Project (T. 971-972; Dept. Ex. 82). In response to the complaint, the Bureau commenced an investigation (T. 971). On or about February 15, 2006, the Bureau served a Records Request Notice on Cadwallader (T. 978; Dept. Ex. 84). The records request required the production of, among other things, copies of the contract, certified payrolls, daily time records, cancelled payroll checks, and proof of payment of fringe benefits (T. 977-989, 1367; Dept. Ex. 84). Although Cadwallader provided nothing in response to the Notice, Quandel and Ithaca provided copies of the contracts and the project specifications (T. 989; Dept. Exs. 85, 86). No certified payroll records were ever

[11] The opinion letter references a draft lease agreement and indicates that no exhibits were attached or reviewed. No lease agreement was offered in evidence. The lease terms referred to are the representations of counsel contained in the opinion letter (Dept. Ex. 87).

produced; they were apparently never created because Ithaca determined, contrary to the written opinion of the Department, that the project was not a public work project (T. 990-994, 996-997; Dept. Ex. 87). The Bureau interviewed employees and obtained some time sheets and pay stubs showing hours worked on the project (T.1015-1018; Dept. Ex. 83).

Based on its investigation, the Bureau determined that Cadwallader failed to pay four employees the required prevailing wages and supplements on Project 6 (T. 1030-1036, 1063-1092, 1149-1185, 1371, 1397; Dept. Exs. 89B, 90B). Specifically, the Bureau determined that from week ending December 3, 2005 through week ending January 14, 2006, Cadwallader underpaid $9, 775.89 in prevailing wages and supplements on Project 6 (Dept. Ex. 90B).

PROJECT 7

TRUMANSBURG CENTRAL SCHOOL DISTRICT

On or about January 17, 2001, Cadwallader entered into a contract with the Trumansburg Central School District ("Trumansburg CSD") for window construction and installation and associated work to four public schools located in the City of Trumansburg, Tompkins County, ("Project 7"), New York (Dept. Ex. 97). Project 7 involved the construction of frames and glazing of windows into those frames, trim store fronts, doors, and accessories and caulking (T. 136, 1099, 1199-1200, 1205, 1208; Dept. Ex. 97). That type of work falls within the Ironworker and Glazier classifications (T. 1201-1204).

Project 7 extended from week ending August 4, 2001 through week ending July 5, 2003 (Dept. Ex. 107-B). The required prevailing rates for that period were established in Tompkins County PRSs 2001, 2002, and 2003 (Dept. Exs 101, 102, 103). Pursuant to PRS 2001, which covered the period July 1, 2001 to June 30, 2002, the ironworker wage rate was $20.50 an hour and the supplemental benefit rate was $12.34 an hour. The glazier wage rate was $17.50 an hour and the supplemental benefit rate was $5.50 an hour (T. 1101, 1211; Dept. Ex. 101). Pursuant to PRS 2002, which covered the period July 1, 2002 to June 30, 2003, the ironworker wage rate was $21.00 an hour and the supplemental benefit rate was $12.59 an hour. The glazier wage rate was $17.77 an hour and the supplemental benefit rate was $6.73 an hour (T. 1101, 1211; Dept. Ex. 102). Pursuant to PRS 2003, which covered the period July 1, 2003 to June 30, 2004, the ironworker wage rate was $22.00 an hour and the supplemental benefit rate was $13.09 an hour.

The glazier wage rate was $18.27 an hour and the supplemental benefit rate was $7.73 an hour (T. 1102, 1211; Dept. Ex. 103).

On or about July 28, 2003, the Bureau received a complaint alleging that Cadwallader was not paying the required prevailing wages and supplements on the Project (T. 101, 109, 111, 134-139, 1093-1098, 1187, 1295, 2091-2092; Dept. Ex. 95). In response to the complaint, the Bureau commenced an investigation of Project 7 (T. 1187, 1295).

On or about April 5, 2003, the Bureau served a Records Request Notice on Cadwallader and Trumansburg CSD (T. 1189; Dept. Ex. 96). The records request required the production of, among other things, copies of the contract, certified payrolls, daily time records, cancelled payroll checks, and proof of payment of fringe benefits (1189-1190; Dept. Ex. 96). Both Cadwallader and Trumansburg CSD were responsive to the Records Request Notice (T. 1192). Among other things, Cadwallader produced a complete set of certified payrolls, some time sheets, a set of the Project Plans and Specifications from its architect, and a copy of the prime contract (T. 1194-1200, 1234; Dept. Exs. 97, 99, 100, 104).

In preparing the audit, the investigator accepted the hours reported and wages paid in the certified payrolls to be an accurate record of what Cadwallader employees actually work and were paid on the Project 7 (T. 1236-1237). A Cadwallader employee, Patrick Dotts, testified that the Project involved the installation of metal framework into masonry, followed by the installation of glass into those frames, and the installation of doors (T. 135). The installation of metal frames into masonry involved work in the ironworker classification (T. 1202-1204). The installation of glass falls within the glazier classification (T. 1201). Mr. Dotts testified that approximately 30-40% of the time would involve frame installation; another 30-40% would involve the installation of glass (T. 136).[12] The Bureau investigator utilized the Project Specifications and Plans to adopt a methodology that utilized the size of the openings to determine what percentage of time was assigned to the respective ironworker and glazier classifications, which initially resulted in a determination that generally 25% of employees time was spent in the glazier classification and 75% in the ironworker classification (T. 1197, 1201, 1254-1261, 1275). Overtime hours were then attributed to work in the glazier classification (T.

[12] And presumably, as with the Watkins Glenn Project, the balance of the time would involve preparatory caulking work.

1271, 1274). During the course of the hearing, upon review of the actual mathematical measurements, it was determined that correct ratio was approximately 50%-50%, and that the audit would be revised to reflect that ratio of time spent in the respective ironworker/glazier classifications rather and 75%-25% (T. 1291). The Investigator relied on spreadsheet another investigator had prepared to annualize and credit Cadwallader supplemental benefits payments for the years 2001 through 2003 (T. 1219-1221, 1280, 1284-1285, 1291).

