STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF LEEMA EXCAVATING, INC. and JOSEPH MONETTE as President and one of the five largest shareholders of LEEMA EXCAVATING, INC. Prime Contractor	**REPORT & RECOMMENDATION** Prevailing Rate Case #'s 97-07407; 99-03569; 98-05231; 97-02394; Onondaga County
IN THE MATTER OF J.M. TRI STATE TRUCKING, INC. and JOSEPH MONETTE as President and one of the five largest shareholders of TRI STATE TRUCKING, INC. Prime Contractor	Prevailing Rate Case 03-00411 Onondaga County
IN THE MATTER OF MURNANE BUILDING CONTRACTORS, INC. Prime Contractor and JOSEPH MONETE d/b/a TRI STATE TRUCKING Subcontractor A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on multiple public work projects.	Prevailing Rate Case 00-03388 Onondaga County

To: Honorable M. Patricia Smith
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on March 11 and 12, and May 12, 2009, in Syracuse, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Leema Excavating, Inc.; J. M. Tri State Trucking, Inc.; Joseph Monette, as president and one of the five largest shareholders and as one of the ten largest shareholders of both corporations; and Joseph Monette doing business as J. M. Tri State Trucking ("Respondent") acting on multiple public work projects as both a prime contractor and as a subcontractor of Murnane Building Contractors, Inc. ("Prime"), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of contracts involving six different public work projects for multiple public entities.

APPEARANCES

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

Respondent appeared pro se and was represented at the hearing by John Monette.

Prime did not appear for the hearing and did not file an Answer to the charges in the Notice of Hearing.

ISSUES

1. Did Respondent pay the rate of wages or provide the supplements prevailing in the localities of the projects, and, if not, what is the amount of underpayment?
2. Was any failure to pay the prevailing rate of wages or to provide the supplements

prevailing in the localities "willful"?

3. Is Joseph Monette a shareholder of Respondent who owned or controlled at least ten per centum of the outstanding stock of the Respondent, with regard to any underpayment that may have taken place after November 1, 2002?
4. Is Joseph Monette one of the five largest shareholders of Respondent, with regard to any underpayment that may have taken place before November 1, 2002?
5. Is Joseph Monette an officer of Respondent who knowingly participated in a willful violation of Article 8 of the Labor Law?
6. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned investigations made by the Bureau on multiple public work projects involving public work performed by Respondent.

In addition to being the owner of and doing business as Tri State Trucking, Joseph Monette was the sole shareholder and only officer of Leema Excavating, Inc., and J. M. Tri State Trucking, Inc. (DOL Ex. 5, 54; Tr. p. 11). Leema Excavating, Inc., is a New York State Corporation registered with the Division of Corporations of the New York Department of State (DOL Ex. 54). J. M. Tri State Trucking, Inc., is a New York State corporation registered with the Division of Corporations of the New York State Department of State (DOL Ex. 42).

Project 1 involved a contract between Prime and the East Syracuse-Minoa Schools in Onondaga County for additions and alterations to the Kinne Street School in East Syracuse (PRC No. 00-3388), entered into on or about September 21, 2001 (DOL Ex. 4). Prime entered into a subcontract with Respondent for work on Project 1 on or about October 22, 2001 (DOL Ex. 5).

Project 2 involved a contract, PRC 98-0231, between Respondent and the Village of Baldwinsville in Onondaga County for walkways, lighting, fencing and landscaping, entered into on or about October 19, 1998 (DOL Ex. 16).

Project 3 involved a contract, PRC 99-03569, between Respondent and the Village of Marcellus in Onondaga County for the construction of Reed Street, Reed Parkway and First Street drainage improvements, entered into on or about June 7, 1999 (DOL Ex. 26).

Project 4 involved a contract, PRC 03-0411, between Respondent and the County of Onondaga for culvert pipe excavating, entered into on or about April 17, 2003 (DOL Ex. 36).

Project 5 involved a contract, PRC 97-07407 between Respondent and the Baldwinsville Central School District, Onondaga County, for site improvement work at Durgee Junior High School and C. W. Baker High School, on or about May 18, 1998 (DOL Ex. 49).

