STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

P.T.&L. CONTRACTING CORPORATION
NICHOLAS LAGANELLA, II
aka
NICHOLAS LAGANELLA, Jr.
RICHARD CLANCY
EUGENE O'DELL
and

ANITA LAGANELLA
as officers, owners and shareholders of
P.T.&L. CONTRACTING CORPORATION
and its substantially owned-affiliated entities,
P.T.&L. ENVIRONMENTAL SERVICES
and
P.T.&L. ENVIRONMENTAL CONSULTANTS, INC.
and
AMERICAN TANK & TESTING COMPANY, INC.,
and
ANITA LAGANELLA,
as an officer, owner and shareholder of
AMERICAN TANK & TESTING COMPANY, INC.

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 employed on a public work project known as the Ramapo Landfill Surface Water Controls Capital Improvement Project in the Town of Ramapo, New York.

REPORT
&
RECOMMENDATION

Prevailing Rate Case
00-03506 Rockland County

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

Pursuant to an Amended Notice of Hearing served on March 15, 2010, and a Notice of Rescheduled hearing served on June 3, 2010, a hearing was held in White Plains on September

22 and 23 and December 9, 2010, which continued thereafter by video conference between Albany and White Plains for an additional six days, concluding on October 26, 2012. 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 P.T.&L. Contracting Corporation ("PT&L") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving a landfill improvement project (the "Project") for the Town of Ramapo (the "Town").

After the hearing was concluded, the parties were afforded the opportunity to submit Proposed Findings of Fact and Conclusions of Law ('Proposed Findings"). The Respondents' and the Department's Proposed Findings were received on March 13 and March 29, 2013, respectively.

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Louise G. Roback, Senior Attorney, of Counsel; Marshall H. Day, Associate Attorney, of Counsel, on the Department's Proposed Findings). The Respondents were represented by The Law Offices of Richard Malagiere (Richard Malagiere, Esq., of Counsel).

ISSUES

1. Did PT&L 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 PT&L 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. Are P.T.&L. Environmental Services, P.T.&L. Environmental Consultants, Inc., and American Tank and Testing Company, Inc. "substantially owned-affiliated entities"?
5. Are Nicholas Laganella, II, aka Nicholas Laganella, Jr., Richard Clancy, Eugene O'Dell and Anita Laganella among the five largest shareholders of PT&L?

6. Are Nicholas Laganella, II, aka Nicholas Laganella, Jr., Richard Clancy, Eugene O'Dell and Anita Laganella officers of PT&L who knowingly participated in a willful violation of Labor Law article 8?

7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

On or about May 16, 2000, PT&L entered into a contract with the Town to furnish the materials, labor and equipment necessary to perform a capital improvement project on the Ramapo Landfill located in Rockland County, New York (T. 111-118, 127, 426, 558, 575; Dept. Exs. 3, 4, 5). The specifications included a 1999A Prevailing Rate Schedule ("PRS"), which notified PT&L of the requirement to pay the prevailing rate of wages and supplements on the Project (T. 117, 121-127; Dept. Ex. 4).[1]

[1] PRSs are updated annually effective July 1 through June 30 (T. 126-127). The work on the Project ran from week-ending August 13, 2000 through week-ending December 6, 2001 (Dept. Ex. 40). Effective July 1, 2000, the Bureau issued PRS 2000 for Rockland County, which detailed the rate of wages and supplements that were to be paid on the Project from July 1, 2000 to June 30, 2001. That PRS included the wage and supplemental benefit rates for the following classifications: (1) Laborer—Heavy Highway (Group E) with wages of $25.80 an hour and supplements of $8.40 an hour (with wages to increase by $1.00 an hour on April 1, 2001); (2) Power Equipment Operator—Heavy Highway (Class B) with wages of $29.53 an hour and supplements of $15.65 an hour; and (3) Teamster—Building Heavy Highway (Group 6) with wages of $21.75 an hour and supplements of $14.45 an hour (increasing to wages of $22.25 an hour and supplements of $14.95 an hour on May 1, 2001) (T. 118-125, 127-128, 191-192, 275-286, 980; Dept. Ex. 6).
Effective July 1, 2001, the Bureau issued PRS 2001 for Rockland County, which detailed the rate of wages and supplements that were to be paid on the Project from July 1, 2000 to June 30, 2001. That PRS included the wage and supplemental benefit rates for the following classifications: (1) Laborer—Heavy Highway (Group E) with wages of $25.80 an hour and supplements of $8.90 an hour; (2) Power Equipment Operator—Heavy Highway (Class B) with wages of $30.28 an hour and supplements of $16.15 an hour, and Class E Oiler with wages of $25.03 an hour and supplements of $16.15 an hour; and (3) Teamster—Building Heavy Highway (Group 6) with wages of $22.25 an hour and supplements of $14.95 an hour (T. 128-133, 297; Dept. Ex. 7).

