STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

BOLAND'S EXCAVATING & TOPSOIL, INC.; and MICHAEL J. BOLAND, as an officer and/or shareholder of BOLAND'S EXCAVATING AND TOPSOIL, INC.; and BOLAND'S NORTH, INC., a substantially owned-affiliated entity of BOLAND'S EXCAVATING & TOPSOIL, INC.;

Prime Contractor,

and

CHRYSTAL MCCALL D/B/A MCCALL MASONRY and CHARLES ZIMMER, JR. T/A MCCALL MASONRY;

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 the County of Broome, New York.

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REPORT & RECOMMENDATION

Prevailing Wage Rate
PRC No. 2006008653
Case ID: PW02080001
Broome County

In the Matter of

M.L. CACCAMISE ELECTRIC CORP., and MICHAEL L. CACCAMISE, as an officer and/or shareholder of M.L. CACCAMISE ELECTRIC CORP.;

Prime Contractor,

and

CHRYSTAL MCCALL D/B/A MCCALL MASONRY and CHARLES ZIMMER, JR. T/A MCCALL MASONRY;

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 the Village of Oswego, New York.

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Prevailing Wage Rate
PRC No. 2007003915
Case ID: PW02080002
Tioga County

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In the Matter of

CHRYSTAL MCCALL D/B/A MCCALL MASONRY
and CHARLES ZIMMER, JR. T/A MCCALL MASONRY;

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 the laborers, workers and mechanics employed on a public work project for the City of Auburn, New York.

Prevailing Wage Rate
PRC No. 07001557
Case ID: PW02080025
Cayuga County

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In the Matter of

NELSON AND STREETER CONSTRUCTION COMPANY, INC. D/B/A AIRPORT STRIPING; and HENRY W. STREETER, HENRY W. STREETER, III and ELOISE N. STREETER as officers and/or shareholders of NELSON AND STREETER CONSTRUCTION COMPANY INC. D/B/A AIRPORT STRIPING; and H W STREETER PAVING & EXCAVATING, a substantially owned-affiliated entity of NELSON AND STREETER CONSTRUCTION COMPANY, INC. D/B/A AIRPORT STRIPING;

Prime Contractor,

and

BRANDY ZIMMER D/B/A BRANDY'S MASONRY
and CHARLES ZIMMER, JR. T/A BRANDY'S MASONRY;

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 the Village of Watkins Glen, New York.

Prevailing Wage Rate
PRC No. 2007007238
Case ID: PW022008012803
Schuyler County

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In the Matter of

BRANDY ZIMMER D/B/A BRANDY'S MASONRY
and CHARLES ZIMMER, JR. T/A BRANDY'S MASONRY;
and CHRYSTAL MCCALL D/B/A MCCALL MASONRY
and CHARLES ZIMMER, JR. T/A MCCALL MASONRY;

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 the laborers, workers and mechanics
employed on a public work project for the Town
of Owego, New York.

Prevailing Wage Rate
PRC No. 2008004423
Case ID: PW022008010501
Tioga County

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In the Matter of

BRANDY ZIMMER D/B/A BRANDY'S MASONRY
and CHARLES ZIMMER, JR. T/A BRANDY'S MASONRY;

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 the laborers, workers and mechanics
employed on a public work project for the Town
of Owego, New York.

Prevailing Wage Rate
PRC No. 2008006208
Case ID: PW022008012804
Tioga County

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In the Matter of

BRANDY ZIMMER D/B/A BRANDY'S MASONRY
and CHARLES ZIMMER, JR. T/A BRANDY'S MASONRY;

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 the laborers, workers and mechanics
employed on a public work project for the Town
of Owego, New York.

Prevailing Wage Rate
PRC No. 2008004423
Case ID: PW022008014454
Tioga County

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In the Matter of

BRANDY ZIMMER D/B/A BRANDY'S MASONRY
and CHARLES ZIMMER, JR. T/A BRANDY'S MASONRY;

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 the laborers, workers and mechanics
employed on a public work project for the Town
of Owego, New York.

