STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

MUTUAL OF AMERICA GENERAL CONSTRUCTION & MANAGEMENT CORPORATION
and
MOHAMMED SALEEM
Individually as President and shareholder of the corporation
Prime Contractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

REPORT & RECOMMENDATION

Prevailing Rate Case
07-0263 Westchester County

To: Honorable Colleen C. Gardner
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on December 2, 2008, December 3, 2008, December 4, 2008, February 4, 2009, February 5, 2009, February 6, 2009, February 10, 2009, February 11, 2009, March 19, 2009, March 20, 2009, April 13, 2009, May 27, 2009, June 3, 2009, and July 10, 2009 in White Plains, New York and Newburgh, New York. Post-hearing Proposed Findings of Fact and Conclusions of Law were received from the attorneys for the Department and Prime Contractor on August 11, 2009 and August 13, 2009, respectively. 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 Mutual of America General Construction & Management Corporation ("Mutual of America" or "Prime Contractor" or "Respondent"), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract involving the provision of material, labor and equipment necessary for alterations to the 2nd and 3rd floors of 112 East Post Road, White Plains, NY ("Project") for the County of Westchester, New York ("Department of Jurisdiction").

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (John D. Charles, Associate Attorney, of Counsel).

The Prime Contractor and Mohammed Saleem were represented by Richard L. Giampa, Esq., P.C. (Richard L Giampa, Esq., of counsel).

HEARING OFFICER

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

ISSUES

1. Did the Prime Contractor pay the rate of wages and/or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any willful underpayment involve the falsification of payroll records?
4. Is Mohammed Saleem an officer of the Prime Contractor who knowingly participated in a willful violation of Article 8 of the Labor Law?
5. Was Mohammed Saleem a shareholder of Mutual of America who owned or controlled at least ten per centum of the outstanding stock of Mutual of America?
6. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The Bureau Investigation

Mutual of America was the Prime Contractor for the Project that is the subject of this proceeding. (Dept. Exs. 3,4) Mohammed Saleem is the sole officer, director, and shareholder of the Prime Contractor. (T. 321-322; Dept. Exs. 3, 4) The Prime Contractor entered into a contract with the Department of Jurisdiction, by which the Prime Contractor was to perform alterations to the 2nd and 3rd floors of the County Office

Building located at 112 East Post Road, White Plains, New York. (Dept. Ex. 3) The contract required the employment of workers, laborers, and mechanics as those terms are used in Labor Law Article 8 to perform work involved in the complete renovation of those floors and the placement of all walls, doors, ceilings, and other work. (T. 2321-2415; Dept, Exs. 1, 3, 7, 20, 22, 25)

In or about July 2007, the Bureau received information from the County of Westchester indicating that the Prime Contractor's employees were complaining about the amount of money they were receiving for their work on the Project, and that the employees were required to kick back wages to the Prime Contractor (T. 274-287; Dept. Ex. 17). In response to these complaints, the Bureau commenced an investigation, which included initial job site visits and interviews with the Prime Contractor's employees (T. 290-308). On and after July 26, 2007, the Bureau received a total of seventeen written complaints from individuals who identified themselves as employees of the Prime Contractor who worked on the Project. All of these employees alleged that they were underpaid wages. In addition, fifteen of the complainants alleged that they were required to cash their pay checks and return a portion of their pay or kick back to the Prime Contractor in cash. (T. 12/2/09:17, 18-29, 34, 35, 43-46; T. 12/3/09: 9, 12, 13, 17, 22, 53-55, 89-92, 136-137, 141-142, 199-202, 213-214, 403, 405, 429-434, 614, 617-618, 759-760, 1246-1250, 1285-1287, 1333-1334; Dept. Exs. 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 1J, 1K, 1L, 1N, 1O, 1P) [1] Specifically, the Department received complaints from the following individuals: Fazal Baksh (Dept. Ex 1A); Mustafa Rahman (Dept. Ex 1B); Mohamed F. Khan (Dept. Ex 1C); Balvir Kumar (Dept. Ex 1D); Farooq Qamar (Dept. Ex 1E); Khalid A. Al kady (Dept. Ex 1F); Mohammed A. Kuyyum (Dept. Ex 1G); Mudassar Shahzad (Dept. Ex 1H); Ansar Farooq (Dept. Ex 1I); Safdar Abbas (Dept. Ex 1J); Muhammad Matloob (Dept. Ex 1K); Khurram Katfar (Dept. Ex 1L); Waheed Kahn (Dept. Ex 1M); Euclides Batista (Dept. Ex 1N); Mohammad Zubair (Dept. Ex 1O); Muhammad Sheraz (Dept. Ex 1P); and Nikollao Maka (Dept. Ex 1Q).