The audit then compared the amount that should have been paid according to the relevant PRS against what was actually paid according to the certified payrolls and determined that Cadwallader had underpaid sixteen employees the required prevailing wages and supplements on Project 7 (T. 1030-1036, 1063-1092, 1149-1185, 1371, 1397; Dept. Exs. 106B, 107B). Specifically, the Bureau determined that from week ending August 4, 2001, through week ending July 5, 2003, Cadwallader underpaid $30,186.56 in prevailing wages and supplements on Project 7[13] (Dept. Ex. 107B).

On or about December 3, 2004, the Bureau served a Notice to Withhold Payment to Trumansburg CDS directing that $135,941.74 be withheld from payment to Cadwallader on Project 7 (Dept. Ex. 108). On December 7, 2004, Trumansburg CDS acknowledged the Notice and advised that nothing was being withheld as nothing was left due on the contract (Id.).

PROJECT 8

CORNELL UNIVERSITY FOREST HOME DRIVE

At the April 8, 2014, hearing the parties advised that they had reached a settlement of Project 8 based upon the written stipulation originally entered into by the prime contractor, Ortlieb, in 2011. Cadwalleder agreed to pay the additional interest that had accrued since the date the Ortlieb stipulation was calculated, in the approximate amount of $1,100.00, and on that basis the Department agreed to withdraw its complaint and the notice of hearing concerning Project 8 (T. 1485-1486). Consequently, no additional evidence was adduced and the case was withdrawn.

PROJECT 9

[13] This number represents the revised underpayment arrived at by the Department after it corrected the ratio of work performed from 75% ironworker and 25% glazier to 50% - 50% for each trade.

ONTARIO COUNTY JAIL

On or about March 7, 2002, Cadwallader entered into a contract with the County of Ontario ("Ontario") for window construction associated with the construction of a new 278 bed Ontario County jail ("Project 9") (T. 19, 20, 40; Dept. Ex. 131). The work performed by Cadwallader mainly involved the installation of windows, aluminum store fronts, and some sunscreen (T. 20, 24, 30, 40; Dept. Ex. 131). That type of work falls within the ironworker and glazier classifications (T. 44, 50, 51, -54, 59, 248).

Project 9 extended from week ending December 21, 2002 through week ending October 4, 2003 (Dept. Ex. 143). The required prevailing rates for that period were established in Ontario County PRSs 2002 and 2003 (Dept. Exs. 134, 135). Pursuant to PRS 2002, which covered the period July 1, 2002 to June 30, 2003, the ironworker wage rate was $22.00 an hour and the supplemental benefit rate was $11.59 an hour. The glazier wage rate was $20.50 an hour and the supplemental benefit rate was $8.71 an hour (T. 42-44; Dept. Ex. 134). Pursuant to PRS 2003, which covered the period July 1, 2003 to June 30, 2004, the ironworker wage rate was $22.35 an hour and the supplemental benefit rate was $12.74 an hour. The glazier wage rate was $20.60 an hour and the supplemental benefit rate was $9.61 an hour (T. 42-44; Dept. Ex. 135).

On or about July 4, 2003, and July 21, 2003, the Bureau received complaints alleging that Cadwallader was not paying the required prevailing wages and supplements on the Project (Dept. Exs. 128, 129). In response to the complaints, the Bureau commenced an investigation of Project 7 (T. 23).

On or about April 6, 2004, the Bureau served a Records Request Notice on Cadwallader and Ontario (T. 38, 212-213; Dept. Ex. 130). The records request required the production of, among other things, copies of the contract, certified payrolls, daily time records, cancelled payroll checks, and proof of payment of fringe benefits (Id.). Cadwallader provided, among other things, a copy of the prime contact, certified payrolls, and the payroll check register that was consistent with the wages shown in the certified payrolls, and time sheets that were also consistent with the certified payrolls (T. 38-39, 50, 54-55). The Bureau determined the amount of time spent in glazier and ironworker classifications based on the work performed as shown in the

daily time records[14] and based on investigator observations of the work performed that occurred during a project site walk-through (T. 50-51, 53, 59; Dept. Ex. 136).

The Bureau accepted the days and hours worked, and wages paid, as reported in the certified payrolls (T. 53-54). The audit then compared the amount that should have been paid according to the relevant PRS against what was actually paid according to the certified payrolls and determined that Cadwallader had underpaid ten (10) employees the required prevailing wages and supplements on Project 9 (T. 240-247; Dept. Ex. 142).[15] Specifically, the Bureau determined that from week ending December 21, 2002 through week ending October 4, 2003, Cadwallader underpaid $9,617.43 in prevailing wages and supplements on Project 9 (Dept. Ex. 143).

On or about May 13, 2004, the Bureau served a Notice to Withhold Payment to Ontario directing that $40,436.4 be withheld from payment to Cadwallader on Project 9 (Dept. Ex. 144). On May 25, 2004, Ontario acknowledged the Notice and advised that the remainder on the contract of $9, 617.43 was being withheld (Id.). On or about February 18, 2005, a second withholding notice in the amount $46,870.66 was served on Ontario, but no additional monies are being withheld as a result of that notice (Dept. Ex. 146).

PROJECT 10

ELMIRA CITY SCHOOL DISTRICT –BROADWAY ELEMENTARY

On or about April 8, 2002, Andrew R. Mancini Associates, Inc. ("Mancini") entered into a prime contract with the Elmira City School District ("Elmira CSD") for addition and alteration of the Broadway Elementary School located in Elmira, Chemung County, New York ("Project 10"). Thereafter, on or about August 8, 2002, Mancini entered into a subcontract with Cadwallader that involved the installation of aluminum widows, metal store fronts, a curtain wall

[14] J. A. H. Cadwallader testified that the bulk of the work on this project, more than 90-95%, was the installation of glass into frames installed by others (T. 2674, 2679). The Bureau relied on work descriptions in the daily time records (Dept. Ex. 136) that specifically referenced work in the ironworker classification, such as "12/23, installed frames and sills", and the glazier classification, such as "12/27, installed glass" to determine the actual time in work classifications (T. 59). I find the Bureau's methods reasonable, and I therefore credit the Bureau's more precise methodology in this regard.