Project 6 involved a project, PRC 97-02394, concerning which Respondent entered into a stipulation with the Department on or about October 5, 2004 (DOL Ex. 59; Tr. p. 213).

Project 1

The Bureau issued a Prevailing Wage Rate Schedule for Project 1, in which were contained the appropriate rates of wages and supplemental benefits for the various classes of worker to be engaged on Project 1 in Onondaga County (DOL Ex. 6; Tr. p. 19).

The schedule established that the prevailing hourly rate of wages for a laborer, heavy/highway, on Project 1 was $17.00 per hour and prevailing supplements were $7.50 per hour. (DOL Ex. 6, 11).

On or about March 22, 2004, claimant Dave Daniel Spoor filed a Claim for Wages and or Supplements with the Bureau (DOL Ex. 1). Mr. Spoor also submitted to the Bureau daily time records, time sheets, daily logs, pay stubs and records kept while working (DOL Ex. 2; Tr. pp17, 18).

Upon receipt of the claim for wages the Bureau issued a Payroll Records Request Notice to Joseph L. Monette DBA Tri State Trucking, East Syracuse -- Minoa Central School District, and Murnane Building Contractors, Inc. (DOL Ex. 3).

The Bureau received certified payrolls from Murnane but not from Respondent (Tr. p. 47).

Respondent did not provide the Bureau with check registers, timecards, sign in sheets, certified payrolls or any other materials even though requested to do so by the Bureau (Tr. p. 49).

The claimant Daniel Spoor testified to the hours he worked and the underpayments which occurred during the time that he worked on Project 1 (Tr. pp. 23-35).

The Bureau calculated underpayments of prevailing wages and supplements to Daniel Spoor based upon the schedule rate for a laborer and the submissions he made to the Bureau, including his payroll journals, canceled checks and other materials; the Bureau did not take into consideration the certified payroll obtained from the Prime because of the detailed, contemporaneously-made records of the claimant and the refusal of the Respondent to comply with the Bureaus' records request (DOL Ex. 11; Tr. pp. 48, 49).

The underpayments calculated by the Bureau for week ending September 6, 2002 through week ending May 3, 2003 amounted to wages of $5,962.75 and supplements of $2,535.00 for a total underpayment of $8,497.75 (DOL Ex. 11).

On October 18, 2006, the Bureau issued a Notice to Department of Jurisdiction to Withhold Payment to the County of Onondaga in the amount of $27,907.28 (DOL Ex. 9)

Project 2

On July 14, 1998, the Bureau issued a Prevailing Wage Rate Schedule for Onondaga County, effective through June, 1999, for Project 2 (DOL Ex. 17). The schedule established the following classifications, wages and supplements: for laborer, heavy/highway, wages of $17.34 per hour and supplemental benefits of $7.30 per hour; for carpenter, wages of $20.31 per hour and supplemental benefits of $7.16 per hour (DOL Ex. 17).

The Bureau subsequently issued a second Prevailing Wage Rate Schedule for the period from July 1, 1999 through June 30, 2000 (DOL 18). The second schedule set forth

for laborer, heavy/highway, an hourly rate of pay of $17.84 and an hourly rate of supplements of $7.50, and for carpenters an hourly rate of pay of $20.83 and an hourly rate of supplements of $7.24 (DOL Ex. 18).

On March 8, 2001, the Bureau received a Claim for Wage and Supplement Underpayment from James Hauswirth (DOL Ex. 14). Included with the claim were pay stubs and a personal logbook kept by the claimant on a day-to-day basis (DOL Ex. 14; Tr. p. 78).

On December 6, 2002, the Bureau served a Records Request Notice on the Village of Baldwinsville and Respondent (DOL Ex. 15). No records were submitted to the Bureau by either party (Tr. p. 81, 82).