Prevailing Wage Rate
PRC No. 2008008691
Case ID: PW022008014629
Tioga County

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

Pursuant to a Notice of Hearing issued on April 6, 2016, a hearing was held on July 18, 2016, in Albany, New York and Glendale, 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 Charles Zimmer, Jr., trading as either Brandy's Masonry or McCall Masonry ("Respondent") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of two public work contracts, one as prime contractor on a contract for a project for the City of Auburn, New York ("Project 1"); the other as a subcontractor of Nelson and Streeter Construction Company, Inc. ("Prime"), in the performance of a contract for a public work project for the Village of Watkins Glen, New York ("Project 2").

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Larissa Bates, Senior Attorney, of Counsel).

Respondent appeared pro se and filed an Answer to the charges incorporated in the Notice of Hearing.

Prime did not appear at the hearing, and failed to submit an Answer. Regular mail to Prime was not returned, and Prime is therefore deemed to have been properly served with notice of this proceeding, and is in default.

At the time of the hearing, Department counsel represented to the Hearing Officer that the Department had settled six of the eight cases set forth in the Department's Notice of Hearing, leaving only Project 1 - Prevailing Rate Case Number 07001557, the City of Auburn - and Project 2 - Prevailing Rate Case Number 2007007238, the Village of Watkins Glen - to be dealt with at the hearing. Respondent agreed that the six cases had been settled.

At the hearing, Department counsel also stated that the Department withdrew its cases against Chrystal McCall, d/b/a McCall Masonry, and Brandy Zimmer, d/b/a Brandy's Masonry, leaving only Charles Zimmer Jr., and Charles Zimmer, Jr., as Brandy's Masonry and McCall Masonry as the Respondent.

ISSUES

1. Did Respondent 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 Respondent to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Were the payrolls maintained by Respondent falsified?
4. Is Charles Zimmer, Jr., an officer of Respondent who knowingly participated in a willful violation of Labor Law article 8?
5. Is H. W. Streeter Paving and Excavating a substantially owned-affiliated entity of Prime?
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 two separate projects involving public work performed by Respondent.

Project 1 involved a public work contract between Respondent and the City of Auburn, New York, in Cayuga County for sidewalk and curb replacement. (DOL 45, 47)

Project 2 involved a public work contract between Prime and the Village of Watkins Glen, New York in Schuyler County for the reconstruction of First Street. (DOL 56, 57)

PROJECT 1

On March 2, 2007, the City of Auburn ("Auburn"), the Department of Jurisdiction for Project 1, notified the Department of Project 1 and requested a prevailing wage rate schedule. (DOL 44)

On June 23, 2007, Respondent entered into a contract with Auburn for Project 1("Auburn Contract"). Charles Zimmer was a party who signed on behalf of the bidder, McCall Masonry. (DOL 45)

The Auburn Contract supporting documents contained the Prevailing Wage Rate Schedule for Cayuga County, for the period July 1, 2006 through June 30, 2007, issued by the Bureau ("Auburn Schedule 1"). (DOL 47)

The Bureau subsequently issued the Prevailing Wage Rate Schedule for Cayuga County for the period July 1, 2007 through June 30, 2008 ("Auburn Schedule 2"). (DOL 48)

In April and May of 2008, the Bureau received complaints from workers on Project 1, alleging that they were not properly paid. (DOL 42)

On April 21, 2008, the Bureau issued a Payroll Records Request Notice to Respondent. (DOL 43)

During the course of the investigation, the Bureau received the Respondent's certified payrolls for Project 1, as well as other relevant material, including invoices and inspector's daily reports. (DOL 51)

The Bureau investigator determined that during the course of Project 1, workers performed the work of laborers, masons and operating engineers. The investigator's determination was based upon the scope of work for Project 1, the statements of the complainant workers, invoices for materials received, and the inspector's daily reports. (DOL 49; T pp. 37, 38)

Auburn Schedule 2 set forth the prevailing rate of wages and supplements for Laborers, Masons, and Operating Engineers in the Heavy/Highway category as follows:

Laborer Group B - $25.80/hour wages and $11.00/hour supplements;

Mason - $26.43/hour wages and $13.67/hour supplements;

Operating Engineer Class A - $27.30/hour wages and $18.65/hour supplements;