On or about May 12, 2003, Hector Herrera filed a complaint with the Bureau alleging that PT&L failed to pay the prevailing rate of wages on the Project (Dept. Ex. 1). [2] The last day of work on the Project was November 29, 2001 (Resp. Ex. 22). In response to that claim, the Bureau commenced an investigation on the Project (T. 106). On or about May 17, 2005, and again on December 5, 2007, the Bureau served a Payroll Records Request Notice on PT&L requiring the production of, *inter alia*, certified payroll records (Dept. Ex. 2). The Bureau did not receive any records from PT&L in response to those notices (T. 109, 415-418), and on that basis maintains that PT&L was uncooperative in its investigation (Dept. Proposed Findings, p. 3).

During the course of its investigation, the Bureau received the contract and project specifications from the Town (T.116). The Town also provided a copy of the certified payrolls PT&L filed with it, which were certified by Eugene O'Dell as chief operating officer and Richard Clancy as chief financial officer (T. 134-136; Dept. Exs. 8, 9). Mr. Herrera provided paystubs with his complaint (Dept. Ex.1). Employees Juan Tabares, Samuel Duque and Edgar Duque provided paystubs (T. 136; Dept. Ex. 10, 12, 12A, 13). Employees John Valencia and Juan Tabares completed questionnaires concerning their job duties, work hours and duration of time on the Project (T. 141, 157; Dept Ex. 11, 11A, 14). The Bureau also met in person with Juan Tabares, Edgar Duque and Sammy Duque to discuss their claims (T. 149).

Based on the information obtained from the employee complaints, paystubs, questionnaires and interviews, the Bureau determined that the certified payrolls filed with the Town were inaccurate and false in that, *inter alia*, they did not accurately report the days and

[2] PT&L asserts that the complaint in fact referred to an incinerator project PT&L performed for the Town and that as a consequence, as this was the only complaint filed within 2 years after the work ceased on the Project, no complaint about underpaid wages on the Project was received timely by the Bureau (T. 392-410). The complaint described the project as "repairing a retaining wall for an incinerator on a garbage dump facility, 320 Torne Valley Road, Hillburn, NY 10931. The Bureau investigator testified that the address is consistent with the landfill project, not the incinerator project (T. 402-403). The Town's director of public works testified and was unclear when the incinerator project took place, testifying at first that the incinerator was demolished "well after the landfill had been shut down," but he then conceded that he just didn't recall whether it might have taken place simultaneously with the landfill project (T. 562-565). He did testify that the Landfill project mobilized in September 2000 and continued through 2001, which time frame is consistent with Mr. Herrera's complaint of having been underpaid from weeks ending November 9, 2000 through November 15, 2001 (T. 559; Dept. Ex. 1). The Bureau investigator testified that the incinerator project was short-lived project performed simultaneously with the landfill project and that it appeared to have been completed in November 2000 (T. 403, 408). He also testified that Mr. Herrera told him he worked on the landfill project (T. 409). In any event, the Bureau thought the complaint pertained to the landfill project and it is authorized by statute to initiate an investigation on either a complaint or on its own initiative (T. 390-410). *See*, NY Labor Law § 220-b (2) (c).