The Bureau credited the Respondent with having paid $15 per hour as shown on the pay stubs submitted by the claimant and calculated the rest of the payments due based upon the work performed by the claimant and the wages and supplements required in the schedules (Tr. pp. 79-82). The completed audit showed two workers had been underpaid on Project 2 for the weeks ending June 6, 2000 through July 31, 1999 as follows: Anthony M. Dejohn was underpaid wages of $189.51 and supplements of $359.88 and James Hauswirth was underpaid wages of $64.74 and supplements of $94.58, for a total underpayment on the project of $708.71 (DOL Ex. 23).

On January 6, 2003, the Bureau issued a Notice to Department of Jurisdiction to Withhold Payment to the Village of Baldwinsville in the amount of $10,250 (DOL Ex. 20)

Project 3

On April 7, 1999, the Bureau issued a Prevailing Wage Rate Schedule for Project 3 (DOL Ex. 28). This schedule established the following wage and supplement information: for laborer, heavy/highway, group A, wages of $17.84 per hour and supplements of $7.50 per hour; for power equipment operator, heavy/highway, class B, wages of $21.77 per hour and supplements of $11.80 per hour; for brick mason, heavy/highway, wages of $19.00 per hour and supplements of $7.72 per hour (DOL Ex. 28).

On March 8, 2001, the Bureau received a Claim for Wage and/or Supplement Underpayment, including a personal log book and other supporting documentation, from James Hauswirth (DOL Ex. 24). Mr. Hauswirth claimed that Respondent paid him $15.00 per hour and did not pay or provide benefits on Project 3, and that Respondent did not pay overtime (DOL Ex. 24).

On December 9, 2002, the Bureau issued a Records Request Notice to the Village of Marcellus and Respondent (DOL Ex. 25).

The Village of Marcellus responded that it never received certified payroll records from Respondent and; the Bureau did not receive certified payroll records from Respondent in response to the request for records (Tr. p. 99).

The Bureau investigator reviewed the claim form of Mr. Hauswirth and, in the absence of any documents from the Respondent, and based upon the materials submitted and discussions with Mr. Hauswirth, constructed an audit which found underpayments to Anthony DeJohn in the amount of $833.89 in wages and $1,227.52 in supplements; and to James Hauswirth in the amount of $853.48 in wages and $1,307.01 in supplements for a total underpayment on Project 3 of $4,221.90 (DOL Ex. 32).

Project 4

On July 1, 2003, the Bureau issued a Prevailing Wage Rate Schedule for Project 4 (DOL Ex. 37). This schedule established, for the period of July 1, 2003 through June 30, 2004, the following wage and supplement information: laborer, heavy/highway, Group A, wages of $19.49 per hour and supplements of $9.40 per hour; operating engineer, heavy/highway, class A, wages of $24.35 per hour and supplements of $15.10 per hour (DOL Ex. 37).

On July 1, 2004, the Bureau issued a second Prevailing Wage Rate Schedule for Project 4 (DOL Ex. 38). This schedule established, for the period of July 1, 2004 though June 30, 2005, the following wage and supplement information: laborer, heavy/highway, group A, wages of $19.99 per hour and supplements of $10.15 per hour; operating engineer, heavy highway, group A, wages of $25.35 per hour and supplements of $15.85 per hour (DOL Ex. 38).

During the course of its investigation, the Bureau received a Claim for Unpaid Wage and/or Supplement Underpayment from seven individuals who worked on Project 4 (DOL Ex. 33).

On January 11, 2005, the Bureau issued a Payroll Records Request Notice to Respondent and to the County of Onondaga for payroll records for Project 4 (DOL Ex. 35).

The Bureau received certified payroll records for Project 4 from Onondaga County on November 16, 2006 (DOL Ex. 39; Tr. p. 116).

The Bureau investigator used the certified payrolls to establish the worker classifications, the hours worked on Project 4, and the amount paid by Respondent (Tr. p. 117, 118).

