STATE OF NEW YORK: DEPARTMENT OF LABOR

In the Matter of

BACON & SEILER CONSTRUCTORS, INC., and JASON SEILER, as an officer and/or shareholder of BACON & SEILER CONSTRUCTORS, INC.,

Prime Contractor,

and

LEO CONSTRUCTION SERVICES, INC. dba LEO CONSTRUCTION & DEVELOPMENT INC., and MARC LEONARDIS, as officer and/or shareholder of LEO CONSTRUCTION SERVICES, INC. dba LEO CONSTRUCTION & DEVELOPMENT INC.,

Subcontractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for Marcellus CSD.

REPORT & RECOMMENDATION

Prevailing Wage Case
PRC No. 2010005694
Case ID: PW062011008640
Onondaga County

JAMES R. VANNOY & SONS CONSTRUCTION COMPANY, INC. dba JAMES & SONS CONSTRUCTION INC. and JAMES ALIBRANDI, as an officer and shareholder of JAMES R. VANNOY & SONS CONSTRUCTION COMPANY, INC. dba JAMES & SONS CONSTRUCTION INC.,

Prime Contractor,

and

LEO CONSTRUCTION SERVICES, INC. dba LEO CONSTRUCTION & DEVELOPMENT INC., and MARC LEONARDIS, as officer and/or shareholder of LEO CONSTRUCTION SERVICES, INC. dba LEO CONSTRUCTION & DEVELOPMENT INC.,

Subcontractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for Jordan Elbridge CSD.

Prevailing Wage Case
PRC No. 2009008573
Case ID: PW062011008641
Onondaga County

BELLOWS CONSTRUCTION SPECIALTIES LLC and KAREN M. BELLOWS, as officer and/or shareholder of BELLOWS CONSTRUCTION SPECIALTIES LLC,

Prime Contractor,

and

LEO CONSTRUCTION SERVICES, INC. dba LEO CONSTRUCTION & DEVELOPMENT INC., and MARC LEONARDIS, as officer and/or shareholder of LEO CONSTRUCTION SERVICES, INC. dba LEO CONSTRUCTION & DEVELOPMENT INC.,

Subcontractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for Onondaga Community College.

BACON & SEILER CONSTRUCTORS, INC., and JASON SEILER, as an officer and/or shareholder of BACON & SEILER CONSTRUCTORS, INC.,

Prime Contractor,

and

LEO CONSTRUCTION SERVICES, INC. dba LEO CONSTRUCTION & DEVELOPMENT INC., and MARC LEONARDIS, as officer and/or shareholder of LEO CONSTRUCTION SERVICES, INC. dba LEO CONSTRUCTION & DEVELOPMENT INC.,

Subcontractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for Chittenango CSD.

Prevailing Wage Case
PRC No. 2009001737
Case ID: PW062011008642
Onondaga County

Prevailing Wage Case
PRC No. 2010003926
Case ID: PW062011008661
Onondaga County

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

Pursuant to an Amended Notice of Hearing issued on August 9, 2016, a hearing was held on November 3, 2016, in Albany, New York and Syracuse, New York by videoconference. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues

raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Leo Construction and Development, Inc. (“Sub”) a subcontractor of Bacon and Seiler Constructors, Inc. (“Bacon and Seiler”), James and Son Construction Co. Inc. (“James and Son”), and Bellows Construction Specialties LLC (“Bellows”) complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of four Projects.[1]

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Evan Zablow, Attorney 2, of Counsel).

Sub appeared *pro se* in Syracuse, New York, and did not file an Answer to the charges in the Notice of Hearing.

Bacon and Seiler appeared *pro se* in Syracuse, New York, and did not file an Answer to the charges in the Notice of Hearing

James and Son received the Notice of Hearing as evidenced by the Domestic Return Receipt received into evidence (HO 5). James and Son did not appear at the hearing or file an Answer and is deemed in default.

Bellows was represented by counsel, and both Bellows and its counsel received the Notice of Hearing, as evidenced by the Domestic Return Receipt received into evidence (HO 5). Bellows filed an Answer to the charges in Notice of Hearing (HO 6). Neither Bellows nor its Counsel appeared at the hearing.