The Bureau continued the investigation by forwarding a form PW-18, Record Request Notice, dated July 27, 2007 to the Prime Contractor and the Department of

[1] The first two day's transcripts begin with page number one and are distinguished by using the hearing date.

Jurisdiction ordering the production of, among other items, certified payrolls, time records, cancelled payroll checks, proof of payment of fringe benefits, and copies of the contract agreements for the Project (T. 312-313, Dept. Ex. 2). Throughout the course of the investigation and the progress of the case the Bureau received the following documents from the Prime Contractor, the claimants or the Department of Jurisdiction: the contract between the Department of Jurisdiction and the Prime Contractor for the Project (Dept. Ex. 3); the Contractor Profile (Dept. Ex. 4); the applicable Prevailing Wage Rate Schedule ("PRS") for 2006 and 2007 (Dept. Exs. 5 and 6); the Prime Contractor's certified payroll records (Dept. Exs. 7, 8, and 25); Manpower Reports (Dept. Exs. 9, 16, and 21); Visitor Sign-In Log (Dept. Ex. 15); Contractor's Application for Payment (Dept. Ex. 20); and Project Schedule Updates (Dept. Ex. 22).

In the complaints (Dept. Exs. 1A-Q) and the interviews, the employees indicated that they were paid a daily rate of between $125 and $150. (T. 12/2/09: 19, 12/3/09: 7, 87, 198-199, 402, 609, 1248, 1249, 1250, 1271-1272, 2146; Dept. Ex. 17) The employees were not paid any amount for overtime work or weekend work (T. 42, 43, 88, 143-144, 202-203, 407, 613, 760, 761, 1155, 1157-1160, 1164, 1267, 1269, 1280, 1281). The employees indicated that they were given checks in amounts that represented the wages listed on the Prime Contractor's certified payroll records but they were required to cash the checks and give the amount in excess of the daily rate back to the Prime Contractor in cash. (T. 12/2/09:17, 18-29, 34, 35, 43-46; T. 12/3/09: 9, 12, 13, 17, 22, 53-55, 89-92, 136-137, 141-142, 199-202, 213-214, 403, 405, 429-434, 614, 617-618, 759-760, 1246-1250, 1285-1287, 1333-1334; Dept. Exs. 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 1J, 1K, 1L, 1N, 1O, 1P)

The employees reported in their complaint forms and told the Bureau Investigator that they performed work on the Project that included demolition, carpentry work, painting, and sheet rock/plastering. The workers also told the Bureau that they were all required to do general clean-up work for one hour at the end of every work day (T. 1127-1128).

The Bureau also had available the contract and contract specifications (Dept. Ex. 3) and payment requisitions (Dept. Ex. 20). Finally, the Investigator was on site at the Project where he observed the employees working as carpenters, painters and laborers (T.

296-298). Based upon the information from all of the available sources, the Bureau determined that the employees worked for the Prime Contractor on the Project as carpenters, painters, and laborers (See, for ex. T. 1244-1245, Dept. Ex. 10).

The Certified Payroll Records received from the Prime Contractor (Dept. Exs. 7 and 25) were certified by Mohammed Saleem as President of the Prime Contractor (Dept. Ex. 8). The Bureau identified eighteen employees who worked on the Project. In the certified payroll records the Prime Contractor listed fifteen of these employees as laborers who were paid at the rate of either $29.85 or $31.45 per hour straight time pursuant to the Prevailing Wage Rate Schedule that was applicable for the weeks the employees worked and $15.50 per hour for supplemental benefits, and three employees who were listed as carpenters who were paid wages at the rate of $36.15 per hour straight time and $21.69 per hour for supplemental benefits (Dept. Ex. 7).