Based upon his review of the certified payrolls, the Bureau investigator constructed an audit which found underpayments due as follows: John Hauswirth, wages of $2,078.96 supplements of $1,055.60; Julee Lewis, wages of $639.68 supplements of $324.80; John Monette, wages of $3,625.18, supplements of $2,201.84; Leo Monette, wages of $779.20, supplements of $2,171.54; David Spoor, supplements of $117.00; Mark Sweeting, wages of $1,719.14; supplements of $872.90; and Kevin Williams, supplements of $19.50 (DOL Ex. 45; Tr. p. 117), for a total underpayment on one project of $15,605.34.

On August 5, 2004, the Bureau issued a Notice to Department of Jurisdiction to Withhold/Release Payment in the amount of $28,779.00 (DOL. Ex. 43).

Project 5

On July 1, 1997, the Bureau issued a Prevailing Wage Rate Schedule for Project 5 in Onondaga County (DOL Ex. 49, 50). This schedule established, for the period of July 1, 1997 through June 30, 1998, the following wage and supplement information: laborer, heavy/highway, group A, wages of $16.79 per hour, and supplements of $7.25 per hour; power equipment operator, heavy/highway, class A, wages of $21.95 per hour, and supplements of $10.60 per hour.

On July 1, 1998, the Bureau issued a Prevailing Wage Rate Schedule for Onondaga County, effective through June 30, 1999, for Project 2; that schedule was also in effect for Project 5 for the same time period and county (DOL Ex. 17). The schedule established the following classifications, wages and supplements: for laborer, heavy/highway, group A, wages of $17.34 per hour and supplemental benefits of $7.30 per hour; power equipment operator, heavy/highway, class B, wages of $21.77 per hour and supplements of $11.35 per hour; mason, heavy/highway, wages of $18.50 per hour and supplements of $7.62 per hour (DOL Ex. 17).

On July 1, 1999, the Bureau issued a Prevailing Wage Rate Schedule for Project 5 in Onondaga County, effective through June 30, 1999, for Project 5 (DOL Ex. 51). The schedule established the following classifications, wages and supplements: for laborer, heavy/highway, group A, wages of $17.84 per hour and supplemental benefits of $7.50 per hour; power equipment operator, heavy/highway, class B, wages of $21.77 per hour and supplements of $11.80 per hour; operator, heavy/highway, class A, wages of $22.65 per hour and supplements of $11.80 per hour; carpenter, wages of $20.83 per hour and supplements of $7.24 per hour; and ironworker, with wages of $19.50 per hour and supplements of $11.59 per hour (DOL Ex. 51).

In March, 2001, the Bureau received a Claim for Wage and/or Supplement Underpayment from James Hauswirth for work performed on Project 5; the claim including detailed records concerning work on Project 5 (DOL Ex. 46).

On December 6, 2002, the Bureau issued a Records Request Notice to Baldwinsville Central Schools and the Respondent (DOL Ex. 47).

In response to the request for records, the Bureau received certified payroll records from the school district (DOL Ex. 48; Tr. p. 154).

The Respondent failed to respond to the request or to provide certified payroll records or any supporting documentation concerning work on Project 5 (Tr. pp. 154, 155).

The Bureau investigator relied upon the certified payrolls, claim forms, employee statements, and supporting documentation to prepare an audit of the work performed and

wages paid on Project 5 (Tr. pp. 154, 155). The audit found underpayments due for the week ending June 5, 1998 through the week ending November 27, 1999, as follows: Anthony DeJohn, wages of $4,307.12 and supplements of $6.477.47; James Hauswirth, wages of $3,147.54 and supplements of $4,481.11; Salvatore Lombardo, supplements of $1,409.06; Brian Macvean, supplements of $1,288.20; James Monette, supplements of $695.42; John Monette, supplements of $949.02; Leo Monette, supplements of $362.40; William Monette, supplements of $131.60; Harry Roberts, supplements of $841.42 (DOL Ex. 56), for a total underpayment on the project of $24,090.36.

On January 6, 2003, the Bureau issued a Notice to Department of Jurisdiction to Withhold/Release Payment to the County of Onondaga requesting an additional amount to withhold $20,500 (DOL Ex. 58).

On August 5, 2004, the Bureau issued a Notice to Department of Jurisdiction to Withhold/Release Payment to the County of Onondaga in the amount of $28,779 (DOL Ex. 57).