[15] Supplemental benefits were annualized based on supplemental benefit payment information Cadwallader provided to the Bureau, which information was incorporated into a hourly supplemental benefits credit spreadsheet used in both this audit and any other audits involving the years in question, to wit: 2001-2003 (T. 60-780; Dept. Ex. 141A).l

system and skylights (T. 2194; Dept. Ex.152). That subcontract work is covered by the ironworker and glazier classifications (T. 2227).

Project 10 extended from week ending November 9, 2002 through week ending October 25, 2003 (Dept. Ex. 159A). The required prevailing rates for that period were established in Chemung County PRSs 2002 and 2003 (T. 729-730; Dept. Exs 153, 154). Pursuant to PRS 2002, which covered the period July 1, 2002 to June 30, 2003, the ironworker wage rate was $22.00 an hour and the supplemental benefit rate was $11.59 an hour. The glazier wage rate was $17.77 an hour and the supplemental benefit rate was $6.73 an hour (T. 2247-2248; Dept. Ex. 153). Pursuant to PRS 2003, which covered the period July 1, 2003 to June 30, 2004, the ironworker wage rate was $22.35 an hour and the supplemental benefit rate was $12.74 an hour. The glazier wage rate was $18.27 an hour and the supplemental benefit rate was $7.73 an hour (T. 2247-2248; Dept. Ex. 154).

On or about May 13, 2003, based upon a Bureau Strike Force investigation, Strike Force investigators visited the Project site, interviewed employees, and determined that underpayments of prevailing rates were occurring (T. 2188). On that basis, the Bureau opened an investigation on Project 10 (T. 2209-2213, 2184-2187, 2205-2246; Dept. Exs. 147, 148, 149). In July 2003, two employees also filed complaints (T. 2229-2245; Dept. Ex. 148, 149).

On or about April 6, 2004, the Bureau served a Records Request Notice on Cadwallader and Ontario (T. 2197-2204; Dept. Ex. 150). The records request required the production of, among other things, copies of the contract, certified payrolls, daily time records, cancelled payroll checks, and proof of payment of fringe benefits (T. 2195; Dept. Ex. 150). In response, Cadwallader provided a copy of the subcontract, certified payrolls, daily log reports (which contain a description the work performed that day), project progress reports (T. 2201, 2204, 2248-2251; Dept. Exs. 152, 155,156).

The Bureau accepted the days and hours worked, and wages paid, as reported in the certified payrolls (T. 2370). Cadwallader received an annualized hourly credit for the payment of supplemental benefits from the employee benefits spreadsheet prepared for the years 2002

through 2003 (T. 2370; Dept. Ex. 157A).[16] The audit generally splits the time worked in the glazier and ironworker classifications evenly (T. 2376).The audit then compared the amount that should have been paid according to the relevant PRS against what was actually paid according to the certified payrolls and determined that Cadwallader had underpaid sixteen (16) employees the required prevailing wages and supplements on Project 10 (T. 2370; Dept. Exs. 158A, 159A). Specifically, the Bureau determined that from week ending December 21, 2002 through week ending October 4, 2003, Cadwallader underpaid $9,617.43 in prevailing wages and supplements on Project 6 (Dept. Ex. 159A).

On or about July 22, 2004, the Bureau served a Notice to Withhold Payment to Elmira CSD directing that $43,010.63 be withheld from payment to Cadwallader on Project 10 (Dept. Ex. 161). On July 31, 2003, Elmira CSD acknowledged the Notice and advised that nothing was being withheld on the contract as nothing remained due (T. 2334; Dept Ex. 161). Thereafter, on or about August 3, 2004, the Bureau served another Notice to Withhold Payment to Elmira CSD directing that Elmira CSD withhold $48,943.13 on the contract (T. 2339; Dept. Ex. 162). On or about August 3, 2004, Elmira CSD acknowledged the withholding notice and advised that they were withholding $43,010.63 as requested under the original withholding notice (T. 2340).

On or about April 10, 2006, the Bureau issued a Notice to Withhold/Release Payment to Elmira CSD, directing Elmira CSD to release $33,373.83, leaving a balance of $15,569.30 to be withheld on the contract (T. 2343; Dept. Ex. 163). Nevertheless, the Department's Proposed Findings state that Elmira CSD has advised the Bureau that $34,569.93 is actually being withheld on the contract (Dept. Proposed Findings, p.35, para. 169).

RESPONDENTS' ESTIMATION OF PERCENTAGE OF TIME WORKED IN THE IRONWORKER AND GLAZIER CLASSIFICATIONS

J.A. Hires Cadwallader testified on behalf of the Respondents that he was personally familiar with each of the Projects involved in this proceeding (T. 2543). He described the particular work involved in each of the Projects and gave his opinion of the amount time that would be involved in the discrete tasks of installing frames into window openings and then

[16] Supplemental benefits were annualized, as required by regulation, based on supplemental benefit payment information Cadwallader provided to the Bureau for the years 2001-2003, which information was incorporated into a hourly supplemental benefits credit spreadsheet used in both this audit and any other audits involving the years in question, to-wit: 2001-2003 (T. 2311-2312, 2315, 2318, 2370; Dept. Ex. 157A).

installing glass into those frames (T. 2595-2639). He testified that on each of these Projects, whenever window units were preglazed,[17] Cadwallader would nevertheless need to remove the glass on site, install the frame, and then reinstall the glass into the frame, in a process he described as "deglazing" and "reglazing" (T. 2596-2597, 2605-2606, 2617-2620, 2628-2630, 2637, 2686-2687). This process was necessary because of the size and weight of these particular preglazed units, the need to properly anchor the frames into the window opening, and the need to seal typically unsealed units (T. 2596, 2625-2630). He testified that the process of glazing (installing glass into a frame) and deglazing (removing the pre-installed glass from the frame) was the work of the glazier and that 90% or more of the installation work involved glazing and deglazing, and thus work in the glazier classification; 5% involved frame installation into masonry openings and general cleanup; and the remaining 5% would involve loading and unloading glass (T. 2598, 2597-2598, 2610, 2616, 2632, 2657-2666).[18] Some of this work involved just clipping a second interior frame holding the glass back into the larger frame that was connected to the opening (T. 2638). Cadwallader classified most of the work as glazier work with the balance assigned to the laborer classification, and that was reflected in the various certified payrolls (T. 2590, 2595, 2597-2598).