CLASSIFICATION

The Bureau of Public Work Investigator, Jonathan Jones, testified regarding his investigation of the Project and the classification of the Prime Contractor's employees. Mr. Jones testified that the factors considered in classifying work include the nature of the work, collective bargaining agreements, jurisdictional agreements, historical practices, case law precedent, and prior Department of Labor responses. (T.1263, 1771, 1772). From the information contained in the complaints (Dept. Ex. 1A-Q), interviews with the employees (See, Dept. Ex. 17), the certified payroll records (Dept. Ex. 7, 8, 25), the requisitions for payment (Dept. Ex. 20), and interviews with the representative of the Department of Jurisdiction, Mr. Vincent Altamari, it was apparent to the Bureau that the Prime Contractor's employees worked on the Project from week ending 4/6/07 through week ending 8/24/07 (Dept. Exs. 10, 11).

The Bureau relied on the contract (Dept. Ex. 3) to define the scope of the work as including interior renovation of office space at a County office building, which included demolition of existing improvements, and constriction of new interior office improvements. The employees performed work that principally included the complete

renovation of the 2nd and 3rd floors and the placement of all walls, doors, ceilings, and other work. (T. 2321-2415; Dept, Exs. 1, 3, 7, 20, 22, 25)

Finally, Investigator Jones relied upon interviews with the employees to determine that the majority of the workers devoted one hour at the end of the day to general clean-up work. Mr. Jones classified this work as laborer's work. (T. 1127)

The Bureau relied on these documents and interviews to determine the Prime Contractor's employees should be classified as carpenters, painters, and laborers. (T. 1771-1778) Investigator Jones considered the work of loading the job, or distributing supplies and construction material throughout the project site, to be carpenter's work. (See, Dept. Exs. 10, 26; T. 1808, 1809) The Prime Contractor's witness, Mr. Nawaz, also identified work performed by the employees during the course of the Project that would be classified as the work of carpenters and painters (T. 2211-2231). With only a few references to carpenters, the Prime Contractor classified its employees primarily as laborers throughout the entire project. (Dept. Ex. 7; T. 1123-1124)

The Prime Contractor's Project Manager, Mr. Ally, and Project Supervisor, Mr. Nawaz, both testified that the laborers on the Project loaded the job. (T. 1574-1610, 2237, 2343, 2401-2404) Additionally, in the post-hearing submission, the Prime Contractor argues that it was erroneous for the Bureau to classify the employees who loaded the job as carpenters when union contracts allow lower paid apprentices to do this type of work. (See Prime Contractor's Proposed Findings of Fact and Conclusions of Law at pgs. 4-5) However, Mr. Banfield, an official with the Carpenters Union, supported the Bureau's conclusion that carpenter's work includes loading the job through transporting materials to the work site from the delivery site (T. 1824-1940). Also, the record does not contain any evidence that the Prime Contractor complied with Article 23 of the Labor Law and established a registered Apprenticeship Training Program. Without such a program, Article 8 does not permit an employer to pay certain workers apprentice wages.

Underpayment Methodology

In preparing the audit of the Project, the Bureau relied on the following documents and evidence: the certified payroll records (Dept. Ex. 7); the sign-in sheets

(Dept. Ex. 15); the manpower reports (Dept. Exs. 9 and 16); the employees' complaints (Dept. Exs. 1A-1Q); interviews with the employees and County employees; the project specifications and contract documents, which identified the scope of the work (Dept. Ex. 3); and the prevailing wage rate schedules (Dept. Exs. 5, 6), which covered the time period of the Project and which detailed the wages and supplements that should have been paid to workers engaged in the classification of carpenters, painters, and laborers for the period in question. (T. 1096-1099)

The Bureau relied on interviews with the employees and the compliant forms to determine the amount of wages paid to the employees. For example, Mr. Safdar Abbas indicated that he was paid $150.00 per day for an eight-hour day. Mr. Jones calculated this to equal $18.75 per hour ($150.00/8). (T. 12/2/09: 19, 12/3/09: 7, 87, 198-199, 402, 609, 1120-1121, 1248-1250, 1271-1272, 2146) The Bureau credited the Prime Contractor for these wages paid to the employees but did not give a credit for overtime wages of weekend premium pay as the employees told Mr. Jones they received only a daily wage. (T. 42-43, 88, 143-144, 202-203, 407,613, 760-761, 1155, 1157-1160, 1164, 1267, 1269, 1280-1281) The Prime Contractor argues that all assessments for not paying overtime are invalid as the contract would not permit overtime payments and the County did not pay the Prime Contractor for overtime. The Prime Contractor did not produce any evidence or credible argument that would justify it relying on contract provisions to avoid the statutory requirement to pay its employees premium pay for overtime work. (See, Labor Law §220) The Bureau also did not credit the Prime Contractor for any supplemental benefit payments since the employees told Mr. Jones they did not receive any benefit payments. (T.87, 1276, 1289)