ISSUES

1. Did Sub pay the rate of wages or provide the supplements prevailing in the locality, on

[1] At all times during the investigation into the four Projects, including in the requests for documents, notices of violations, and audits entered into evidence, the Department identified Respondent subcontractor as “Leo Construction Services, Inc.”

each of the Projects and, if not, what is the amount of underpayment?

2. Was any failure by Sub to pay the prevailing rate of wages or to provide the supplements prevailing in the locality on each of the Projects "willful"?

3. Did any willful underpayment on each of the Projects involve the falsification of payroll records?

4. Is Leo Construction Services a "substantially owned-affiliated entity" of Sub?

5. Is Marc Leonardis a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of the Sub?

6. Is Marc Leonardis an officer of Sub who knowingly participated in a willful violation of Labor Law article 8[2]?

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

8. Should a civil penalty be assessed on each of the Projects and, if so, in what amount?

9. Pursuant to Labor Law Section 223, is Bacon and Seiler, as prime contractor Projects 1 and 2, liable for non-compliance or evasion by the subcontractor of its obligation to pay prevailing wages and/or supplemental benefits.

10. Pursuant to Labor Law Section 223, is James and Son, as prime contractor on Project 3, liable for non-compliance or evasion by the subcontractor of its obligation to pay prevailing wages and/or supplemental benefits.

11. Pursuant to Labor Law Section 223, is Bellows, as prime contractor on Project 4, liable for non-compliance or evasion by the subcontractor of its obligation to pay prevailing wages and/or supplemental benefits.

[2] In the Notice of Hearing, the Department proposes that the Hearing Officer should determine whether certain individuals are a "shareholder owning or controlling at least ten per centum of the outstanding stock of and/or ...one of the five largest shareholders" of the three prime contractors involved in the Projects. However, the Department does not allege any wrongdoing on the part of the prime contractors (HO 1). Therefore, pursuant to Labor Law §§ 220 and 220-b, any such findings would be irrelevant with regard to willfulness and, at best, premature with regard to the collection of an underpayment found by the Commissioner. (Labor Law § 220-b(2)(g)(iii))

FINDINGS OF FACT

PROJECT 1 – MARCELLUS CENTRAL SCHOOL DISTRICT

On or about November 18, 2008, Bacon and Seiler entered into a contract with the Marcellus Central School District ("Marcellus"), the Department of Jurisdiction, in Onondaga County, for a capital improvement project at Marcellus ("Project 1"). (DOL 6)[3] The Department designated Project 1 as PRC No. 0408053. (DOL 5A)[4]

On or about July 1, 2009, the Bureau issued a Prevailing Wage Rate Schedule for Onondaga County for the period July 1, 2009 through June 30, 2010 ("PRWS 1"). PRWS 1 set forth the amounts of wages and supplemental benefits which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project 1. PWRS 1 included the classification of carpenter, with wages of $23.18 per hour and supplements of $13.79 per hour. Overtime rates applied for, among other things, work over eight hours in a single day. (DOL 8; Tr. p 32)

Bacon and Seiler received a prevailing wage rate schedule at the time it entered into a contract with Marcellus. (DOL 6; Tr. pp 27, 28)

Sub was a subcontractor to Bacon and Seiler on Project 1. (DOL 4)[5]

Bacon and Seiler confirmed with Sub that Project 1 was subject to the Prevailing Wage Law. (Tr. p 116)

On or about April 6, 2011, the Bureau received a claim from an employee on Project 1. (DOL 2) The claimant alleged that Sub did not pay him for all hours worked at the correct rate of pay; specifically, the claimant claims that he worked for fourteen and one-half hours on Project 1 for the week ending May 16, 2010 - nine and one-half hours on May 13 and 5 hours on May 14 - but was not paid for all of the time worked. (DOL 2)

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[3] Department of Labor exhibits will be designated "DOL XX" throughout.