Operating Engineer Class B - $26.45/hour wages and $18.65 supplements. (DOL 48)

The Bureau determined that Respondent employed thirteen workers on Project 1 from the week ending 8/25/2007 through the week ending 11/24/2007. Because Respondent's payroll records did not reflect all of the workers employed, the Bureau relied upon employee log books,

complaint forms, invoices, and the engineering log books and identified six of the workers as "John Doe." The Bureau credited Respondent with having paid the minimum wage to the John Doe workers, using the assumption that no workers received at least the minimum wage in effect at the time. (DOL 49; T pp. 39 – 45)

The Bureau determined that Respondent employed the thirteen workers on Project 1 in the classifications of Laborer Group B, Mason, Operating Engineer Group A, and Operating Engineer Group B, and underpaid these workers $26,307.87 in wages and $22,781.04 in supplements for a total underpayment of $49,088.91. (DOL 50)

The Bureau issued a Notice to Withhold Payment to Auburn, which resulted in Auburn acknowledging that it withheld $5,000.00 on Project 1. (DOL 53)

PROJECT 2

On October 3, 2007, the Village of Watkins Glen ("Watkins Glen"), the Department of Jurisdiction for Project 2, notified the Department of Project 2 and requested a prevailing wage rate schedule. (DOL 55)

On June 18, 2008, Watkins Glen entered into a contract with Prime for Project 2, the First Street Reconstruction Project ("Watkins Glen Contract"). (DOL 56)

The Watkins Glen Contract supporting documents contained the Prevailing Wage Rate Schedule for Schuyler County, for the period for the period July 1, 2007 through June 30, 2008, issued by the Bureau ("Watkins Glen Schedule 1"). (DOL 57)

The Bureau subsequently issued the Prevailing Wage Rate Schedule for Schulyer County for the period for the period July 1, 2007 through June 30, 2008 ("Watkins Glen Schedule 2"). (DOL 59)

On July 20, 2009, Respondent Brandy's Masonry entered into a contract with Prime for Project 2 ("Watkins Glen Subcontract"). Charles Zimmer, Jr., was the owner of Brandy's Masonry. (DOL 58; T pp. 85, 86)

During the course of the investigation, the Bureau received the Respondent's certified payrolls for Project 2, as well as other relevant material, including invoices and inspector's daily reports. (DOL 61, 63)

The Bureau investigator determined that during the course of Project 2, workers performed the work of laborers and masons. The investigator's determination was based upon the scope of work for Project 1, the statements of the complainant workers, invoices for materials received, and the inspector's daily reports. (DOL 61, 63)

Watkins Glen Schedule 2 set forth the prevailing rate of wages and supplements for Laborers, and Masons as follows:

Laborer Group B - $21.03/hour wages and $12.46/hour supplements;

Mason - $26.29/hour wages and $15.65/hour supplements. (DOL 61)

The Bureau determined that Respondent employed seven workers on Project 2 from the week ending 6/28/2008 through the week ending 7/26/2008. Because Respondent's payroll records did not reflect all of the workers employed, the Bureau relied upon employee log books, complaint forms, invoices, and the engineering log books and identified two of the workers as "John Doe." The Bureau credited Respondent with having paid the minimum wage to the John Doe workers, using the assumption that the workers would not work for no pay. (DOL 61)

The Bureau determined that Respondent employed the seven workers on Project 2 in the classifications of Laborer Group B, and Mason, and underpaid these workers $2167.21 in wages and $1998.66 in supplements for a total underpayment of $4165.87. (DOL 62)

In addition to settling multiple cases with the Department as noted by Department Counsel and conceded by Respondent at the hearing, Respondent was convicted of a criminal violation of Article 8 – Willful Failure to Pay Prevailing Wages - in September, 2012. (DOL 19; T pp. 9, 10)

The Department investigator became involved with the investigation in June of 2007; upon referring the matter for criminal prosecution, the Department took no action until the criminal matters' resolution in 2012. (T pp. 77, 78)