The Bureau did not rely on the amounts paid to the employees as indicated in the certified payroll records. In interviews with the employees, the Bureau was informed that the employees received checks in the amount indicated in the certified payroll records. However, the employees were required to cash the checks and give back to the employer the amount in excess of the agreed hourly rate. (T. 12/2/09:17, 18-29, 34, 35, 43-46; T. 12/3/09: 9, 12, 13, 17, 22, 53-55, 89-92, 136-137, 141-142, 199-202, 213-214, 403, 405, 429-434, 614, 617-618, 759-760, 1246-1250, 1285-1287, 1333-1334; Dept. Exs. 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 1J, 1K, 1L, 1N, 1O, 1P)

The Prime Contractor produced the certified payroll records for the Project listing its classifications of its employees. However, the Prime Contractor did not produce any other documents detailing the days worked by the employees and the occupations in which the individual workers worked on those days (T. 1144-1145). Therefore, in calculating the hours worked by the employees per day, the Bureau relied on the Prime Contractor's certified payroll records (Dept. Ex. 7, 8, 25), the contractor's daily manpower sign-in sheets (Dept. Ex. 9, 16, 21); and the County visitor sign-in sheets. (Dept. Ex. 15; T. 1153) Mr. Jones testified that, with respect to hours worked by the employees, the Prime Contractor's certified payroll records were fairly accurate. (T. 1250)

Investigator Jones gave the Prime Contractor a one hour per day credit for each employee's lunch period. This credit was based upon employee interviews. (T. 1246) The Prime Contractor argues that this credit is not accurate since Mr. Nawaz credibly testified that the employees took a one hour lunch for an eight hour day, and two hours if they worked more than eight hours in a day. (T. 2192-2193) The Prime Contractor did not produce documents or employee records to support a credit of greater that one hour per day. [See, for example, certified payroll records (Dept. Exs. 7, 25); the contractor's daily manpower logs (Dept. Exs. 9, 21); and visitor sign-in sheets (Dept. Ex. 15)]

The Bureau determined the rates that should have been paid for the hours worked in the various classifications in accordance with the rates published in the relevant PRS for the time period in question (Dept. Exs. 5, 6; T. 1115-1119). The Bureau's audit then compared the amounts that the Bureau determined were actually paid in accordance with the aforesaid methodology against the amounts should have been paid in accordance with the PRSs. The audit determined that for the period of week ending 4/6/07 through week ending 8/24/07, the Prime Contractor underpaid prevailing wages and supplements to 18 employees in the amount of $415,475.99 (Dept. Exs. 26, 27). Included in the employees found to have been underpaid was Mr. Nawaz, an individual referred to in the record as "Z", who was considered a supervisor by the Prime Contractor and, therefore, not included by the Prime Contractor in the certified payroll records. The Bureau determined that Mr. Nawaz worked on the Project as a carpenter hanging ceilings and he was,

therefore, underpaid for the time he worked in the amount reflected in the audit. (Dept. Exs. 26, 27; T. 2195-2199)

The Bureau gave the Prime Contractor credit for payments made to several employees which were supported by copies of checks produced at the July 10, 2009 hearing. The credit was in the total amount of $23,127.41, which reduced the underpayments to $415,475.99. (T. 2266-2268; Dept. Exs. 26, 27) This credit is further explained in a letter from Attorney Charles dated July 15, 2009, together with attachments, that is made part of the record as Hearing Officer Exhibit 12. The Prime Contractor argues that the testimony of Chauduhry Ghuman and documents signed by several of the employees (Respondents Exs. S, S1, T, T1, U, U1) support a finding of additional lump sum cash payments for back wages in the amount of $22,047.16, which should further reduce the underpayments to $393,428.83. (T. 2271-2289; Prime Contractor's Proposed Findings of Fact and Conclusions of Law pgs. 1-3) The Prime Contractor did not produce evidence of the claimed lump sum cash payments for past due wages such as cash journals or bank statements reflecting cash withdrawals.