SHAREHOLDERS AND OFFICERS OF CADWALLADER

John F. Cadwallader, Sr., senior testified that from approximately 1983 into 2006 he was the president and treasurer of John F. Cadwallader, Inc., and held approximately 75% of the shares in the corporation (T. 270, 274). The other shareholders in the corporation were Cadwallader, Sr.'s sons (T. 274), making all three individuals by default three of the five largest shareholders of the corporation. The other officers of the corporation were Greg Olson, vice-president, and J. A. Hires Cadwallader, secretary (T. 270). J. A. Hires Cadwallader and Greg Olson ran the corporation from 1998 through 2006 (T. 298, 299).

[17] Preglazed units are units where the glass is installed in the frame at the factory rather than on site. Mr. Cadwallader testified that approximately 90% of the work on these projects involved preglazed units that required deglazing and reglazing (T. 2707). In these cases, the preglazed units had two frames: a larger frame that would be affixed to the masonry opening; and a smaller interior frame that would hold the glass, which would be affixed to the larger frame (T. 2623-2624). Mr. Cadwallader reiterated that the process he described was in fact the typical process in this type of commercial installation (T. 2620, 2627-2630, 2633-2637). The Department offered no rebuttal contesting this work process description.

[18] The installation of the large frame into the masonry opening required the drilling of holes for screws, fasteners or shielded plugs to anchor the frame, the insertion of the anchoring devices, the insertion of insulation, caulking or other material between the frame and the wall, and ensuring that the frame is plumb, true and square (T. 2717). This is a significant part of the installation process (*Id.*).

STUBSTANTIALLY OWNED OR AFFLIATED ENTITY

Windshield Installation Network, Inc. ("WIN"), is a business incorporated in New York State (Dept. Ex. 169). The four top shareholders of the corporation are John F. Cadwallader, John F. Cadwallader, Jr., J. A. Hires Cadwallader, and Mary Parameter (T. 265, 266). John F. Cadwallader owns close to one hundred percent of the stock in WIN with the other shareholders owning the remaining shares (T. 265). John F. Cadwallader is the president of WIN; John F. Cadwallader, Jr., is the vice-president (T. 266).

CONCLUSIONS OF LAW

RESPONDENT'S MOTION TO DISMISS

During the course of the hearing, Cadwallader moved to dismiss the Department's allegations, arguing that the Department had failed to meet its burden of proof.[19] Given the extensive testimony elicited concerning the violations and the documents received into evidence on behalf of the Department, I find no basis for granting such a motion.

SPOLIATION

Cadwallader alleges that the Department intentionally destroyed certain documents, thereby engaging in spoliation and depriving Cadwallader of due process. Specifically, Cadwallader claims that the Department "destroyed the PW-11s and PW-27s which could have been utilized to confirm or counter his (sic) calculations and without which he could not determine how he reached his calculations." (Respondent's Proposed Findings, para. X, unnumbered pp. 15, 16). Having alleged spoliation, Cadwallader then claims that the appropriate remedy is dismissal of all of the Department's allegations. *Id.*

The documents in question are earlier versions of the audits and audit summaries for the Projects that the Department *did not use* to support its allegations of Labor Law violations. Other than Cadwallader's bald assertion as set forth above, it provides no rationale or support for its argument that the unavailability of prior audits detrimentally affected its ability to defend itself at the hearing[20].

[19] Cadwallader did not pursue or expand upon this motion in its Proposed Findings.
[20] Nor does Cadwallader assert that it served any form of notice to preserve evidence on the Department prior to the hearing.

The formal rules of evidence do not apply to administrative hearings. State Administrative Procedure Act §306.1. The Commissioner's Order is based upon the record as a whole. *Id*., Labor Law §220.8. Assuming, *arguendo*, that the Hearing Officer and the Commissioner have the authority to address the allegation, several points must be addressed.

The Department concedes that multiple audits were prepared, even during the course of the hearing, based upon "evidence and information as it was produced." (Dept. Proposed Finding pp. 71, 72). The final audit versions relied upon by the Department were received into evidence for the various Projects. Testimony was received concerning how the underpayments of wages and supplements were calculated, and Cadwallader had the opportunity to exhaustively cross-examine the Department witnesses[21].

The fact that before and during the hearing the Department revised audits, sometimes several times, based upon new or corrected information, and that the electronic system used by the Department to compile audits does not automatically store every version created, does not by itself support Cadwallader's claim of spoliation. At the hearing, the Department presented the amounts it had determined to be underpaid to each worker on each Project, the rationale underlying its calculations, and the audits that it believed represented the best estimate of underpayments. Cadwallader had a full opportunity to question Department staff concerning every factor involved in the creation of these audits. The fact that there may have been intermediate steps taken to arrive at the amounts relied upon by the Department was also in evidence. Whatever evidence Cadwallader believes may have been destroyed has not been shown to have any relevance to the final numbers arrived at by the Department, and I find the claim of spoliation to be unfounded.

STATUTE OF LIMITATIONS

Cadwallader, in its Proposed Findings, references the Labor Law provision concerning the statute of limitations with regard to investigations on public work projects (Respondent's Proposed Findings, para. VII). However, if Cadwallader is claiming that the Department in some way did not comply with this provision, it makes no such argument, nor does it cite any portion of the record. Accordingly, I find no basis for finding a violation of this provision of the law.

[21] The various paragraphs for each of the Projects, supra, and the paragraph "UNDERPAYMENT METHODOLGY," infra, describe how the audits were compiled, what information was used, and why the Department arrived at the numbers in each audit.

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 projects[22]. 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:

> 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.*

Respondents raise jurisdictional issues with regard to Projects 1 and 6, the former on the basis that it was a federally funded Davis -Bacon project, the latter on the basis that the project

[22] This section derives from the 1905 amendment of section 1 of article XII of the New York State Constitution of 1894.

was not a public work project subject to Labor Law article 8 (Respondent's Proposed Findings, III, (A) and (F)).