[4] Although the Department listed a different PRC number in the initial caption for this proceeding, testimony at the hearing made it clear that the correct number is that set forth in this Report and Recommendation. (Tr. p 26)

[5] Although the Department did not present direct evidence of the contractual agreement between Bacon and Seiler and Sub, the certified payrolls submitted to the Department by Sub clearly state that it was the subcontractor on Project 1. (DOL 4; Tr. pp 24, 25). Furthermore, Prime stated that Sub was its subcontractor pursuant to a purchase order (Tr. pp 109 – 112) and Sub responded to Department requests for records on Project 1 and at no time during the investigation or the hearing contested the Department's assertions concerning its contractual relationship to Bacon and Seiler.

In response to the claim, the Bureau commenced an investigation of Project 1. (DOL 1)

The Bureau requested Sub to furnish payroll records and other documents relating to the Project 1. (DOL 3)

Sub failed to comply with the initial request for documents. Pursuant to a subsequent request, Sub provided a certified payroll report, but failed to produce the other requested records such as time cards. (DOL 1; Tr. p 24)

The claimant identified the work he performed in a handwritten log, which the Department investigator determined was the work of a carpenter. The claimant also claimed that Sub paid him at the rate of $36.97 per hour for work performed on Project 1. (DOL 1; Tr. p 30 31)

Sub classified the claimant as a carpenter on its certified payrolls. (DOL 4)

Sub's certified payrolls showed that claimant worked for fourteen hours on Project 1 for the week ending May 16, 2010, and was paid at the rate of $36.97 per hour for all hours worked, for a total wage of $517.58. (DOL 2, 4)

In its audit, the Bureau credited Sub with having paid the claimant $486.73 for the week ending May 16, 2010. (DOL 7A)

The Department did not provide any evidence to substantiate its allegation that Sub paid the claimant $486.73 for the week ending May 16, 2010.

The Bureau determined that Sub employed the claimant on the Project 1 as a carpenter, and failed to pay or provide prevailing wages and/or supplements to the worker in accordance with the prevailing wage schedule in effect at the time, resulting in an underpayment of wages and supplements in the amount of $66.68. (DOL 7A; Tr. p 32 - 34)[6]

PROJECT 2 – CHITTENANGO CENTRAL SCHOOL DISTRICT

[6] In its Notice of Hearing, paragraph 12, the Department alleges that the underpayment of $66.68 occurred during the week ending March 16, 2010; testimony and documentary evidence at the hearing belie this allegation which was, presumably, a typographical error.

On or about July 1, 2010, Bacon and Seiler entered into a contract with the Chittenango Central School District ("Chittenango"), the Department of Jurisdiction, in Madison County, for reconstruction to multiple elementary, middle and high schools ("Project 2"). (DOL 41)

On or about July 1, 2010, the Bureau issued a Prevailing Wage Rate Schedule for Madison County for the period July 1, 2010 through June 30, 2011 ("PRWS 2"). PRWS 2 set forth the amounts of wages and supplemental benefits which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project 2. PWRS 2 included the classification of carpenter, with wages of $24.08 per hour and supplements of $13.17 per hour. Overtime rates applied for, among other things, work over eight hours in a single day. (DOL 44)

Bacon and Seiler received a prevailing wage rate schedule at the time it entered into a contract with Chittenango. (DOL 42)

Sub was a subcontractor to Bacon and Seiler on Project 2. (DOL 39)[7]

Bacon and Seiler confirmed with Sub that Project 1 was subject to the Prevailing Wage Law. (Tr. p 116)

On or about April 6, 2011, the Bureau received a claim from an employee on Project 2. (DOL 2) The claimant alleged that he was a carpenter on Project 2 and that Sub paid him at the rate of $37.25 per hour, but did not pay him for all hours worked at the correct rate of pay, specifically, that Sub did not pay him an overtime rate for certain hours. (DOL 37)

On or about June 28, 2011, the Bureau requested Sub to furnish payroll records and other documents relating to the Project 2. (DOL 38)

On or about November 9, 2011, Sub provided certified payroll records to the Bureau in response to the Bureau's request. (DOL 39)

Sub's certified payroll records identified two workers on Project 2. Although Sub did not classify the workers on its payrolls, the pay rate of $37.25 was the amount of wages and supplements required for the classification of carpenter on PWRS 2. (DOL 39, 44)