The Bureau served two Notices to Department of Jurisdiction to Withhold Payment (form PW-61), dated August 10, 2007 and September 14, 2007, requesting that the County withhold payments to the Prime Contractor in the amount of $313,401.40 and $712,504.24, respectively. The record indicates that the County is withholding $232,180.25. (T. 1073; HO Ex. 1 at para. 15)

Falsification of Payroll Records

The Prime Contractor produced certified payroll records (Dept. Ex. 7, 8, 25) that indicate the employees were paid wages and supplemental benefits that were consistent with the PRS for the job classifications assigned to each employee. However, the employees who were interviewed by the Bureau indicated that they were paid a daily rate and were required to kick back to the Prime Contractor the amounts in excess of the daily rate. (T. 12/2/09:17, 18-29, 34, 35, 43-46; T. 12/3/09: 9, 12, 13, 17, 22, 53-55, 89-92, 136-137, 141-142, 199-202, 213-214, 403, 405, 429-434, 614, 617-618, 759-760, 1246-1250, 1285-1287, 1333-1334; Dept. Exs. 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 1J, 1K, 1L,

1N, 1O, 1P) Additionally, the Prime Contractor certified in the payroll records that supplemental benefits were paid to the employees. The employees denied receiving any benefit payments. As indicated above, the Prime Contractor misclassified the employees as laborers, which was a lower paying classification than the accurate classifications of carpenters and painters (T. 1824-1940). Some of the employees received payroll checks that were dishonored and they never received their wages for the weeks covered by these bounced checks. (T. 28-29, 205, 423) Finally, the Prime Contractor failed to include in the certified payroll documents Mr. Nawaz who worked on the Project as a carpenter (T. 2195-2199). The Bureau concluded that the Prime Contractor failed to accurately report the payment of prevailing wages to its employees in the certified payroll records, underpaid its employees, and falsified the certified payroll records. The Prime Contractor and its sole officer and shareholder, Mohammed Saleem entered guilty pleas in Westchester County Court to charges of falsifying records (the certified payroll records) and failing to comply with the Labor Law with regard to this Project and underpayment of wages due to the employees (Dept. Ex. 24; T. 2178-2180).

CONCLUSIONS OF LAW

Jurisdiction of Article 8

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

Since the County of Westchester, a public entity, is a party to the instant public work contract, Article 8 of the Labor Law applies. New York Labor Law § 220 (2); and *see, Matter of Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd.*, 63 N.Y.2d 810 (1984).

Classification of Work

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The similarity of trade or occupation is determined in a process referred to as "classification." *Matter of Armco Drainage & Metal Products, Inc. v. State of New York*, 285 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Matter of Lantry v. State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v. New York State Department of Labor*, 34 A.D.3d 905, 906 (3rd Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v. Angello*, 31 A.D.3d 925, 927 (3rd Dept. 2006); *lv denied*, 8 N.Y.3d 802 (2007). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.'" *Matter of Nash v. New York State Department of Labor, supra, quoting Matter of General Electric, Co. v. New York State Department of Labor*, 154 A.D.2d 117 (3rd Dept. 1990), *affd.*, 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v. Beame*, 15 N.Y. 103, 109 (1965). The pivotal question then is the nature of the work performed, not the skill level of the employees performing the work. *Matter of Nash v. New York State Dept of Labor*, 34 A.D.3d 905, 906 (3rd Dept. 2006). Workers are to be classified according to the work they perform, not their qualifications and skills. *See, Matter of D. A. Elia Constr. Corp. v. State of New York*, 289 A.D.2d 665 (3rd Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

This case involves a construction contract in Westchester County for which the Bureau classified the interior demolition of existing improvements and the construction of new interior improvements as the work of carpenters, painters and laborers. In order to successfully challenge the Department's classification determination, the Prime

Contractor must demonstrate by competent proof that the Department's determination was arbitrary, capricious or without legal basis. The Prime Contractor failed to meet this burden. In its own certified payroll records, the Prime Contractor classified some of its employees as carpenters. Additionally, the Prime Contractor's project supervisor, Mr. Nawaz, identified the employees the Prime Contractor included in the certified payroll records who actually performed painting and carpentry work on the Project. (T. 2211-2230) The Prime Contractor failed to include Mr. Nawaz in the certified payroll records because he was a supervisor. However, Mr. Nawaz testified that he did ceiling work and attached metal runners to the floor in preparation for the construction of stud walls. (T. 2199-2207)