THE PUBLIC AGENCY CONTRACTING REQUIREMENT

Respondents contend that Project 6 is not subject Labor Law article 8 because there is no public agency that is a party to the contract and Labor Law article 8 does not apply to private construction projects financed by industrial development agencies (Respondents' Proposed Findings, III (F)).[23] Respondents contend that this is a private construction project performed pursuant to a prime contract between CDI, a not-for-profit corporation incorporated in the State of Delaware, as owner,[24] and Quandel, which in turn subcontracted the window replacement work to Cadwallader.

Although neither the deed to the property nor the relevant lease agreement was offered in evidence, it appears from representations in both the construction management agreement, which constitutes the prime construction contract, and a Department Counsel's Office opinion letter, that the property was originally owned by the City of Ithaca; that the City transferred title to the property to the Ithaca Urban Renewal Agency ("IURA"); and that IURA, an Urban Renewal Agency, leased the property to CDI to construct a public park and a seven-story, 700-space parking garage (Dept. Exs. 85, 87). The IURA, as an urban renewal agency, is established under the General Municipal Law, which expressly provides that urban renewal agencies are governmental agencies. NY Gen Mun § 551, 553 (2). Section 551 specifically declares that urban renewal agencies authority under article 15 of the General Municipal Law "… is a public purpose essential to the public interest, and for which public funds may be expended." *Id*. Urban renewal agencies are public benefit corporations under provisions of General Municipal Law § 553 (2).

In order to finance the Project, CDI subleased the property to the Tomkins County Industrial Development Agency ("IDA") to facilitate bond financing, and the IDA then leased

[23] Only four public entities are specifically identified under Labor Law § 220 (2): the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law.

[24] Although the construction management agreement refers to CDI as the owner, it appears that CDI is in fact a long term lessee, obligated to perform Project 6 pursuant to the lease terms. Neither a deed to the subject property nor the relevant lease agreement was offered in evidence. The evidence produced consists of the December 19, 2003 construction management agreement and the Department Counsel's office February 14, 2005 opinion letter (Dept. Exs. 85, 87). Those documents contain representations concerning actual ownership of the property and relevant lease terms (*Id.*).

the property back to CDI for a rental that would service the bond financing debt (Dept. Exs. 85, 87). The lease agreement between IURA and CDI described the intended construction and required IURA approval of the initial improvements and alterations, which were to become part of the subject premises, and could only be removed only upon written consent (Dept. Ex. 87). Later alterations also required IURA approval, became part of the premises, and were not subject to removal (*Id*.). At the end of the lease term, the improvements will be owned by the IURA (*Id.*).

Prior to the Court's *De La Cruz* decision, the long-standing test to determine whether a particular project constituted public work required that two conditions be satisfied: (1) a public agency[25] must be a party to a contact involving the employment of laborers, workers or mechanics, and (2) the contact must concern a "public works" project. *Matter of Erie County Indus. Dev. Agency v. Roberts,* 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). *See, also, Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285 (3d Dept. 1996). The first prong of the *Erie County* test remains unchanged after *De La Cruz.* In order to satisfy the first prong of the *Erie County* test, the "public agency contract" test, it has never been necessary that a public agency be a direct party to the construction contract. *See, Bridgestone/Firestone, Inc. v. Hartnett*, 175 AD2d 495, 497 (3d Dept. 1991) (involving warranty work). So, for example, the Appellate Division has found that a county's agreement to lease a new building proposed to be constructed by a limited partnership (and actually constructed by a private construction company pursuant to a separate construction contract that the county was not a party to) necessarily involved the employment of workers to construct the building, and that lease agreement was therefore sufficient to satisfy the first prong of the test. *Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207 (3d Dept. 1990), *affd* 76 NY2d 993 (1990).

Likewise, in its *National R.R. Passenger* decision, the Appellate Division found that the financing and implementation agreements that allowed Amtrak to consolidate its lines in New

[25] A public agency is one of the public entities specified in Labor Law § 220 (2). The Court of Appeals has made clear that the definition of public agency may not be expanded beyond those specifically designated entities. *Matter of M.G.M. Insulation Inc. v. Gardner,* 20 NY3d 469, 475 (2013); *Matter of New York Charter School Assoc. v. Smith*, 15 NY23d 403, 410(2010). The 2007 remedial amendment extending the coverage of Labor Law section 220 (2) to any contract for public work entered into by a third party acting in the place of, on behalf of and for the benefit of any of the covered public entities pursuant to any lease, permit or other agreement between such third party and the public entity was not in effect at the time this contract was entered into.

York's Penn Station satisfied the first prong of the *Erie County* test. *Matter of National R.R. Passenger Corp. v. Hartnett*, 169 AD2d 127, 129-130 (3d Dept. 1991). In that case, Amtrak contracted with a private construction company for clearing, grubbing and track removal and fencing preparatory to the installation of the contemplated improvements, and that company then subcontracted with other companies for portions of the work. *Id.* at 129. The State was not a party to the construction contracts, but had entered into agreements with Amtrak to, among other things, share 40% of the cost of the project, which agreements further provided for State Department of Transportation ("DOT") approval of contractor selection and change orders. *Id.* The Court found that "[t]he contractual arrangements between the State and Amtrak rather easily satisfied the first of these elements (referring to the first prong of the *Erie County* test), in that a public agency is one of the parties and Amtrak is obligated thereunder to go forward with the project, necessarily involving the employment of workers and mechanics *(see, Matter of 60 Mkt. St. Assocs. v Harnett*, 153 AD2d 205, 207, *affd* 76 NY2d 993)." *Id.* at 130.