Project 6

As set forth above, Project 6 involved a public work project for which Respondent entered into a stipulation with the Department in which it admitted to underpayments of wages and supplements on or about October 5, 2004 (DOL Ex. 59; Tr. p. 213), totaling $11,324.88.

General Findings of Fact

On all of the Projects, the Bureau investigator's record of conversations showed that officials of the project owners were aware of weekend and overtime work by the Respondent (DOL Ex. 7, 19, 29, 40, 52).

Respondent produced Brian MacVean, a prior employee who was the project superintendent on Project 2 (R. Ex. B; Tr. 256, 257). MacVean testified that there was no overtime worked on Project 2 (Tr. p. 259).

Respondent also submitted into evidence multiple documents concerning this matter, specifically a check dated October 18, 2002 to David Spoor (R. Ex. A), a non-notarized affidavit from Jimmy Monette (R. Ex. C), a check to David Spoor (R. Ex. D), a

hand written, undated calculation sheet (R. Ex. E), a second, similar calculation sheet (R. Ex. F), the Certificate of Incorporation of Royal-T, Inc. (R. Ex. G), a check to David Spoor dated February 13, 2004 (R. Ex. H), a check dated February 26, 2004 to "DMV" (R. Ex. I), and a credit application (R. Ex. J).

CONCLUSIONS OF LAW

Jurisdiction of Article 8

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law Article 8. Labor Law §§ 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." *Matter of Beltrone Constr. Co. v McGowan,* 260 A.D.2d 870, 871-872 (3d Dept. 1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

Since the East Syracuse – Minoa School District, Village of Baldwinsville, County of Onondaga, Village of Marcellus, and Baldwinsville Central School District, all public entities, are parties to the public work contracts for Projects 1, 2, 3, 4, 5 and 6, Article 8 of the Labor Law applies. Labor Law § 220 (2); and *see*, *Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984).

Classification of Work

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the

locality where the work is performed. The trade or occupation is determined in a process referred to as "classification." *Matter of Armco Drainage & Metal Products, Inc. v State of New York*, 285 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor*, 34 A.D.3 905, 906 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.' " *Matter of Nash v New York State Dept of Labor*, 34 A.D.3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor*, 154 A.D.2d 117, 120 (3d Dept. 1990), *affd* 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v Beame*, 15 N.Y. 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 A.D.2d 665 (3d Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992). The classifications used by the Bureau investigator were those either shown on the limited certified payrolls or, in the absence of information from the Respondent, established based upon the actual work performed by the Respondent's employees. The Respondent did not challenge the classifications thus established.

Underpayment Methodology

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

Dept. 1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

The Bureau investigator was faced with a complete lack of cooperation by the Respondent in that it failed to provide any documents in response to repeated requests for certified payrolls, time cards, or any material to substantiate the hours worked by its employees on the projects. The documents produced by the Respondent were either self-serving, contradicted by credible testimony and evidence produced by the Department, or irrelevant to the issues present in this matter. It was therefore acceptable and, in fact, necessary, for the Bureau to produce audits based upon the available credible information which included the workers' testimony and contemporaneous work logs, cancelled checks and other supporting documents; the evidence provided by representatives of the public owners; and what few certified payrolls that were received, which payrolls, on their face, showed a failure to pay or provided prevailing wages and supplements on the projects.

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 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, Respondent is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

Willfulness of Violation

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation. This

inquiry is significant because Labor Law § 220-b (3) (b) (1) [1] [2] 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

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

[2] "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.

contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Article 8 of the Labor Law, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v Roberts,* 128 A.D.2d 1006, 1006-1007 (3d Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v Hartnett,* 181 A.D.2d 1013, 1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v Hudacs,* 185 A.D.2d 483, 485 (3d Dept. 1992). The violator's knowledge may be actual or, where he should have known of the violation, implied. *Matter of Roze Assocs. v Department of Labor*, 143 A.D.2d 510; *Matter of Cam-Ful Industries, supra.* An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. *Matter of Scharf Plumbing & Heating, Inc. v Hartnett,* 175 A.D.2d 421.