Finally, the Prime Contractor failed to offer any evidence at the hearing to indicate that the Department's classifications were in error. The Prime Contractor did introduce testimony indicating that laborers are responsible for distributing material such as sheetrock around the job site, which was classified by the Bureau as the work of a carpenter. (T. 1574, 1575, 1576, 2237-2239) I find that this argument ignores the longstanding practice of the Bureau and the Carpenters' Union as testified to by Mr. Jones and Mr. Banfield. (T. 1808,1809, 1824-1940) Without evidence of jurisdictional agreements or determinations or past practice, the Prime Contractor's arguments are anecdotal and not competent proof that the Department's classifications were arbitrary and capricious. *See, General Electric Co. v. New York State Department of Labor, et al.*, 154 A.D.2d 117 (3rd Dept. 1990). I find that the Department's determination that the Prime Contractor's employees were employed as laborers, carpenters, and painters on the subject Project should be sustained as it reflects the nature of the work actually performed and is supported by sufficient credible evidence in the record.

Underpayment Methodology

"[W]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." *Matter of Mid Hudson Pam Corp. v.*

Hartnett, 156 A.D.2d 818, 821 (3rd Dept. 1989) (citation omitted). The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. *Matter of TPK Constr. Co. v. Dillon*, 266 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v. Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

In this case, the lack of accurate and complete certified payroll records justified the Bureau's reliance on other evidence to determine that the Prime Contractor's employees were underpaid during the duration of the Project. The other evidence which the Bureau relied upon was ample, including the certified payroll records (Dept. Ex. 7); the sign-in sheets (Dept. Ex. 15); the manpower reports (Dept. Exs. 9 and 16); the employees' complaints (Dept. Exs. 1A-1Q); interviews with the employees and County employees; the project specifications and contract documents, which identified the scope of the work (Dept. Ex. 3); and the PRS (Dept. Exs. 5, 6), which covered the time period of the Project and which detailed the wages and supplements that should have been paid to workers engaged in the classification of carpenters, painters, and laborers for the period in question (T. 1096-1099). Considering the inaccurate certified payroll records provided by the Prime Contractor, the Bureau also relied on the information contained in the complaints and employee interviews to determine the rates paid by the Prime Contractor to its employees, to determine that the employees were required to kick back money to the Prime Contractor, and to determine that the Prime Contractor's employees were not paid supplemental benefits.

In the first instance, the Prime Contractor has admitted the violation of Labor Law Section 220 and the falsification of payroll records through the entry of guilty pleas in County Court. The plea allocution was entered into the record without objection as Department Exhibit 24. Additionally, it is established that, 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 evidence available. *Matter of Mid-Hudson*

Pam Corp. v. Hartnett, 156 A.d.2d 818 (3rd Dept. 1989). The methodologies employed by the Commissioner that may be imperfect are permissible when necessitated by the presence of inaccurate records. *Matter of TPK Construction Co. v. Dillon*, 266 A.D.2d 82 (1st Dept. 1999). In cases where the employer's records are inaccurate, the burden shifts to the employer to negate the reasonableness of the Commissioner's calculations. *Matter of Mid-Hudson Pam Corp. v. Hartnett, id.*

The Prime Contractor did not offer any testimony or evidence to show that the information contained in the certified payroll records was accurate and that the information contained in employees' complaints was inaccurate. The Department demonstrated that there were inconsistencies between the Prime Contractor's certified payroll records and the complaints. Additionally, the Department reasonably relied on all of the information it gathered in the course of its investigation to arrive at the conclusion that the Prime Contractor's underpayment of its employees included a calculated scheme that required the employees to kick back wages to the Prime Contractor. Through witness testimony and cross-examination the Prime Contractor challenged the Bureau's classifications and challenged the credibility of the employee witnesses. The Prime Contractor cannot shift the burden to the Department of Labor with arguments, conjecture or conclusory allegations regarding the veracity of the employees.