hours of work of all the employees who worked on the Project (T. 200-218, 418-428).[3] As a consequence, the Bureau prepared an audit utilizing the following methodology. For those employees who produced pay stubs, the Bureau relied on those stubs to determine the hours that they worked and the rate of wages paid to them (T. 166-171, 184, 193-194, 200, 204). The exception to that methodology was Samuel Duque, whose paystubs would show a full week of work, but who advised the Bureau he worked on the Project approximately sixteen hours each week, which led the Bureau to place him on the audit for sixteen hours each week (T. 173, 176-177). For those employees for whom the Bureau had no paystubs, and thus lacked any other information, the Bureau relied on the certified payrolls to establish the days and hour they worked and the rate of wages they were paid (T. 218-219, 233-234). In its initial hearing audit (Dept. Exs. 15, 16), the Bureau provided no credit to PT&L for the payment of any supplemental benefits as the employees claimed they were not paid supplemental benefits and PT&L provided no evidence of having paid supplemental benefits (T. 166-171; Dept. Exs. 15, 16).[4]

The Bureau classified the work hours according to the employees' descriptions of their work tasks (T. 150, 152-154, 172-183, 183-189, 193-199). Where an employee such as Samuel Duque performed tasks in two classifications (laborer/operating engineer), the Bureau divided his hours into those two classifications evenly (T. 172-183). For Juan Tabares, who performed tasks in the laborer, operator and truck driver classifications, the Bureau divided his time 40%, 40% and 20%, respectively, based on his estimate of time he worked in those classifications (T. 186-189).

The Bureau audit then compared the wages and supplements actually paid against the wages and supplements that should have been paid for the classification of the work performed according to the relevant PRS (T. 224; Dept. Ex 15). That comparison determined that PT&L underpaid wages and supplements due to twelve workers in the amount of $108,197.63 (T. 165; Dept. Ex. 16).

During the course of the hearing, the initial audit was revised twice, and then a final revised audit was produced post-hearing to make a correction to a mistaken interest rate

[3] Payroll information and daily project reports produced by PT&L late in the proceeding further established, *inter alia*, that the certified payrolls did not cover all weeks worked and failed to accurately report the hours of all employees who worked on the Project (cf. Dept Exs. 8 & 9 and Resp. Exs. 22, 26, & 27).

[4] The sole exception involved the complainant Hector Herrera who provided the Bureau with evidence of his having been paid some supplemental benefits (T. 204-207; Dept Exs 1, 15, pp. 103-121).

calculation identified on the final day of the hearing. During the examination of Senior Investigator Keeler, mistakes in the audit were identified which were subsequently corrected and led to the creation of the first revised audit (T.319-321; Dept. Exs. 31[corrections identified], 29[revised audit], 30[revised audit summary]). The corrections primarily involved entering the correct supplemental benefit rate that should have been paid for three employees (which had been entered as $0.00 for two of them [Dept. Ex. 31]), and adding hours for another that had been inadvertently left off the initial hearing audit (T. 328-335). On the basis of those revisions, the revised audit determined that twelve workers were underpaid $112,802.91 (Dept. Ex. 30).

Late in the proceeding, the Bureau obtained, pursuant to subpoena, supplemental benefit information from the Boone Group, American Tank and Testing Company, Inc.'s benefit administrator,[5] which the Bureau reviewed, and based on that review, determined that it would provide PT&L with an annualized credit for the payment of supplemental benefits on the Project (T. 933-934). The Bureau also received employee time records and daily project reports from PT&L (T. 976-987; Resp. Exs. 22, 26, 27). The incorporation of those credits into the audit resulted in the second revised audit, the methodology of which was explained on the final day of the hearing (T. 935-993; Dept. Exs. 36, 37). The Bureau received information concerning employee health plan contributions and 401 (k) retirement contributions for the years 2000 and 2001 (Dept. Exs. 33, 34). Pursuant to the Department's "Annualization Regulation,"[6] the Bureau divided each employee's annual contribution by 2080, the total hours assumed worked by a full time employee on both public and private jobs, to derive an hourly supplemental benefit credit for each employee, which was then multiplied by the number of hours each employee worked on the Project, to provide PT&L with an annualized supplemental benefit credit for each employee

[5] American Tank and Testing Company, Inc. was the payroll company for PT&L's non-union employees on the Project (T. 480-481).
[6] 12 NYCRR 220.2 (d).

(T. 936-950).[7] For employees who worked less than a full year, the Bureau used the employees actual hours worked and divided those hours worked by the benefit received to derive an hourly supplemental credit for that particular year (T. 944).

Based on daily logs PT&L provided, the Bureau also reviewed its work classifications and reclassified some of the hours work based on the information provided in the daily logs (T. 956-957, 979-987; Resp. Ex. 22). The Bureau's classification determinations in this revised audit are based upon the daily logs, which are sign-in sheets that list the time in and out for each employee each day, the classification of the worker, and the work performed each day (T. 961-962, 979-987; Resp. Ex. 22). The Bureau also added additional weeks for employee that had been shown in the daily logs (T. 956) and removed weeks from the audit the period of March and April, 2001, during which time it was established that the Project was shut down (T. 964-965).[8] That revised audit determined that PT&L had underpaid nine workers wages and supplements of $53,208.80 for the period week-ending August 13, 2000 through week-ending December 6, 2001 (Dept. Ex 37).

That revised audit calculated interest at a rate of 10% per annum instead of the 16% rate mandated by law to be applied on an underpayment determined due after a hearing and order of the Commissioner of Labor (Dept. Ex. 37). At the end of the hearing the Department requested and was granted the right to submit a third revised audit correcting the interest rate calculation (T. 993). That final revised audit was received with the Department's Proposed Findings on March 29, 2013, as Department Exhibits 39 and 40. The final audit still determines that nine

[7] Pursuant to the Annualization Regulation, the benefits paid could be divided by the actual hours worked on public and private jobs (rather than 2,080) if accurate information is provided showing those hours. The Bureau investigator could not determine from the information PT&L provided what the actual hours of work, public and private, were for employees in the years 2000 and 2001 because (1) PT&L lumped employee hours for 2000 and 2001 together, and (2) the hours listed, particularly for 2000, which ran from September 2000 through December 31, 2000, were not complete (T. 953-954, 976-979, 989-993; Resp. Ex. 26, 27). PT&L maintains that the hours in Respondent Exhibit 27, which are American Tank & Testing payrolls for 2000 and 2001, are the complete hours for at least 2001, but the Department did not accept that there was only one payroll covering the employees work on both public and private jobs, when at least two entities, PT&L and American Tank & Testing, were involved in their employment (T. 990-993; Resp. Proposed Findings, pp. 8-9). The skepticism appears justified based on the limited number of hours reported for 2001 in the Respondent's examples of employees' hours worked in 2001 (Cinotti/472; E. Duque/1858; Herrera/62; Muffle/258; Tabares/502) (Resp. Proposed Findings, pp. 9-10).

[8] PT&L maintains the Project was shut down somewhat longer than credited by the Bureau, to-wit: from February 16, 2001 until May 9, 2001 (Resp. Proposed Findings, pp. 4-5, 7-8; T.561-562; Resp. Ex. 9). With the sole exception of Samuel Duque, who is on the audit for 1 hour 2/26/01, 2 hours 3/5/01, 1 hour 3/12/01 and 2 hours 5/7/01, I find no other time in the audit during that period, and note that PT&L's own daily logs show 3 employees working 10 hours each on Tuesday, March 20, 2001, so that it appears that there was not a complete cessation of work in that shut down period (Resp. Ex. 22).

workers were underpaid $53,208.80 for the period week-ending August 13, 2000 through week-ending December 6, 2001 (Dept. Ex. 40).

On or about July 19, 2005, the Bureau sent a withholding notice to the Town directing that it withhold $100,000.00 on the contract (Dept. Ex. 17). On July 25, 2005, the Town acknowledged the withholding notice and notified the Bureau that it was withholding $15,000.00, which was the amount that remained owing on the contract (*Id*.).

Officers and Shareholders

Nicholas Laganella II and Nicholas Laganella, Jr. (hereinafter "Nicholas Laganella") is the same person (T. 469). At all relevant times, Nicholas Laganella was the owner and president of PT&L (*Id.*). His mother, Anita Laganella, became president of PT&L after the Project was performed at a time when Mr. Laganella was facing felony criminal charges (T. 469-473). Eugene O'Dell was the chief operating officer ("COO") at the time the Project was performed (T. 473). Richard Clancy was the chief financial officer ("CFO") from 1998 to 2007, when PT&L ceased doing business (T. 468). The record lacks any information as to whether those titles, COO and CFO, are offices prescribed by PT&L's articles of incorporation or by-laws. Mr. Clancy, by his own admission, was also the corporate treasurer of PT&L (T. 474). In his capacity as the Chief Financial Officer, Mr. Clancy controlled the company's cash, paid its bills and payroll, and established financial controls (T. 468). He occasionally reviewed certified payrolls (*Id*.). Both he and Mr. O'Dell certified the accuracy of the payrolls on the Project (Dept. Ex. 9).

Substantially Owned-Affiliated Entities

PT&L and PT&L Environmental Consultants, Inc. were related companies with common ownership which performed similar work (T. 476-478). PT&L and PT&L Environmental Consultants, Inc. were both headquartered at 411 Sette Drive, Paramus, New Jersey (T. 474-475). Nicholas Laganella was president of both corporations, and Messers. O'Dell and Clancy served as the chief operating officer and chief financial officer, respectively, of both companies (T. 475). PT&L Environmental Services is an assumed business name used by both PT&L and PT&L Environmental Consultants, Inc. (T. 475). American Tank & Testing Company, Inc. was the payroll company for PT&L's non-union employees on prevailing wage jobs (T. 480-481). Lisa Laganella, Nicholas Laganella's ex-wife, was the owner and president of that company (T.

478-480). Mr. Clancy was the chief financial officer (T. 480). American Tank & Testing Company, Inc. was one of the payroll companies on the Project (T. 481).

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

The New York State Constitution, article 1, § 17, mandates the payment of prevailing wages and supplements to workers employed on a public work project. 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 (3d Dept. 1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

The New York State Court of Appeals has adopted a 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, 538 (2013). The Court stated the 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.*

Since the Town is a party to the contract which involved the employment of workmen; and since the contract involved construction-like labor and was paid for by public funds; and since a landfill improvement project is for the use and benefit of the general public, Labor Law article 8 applies to the Project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538.

STATUTE OF LIMITATIONS

The Department is authorized to investigate the underpayment of workers on a public work project for a period of three years immediately preceding the filing of a complaint or the

commencement of an investigation on the Bureau's own initiative. *Matter of Pav-Lak Contracting Inc. v. McGowan,* 184 Misc. 2d 386, 389 (Sup. Ct., Nassau Co., 2000); *Labor Law § 220-b (2) (c)*. The evidence credibly establishes that the last day of work on the Project was November 29, 2001. Bureau received an employee complaint on May 9, 2003, and on the basis of that complaint it opened an investigation on the Project. No other complaint was received within three years from the cessation of work on the Project. PT&L maintains that the complaint the Bureau relied on actually refers to an incinerator project PT&L performed for the Town, and that since the Bureau received no timely complaint referring to the Project, the claims should be dismissed (Resp. Proposed Findings, pp. 13-17). Although the complaint does refer to an incinerator, it lists an address consistent with the Project. And although the complaint does makes reference to a start time somewhat before the commencement of the Project (July 2000), it also the specifically lists weeks of work consistent with the duration of the Project (2000-2001), not the incinerator project (2000). Although these inconsistencies create some confusion, at the time the complaint was received the Bureau understood it to pertain to the Project, and it opened its investigation concerning the Project. As the Bureau is authorized to open an investigation on its own initiative, the fact that it did so on the Project within the prescribe time period is sufficient to preserve all claims, regardless of whether the complaint is subsequently determined to be in some manner defective. *Labor Law § 220-b (2) (c).*

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 (1st Dept. 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 (3d Dept. 2006), *lv denied*, 8 NY3d 803 (2007); *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 927 (3d Dept. 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*, 180 AD2d 881, 881-882 (3d Dept. 1992), *lv denied*, 80 NY2d 752 (1992).

The Bureau ultimately classified the work according to the classifications recorded in the daily project reports, which are generally consistent with nature of the work called for by the contracts and the employees' statements concerning the tasks they actually performed on the Project. This process of classification is committed to the expertise of the Bureau. It was reasonable for the Bureau to credit the classification descriptions in the contemporaneously maintained daily reports over Mr. Clancy's testimony regarding his recollection of worker classifications. *Matter of A. Uliano & Son. Ltd. v. New York State Department of Labor*, 97 AD3d 664, 667 (2d Dept. 2012)

PT&L has not made a clear showing that the classifications utilized do not reflect the nature of the work actually performed. *See, Matter of Lantry v. State of New York,* 6 NY3d 49, 55; *Matter of D & D Mason Contrs., v. Smith*, 81 AD3d 943, 944 (2d Dept. 2011), *lv denied* 17 NY3d 714 (2011).

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 (3d Dept. 1989) (citation omitted). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. *Matter of TPK Constr. Co. v. Dillon*, 266 AD2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v. Sweeney*, 251 AD2d 169, 169-170 (1st Dept. 1998).

As the Bureau determined that the certified payroll records were incomplete, inaccurate and false, the Bureau initially prepared an audit utilizing a methodology which relied on employee paystubs to determine the hours that they worked and the rate of wages paid to them. The exception to that methodology was Samuel Duque, whose paystubs would show a full week of work, but who advised the Bureau he worked on the Project approximately sixteen hours each week, which led the Bureau to place him on the audit for sixteen hours each week (T. 173, 176-177). For those employees for whom the Bureau had no paystubs, and thus lacked any other information, the Bureau relied on the certified payrolls to establish the days and hour they worked and the rate of wages they were paid (T. 218-219, 233-234). Initially, with the exception of Mr. Herrera, the Bureau provided no credit to PT&L for the payment of any supplemental benefits as the employees claimed they were not paid supplemental benefits and PT&L provided no evidence of having paid supplemental benefits.

Late in the proceeding, once the Bureau obtained supplemental benefit information, the Bureau determined that it would provide PT&L with an annualized credit for the payment of supplemental benefits on the Project (T. 933-934). The Bureau further revised the initial audit based on employee time records and daily project reports PT&L produced late in the proceeding.

With regard to the annualized supplemental benefit credit, pursuant to the Department's Annualization Regulation, 12 NYCRR § 220.2 (d) (2), the Bureau divided each employee's annual contribution by the 2080 annual hours assumed worked by a full time employee. This resulted in a derived hourly supplemental benefit credit for each employee. That derived hourly supplemental benefit credit was then multiplied by the number of hours each employee worked on the Project, which provided PT&L with an annualized supplemental benefit credit for each employee. For employees who worked less than a full year, the Bureau used the employees actual hours worked and divided those hours worked by the benefit received to derive an hourly supplemental credit for that particular year.

PT&L maintains that the Bureau should have divided the employee contributions by their purported actual hours worked as shown in the voluminous American Tank & Testing payrolls produced late in the proceeding, which PT&L summarized in a spreadsheet provided to the Bureau. Pursuant to the Annualization Regulation, the benefits paid could be divided by the actual hours worked on public and private jobs (rather than 2,080) if accurate information is

provided showing those hours. 12 NYCRR § 220.2 (d) (1). The Bureau investigator testified that she could not determine from the information PT&L provided what the actual hours of work, public and private, were for employees in the years 2000 and 2001 because (1) PT&L lumped employee hours for 2000 and 2001 together, and (2) the hours listed, particularly for 2000, which ran from September 2000 through December 31, 2000, were not complete. Although PT&L maintains that the hours recorded in American Tank & Testing payrolls for 2001 are the complete hours public and private for all non-union workers who worked on the Project, the Department did not accept that there was only one payroll covering these employees, since at least two entities, PT&L and American Tank & Testing, were involved in their employment. The skepticism appears justified based upon the falsified certified payrolls previously obtained and the limited number of hours reported in the American Tank & Testing payrolls for 2001. For example, Mr. Cinotti purportedly worked 472 hours, public and private, in 2001; Mr. Edgar Duque, 1858 hours; Mr. Herrera, 62 hours; Mr. Muffle, 258 hours; and Mr. Tabares, 502. (Resp. Proposed Findings, pp. 9-10). It was reasonable for the Bureau to divide supplemental benefit contributions by the 2080 hours assumed worked by a full time employee. 12 NYCRR § 220.2 (d) (2)

Based on daily logs PT&L provided, the Bureau also reviewed its work classifications and reclassified some of the hours work based on the information provided in the daily logs. The daily logs are sign-in sheets that list the time in and out for each employee each day, the classification of the worker, and the work performed each. As previously explained, it was reasonable for the Bureau to credit the classification descriptions in the contemporaneously maintained daily reports over Mr. Clancy's testimony regarding his recollection of worker classifications. *Matter of A. Uliano & Son. Ltd. v. New York State Department of Labor*, 97 AD3d 664, 667 (2d Dept. 2012)

The Bureau also added additional weeks for employee that had been shown in the daily logs and, with very limited exception, removed from the audit hours worked from the period of

February 16 through May 9, 2001, during which time it was established that the Project was shut down.[9]

Based on the aforesaid methodology, the revised audit determined that PT&L had underpaid nine workers wages and supplements of $53,208.80 for the period week ending August 13, 2000 through December 6, 2001.

In light of PT&L's failure to produce true, complete and accurate certified payroll records, the Bureau was entitled to use information from investigatory interviews with employees, employee complaint forms, employee testimony, and the daily logs. *Matter of A. Uliano & Son. Ltd. v. New York State Department of Labor*, 97 AD3d 664, 667 (2d Dept. 2012); *Matter of Georgakis Painters Corp. v Hartnett*, 170 AD2d 726, 728 (3d Dept 1991); *Matter of Naftilos Painters Painting and Sandblasting, Inc. v Hartnett*, 173 AD2d 964, 967 (3d Dept 1991). Moreover, hearsay evidence, if sufficiently believable, relevant and probative, constitutes substantial evidence. *Matter of D & D Mason Contrs., v. Smith*, 81 AD3d 943, 944; *Matter of Tsakonas v. Dowling*, 227 AD2d 729, 730 (3d Dept. 1996). The Bureau's reliance on employee interviews, complaints, testimony and daily logs, and the inferences drawn from therefrom, was necessitated by PT&L's failure to maintain true, complete and accurate certified payroll records. Although the determinations may necessarily be imperfect approximations, the estimates have a rational basis and are supported by substantial evidence. *See, Matter of D & D Mason Contrs., v. Smith*, 81 AD3d 943, 944.

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, 928 (3d Dept. 2006), *lv denied*, 8 NY3d 802 (2007). Consequently, PT&L 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.

[9] The sole exception was Samuel Duque, who is on the audit for 2 hours on 2/19/01, 1 hour on 2/26/01, 2 hours on 3/5/01, 1 hour on 3/12/01 and 2 hours 5/7/01. I note that PT&L's own daily logs show 3 employees working 10 hours each on Tuesday, March 20, 2001, so it would appear that there was not a complete cessation of work during the shutdown period (Resp. Ex. 22).

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

For the purpose of Labor Law article 8, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v. Roberts*, 128 AD2d 1006, 1006-1007 (3d Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v. Hartnett*, 181 AD2d 1013, 1013 (4th Dept. 1992); s*ee also, Matter of Otis Eastern Services, Inc. v. Hudacs*, 185 AD2d 483, 485 (3d Dept. 1992).

[10] Prior to November 1, 2002, the section read as follows: "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the five largest shareholders of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." *Labor Law § 220-b (3) (b) (1*), prior to amendment effective November 1, 2002.

PT&L knew that the Project was a public work project requiring the payment of prevailing wages and supplements. The prime contract expressly notified it of that fact. The failure to pay the required wages and benefits constitutes a willful violation of Labor Law article 8.

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. *See, e.g., Matter of Miller Insulation Co., Inc.*, WAB Case No. 99-38 (1992). The dictionary definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." Merriam-Webster, 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).

The evidence demonstrates that the certified payrolls, *inter alia,* underreported the number of employees on Project and the days and hours of their work. The omission of employees and of days and hours of work from the certified payrolls demonstrates an intention to deceive and constitutes payroll falsification.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

Labor Law § 220-b (3) (b) (1) provides that any successor or substantially owned-affiliated entity of the contractor shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the contractor.

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).

PT&L and PT&L Environmental Consultants, Inc. were related companies with common ownership. They performed similar work and were both headquartered at 411 Sette Drive, Paramus, New Jersey. Nicholas Laganella was president of both corporations, and Messers. O'Dell and Clancy served as the chief operating officer and chief financial officer, respectively, of both companies (T. 475). PT&L Environmental Services is an assumed business name used by both PT&L and PT&L Environmental Consultants, Inc. (T. 475). American Tank & Testing Company, Inc. was the payroll company for PT&L's non-union employees on prevailing wage jobs. Lisa Laganella, Nicholas Laganella's ex-wife, was the owner and president of that company and Mr. Clancy was the chief financial officer. American Tank & Testing Company, Inc. was one of the payroll companies on the Project.

In view of the interconnected relationship among PT&L, PT&L Environmental Consultants, Inc. and American Tank & Testing Company, Inc., and the expansive construction to be applied to the statute, PT&L Environmental Consultants, Inc. and American Tank & Testing Company, Inc., are substantially owned-affiliated entities within the meaning Labor Law § 220-b (3) (b) (1). *Matter of Bistrian Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

SHAREHOLDERS AND OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor, or, prior to November 1, 2002, any of the five largest shareholders of the contractor, or any officer of the contractor or 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.

Nicholas Laganella was one of the top five shareholders of PT&L at the time the Project was performed and in that capacity he is subject to the same bidding ineligibility as the corporate entity. Having determined that Nicholas Laganella is one of the top five shareholders of PT&L, it is unnecessary to determine whether, as an officer, he knowingly participated in the willful violation. Richard Clancy testified that he was the treasurer and CFO of PT&L. In that capacity he was responsible generally for PT&L's payroll, and he in fact reviewed and certified the payrolls that have been determined to have been falsified. As such, as an officer of the corporation, he knowingly participated in the willful violation.

The evidence on this record is insufficient to determine that Anita Laganella and Eugene O'Dell were a shareholders or officers of PT&L at the time these projects were undertaken.

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 willful underpayment of approximately $50,000.00 to nine employees on the Project, which involved the falsification of payroll records, is a serious violation involving bad faith that justifies the maximum penalty sought by the Department, to-wit: 25% of the total amount due on the Project.

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 PT&L underpaid wages and supplements due the identified employees in the amount of $53,208.80; and

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

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

DETERMINE that PT&L Environmental Consultants, Inc. and American Tank & Testing Company, Inc. are "substantially owned-affiliated entities" of PT&L; and

DETERMINE that Nicholas Laganella is one of the five largest shareholders of PT&L; and

DETERMINE that Richard Clancy is an officer of PT&L who knowingly participated in the violation of Labor Law article 8; and

DETERMINE that PT&L be assessed a civil penalty in the Department's requested 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

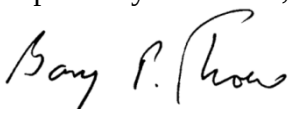
ORDER that Town of Ramapo remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, PT&L, 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: June 17, 2014
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer