

IN THE MATTER OF

EASTLAND CONSTRUCTION, INC.,

and

NANCY SCHULMAN and ALLAN G. SCHULMAN,
both Individually as officers and/or two of the five largest
shareholders of the corporation

Prime Contractor

and

McINTOSH INTERIORS, LLC, and ERIKA BARNETT,
Individually, and as an officer and managing member of the
corporation; and 4618 FOSTER AVE., LLC, a substantially-
owned affiliated entity

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 workers employed on a public work
project known as the Addition to the New City Elementary
School, in New City, New York.

**DEFAULT
REPORT
&
RECOMMENDATION**

**Prevailing Wage Rate
Case No. 2007001118
PW11 2010010014**

Rockland County

IN THE MATTER OF

LORENCIN CONTRACTING CORP.,

and

LORRAINE DI NARDI,

Individually as one of the five largest shareholders of the corporation

Prime Contractor

and

McINTOSH INTERIORS, LLC, and ERIKA BARNETT,

Individually, and as an officer and managing member of the corporation; and 4618 FOSTER AVE., LLC, a substantially-owned affiliated entity

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 workers employed on a public work project known as the Construction of the Campus Fun and Learn Center, Rockland Community College, in Suffern, New York.

Prevailing Wage Rate
Case No. 2008002268
PW11 2010010212

Rockland County

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on October 5, 2012 in Albany, New York and by videoconference with White Plains, 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 McIntosh Interiors, LLC ("Sub" or "McIntosh") a subcontractor of Eastland Construction, Inc. in Project #1 ("Project #1 Prime" or "Eastland") and Lorencin Contracting Corp. in Project #2 (Project #2 Prime or "Lorencin") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving an addition to the New City Elementary School ("Project #1" or "New City Project") for Clarkson Central School District ("Project #1 Department of Jurisdiction"), and the construction of the Campus Fun and Learn Center at Rockland Community College ("Project #2" or Rockland CC Project") for the County of Rockland Department of General Services ("Project #2 Department of Jurisdiction").

HEARING OFFICER DESIGNATION

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz, (Louise Roback, Esq., of counsel).

There was no appearance made by, or on behalf of and of the parties in this proceeding. However, Scott M. Albrecht, Esq., the attorney for Lorencin, did submit a letter dated October 2, 2012 offering evidence on the issue of the waiver of the assessment of a civil penalty pursuant to 12 NYCRR 221.1(a).

FINDINGS OF FACT

On August 24, 2012, the Department duly served a copy of the Notice of Hearing on McIntosh, Eastland, Lorencin, and all other interested parties via regular and certified mail, return receipt requested. Signed Return Receipts evidencing receipt of the Notice of Hearing by all parties, were entered into evidence as Hearing Officer Exhibit 1. On September 14, 2012, the Department served an additional copy of the Notice of Hearing on McIntosh by serving the New York State Department of State. The Receipt of Service by the Department of State was entered

into evidence as Hearing Officer Exhibit 4. The Notice of Hearing scheduled an October 5, 2012 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

McIntosh, Eastland, and Lorencin failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. Eastland sent correspondence indicating that it would not appear (HO Exs. 5, 6, 7); and the attorney for Lorencin sent a letter indicating that he would not appear on behalf of this client and setting forth evidence in support of waiving the assessment of a civil penalty against Lorencin. (HO Ex.8) As a consequence, the parties are in default in this proceeding.

The Notice of Hearing alleges that McIntosh underpaid wages and supplements to its workers in the amount of \$20,276.69 on the New City Project and that Eastland is responsible for McIntosh's underpayment pursuant to Labor Law § 223. The Notice of Hearing further alleges that McIntosh underpaid wages and supplements to its workers in the amount of \$18,824.77 on the Rockland CC Project and that Lorencin is responsible for McIntosh's underpayment pursuant to Labor Law § 223.

Prior to the hearing, Lorencin paid the full amount alleged by the Department to be owed by McIntosh as an underpayment in the Rockland CC Project, or \$18,824.77, inclusive of interest at a rate of 6% per annum (See, DOL Ex. 29C; T. 57), which the Department deemed sufficient to resolve Lorencin's Article 8 liability. (T. 57, 65)

The Department produced evidence indicating that the Clarkson Central School District, the Project #1 Department of Jurisdiction, has withheld the amount of \$39,624.04 as a result of the Department's Notice to Department of Jurisdiction to Withhold Payment. (DOL Ex. 16) There was no withholding in the Rockland CC Project. (DOL Ex. 31, 64)

WILLFULNESS

In the Notice of Hearing and in closing arguments the Department raised the issue that McIntosh willfully underpaid its workers on both projects. (HO Ex. 1; T. 65) However, the Department failed to specifically address this issue of willful underpayments with respect to either project during the hearing. This inquiry into the willfulness of the underpayments is significant because Labor Law § 220-b (3) (b) (1) 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]; see 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 familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

A review of the record indicates that the Department did not produce the sub-contract documents for the New City Project so there is no indication in the record that McIntosh received notice from Eastland that this was a public work project or what the prevailing rate of wages was for this project. However, the record does contain Payroll Reports prepared by McIntosh indicating that McIntosh was aware that it was required to pay prevailing wages to its employees and benefits to the employees’ union. (DOL Ex. 8) The record indicates that these Payroll Reports were accurate with respect to the hours reported and the wages paid. (T. 40-41) The Payroll Reports were false with respect to the payment of supplemental benefits as McIntosh certified that the benefits were paid to the unions when they were not paid. (T. 40) The statements on the Payroll Reports indicate that McIntosh was aware it was required to pay benefits for its employees and the failure to disclose the non-payment of supplemental benefits to its employees is an indication that McIntosh knowingly and intentionally acted to deceive Eastland and the Department of Jurisdiction. I find this is sufficient to find that McIntosh’s failure to pay supplemental benefits was willful.

In the Rockland CC Project, the Department produced the sub-contract agreement between McIntosh and Lorencin that specifically referenced that the “Prevailing Rate Schedule #PRC NO. 2008002268 – dated March 1, 2008 is included in this project.” (DOL Ex. 24) Therefore, McIntosh had actual knowledge of its obligation to pay its workers the prevailing wage and supplemental rate. However, as in the New City Project, McIntosh prepared Payroll Records indicating that it paid the prevailing wages and supplemental benefits when it did not pay supplemental benefits to the employees’ union as represented. (DOL Ex. 25; T. 54) McIntosh had actual knowledge that it was required to pay benefits for its employees and it acted knowingly, intentionally or deliberately when it failed to pay the supplemental benefits to its employees and then created false Payroll Reports to hide the non-payment. I find McIntosh’s failure to pay its workers prevailing wages in the Rockland CC Project was also willful.

FALSIFICATION

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, 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>).

It is clear from the record that McIntosh failed to meet its obligation to maintain true and accurate payroll records. It is also clear from the record that such failure rises to the level of falsification as contemplated by this section of the Labor Law. It is clear that McIntosh indicated in its Payroll Reports for both the New City Project and the Rockland CC Project that it paid benefits on behalf of its employees to their unions when, in fact, it did not make such payments. I find, in light of the evidence set forth above, that McIntosh’s willful failure to pay or provide prevailing supplements as indicated on the payroll reports involved the falsification of these payroll reports.

SUBSTANTIALLY-OWNED AFFILIATED ENTITIES

The Department alleged in the Notice of Hearing that McIntosh and 4618 Foster Ave., LLC are substantially-owned affiliated entities. (HO Ex. 1) At the hearing, the Department offered evidence that Erika Barnett was the Operating Manager of 4618 Foster Ave., LLC at the time she signed a Certificate of Amendment changing the name of that corporation to McIntosh Interiors, LLC. (DOL Ex. 18; T. 47-48) The Department alleged in the Notice of Hearing that Erika Barnett is an officer and managing member of McIntosh and at the hearing offered payroll records certified by Erika Barnett as Vice-President of McIntosh in the New City Project and as President of McIntosh in the Rockland CC Project. (DOL Exs. 8, 25)

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 of 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. Additionally, Labor Law § 220 (5) (k) defines a successor as "an entity engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor."

The record does not contain evidence tending to indicate that there was any "indicia of 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" exercised by 4618 Foster Ave., LLC or McIntosh Interiors, LLC over the other. Based upon the record as developed, 4618 Foster Ave., LLC and McIntosh Interiors, LLC should not be deemed "substantially owned-affiliated entities" on the New City Project and the Rockland CC Project.

The Department did not allege that McIntosh Interiors, LLC was a successor corporation of 4618 Foster Ave., LLC. However, even if the Department did raise this issue, the record does not contain sufficient credible evidence of continuity of operations between these corporations to support a finding of successor entities. The record does not indicate what business 4618 Foster Ave., LLC was engaged in. The credible evidence merely indicates that Erika Barnett was an

officer or managing agent of both corporations and this is not sufficient to make a finding of successor entities and substantially-owned affiliated entities.

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]). Consequently, McIntosh is responsible for the interest on the aforesaid underpayments in the New City Project and the Rockland CC Project at the 16% per annum rate from the date of underpayment to the date of payment. McIntosh should, however, receive credit against interest owed for the 6% per annum interest amount paid by Lorencin in the Rockland CC Project. (T. 57)

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 offered evidence indicating that McIntosh failed to cooperate in the investigation in both the New City Project and the Rockland CC Project. (T. 29, 50) Additionally, the Department offered evidence indicating that McIntosh willfully falsified its payroll records to conceal its underpayment of supplemental benefits to its workers. The Department produced substantial and credible evidence to support its request that the maximum civil penalty of 25% be assessed against McIntosh in both the New City Project and the Rockland CC Project.

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]). McIntosh performed work on the New City Project as a subcontractor of Eastland. Consequently, Eastland, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor, McIntosh, on this Project.

McIntosh also performed work on the Rockland CC Project as a subcontractor of Lorencin. Consequently, Lorencin, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor, McIntosh, on this Project. However, I note that Lorencin submitted a letter, unopposed by the Department and made a part of the record as HO Ex. 8, in which it requests that, pursuant to 12 NYCRR § 221.1, any penalty assessed against McIntosh be waived insofar as it would normally apply to Lorencin under Labor Law § 223. The Department also offered evidence in support of the waiver of the assessment of a civil penalty as against Lorencin. (T. 59-62) I further note that this regulation contains, in § 221.1(a)(1) – (6), six requirements, all of which must be met if the Commissioner is to waive the assessment of any penalty. Lorencin and the Department have established all of the factors set forth in the regulation and, therefore, any penalty against Lorencin is waived.

CONCLUSIONS OF LAW

NEW CITY PROJECT

McIntosh willfully underpaid \$20,107.99 to its workers for the audit period weeks ending 7/15/2008 to 10/28/2008; and

McIntosh falsified its payroll records in connection with that willful underpayment; and

Erika Barnett is an officer of McIntosh; and

Erika Barnett knowingly participated in the violation of Labor Law article 8.

On April 5, 2011, the Department issued a Notice to Withhold Payment to the Project #1 Department of Jurisdiction for direct withholding in the amount of \$39,624.04 and the Project #1 Department of Jurisdiction has withheld this amount as requested.

ROCKLAND CC PROJECT

McIntosh willfully underpaid \$18,824.77 to its workers for the audit period weeks ending 9/16/2008 to 11/4/2008; and

McIntosh falsified its payroll records in connection with that willful underpayment; and

Erika Barnett is an officer of McIntosh; and

Erika Barnett knowingly participated in the violation of Labor Law article 8.

On or about April 28, 2011, Lorencin paid \$18,824.77, the full amount alleged by the Department to be owed by McIntosh as an underpayment in the Rockland CC Project, which amount included interest at a rate of 6% per annum.

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

RECOMMENDATIONS

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

DETERMINE that McIntosh underpaid its workers \$39,624.04 on the New City Project, PRC No. 2007001118; and

DETERMINE that McIntosh was responsible for interest on the total underpayment on the New City Project at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that McIntosh underpaid its workers \$18,824.77 on Rockland CC Project, PRC No. 2008002268; and

DETERMINE that McIntosh shall receive credit for the interest paid by Lorencin and is responsible for interest on the total underpayment on the Rockland CC Project at the rate of 10% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of McIntosh to pay the prevailing wage or supplement rate on both the New City Project and the Rockland CC Project was a “willful” violation of Labor Law article 8; and

DETERMINE that the willful violation of McIntosh in both the New City Project and the Rockland CC Project involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Erika Barnett is an officer of McIntosh at the time McIntosh performed the work on the New City Project and the Rockland CC Project; and

DETERMINE that Erika Barnett knowingly participated in the violation of Labor Law article 8 in both the New City Project and the Rockland CC Project; and

DETERMINE that McIntosh be assessed a civil penalty in the Department’s requested amount of 25% of the underpayment and interest due on both the New City Project and the Rockland CC Project; and

DETERMINE that Eastland is responsible for the underpayment, interest and civil penalty due on the New City Project pursuant to its liability under Labor Law article 8; and

DETERMINE that Lorencin has paid \$18,824.77, the full amount alleged by the Department to be owed by McIntosh as an underpayment in the Rockland CC Project, which amount included interest at a rate of 6% per annum, to fully satisfy its vicarious liability under Labor Law article 8; and

ORDER that McIntosh shall receive a credit for the \$18,824.77 paid by Lorencin on the Rockland CC Project; and

ORDER that the Project #1 Department of Jurisdiction 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: 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER that if the withheld amount in the New City Project is insufficient to satisfy the total amount due, McIntosh, upon the Bureau’s notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; and

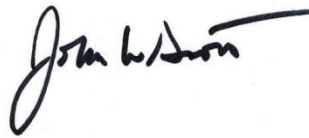
ORDER that upon the Bureau's notification, McIntosh shall immediately remit payment of the total amount due in the Rockland CC Project, made payable to the Commissioner of Labor, to the Bureau at: 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

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

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

Dated: February 4, 2013
Albany, New York

John W. Scott, Hearing Officer

A handwritten signature in black ink, appearing to read "John W. Scott", with a long horizontal flourish extending to the right.

Office of Administrative Adjudication