The Prime Contractor argues that the testimony of all of the employee witnesses should be disregarded, since these individuals are motivated by the desire to receive additional wages. This argument is unpersuasive, since all parties in a case involving the underpayment of prevailing wages, including the employer and employees, have an expectation that their testimony and evidence will result in a favorable outcome. The Prime Contractor's logic would call into question the credibility of every claimant or employer witness in a wage and hour case because of the potential for additional compensation or a reduction of the Bureau's finding of underpayments. The Prime Contractor further argues that the employees are not credible because they are or may be illegally in this country and/or without authority to work. This argument is also unpersuasive. A contract of employment exists between an undocumented worker and the employer, under which the worker is entitled to be paid for his work. The contractual, statutory, and common-law duties owed to the worker are unrelated to, and do not depend

on, the worker's compliance with federal immigration laws. *See, Majlinger v. Cassino Contracting Corp., et al.*, 25 A.D.3d 14 (2nd Dept., 2005). The Prime Contractor also argues that the employee witnesses have signed statements recanting the claims for underpayment of wages they made in their complaints. (T. 711-735, 809-811, 820-830; Resp. Exs. D, E, F, G, H, I, S, S-1, T, T-1, U, U-1) The employee statements indicating that they were properly paid are also not compelling. It is established that statements indicating that full wages were received do not preclude the Commissioner from finding that prevailing wages have not been paid. *John F. Cadwallader, Inc. v. NYS Dept. of Labor*, 112 A.D.2d 577 (3rd Dept., 1985).

Finally, Mohammed Saleem, the sole officer and shareholder of the Prime Contractor, failed to testify in this proceeding. During the hearing, Mr. Saleem was called as a witness by the Department and he declined to testify or to answer any questions posed to him. An officer of a corporation cannot refuse to testify on the ground that it might incriminate the corporation because corporations are denied the protection against self-incrimination. *George Campell Painting Corp. v. Reid*, 392 U.S. 286 (1968); *People v. Hudson Valley Construction Co.*, 165 A.D. 615 (3rd Dept. 1915); *Abrams v. Temple of Lost Sheep*, 148 Misc. 825. Additionally, to the extent he may invoke such a privilege in his own behalf, since he remains personally liable for such underpayments as the sole owner of the corporation by operation of Labor Law §220-b(4)(g), it is established that the Commissioner, as the trier of fact, is permitted to draw the strongest inference against the party that the evidence permits. *Matter of Commissioner of Social Services v. Phillip DeG*, 59 N.Y.2d 137 (1983); *Paruch v. Paruch*, 140 A.D.2d 418 (2nd Dept. 1988). Given the fact that Mohammed Saleem refused to testify as to the manner in which his employees were paid, I find that the evidence supports an inference that any evidence or testimony that could have been offered by Mr. Saleem would have been unfavorable to the Prime Contractor on the issues of underpayment of wages and supplements, the kick back of wages, and classification of the employees.

The Bureau's method of arriving at an underpayment determination was reasonable and necessitated by the lack of accurate records. I find that there is sufficient credible evidence in the record to support the Department's finding of an underpayment. The Department's calculation that the Prime Contractor underpaid its employees in the

total amount of $415,475.99, in wages and supplements (See, Dept. Exs. 26, 27), should, therefore, be sustained.

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. *See*, *CNP Mechanical, Inc. v. Angello*, 31 A.D.3d 925 (3rd Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, based upon this statutory mandate, the Subcontractor is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

Willfulness of Violation

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation. This inquiry is significant because Labor Law § 220-b (3) (b) (1)[2] provides, among other

[2] "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the five largest shareholders of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has 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 five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." Labor Law § 220-b (3) (b) (1), prior to amendment effective November 1, 2002.

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 Article 8 of the Labor Law, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v. Roberts*, 128 A.D.2d 1006, 1006-1007 (3rd Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v. Hartnett,* 181 A.D.2d 1013, 1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v. Hudacs*, 185 A.D.2d 483, 485 (3rd Dept. 1992).

A finding of willfulness is supported by substantial evidence where, by virtue of a contractor's prior public work experience and its officer's knowledge of the prevailing wage law, the contractor should have known that its actions violated the labor law. *Matter of TPK Constr. Corp*, 205 A.D.2d 894, 896 (3rd Dept. 1994). The violator's knowledge may be actual or, where he should have known of the violation, implied. *Matter of Roze Assocs. v. Department of Labor*, 143 A.D.2d 510; *Matter of Cam-Ful Industries, supra.*

The record does not contain evidence indicating that the Prime Contractor was an experienced public work contractor. However, the bid documents for the contract (Dept. Ex. 3) clearly defined the nature and scope of the work incorporated in the Project, identified the Project as being subject to Labor Law Article 8, and specifically contained a Schedule of Hourly Rates and Supplements and the Prevailing Wage Schedule for Article 8 Public Work Project. Accordingly, the record contains sufficient evidence to support a finding that the Prime Contractor knew that the Project was a public work project and that the employees should have been classified as painters, carpenters, and laborers and paid the prevailing wage rates that correspond with those classifications.