The Court of Appeals has recently recognized the continuing vitality of this principal by citing with approval these decisions in its *Charter School* and *M.G.M. Insulation* decisions. *Matter of M.G.M. Insulation Inc. v. Gardner*, 20 NY3d 469, 475 (2013); *Matter of New York Charter School Assn. v. Smith*, 15 NY3d 403, 409 (2010). In its *Charter School* decision, the Court stated that "Labor Law §220 (2), by its terms, requires that the contract be particular to the 'work contemplated' by the parties. In other words, construction or renovation work must be involved (citations omitted)." *Matter of New York Charter School Assn. v. Smith*, 15 NY3d at 409. The Court specifically cited the lease agreement in *60 Market Street* and the financing and implementation agreements in *National R.R. Passenger* as examples of agreements sufficient to satisfy Labor Law §220 (2), which it then distinguishing from the charter school agreement involved in the *Charter School* case, finding that no such work was specifically or expressly contemplated in the involved charter school agreement. *Id.*

In *M.G.M. Insulation*, which involved the issue of whether a not-for-profit voluntary fire company's project to construct a new firehouse was subject to Labor Law article 8, the Department argued, among other things, that service agreements entered into with the Village satisfied the public agency contract test. *Matter of M.G.M. Insulation Inc. v. Gardner*, 20 NY3d 469, 475. The Court found, however, that the service agreements were contracts for emergency services pursuant to the Village Law, which empowered a Village to contract with a local fire

corporation to furnish fire protection, and did not "include any provision contemplating the work involved here: the construction of a new firehouse (*see Charter School Assn., 15 NY3d at 409*). Thus, the service agreements are not a contract for public work within the meaning of the prevailing wage law." *Id*. The Court again did not reject prior case law, but simply found that the agreements upon which the Department sought to rely lacked the necessary reference to construction or renovation work.

Here, the Lease Agreement between IURA and CDI contemplated the construction of a public park and a seven-story, 700-space parking garage (Dept. Exs. 85, 87). Since IURA, a public benefit corporation, is a party to lease, which obligated CDI perform Project 6, and since the lease required IURA approval of the initial improvements and alterations, which were to become part of the subject premises, and could only be removed only upon written consent, and since the improvements will be owned by the IURA upon lease termination, the *De La Cruz* "public agency contract" test is satisfied. *Matter of National R. R. Passenger Corporation v. Hartnett*, 169 AD2d 127, 130. Respondents have not contended that the remaining prongs of the *De La Cruz* test are not satisfied, but, in any event, it is clear that the project involved construction-like labor and was for the use or other benefit of the general public.[26]

Since the IURA, a public benefit corporation, is a party to the lease agreement that obligated CDI to perform Project 6, which project required construction-like labor and had as its purpose the benefit of the general public, Labor Law article 8 applies. *Labor Law § 220 (2); De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530.

PROJECT 1 PURPORTEDLY SUBJECT TO FEDERAL DAVIS-BACON ACT

Respondents' Proposed Findings raise for the first time that Project 1 was a federally funded project subject to the federal prevailing wage Davis-Bacon Act (Respondents' Proposed Findings, III (A)). The record is devoid of any evidence in support of this proposition. When J.A. H. Cadwallader testified, no such defense was raised and no evidence was adduced in support of the proposition (T. 2592-2602). The prime contractor, Welliver, raised no such defense and in fact resolved its liability with the Department (*See*, fn.1, *infra.*; H.O. 10). The Department did produce a computer screen shot of what is referred to as a PW-39, which is a request from

[26] Beyond the reference to civic facilities revenue bonds issued by TCIDA, the parties did not develop the record concerning Project 6 funding.

Chemung County to the Department for a prevailing rate schedule for Project 1, which further shows that the project was accepted and a New York State prevailing rate case number ("PRC #") was assigned (Dept. Ex. 6). In conclusion, there is no evidentiary basis to find that Project 1 was a one hundred percent federally funded Davis-Bacon project over which the Department lacks jurisdiction.

With regard to the remaining eight projects, since a public entity is a party to each of the subject contracts, all of which involved the employment of workmen; and since each of the contracts involved construction-like labor and were paid for by public funds; and since the work product of each contract was for the use or benefit of the general public, Labor Law article 8 applies to each of the eight contracts. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530

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]).

The Department classifies the installation of aluminum or metal frames into masonry openings as ironworker work. The installation of glass into those frames is glazier work. The

installation of preglazed windows is classified as ironworker work. That classification of the installation of preglazed windows into masonry openings as ironworker work has been sustained by the New York State Court of Appeals. *Matter of Lantry v State of New York*, 6 N.Y.3d 49, 54 (2005). The trade doing the work is responsible for its own cleanup. The process of classification is committed to the expertise of the Bureau and the Respondents have failed to make a clear showing that the classifications do not reflect the nature of the work actually performed.

With regard to Respondents testimony that most of the window installation involved preglazed windows that had to have the glass removed on site in order to affix the metal frames into the masonry openings and then have the glass reinstall into the frame, this process is analogous to the installation process involved when installing independent metal frames and glass into masonry openings and should be so classified, to-wit: the installation of the frame is the work of the ironworker, the installation of the glass into the frame is the work of the glazier.

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).

On each of the projects, Cadwallader classified the work in the glazier and laborer classifications. Given that tasks performed on the projects involved work in the ironworker classification (the installation of metal frames into masonry openings), the certified payroll records misclassified the work and are inaccurate. Those inaccuracies required the Bureau to estimate the amount of time that the workers performed tasks in the ironworker and glazier classifications. In doing so, the Bureau investigators looked to the type of tasks required to be

performed on each projects and, based upon their experience in the construction trades and as public wage investigators, and after interviewing some employees, they estimated the percentages of time required to performed the tasks in the two classifications. The end result was that, generally speaking, the investigators split the time recorded in the certified payrolls evenly between the two classifications. That estimation was generally in line with employee testimony concerning the percentage of time devoted to frame and glass installation.

J.A. Hires Cadwallader testified that approximately 90% of the work on these projects involved preglazed units that required on-site removal of the preinstalled glass, installation of the frames into masonry openings and then the reinstallation and sealing of the glass. In these cases, the preglazed units actually had two frames: a larger frame that would be affixed to the masonry opening; a smaller interior frame, which held the glass and would be affixed to the larger frame. According to Mr. Cadwallader's testimony, in some instances, the interior frame holding the glass could just be clipped back in. Typically, the glass would be removed from the interior frame and need to be reinstalled and sealed. The installation of the large frame into the masonry opening required the drilling of holes for screws, fasteners or shielded plugs to anchor the frame, the insertion of the anchoring devices, the insertion of insulation, caulking or other material between the frame and the wall, and ensuring that the frame is plumb, true and square. This is a significant part of the installation process.