[7] As with Project 1, the Department did not present direct evidence of the contractual relationship between Bacon and Seiler and Sub. However, the payroll records submitted by Sub clearly show that it was a contractor on Project 2 with Bacon and Seiler, and Sub did not contest the Department's characterization of it as a subcontractor. (DOL 39)

The Department investigator used information from the certified payrolls, paystubs, and handwritten logs to prepare the audit. (Tr. p 63)

The Bureau determined that Sub employed two workers on the Project 2 as carpenters, and failed to pay or provide prevailing wages and/or supplements to the worker in accordance with the prevailing wage schedule in effect at the time, resulting in an underpayment of wages and supplements in the amount of $533.91. (DOL 43, 45)

PROJECT 3 – JORDAN ELBRIDGE HIGH SCHOOL

On or about May 5, 2010, James and Son entered into a contract with the Jordan Elbridge Central School District ("Jordan Elbridge"), the Department of Jurisdiction, in Onondaga County, for general construction work on a new field house ("Project 3"). (DOL 18)

On or about July 1, 2010, the Bureau issued a Prevailing Wage Rate Schedule for Onondaga County for the period July 1, 2010 through June 30, 2011 ("PRWS 3"). PRWS 3 set forth the amounts of wages and supplemental benefits which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project 3. PWRS 3 included the classification of carpenter, with wages of $25.09 per hour and supplements of $13.58 per hour. Overtime rates applied for, among other things, work over eight hours in a single day. (DOL 22)

James and Son received a prevailing wage rate schedule at the time it entered into a contract with Jordan Elbridge. (DOL 20)

On or about June 1, 2010, James and Son entered into a subcontract with Sub for work to be performed on Project 3. Marc Leonardis signed the subcontract as president of Sub. (DOL 19)

On or about April 6, 2011, the Bureau received a claim from an employee on Project 3. (DOL 14) The claimant alleged that he was a carpenter on Project 3 and that Sub paid him at the rate of $37.07 per hour, but did not pay him for all hours worked at the correct rate of pay, specifically, that Sub did not pay him an overtime rate for certain hours. (DOL 14)

On or about June 28, 2011, the Bureau requested Sub to furnish payroll records and other documents relating to the Project 3. (DOL 15)

Subsequent to issuance of the request for records, Sub provided certified payroll records to the Bureau in response to the Bureau's request. (DOL 16)

Sub's certified payroll records identified three workers on Project 3. Although Sub did not classify the workers on its payrolls, it usually paid its workers at the pay rate of $38.67, the amount of wages and supplements required for the classification of carpenter on PWRS 3. (DOL 16, 22)

The Department investigator used information from the certified payrolls, paystubs, and handwritten logs to prepare the audit. (Tr. pp 145, 146)

The Bureau determined that Sub employed three workers on the Project 3 as carpenters, and failed to pay or provide prevailing wages and/or supplements to the worker in accordance with the prevailing wage schedule in effect at the time, resulting in an underpayment of wages and supplements in the amount of $1108.29. (DOL 21, 22)

PROJECT 4 – ONONDAGA COMMUNITY COLLEGE

On or about March 1, 2010, Bellows entered into a contract with Onondaga Community College and Onondaga County ("OCC"), the Department of Jurisdiction, in Onondaga County, for Ferrante Hall renovations ("Project 4"). (DOL 30)

On or about July 1, 2010, the Bureau issued a Prevailing Wage Rate Schedule for Onondaga County for the period July 1, 2010 through June 30, 2011 ("PRWS 4"). PRWS 4 set forth the amounts of wages and supplemental benefits which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project 4. PWRS 4 included the classification of carpenter, with wages of $25.09 per hour and supplements of $13.58 per hour. Overtime rates applied for, among other things, work over eight hours in a single day. (DOL 33)

Bellows received a prevailing wage rate schedule at the time it entered into a contract with OCC. (DOL 30)

On or about February 3, 2010, Bellows entered into a subcontract with Sub for work to be performed on Project 4. Marc Leonardis signed the subcontract as president of Sub. (DOL 31)

On or about April 6, 2011, the Bureau received a claim from an employee on Project 4. (DOL 26) The claimant alleged that he was a carpenter on Project 4 and that Sub paid him at the rate of $38.67 per hour, but did not pay him for all hours worked at the correct rate of pay, specifically, that Sub did not pay him an overtime rate for certain hours. (DOL 26)