Prime is a corporation, shown to be active in the New York State Department of State Division of Corporations records, with its principal office located at 70 Sagetown Road, Pine City, New York, 14871. Henry W. Streeter III is the Chief Executive Officer of Prime, with an address of PO Box 184 Pine City, New York, 14871 . The address for service of process on Prime is Nelson and Streeter Construction Company, Inc., Airport Striping, PO Box 184 Pine City, New York, 14871. (DOL 65)

As shown in a yellow pages advertisement, HW Streeter Paving & Excavating ("HW Streeter") is a business involved in paving and excavating, with an address of 70 Sagetown Road, Pine City, New York, 14871. The same advertisement has an internet link to "nelsonandstreeter.com." (DOL 66)

Henry W. Streeter signed as President of Prime on the Watkins Glen Contract. (DOL 56)

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[1]. 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*

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

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.*

Recently 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.*

The City of Auburn and the Village of Watkins Glen, both public entities, are parties to the public work contracts in question. The contracts involved sidewalk and curb replacement, which required construction-like labor paid for by public funds. Finally, the work product is clearly for the use or other benefit of the general public. Labor Law article 8 applies.

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 classified workers on the Projects pursuant to the scope of work for the Projects, the statements of the complainant workers, invoices for materials received, and the inspector's daily reports. I find the classifications reasonable.

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]).

Evidence in the record established that the certified payrolls of the Respondent did not accurately reflect the workers on the job sites at all times. Under those circumstances, it was reasonable for the investigator to use all of the sources available to determine the days and hours worked, as well as to assign underpayments to "John Doe" workers.

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]), 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).

Consequently, Respondent is responsible for the interest on the underpayments at the 16% per annum rate from the date of underpayment to the date of payment. However, interest should be waived for the period of time the Department chose not to prosecute this matter, such period being from mid – 2007 to mid – 2012, or five years.

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) [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 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

[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 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.

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

The evidence in this matter warrants a finding of willfulness.

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 Respondent failed to meet its obligation to maintain true and accurate payroll records, and I find the evidence set forth, such as conflicts between the certified payrolls and other credible reports concerning workers on the Projects, shows deliberate, intentional falsification, and, therefore, that Respondent's willful failure to pay or provide prevailing wages and/or supplements involved 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).

The Department alleges that HW Streeter is a substantially owned-affiliated entity of Prime. The facts established in this matter show similar addresses for the entities and a single link on an internet page. There is no evidence of similar employees, equipment, shareholders, or projects. Absent such proof, I do not find that HW Streeter is a substantially owned-affiliated entity of Prime.

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.

The record shows that Charles W. Zimmer, Jr., was the owner of McCall Masonry and Brandy's Masonry, and is therefore personally subject to the willful violations in this matter.

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 record shows a failure to cooperate, serious violations, record-keeping violations, and criminal behavior. Under these circumstances, the Department's request for 25% civil penalty 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]). Respondent performed work on the Project 2 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 2.

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 on two Projects in the amount of $49,088.91 on Project 1 and $4,165.87 on Project 2; and

DETERMINE that Respondent is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment however, five years' worth of interest shall be removed from this calculation as set forth above; and

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

DETERMINE that the willful violation of Respondent involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Charles W. Zimmer, Jr., was the owner of McCall Masonry and Brandy's Masonry and knowingly participated in the violation of Labor Law article 8; and

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 of 25% due on Project 2, pursuant to its liability under Labor Law article 8; and

ORDER that the Bureau compute the total amount due for each Project (underpayment, interest less five years, and civil penalty); and

ORDER that for Project 1 the City of Auburn 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 State Office Building, 44 Hawley Street, Room 908, Binghamton, NY 13901; and

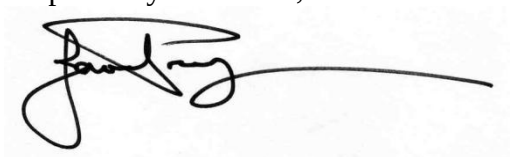
ORDER that if any withheld amount is insufficient to satisfy the total amount due, Respondent, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; and

ORDER that, for Project 2, upon the Bureau's notification, Respondent shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Building, 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.

Dated: September 21, 2016
Albany, New York

Respectfully submitted,



Jerome Tracy, Hearing Officer