Respondent, in its Proposed Findings of Fact, would have the Commissioner accept its estimate of the time spent engaged in the work of the various trades, and ignore the testimony of both the workers and the Department investigator. I do not agree. Based upon the record as a whole, I find the allocation of less than 5% of the time to work that is that of an ironworker not to be credible. I further find that the Bureau's decision to evenly split the time between the two classifications has a rational basis and is a reasonable estimation of time workers spent in the ironworker and glazier classifications. In view of Cadwallader's inaccurate payroll records, the Bureau was entitled to use information from investigatory interviews with employees and employee complaint forms. *Matter of A. Uliano & Son. Ltd. v New York State Department of Labor*, 97 AD23d 664, 667 (2d Dept. 2012. Hearsay evidence, if sufficiently believable, relevant and probative, may constitute substantial evidence. *Matter of Tsakonas v Dowling*, 227 AD2d at730. The Bureau's reliance on employee interviews and complaints, and the inferences drawn therefrom, was necessitated by Cadwallader's failure to maintain accurate records of the time

employees spent in the various trade classifications. Although the determinations of amount of time worked in the various classifications are necessarily imperfect approximations, the estimates have a rational basis and are reasonable in light of the evidence. *Matter of TPK Constr. Co. v Dillon*, 266 AD2d 82 (1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170.

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]),[27] 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). Contrariwise, where the delay is attributable, at least in part, to Respondents' failure to produce payroll records, the retirement of key Department personnel, and settlement negotiations, the Appellate Division has found that there exists "…no basis on which to conclude that the delay was attributable to unreasonableness by the Department of Labor (*see Matter of D & D Mason Contrs., Inc. v Smith*, 81 AD3d 943, 945, 917 NYS2d 283 [2011], *lv denied* 17 NY3d 714, 957

[27] 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). Only true, accurate and contemporaneously maintained records establishing the actual hours worked in the proper classification, and payment of the required prevailing wages and supplements for the hours worked in those classifications, could have effectively refuted the employees' claims. *See, Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821; *Anderson v. Mt. Clemens Pottery Co*., 328 US 680, 686-688 (1946).

NE2d 1158, 933 NYS2d 654 [2011]).” *Pascazi v. Gardner*, 106 AD3d 1143, 1145-1146 (3d Dept., 2013), *appeal dismissed*, 21 NY3d 1057 (2013), *lv denied*., 22 NY3d 857 (2013). Each of those factors is a cause, in part, to the extensive delay in these cases. Cadwallader has not created a record of particularized specific periods of time it contends resulted in delays attributable solely to the unreasonableness of the Department. Consequently, there is no basis to determine whether interest should be abated for periods of such unreasonable delay. *See, Matter of Georgakis Painting Corp. v. Hartnett*, 170 AD2d 726, 729.

However, I note that, due to circumstances beyond both Cadwallader’s and the Department’s control, after the hearing in this matter concluded, the originally designated Hearing Officer was unable to complete this Report and Recommendation, and a new Hearing Officer was substituted as set forth above. As a result of that substitution there was a period of one year attributable solely to the Department during which work on this Report and Recommendation was held in abeyance. Cadwallader is therefore responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment, *less one year*. Cadwallader should, however, receive credit against interest owed for any interest amount paid by the Prime Contractors.

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) [28],[29] 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.

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[28] "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.

[29] "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the five largest shareholders of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." Labor Law § 220-b (3) (b) (1), prior to amendment effective November 1, 2002.

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 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]; s*ee 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)*

Cadwallader had significant experience performing public work projects and ample notice of the requirement to pay prevailing wages and supplements on the Projects by virtue of the contract documents, therefore its failure to do so on each Project was a willful violation of the Labor Law[30].

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).

[30] The sole exception to this finding involves Project 6. In that Project, the contracting entity apparently informed Cadwallader that it was *not* subject to Labor Law article 8. Furthermore, there is no evidence in the record that the Department notified Cadwallader of its obligations prior to completion of the Project. Under these circumstances, although Cadwallader remains liable for the underpayments, I find that its violation of the prevailing wage law was not willful.

It is clear from the record that Cadwallader failed to meet its obligation to maintain true and accurate payroll records[31]. For at least a portion of the time that work was performed on the projects, Cadwallader did supply some level of supplemental benefits, which amounts the Department took into account when it performed its annualization and gave credit to Cadwallader for the annualized amounts (Dept. Ex. 141). As set forth above, the term "falsify" must, if it is to have any utility, must be interpreted to mean something more than an error based upon misunderstanding or even failure to investigate what is required. There is no question that Cadwallader was uncooperative in the investigations that took place, misclassified workers, and took credit for having supplied prevailing supplements when it did not do so. I find that Cadwallader's willful failure to pay or provide prevailing wages and supplements did not involve the falsification of payrolls.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one were 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 Bistrian Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

Windshield Installation Network, Inc. ("WIN"), is a business incorporated in New York State (Dept. Ex. 169). Given that of the John F. Cadwallader and his two sons were the top shareholders of the Cadwallader and John F. Cadwallader and his two sons are three of the four top shareholders of WIN, WIN should be deemed a "substantially owned-affiliated entity" of Cadwallader.

[31] For example, Cadwallader's certified payrolls for Project 9, signed by Gregory S. Olson as vice-president of John F. Cadawallder, Inc., show payment of supplements to approved plans on behalf workers on the Project when such payments were not made in full (Dept. Ex 136). Certified payrolls for other projects are similarly marked.

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 of the five largest shareholders 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.

John F. Cadwallader was the majority shareholder and president of Cadwallader. J. A. Hires Cadwallader and Greg Olson were officers of Cadwallader who ran the corporation from 1998 through 2006. Accordingly, all three are subject to a finding of willfulness.