On or about June 28, 2011, the Bureau requested Sub to furnish payroll records and other documents relating to the Project 3. (DOL 27)

Subsequent to issuance of the request for records, Sub provided certified payroll records to the Bureau in response to the Bureau's request. (DOL 28)

Sub's certified payroll records identified two workers on Project 4. Although Sub classified its workers as carpenters and in most cases paid the workers $38.52 per hour for all hours worked. (DOL 28)

The Department investigator used information from the certified payrolls, paystubs, and handwritten logs to prepare the audit. (Tr. pp 157 - 160)

The Bureau determined that Sub employed two workers on the Project 4 as carpenters, and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time, resulting in an underpayment of wages and supplements in the amount of $255.08. (DOL 34)

Sub worked on public work projects other than the four in question at some point in time. (DOL 12)

The Department did not produce any evidence concerning whether Marc Leonardis was a shareholder of Sub.

Leo Construction Services, Inc., is a separate corporate entity from Leo Construction and Development, Inc.; it was dissolved by proclamation on April 25, 2012. (DOL 11) Leo Construction Services, Inc., was created on October 30, 2013. (DOL 11) The agent for service of process for Leo Construction Services, Inc., is a third corporate entity, KL Design and Construction, Inc., also incorporated in 2013, with attention directed to Marc Leonardis. Eventually, in 2014, KL Design and Construction, Inc., changed its name to Leo Construction Services, Inc.

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York State Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work projects[8]. 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

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

> 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.*

Marcellus, Chittenango, Jordan Elbridge, and OCC, all public entities, were party to the public work contracts in Projects 1 through 4. The contracts involved construction-like labor paid for by public funds. Finally, the work products were clearly for the use or other benefit of the general public. Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts,* 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]). Although certain contracts may have been performed pursuant to work orders rather than formal contracts, ancillary contracts are covered by Labor Law § 220. (*Matter of Pyramid Company of Onandaga v Hudacs,* 193 AD2d 924 [1993]).

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]).

In the four Projects, Sub's own certified payrolls either listed the workers as carpenters or showed hourly wages equal to the carpenter classification set forth in the applicable Prevailing Wage Schedule. Furthermore, the worker claimant performed work that fell within the

classification of carpenter. Therefore, the Department's classification of the workers as carpenters is appropriate.

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]).

The Department relied upon Sub's payroll records as well as the claimant's work logs when Sub's payroll records failed to properly show daily hours and account for overtime. Accordingly, the methodology used is reasonable.

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]),[9] 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).

The claim in this matter was received by the Department in April of 2011, but the Department took little action until 2016. The Department witness did not adequately explain the reason for the Department's lack of significant action until his involvement in 2016, saying only that Sub's failure to provide documents caused a delay in the investigation. While that may be the case, a delay of five years is not warranted based upon the facts presented at the hearing. Accordingly, interest should be waived for a period of approximately five years, from April 6, 2011 through June 8, 2016, the point at which the Department produced its audits.

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

[9] 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). I do not perceive any substantial prejudice in the respondents' ability to defend against these claims as a result of the delay—the lapse of time does not change the fact that true and accurate records establishing that the wages and benefits were properly paid do not exist. The Bureau sought records evidencing that wages and benefits were properly paid as early as March 2000. It in fact received some payroll records in 2000 and 2001, which were not true, complete or accurate, and which were determined to have been falsified. The respondents' difficulty in defending against the Bureau's claim results not from the passage of time but from Apollo's and Apollo Construction's inability to produce true, accurate and complete records, which they knew the Bureau sought as early as 2000 and 2001. Only true, accurate and contemporaneously maintained records establishing that the required prevailing wages and supplements were paid 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).

because Labor Law § 220-b (3) (b) (1) 10 provides, among other things, that when two final determinations of a "willful" failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

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

[10] "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 willfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the 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.

familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

Sub demonstrated through its own payrolls that it was cognizant of the various Prevailing Wage Rate Schedules in effect at the time of the Projects, as it usually paid the correct hourly rates for wages and supplements to its workers. However, Sub failed to pay overtime as required. Given that Sub not only should have known, but actually knew, that it was required to pay certain hourly rates pursuant to the schedules, its failure to pay overtime as required by those schedules is willful. However, I note that the Projects were conducted almost simultaneously, and Sub argued vigorously that it did not fail it in its obligation to pay the correct wages. Based upon the facts in this matter, I find that there should be a single willful violation for the four Projects involved in this hearing.