In this case, Respondent signed a stipulation admitting that it willfully violated Article 8 in four separate cases. Even if that stipulation were not sufficient evidence of willfulness by itself, the record clearly shows the issuance of prevailing wage rate schedules for the projects in question to Respondent. The Respondent has never denied receiving the schedules or denied that it was subject to the provisions of Article 8 on all of the projects. Under these circumstances, it is clear that the violations found in each project were willful.

Substantially Owned-Affiliated Entities

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some indicia of a controlling ownership relationship exists or as "…an entity which exhibits any other indicia of control over the …subcontractor…,

regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,… power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity." In this matter, Joseph Monette has admitted that he was the sole owner, shareholder and officer of the variously named entities which performed work on the projects in question. Thus, they may all be deemed substantially-owned or affiliated entities and subject collectively to the findings of the Commissioner in this matter.

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, depending on when the violations occurred, 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 Article 8 of the Labor Law shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity. Joseph Monette admitted that he was the sole owner and shareholder of the different entities that performed work on the projects and, thus, both Mr. Monette individually and the various business entities involved are subject to the ban described above.

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 Respondent was completely uncooperative with the Bureau investigator during the course of the investigations; it failed to maintain payroll records; it received prevailing wage schedules for multiple projects but never requested clarification from the Bureau of its obligation to pay or provide the prevailing rate of wages and supplements to its workers on the projects while performing work on them; it signed a stipulation admitting to underpayments on the projects and agreeing to be found to have willfully violated Article 8. Given the facts established at the hearing, the Department's requested penalty of 25% should be assessed.

Liability under Labor Law § 223

Under Article 8 of the Labor Law, a prime contractor is responsible for its subcontractor's failure to comply with or evasion of the provisions of this Article. Labor Law § 223. *Konski Engineers PC v Commissioner of Labor*, 229 A.D.2d 950 (1996), *lv denied* 89 N.Y.2d 802 (1996). Such contractor's responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor's violation. *Canarsie Plumbing and Heating Corp. v Goldin*, 151 A.D.2d 331 (1989). Respondent performed work on Project 1 as a subcontractor of Prime. Consequently, Prime, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on Project 1.

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 Respondent underpaid wages and supplements due the identified employees in Project 1 the amount of $8,497.75; in Project 2 the amount of $708.71; in Project 3 the amount of $4,221.90; in Project 4 the amount of $15,605.34; in Project 5 the amount of $24,090.36 and in Project 6 the amount of $11,324.88

DETERMINE that Respondent is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Respondent to pay the prevailing wage or supplement rate in each of the cases set forth above was a separate "willful" violation of Article 8 of the Labor Law, resulting in six separate findings of willfulness; and

DETERMINE that Tri State Trucking, Leema Excavating, Inc., and J. M. Tri State Trucking, Inc., were "substantially owned-affiliated entities" on the projects;

DETERMINE that Joseph Monette is an officer of Leema Excavating, Inc. and of J. M. Tri State Trucking, Inc.; and

DETERMINE that Joseph Monette knowingly participated in the violation of Article 8 of the Labor Law; and

DETERMINE that Joseph Monette is a shareholder of Leema Excavating, Inc. and J. M. Tri State Trucking, Inc., who owned or controlled at least ten per centum of the outstanding stock and was one of the five largest shareholders;

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

DETERMINE that Prime is responsible for the underpayment, interest and civil penalty found due on Project 1 pursuant to its liability under Article 8 of the Labor Law; and

ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty) on all of the projects in this matter; and

ORDER that Respondent shall receive a credit for any amounts paid by Prime; and

ORDER that the Departments of Jurisdiction of the various projects remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at its address in Syracuse, New York (State Office Building, 333 East Washington Street Room 419, Syracuse, NY 13202); and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Respondent, 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

Dated: October 21, 2009
Albany, New York

Respectfully submitted,

Jerome Tracy, Hearing Officer