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 requests the maximum civil penalty of 25%, arguing that Respondent's total lack of cooperation, refusal to provide payroll and other records, and falsification of payroll records warrant the maximum penalty (Dept. Proposed Findings, p. 68, 69). Respondent takes no position with regard to penalty in its Proposed Findings.

With regard to the statutory factors set forth above, I note that Cadwallader was a substantial business, with annual income estimated by John F. Cadwallader as two to six million dollars. The good faith of the employer was not in evidence during the investigations, due to its refusal to cooperate with the Department's investigation by promptly providing records when requested. The violations vary in size, but involve matters of classification that the Department clearly communicated to Cadwallader. There is little in the record concerning prior violations, but those in this case cover a substantial period of time. Finally, Cadwallader failed to comply with mandatory record keeping requirements on multiple occasions.

Under these circumstances I find the imposition of a 25% penalty to be appropriate.

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]). Cadwallader performed work on several Projects as a subcontractor to Welliver, Mancini, and The Quandel Group ("Quandel")[32]. Consequently, Welliver, Mancini, and Quandel, in their capacity as prime contractor, are responsible for the total amount found due from its subcontractor on this Project, subject to the agreements entered into with the Department with regard to such liability.

Welliver, Mancini, and Quandel submitted affidavits, agreed to by the Department and made a part of the record as HO Exs. 10, 11, and 12, in which the contractors requests that, pursuant to 12 NYCRR § 221.1, any penalty assessed against Sub be waived insofar as it would normally apply to Prime under Labor Law § 223. I note that this regulation contains, in §221.1(a)(1) – (6), six requirements, all of which must be met if the Commissioner is to waive the assessment of any penalty. The contractors established all of the factors set forth in the regulation and, therefore, the penalty assessed against Cadwallader is waived as to Welliver, Mancini, and Quandel.

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 Cadwallader underpaid wages and supplements due the identified employees in the amounts set forth in the various Projects as follows:

[32] The Department withdrew the case involving Project 8 and Cadwallader and Ortlieb pursuant to a stipulation as set forth in footnote 2.

Project 1: Chemung County, Transportation Center Remodel, underpayment of $680.20 in wages and $2,431.08 in supplemental benefits to nine workers for the period week ending August 1, 1998 through week ending November 21, 1998; and

Project 2: Elmira Heights Central School District, underpayment of $3,934.20 in wages and $7,898.25 in supplemental benefits to sixteen (16) workers for the period week ending January 9, 2002 through week ending September 6, 2003; and

Project 3: Watkins Glen Central School District, underpayment of $8,249.79 in wages and $22,938.36 in supplemental benefits to twenty-two (22) workers for the period week ending January 3, 2001 through week ending September 13, 2003; and

Project 4: Elmira Heights Central School District, Ernie Davis Middle School, underpayment of $906.44 in wages and $5,801.95 in supplemental benefits to Thirteen (13) workers for the period week ending November 15, 1997 through week ending January 9, 1999; and

Project 5: Hornell City School District, underpayment of $459.80 in wages and $1,715.98 in supplemental benefits to four (4) workers for the period week ending August 12, 2001 through week ending March 15, 2003; and

Project 6: City of Ithaca Urban Renewal Agency, Cayuga Green Parking Deck Construction, underpayments of $9, 775.89 in prevailing wages and supplements from week ending December 3, 2005 through week ending January 14, 2006; and

Project 7: Trumansburg Central School District, underpayment of $30,186.56 in prevailing wages and supplements from week ending August 4, 2001, through week ending July 5, 2003; and

Project 9[33]: Ontario County Jail, underpayment of $9,617.43 in prevailing wages and supplements from week ending December 21, 2002 through week ending October 4, 2003; and

Project 10: Elmira City School District, Broadway Elementary School, underpayment of $9,617.43 in prevailing wages and supplements from week ending December 21, 2002 through week ending October 4, 2003; and

[33] As set forth previously, pursuant to a stipulation and settlement of the matter, the Department withdrew its allegations concerning violations on Project 8.

DETERMINE that Cadwallader 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 less one calendar year of interest; and

DETERMINE that the failure of Cadwallader to pay the prevailing wages or supplements on Projects 1, 2, 3, 4, 5, 7, 9, and 10 was a "willful" violation of Labor Law article 8, resulting in 8 separate findings of willfulness; and

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

DETERMINE that James F. Cadwallader, Sr., Greg Olson, and J. A. Hires Cadwallader were officers of Cadwallader who knowingly participated in the violation of Labor Law article 8; and

DETERMINE that John F. Cadwallader, Sr., John F. Cadwallader, Jr., and J. A. Hires Cadwallader were shareholders of Cadwallader who owned or controlled at least ten per centum of the outstanding stock of Cadwallader and/or were three of the five largest shareholders of Cadwallder; and

DETERMINE that Windshield Installation Network, Inc., is a "substantially owned-affiliated entity" of Cadwallader; and

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

DETERMINE that Welliver, Mancini, and Quandel, as prime contractors, are responsible for the underpayments and interest, but not civil penalties, assessed against Cadwallader, however, the contractors have paid the underpayment and interest amounts required by the stipulations they entered into with the Department in full satisfaction of their liability under Labor Law article 8; and

ORDER that each Department of Jurisdiction withholding funds remit payment of any such funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at State Office Building, 44 Hawley Street, Room 908, Binghamton, NY 13901; and

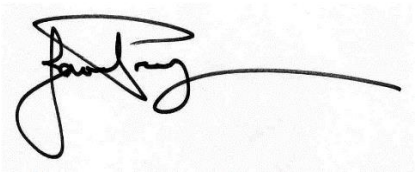
ORDER that if any withheld amount is insufficient to satisfy the total amount due, Cadwallader, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; and

ORDER that upon the Bureau's notification, Cadwallader shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Building, 44 Hawley Street, Room 908, Binghamton, NY 13901; 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, or released to the appropriate prime contractor, depending upon the amounts involved and the terms of the individual stipulations agreed to by the Department.

Dated: March 8, 2018
Albany, New York

Respectfully submitted,



Jerome Tracy, Hearing Officer