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).

It is clear from the record that Sub failed to meet its obligation to maintain true and accurate payroll records, and failed to pay overtime as required by the various Prevailing Wage Rate Schedules in effect for the Projects. However, I do not find, particularly in light of the limited workers affected and the small amounts of actual underpayments, that such failure rises to the level of falsification as contemplated by this section of the Labor Law.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one 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).

The record shows that Marc Leonardis was president of Leo Construction and Development, Inc., and is connected in some way to Leo Construction Services, Inc. The Department asks, based upon this information alone, for Leo Construction Services Inc. to be found to be a substantially owned-affiliated entity of Leo Construction and Development, Inc. The Department did not show that the two entities have common employees, equipment, locations, projects, or other indicia to support its position. I therefore find that the Department did not support its allegation that Leo Construction Services is a substantially owned-affiliated entity of Leo Construction and Development, Inc.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any such contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of Labor Law article 8 shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

Evidence produced at the hearing demonstrates that Marc Leonardis was the president of Sub who knowingly participated in the preparation of payroll records that failed to demonstrate Sub's compliance with the Labor Law.

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 has requested a 25% penalty. The record shows that Sub was a relatively small business, that it was not especially cooperative, and that the violations involved only a few workers for small amounts of money. The Department did not provide any evidence concerning Sub's history with the Department. Based upon these factors I reject the Department's request for a penalty of 25% and find that a penalty of 5% is reasonable.

LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor's failure to comply with, or evasion of, the provisions of Labor Law article 8. (Labor Law § 223; *Konski Engineers PC v Commissioner of Labor,* 229 AD2d 950 [1996], *lv denied* 89 NY2d 802 [1996]). Such contractor's responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor's violation. *(Canarsie Plumbing and Heating Corp. v Goldin,* 151 AD2d 331 [1989]). Sub performed work on the projects as a subcontractor of the various named prime contractors. Consequently, the prime contractors are responsible for the total amounts found due from their Sub on the four projects in which they were involved.

Bacon and Seiler requested 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. 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. In Prime's case, it failed to meet the

test set forth above. Therefore, the Commissioner may not waive the penalty in full. The regulation also states at § 221.1 (b) that, when uncontroverted evidence of some, but not all, of the factors set forth in the regulation exist, the Commissioner may reduce the civil penalty to an amount less than that which would otherwise be assessed. I find that, insofar as the penalty has already been reduced to 5% (see above) no further reduction shall be made.

RECOMMENDATIONS

Based upon the weight of the evidence set forth in the record as a whole, I

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

DETERMINE that Sub underpaid wages and supplements due the identified employees as follows:

- Project 1 - $66.68;
- Project 2 - $533.91;
- Project 3 – $1108.29;
- Project 4 - $255.08; and

DETERMINE that Sub is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment, except that no interest shall be assessed for the period April 6, 2011 through June 8, 2016; and

DETERMINE that the failure of Sub to pay the prevailing wage or supplement rate on all four projects shall result in a single finding of willfulness for all four projects under Labor Law article 8; and

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

DETERMINE that Marc Leonardis is an officer of Sub who knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Sub be assessed a civil penalty in the amount of 5% of the underpayment and interest due; and

DETERMINE that Bacon and Seiler, James and Son, and Bellows, as prime contractors, respectively, on Projects 1 through 4, are responsible for the underpayments, interest, and civil penalties found due on Projects 1 through 4; and

ORDER that the Bureau compute the total amount due (underpayment, interest – less the period for which no interest shall be calculated - and civil penalty) for each of the four projects; and

ORDER that upon the Bureau's notification, Sub shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Building, 333 East Washington Street, Room 419, Syracuse, NY 13202; and

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

Dated: August 30, 2017
Albany, New York

Respectfully submitted,

Jerome Tracy, Hearing Officer