The record further supports a finding that the Prime Contractor's failure to pay prevailing wages to its employees was a willful violation of the Labor Law. As set forth above, the Prime Contractor misclassified its workers as laborers to avoid paying the higher prevailing wage rates for the painter and carpenter classifications. More importantly, the Prime Contractor engaged in a scheme whereby the certified payroll records and checks reflected wages paid at the approximate rate for the assigned classification, but then required the employees to kick back the amount in excess of the agreed upon daily rate. The Prime Contractor and Mohammed Saleem admitted to violations of the Labor Law and falsification of payroll records in County Court. Based upon the foregoing, the record supports a finding that the Prime Contractor and Mohammed Saleem knew their employees were not being paid the prevailing wages reflected in the certified payrolls and that this underpayment of wages constitutes a willful violation of Labor Law §220.

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.

Falsification requires the making of a false document. In this context, falsification of payroll records would require the submission of payroll records that would seek to simulate compliance with requirements of Section 220 or conceal violations. There must be a cover up of violations – an effort at deception. *Matter of Chesterfield Associates, Inc.*, PRC 93-0766A, 93-7632A, 94-0005, 93-8189, 95-2663 (July 29, 2002). The mere evidence of an underpayment shown on a truthfully reported payroll record does not create a falsified document, and no falsification should be determined on that ground. *Id.*

The Department contends that the Prime Contractor falsified its payroll records because it reported that wages were paid at the prevailing rates for the corresponding labor classification when, in reality, it paid wages to its employees at a substantially reduced daily rate. In support of this argument, the Department has produced employee complaints and testimony indicating the payment of wages at a rate that is not consistent

with the Prime Contractor's certified payroll records. The Prime Contractor has offered no evidence or testimony that would tend to explain this inconsistency, and the Prime Contractor admitted the falsification of payroll records in the Plea Allocution. (Dept. Ex. 24) Additionally, the Prime Contractor failed to include Mr. Nawaz in the certified payroll records even though he worked on the Project as a carpenter installing drop ceilings. I find that the foregoing acts of the Prime Contractor constitute an effort to deceive and, accordingly, the Bureau's finding as to falsification of payroll records is supported by sufficient evidence in the record and should be sustained.

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 Prime Contractor seriously underpaid its employees, knowingly falsified payroll records, and made no effort to resolve the matter or make restitution after being notified of the Department's investigative findings. Based upon the facts of this case, a penalty of 25% of the total amount found due is warranted.

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 officer of the contractor or subcontractor who knowingly participated in the willful violation of Article 8 of the Labor Law shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

In the present case, it is not disputed that Mohammed Saleem is the sole officer and shareholder of the Prime Contractor. Additionally, the record contains evidence that

Mohammed Saleem knew the Project was a public work contract through the information contained in the contract and bid specifications, and participated in the willful violation of the Labor Law in failing to pay prevailing wages and supplemental benefits to the employees as evidenced in his certification of the certified payroll documents as President of the Prime Contractor. (Dept. Ex. 8) Based upon the foregoing, I find that the record supports a finding that Mohammed Saleem knowingly participated in the willful violation of Article 8 of the Labor Law and that, accordingly, he shall be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

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 Mutual of America General Construction & Management Corporation underpaid wages and supplements due the identified employees in the amount of $415,475.99; and

DETERMINE that Mutual of America General Construction & Management Corporation is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Mutual of America General Construction & Management Corporation to pay the prevailing wage or supplement rate was a "willful" violation of Article 8 of the Labor Law; and

DETERMINE that Mutual of America General Construction & Management Corporation violation of Article 8 involved the falsification of payroll records; and

DETERMINE that Mohammed Saleem is an officer of Mutual of America General Construction & Management Corporation; and

DETERMINE that Mohammed Saleem knowingly participated in the violation of Article 8 of the Labor Law; and

DETERMINE that Mutual of America General Construction & Management Corporation be assessed a civil penalty in the amount of 25% of the underpayment and interest due; and

ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty); and

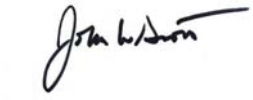
ORDER that the County of Westchester, NY remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Mutual of America General Construction & Management Corporation, 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 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: May 24 , 2010
Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer