STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

ML, INC., and LUCYNA MROCZEK, as an officer and/or shareholder of ML, INC., and its successor or substantially owned-affiliated entity ML OF NEW JERSEY,

Prime Contractor,

and

ALLIANCE 360 GROUP, INC. d/b/a A3G INC., and ERIC STEPHAN, as an officer and/or shareholder of ALLIANCE 360 GROUP, INC. d/b/a A3G INC.,

Subcontractor,

and

QUALITY STEEL ERECTORS INC., and DANIEL LOHAN, as an officer and/or shareholder of QUALITY STEEL ERECTORS INC.

Subcontractor,

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

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DEFAULT

REPORT AND

RECOMMENDATION

Prevailing Wage Rate
PRC No. 2020009422
Case ID: PW08 2023000327
Putnam County

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

Pursuant to a Notice of Hearing issued on May 6, 2025, a videoconference hearing was held on October 15, 2025 in Albany, New York with participating parties and/or witnesses appearing remotely at various other locations. The purpose of the hearing was to provide all interested 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. At the conclusion of the hearing, the parties who appeared were given the opportunity to submit Proposed Findings of Fact and Conclusions of Law ("Proposed Findings"), and those parties submitted Proposed Findings by the submission deadline.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Quality Steel Erectors Inc. and Daniel Lohan, as an officer and/or shareholder of Quality Steel Erectors Inc. (hereinafter "Quality Steel"), a subcontractor of intermediate contractor, Alliance 360 Group, Inc. d/b/a A3G, Inc. (hereinafter "A3G") which in turn was a subcontractor to ML, Inc. (hereinafter "ML" and/or "Prime") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving construction of a new Town of Philipstown Highway Department Headquarters for the Town of Philipstown ("Department of Jurisdiction"), located in the County of Putnam, State of New York ("Project").

HEARING OFFICER

Chief Administrative Law Judge, Marshall H. Day was designated as Hearing Officer and conducted the hearing in this matter.

APPEARANCES

The Bureau was represented by Department Deputy Commissioner and General Counsel, Jill Archambault, (Ana D'Angelo, Assistant Attorney 3, of Counsel).

Respondents, ML and A3G, appeared by and through their attorney, Littler Mendelson P.C. (Russell McEwan, Esq., Jonathan Carrillo, Esq. and Max Lamcken, Esq., all of counsel).

There was no appearance by Respondents, Quality Steel.

ISSUES

1. Did Quality Steel pay the rate of wages or provide the supplemental benefits prevailing in the locality at issue, and, if not, what is the amount of underpayment?
2. Was any failure by Quality Steel to pay the prevailing rate of wages or to provide the supplemental benefits prevailing in the locality at issue a "willful" violation?
3. Did any of the underpayment of wages and/or supplemental benefits by Quality Steel involve the falsification of payroll records?
4. Is Daniel Lohan a shareholder of Quality Steel who owned or controlled at least ten per centum of the outstanding stock of Quality Steel?
5. Is Daniel Lohan an officer of Quality Steel who knowingly participated in a willful violation of Labor Law Article 8?
6. Should interest on the underpayment of wages and/or supplemental benefits be assessed against Quality Steel and, if so, in what amount?
7. Whether, pursuant to Labor Law Section 223, ML as prime contractor on the Project, and A3G as an intermediate subcontractor on the Project, are liable for the non-compliance or evasion by their subcontractor Quality Steel of its obligation to properly pay prevailing wages and/or supplemental benefits, interest, and civil penalty?
8. Should a civil penalty be assessed against Quality Steel or ML, as the prime contractor on the Project, and, if so, in what amount?
9. Is ML of New Jersey a substantially owned-affiliated entity of ML, Inc. as defined in Sections 220(5) (g) of the Labor Law?
10. Should the Motion to Dismiss brought forth in ML and A3G's Answer be granted?
11. Should Estoppel apply and/or be granted on behalf of Respondents', ML and A3G?

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau into a project involving public work performed by Quality Steel[1].

The Notice of Hearing alleges that Quality Steel willfully failed to pay or provide prevailing wages and supplemental benefits to eleven (11) of its laborers, workmen and/or mechanics performing work in the Ironworker classification on the Project (HO 1).

Respondents, ML and A3G, by and through its attorney, filed separate Answers to the charges contained in the Notice of Hearing (HO 6 and 7), counsel appeared on behalf of both those just named Respondents at the hearing, and a post hearing brief ("Proposed Findings") was submitted on behalf of both entities.

On May 8, 2025, the Department duly served a copy of the Notice of Hearing on Quality Steel, via regular and certified mail, return receipt requested using the last two known addresses of Quality Steel (HO 2). Two of the certified mailings were returned signed by a representative of the Quality Steel (HO 3). The Notice of Hearing scheduled a July 17, 2025, and July 18, 2025, hearing date and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing[2].

Quality Steel failed to file an Answer to the charges contained in any of the Notices of Hearing and Designation of Hearing Officer that were issued or to appear and/or participate in the hearing, therefore, Respondent, Quality Steel, is held in default of this proceeding.

PROJECT
TOWN OF PHILIPSTOWN
PRC #: 2020009422

On or about July 6, 2021, ML entered into a contract with the Town of Philipstown to furnish materials, labor, tools and equipment necessary for the construction of a new Town of Philipstown Highway Department Headquarters for the Town of Philipstown, located at 50

[1] Documentary evidence will be referenced as follow: Hearing Officer Exhibits, HO X; Department Exhibits, DOL X and Respondents Exhibits R X. Transcript references will be in the format: T p X or T pp X, X or T pp X–Y.

[2] The hearing date was later adjourned at the request of the participating parties and a new hearing date of October 15, 2025 was set (HO 4).

Fishkill Road, in the Village of Nelsonville, in the County of Putnam, State of New York (as mentioned above, "Project") (DOL 5 and 10; T pp 38-40, 50-52, 137-139, 176-179).

On or about May 11, 2022, ML entered into a subcontract with A3G under which A3G was to deliver and furnish all materials, labor, and equipment necessary for the installation of primary and secondary steel framing and pre-engineered metal roofing system with all associated components for the Project (DOL 8; T pp 44-47, 171, 175-176).

On or about June 19, 2022, A3G entered into a subcontract with Quality Steel under which Quality Steel was to deliver and furnish all materials, labor, and equipment necessary for the installation of a new Turf Field Building with a slope gable roof for the Project. Pursuant to the scope of work contained in the subcontract agreement, Quality Steel was to provide primary/secondary roof and wall steel framing assemblies and wall/roof cladding accessories with related trim (which included the installation of a pro-liner roof insulation system) (DOL 9; T pp 47-50, 172, 173, 176).

The scope of work outlined in the subcontract agreement and specifications involved the employment of laborers, workmen and/or mechanics in the Ironworker classification on the Project (T pp 66-67, 77).

On or about July 1, 2021, the Bureau issued Prevailing Wage Rate Schedule 2021 for Putnam County. Prevailing Wage Rate Schedule 2021 for Putnam County detailed the amount of wages and supplements which were to be paid to or provided for the laborers, workmen and mechanics performing work on the Project from July 1, 2021 through June 30, 2022, in the following classification: Ironworker, with wages of $50.18 per hour and supplements of $40.90 per hour (DOL 17; T pp 76-79).

On or about July 1, 2022, the Bureau issued Prevailing Wage Rate Schedule 2022 for Putnam County. Prevailing Wage Rate Schedule 2022 for Putnam County detailed the amount of wages and supplements which were to be paid to or provided for the laborers, workmen and mechanics performing work on Project 1 from July 1, 2022 through June 30, 2023, in the following classification: Ironworker, with wages of $51.38 per hour and supplements of $42.71 (DOL 18; T pp 79-81).

On or about December 9, 2022, a Business Representative from Ironworkers Local 417

contacted the Bureau and thereafter filed a complaint regarding payment irregularities on the Project, alleging that employees were not being paid the proper prevailing wages and supplemental benefits for work performed on the Project (DOL 1; T pp 22-27, 126-137, 139-143, 170, 173-174, 178, 190-195).

In response to the aforementioned complaint, the Bureau commenced an investigation of the Project.

On or about December 15, 2022, the Bureau requested that A3G and Quality Steel furnish certified payroll records and other documents relating to the Project (DOL 2; T pp. 28-31).

A3G and Quality Steel failed to respond to the Bureau's initial request for payroll records and other documents (T p 30).

On or about December 21, 2022, a representative for ML reached out to the Bureau to confirm that ML was the prime contractor on the Project, A3G was a subcontractor on the Project, and Quality Steel was a subcontractor of A3G on the Project (T p 32).

On or about January 25, 2023, the Bureau again requested that Quality Steel furnish certified payroll records and other documents relating to the Project (DOL 3; T pp. 31-33).

Quality Steel failed to respond to the Bureau's second request for payroll records or other documents (T p 36).

On or about January 26, 2023, the Bureau received from ML, Quality Steel's certified payroll records relating to the Project (DOL 11 and 12; T pp 37, 52-57, 143, 147, 183-187).

On or about March 9, 2023, the Bureau received from A3G, Quality Steel's certified payroll records and other documents relating to the Project (T pp 38, 53-55).

On or about October 2, 2023, the Bureau issued a Notice to Withhold Payment to the Town of Philipstown directing them withhold payment in the amount of $100,000.00 due to ML (DOL 22; T pp 110-112).

On or about August 13, 2024, and September 9, 2024, two employees from Quality Steel completed a Bureau-issued questionnaire about their rate of pay and work schedule on the Project (DOL 14 and 15; T pp 59-63, 182).

On or about September 4, 2024, ML remitted a check in the amount of $100,000.00 to the Department in lieu of the withholding amount per the aforementioned Notice to Withhold Payment issued on October 2, 2023, to be held by the Department pending the issuance of a Determination and Order by the Commissioner of Labor in this matter (DOL 24; T pp 114-116, 158-161, 193, 194).

On or about September 9, 2024, the Bureau issued a Notice to Release Payment to the Town of Philipstown directing them to release payment in the amount of $100,000.00 due to the check remitted by ML to the Department (DOL 25; T pp 116-119).

On or about September 20, 2024, the Bureau received from the Town of Philipstown a copy of the prime contract, project specifications, and bond records relating to the Project.

The information provided by the various sources enabled the Bureau to reach certain conclusions as part of its investigation of the Project.

Over the course of the investigation, the Bureau issued five Notice of Labor Law Inspection Findings to Quality Steel with the final version being issued on or about September 23, 2024, notifying Quality Steel of the Bureau's findings on the Project (DOL 21; T pp 104-110, 156-158, 187-189).

Based on its investigation, the Bureau determined that Quality Steel employed and underpaid eleven (11) workers on the Project in the Ironworker classification and failed to pay or provide prevailing wages and supplements to those eleven (11) workers in accordance with the prevailing wage schedules in effect at the time.

During the period from the week ending June 26, 2022, through the week ending July 10, 2022, Quality Steel underpaid prevailing wages and supplements to eleven (11) laborers, workmen and mechanics performing work in the Ironworker classification on the Project in the total amount of $34,353.23[3] (DOL 16 and 20; T pp 64-75, 80-85, 87-104, 149-156, 179-181).

During the period when work was performed on the Project, Lucyna Mroczek was an officer and/or shareholder owning or controlling at least ten per centum of the outstanding stock,

[3] In the Department's pleadings, it alleged that $109,094.32 in wages and supplements were due to the laborers, workmen and mechanics on the Project. There is nothing contained in the record which outlines the disparity between the amounts alleged in the pleadings and the amounts ultimately sought for the workers by the Department.

and/or one of ML's five largest shareholders, or any combination of the above (DOL 27; T pp 119-121).

During the period when work was performed on the Project, ML OF New Jersey is a substantially owned-affiliated entity of ML. as defined in Sections 220(5) (g) of the Labor Law (DOL 27; T pp 119-121).

During the period when work was performed on the Project, Eric Stephan was an officer and/or shareholder owning or controlling at least ten per centum of the outstanding stock, and/or one of A3G's five largest shareholders, or any combination of the above (DOL 27; T pp 121-123).

During the period when work was performed on the Project, Daniel Lohan was an officer and/or shareholder owning or controlling at least ten per centum of the outstanding stock, and/or one of Quality Steel's five largest shareholders, who knowingly participated in Quality Steel failure to pay or provide prevailing wages and supplements to or for the benefits of employees who performed work on the Project, or any combination of the above (DOL 27; T pp 123-124).

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and documents describing the underpayments, which supported the Bureau's charges that:

The Project was subject to Labor Law article 8; and

Prime entered into a contract for the Project with the Department of Jurisdiction; and

A3G entered into a subcontract with Prime for work on the Project; and

Quality Steel entered into a subcontract with A3G for work on the Project; and

Quality Steel willfully underpaid eleven (11) laborers, workers and mechanics performing work in the ironworker classification during the week ending June 26, 2022, through the week ending July 10, 2022; and

Daniel Lohan is the sole owner of Quality Steel; and

Daniel Lohan knowingly participated in Quality Steel's violation of Labor Law article 8; and

The willful violation of Quality Steel and Danel Lohan involved the falsification of payroll records under Labor Law Article 8, and

Pursuant to Labor Law Section 223, ML as prime contractor on the Project, is liable for the non-compliance or evasion by their subcontractor Quality Steel of its obligation to properly pay prevailing wages and/or supplemental benefits, interest, and civil penalty.

CONCLUSIONS OF LAW

MOTION TO DISMISS

In Respondents' Answers, ML and A3G moved the Administrative Adjudication Unit to dismiss the Department's Petition, in its entirety, with prejudice, arguing that the Department could not prove each and every prima facie element it needed to maintain its claims.

Pursuant to Department of Labor hearing rules of procedure, a determination on this motion is held until the conclusion of the hearing. Given the substantial evidence of prevailing wage violations addressed herein and given the extensive testimony elicited concerning the violations and the documents received into evidence on behalf of both parties, I find no basis for granting such a motion.

For the foregoing reason, based upon the evidence in the record as a whole, the motion to dismiss is not granted.

EQUITABLE ESTOPPEL

Respondents, ML and A3G, both in its Answer and Post-Hearing Proposed Findings asked that this matter be terminated in the interests of justice. That Respondents believe that the Department should be equitably estopped from imposing liability or penalties beyond the scope of a pre-hearing settlement agreement allegedly reached by the parties.

The general rule is that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (*Matter of Schorr v New York City Department of Housing Preservation*, 10 NY3d 776, 779, 886 N.E.2d 762, 857 N.Y.S.2d 1 [2008], quoting citations omitted) or to prevent it from performing a "governmental function" (*see Matter of Village of Fleischmanns*, 77 AD3d 1146, 1148-1149, 909 N.Y.S.2d 564 [3rd Dept., 2010];

Matter of Pegasus Cleaning Corporation v Smith, [**10] 73 AD3d 1328, 1330, 905 N.Y.S.2d 666 [3rd Dept., 2010]). "Moreover, "'erroneous advice by a government employee does not constitute the type of unusual circumstance[s] contemplated by the exception"' to this general rule" (*Matter of Amsterdam Nursing Home Corporation (1992) v Daines*, 68 AD3d 1591, 1592, 892 N.Y.S.2d 608 [3rd Dept., 2009], quoting *Notaro v Power Auth, of State of N.Y.,* 41 AD3d at 1320, quoting *Matter of Grella v Hevesi,* 38 AD3d 113 [3d Dept., 2007] at 117, 827 N.Y.S.2d 756). The fact that the investigator produced multiple audits, and draft stipulations were exchanged between the parties, even if the investigator gave erroneous advice which may have suggested that the matter was resolved, does not constitute the unusual circumstances contemplated by the exception, and therefore the equitable estoppel argument fails.

In addition, for a stipulation of settlement to be entered into by the Department, the Stipulation has to be So Ordered by the Commissioner and a Notice of Filing concerning the stipulation has to be filled in the office of the Commissioner of Labor. There is no evidence in this proceeding indicating that occurred, and as such the Respondent's cannot rely on a prior audit to set their financial liability herein. Furthermore, the evidentiary value of documents discussed during voluntary exchanges between the parties, in pre-hearing discussions not before this body, is given little weight when making a final recommendation to the Commissioner.

Respondents go on to state that this case presents unusual and compelling circumstances warranting equitable estoppel particularly given the extraordinary delay associated with the proceeding and the retention of Respondents' funds for more than a year. To address the issue of retention of funds a discussion on the purpose of the Withholdings has to be broached.

The clear intent of Labor Law § 220-b (2) (a) (1) is to vest in the Department the ability to seize funds for prevailing wage violations from any public entity retaining funds due an offending contractor, whether or not the funds were earned on that public improvement project.

In order to seize those funds, the Department has the ability to issue what is called a Notice to Withhold or a Notice to Cross-Withhold, these two types of withholding notices create a lien against funds earned, or due to be earned, on a public work project[4]. The Department holds a valid statutory lien by virtue of the filing of the Notice of Withholdings and/or Notice of Cross-

[4] The lien attaches against the prime contractor's funds.

Withholdings with the financial officer of the Department of Jurisdiction, which lien is enforceable, upon satisfaction of the Lien Law Article 3-A obligations arising from the contracts on the project.

Article 3-A of the Lien Law provides that funds received by a (prime) contractor in connection with a public improvement contract and any right of action for any such funds due or earned, or to become due or earned, shall constitute assets of a trust, and that pursuant to Article 3-A of the Lien Law, such assets are to be held and applied to the payment of Article 3-A trust obligations as defined in Lien Law Section 71.

Article 3-A of the Lien Law mandates that once a trust comes into existence, the funds may not be diverted for non-trust purposes, and that only after all trust claims have been paid or discharged does a beneficial interest in the remaining balance vest in the trustee owner, contractor, or secondary beneficiaries.

That the funds held by financial officer pursuant to the Notice of Withholding and/or Notice of Cross-Withholding are Article 3-A trust assets to be held and applied to the payment of the Article 3-A trust obligations arising from the primary project and secondary public improvement projects. Article 3-A trust beneficiaries entitled to be paid from Article 3-A trust funds are subcontractors, laborers, materialmen and suppliers.

A direct withholding is given super priority over all other liens on the job, and those trust assets are used first to make whole the trust beneficiaries on the project.

A cross-withholding is given a secondary position and falls behind all other valid liens directly connected with a public improvement contract (liens of subcontractors, laborers, materialmen and suppliers). The cross-withholding will not be lifted until to all funds and retainage have been expended from the contract at issue.

The withholding on this particular project was a direct withholding thereby giving the lien a super priority over all other liens. The fact that the funds were released to the Department, by agreement between the parties, to accommodate the jurisdiction so it didn't lose critical funding and are now being withheld in an escrow account on the laborers, workmen and mechanics behalf does not change the character of the funds being withheld. It also doesn't give the Prime contractor the ability to argue that since the funds are held in another form other than

in an Article 3-A trust obligation that they are now somehow prejudiced, because the funds in escrow are being held for an extensive period of time pending resolution of the matter. Labor Law § 220-b (2) (a) (1) again is clear that sufficient monies are to be held to satisfy the said wages, and supplements, including interest and any civil penalty that may be assessed pending a final determination. Although it may be unusual for the Bureau to hold funds in an escrow account instead of using its statutory withholding powers, the form those funds are held in, the delays associated with the investigation process and the final release of funds pending a final determination of the proceeding are not, as a valid withholding may stay in place for years pending a final determination. Given the fact that historically withholdings have been held in place in these type of cases for extensive periods of time (some at least a decade), I do not find that the Respondents' are prejudiced in any way by the holding of funds in an escrow account (in trust) on behalf of laborers, workmen or mechanics given the time period associated with this case, even if it was longer than one year.

Also, given the fact that the Prime contractor agreed to tender to the Department $100,000.00 to hold in escrow rather than the $18,891.40 allegedly agreed upon by the parties, further evidences a final number was not agreed to between the parties. If there was an agreed to amount, that amount would have been held in escrow, rather than the full $100,000.00, an amount set by virtue of the withholding notice (for failure to produce records timely), not by an amount agreed to by a settlement between the parties.

Finally, given the fact that the only motion that can be made by the Respondents in an administrative hearing is a motion to dismiss, the Respondents have failed to articulate relief which can be granted in this proceeding. Accordingly, I find no basis to grant the relief requested, and Respondent's estoppel argument is denied.

JURISDICTION OF ARTICLE 8

New York State Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work projects[5]. This constitutional mandate is

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

implemented through Labor Law article 8. Labor Law §§ 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." (*Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 [1999]). Labor Law § 220.2 establishes that the law applies to a contract for public work to which the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law is a party. Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

In 1983, the New York State Court of Appeals established what was, until somewhat recently, the test for whether a project was subject to the Labor Law public work provisions. *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), affd 63 N.Y.2d 810 (1984). Erie involved a construction contract on a project financed by an industrial development agency, and established the now-familiar two-prong test:

> First, the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and second, the contract must concern a public works project. *Id at 537*.

In 2013, the New York State Court of Appeals adopted a new, three-prong test to determine whether a particular project constitutes a public work project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc*, 21 NY3d 530 (2013). The Court states this test as follows:

> First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public. *Id at 538*.

Respondents, ML and A3G, do not dispute that the Department of Jurisdiction associated with the Project is a public entity, and a party to the public work contract for that prevailing wages should have been paid on the Project. The contract involved construction-like labor paid for by public funds. Finally, the work product is clearly for the use or other benefit of the

general public. Additionally, the Department of Jurisdiction applied for a PRC number, and all three contracts specifically enumerate that the Project was subject to Article 8 (Public Work) of the New York State Labor Law and the payment of Prevailing Wages and Supplemental benefits to the laborers, workmen and mechanics was required. As such, Labor Law Article 8 applies, and all laborers, workmen and mechanics employed on the public work project at issue are required to be paid of prevailing wages and supplemental benefits for the work they performed on the Project.

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workmen or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as "classification." (*Matter of Armco Drainage & Metal Products, Inc. v State of New York,* 285 AD 236, 241 [1954]). Classification of workers is within the expertise of the Department. *(Matter of Lantry v State of New York,* 6 NY3d 49, 55 [2005]; *Matter of Nash v New York State Dept of Labor,* 34 AD3 905, 906 [2006], *lv denied*, 8 NY3d 803 [2007]; *Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.'" (*Matter of Nash v New York State Dept of Labor,* 34 AD3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor,* 154 AD2d 117, 120 [3d Dept. 1990], *affd* 76 NY2d 946 [1990], *quoting Matter of Kelly v Beame,* 15 NY 103, 109 [1965]). Workers are to be classified according to the work they perform, not their qualifications and skills. (*See, Matter of D. A. Elia Constr. Corp v State of New York*, 289 AD2d 665 [1992], *lv denied*, 80 NY2d 752 [1992]).

The record contains ample evidence from the contract documents, project specifications/manual, PW-5 complaint, questionnaires, nature and/or scope of work performed, Quality Steel's certified payrolls, and investigator and witnesses testimony to justify the classifications used in this instance. In addition, the Respondents did not contest the classification used in this instance. Therefore, I find that the weight of the evidence taken in its

entirety supports the classification determination made by the Department for the workers on the Project as that of Ironworker.

UNDERPAYMENT METHODOLOGY

"When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." (*Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [1989] (citation omitted)). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. (*Matter of TPK Constr. Co. v Dillon*, 266 AD2d 82 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]). In cases where employer's records are inaccurate, the burden shifts to the employer to negate the reasonableness of the Commissioner's calculations. *Mid Hudson Pam Corp,* 156 AD2d at 821 (citation omitted).

The Bureau received certified payrolls, as well as other relevant material including employee questionnaires, text messages, and a PW-5 complaint and photos. The Bureau investigator derived the days and hours worked directly from either the certified payroll records, or what the Bureau deemed the best available evidence for the work performed on the July 2 and July 3, 2022, dates directly from the PW-5 form and the photographs of workers on the Project site timestamped on the dates in question. The classification of work was determined based on the scope of work performed by each worker and verified through the classification listing on the certified payrolls. He obtained the hourly wage rates paid to the employees either directly from the certified payrolls[6] or the employee questionnaires and compared these rates with the

[6] The investigator also confirmed that the listed apprentice on the certified payroll records was not registered with New York State thereby that individual should have received journeymen wages and therefore was underpaid. There was also a change in rate that was not picked up by the contractor.

prevailing wage schedule applicable in the county at issue for the rates that should have been paid, to ultimately determine the amount of unpaid prevailing wages and supplements due to the workers.

Evidence in the record established that the certified payrolls of the Respondents did not accurately reflect the wages and supplements paid to the workers who performed services on the Project. Also, there is a clear absence of comprehensive payroll and time records on which the Bureau could rely to credit the Respondents with the full payment of wages and supplemental benefits to its workers or verify the hours worked. The limited payroll records that were submitted to the Bureau did not include any paystub information, canceled checks or time records. Under those circumstances, it was permissible and reasonable for the investigator to reach the conclusions made and employ the methodology he used, although it may have been imperfect, to determine the days and hours worked, as well as rates paid to the workers.

That being said there is direct testimony from Mr. Pineda in which he states he did not work during the fourth of the July weekend, and even though the investigator made reasonable conclusions in regards to how he extrapolated the information from the text messages he received from this witness and the questionnaires this worker filled out, the direct testimony is clear Mr. Pineda did not work on Sunday, July 3, 2022 and those eight hours credited at double time should be removed from the audit for this worker.

Labor Law § 661 requires an employer to establish, maintain, and preserve for not less than six years, contemporaneous, true, and accurate payroll records showing for each week worked the hours worked, the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other basis; gross wages, deductions, allowances, if any, claimed as part of the minimum wage; and net wages for each employee, plus such other information as the Commissioner deems material and necessary. As early as March 7, 2023, Respondents were put on notice of their violation of the labor law for their failure to pay prevailing wage and supplemental benefits to their employees, and that they were required and failed to produce accurate payroll records although given the time to do so.

Since there were no time records, canceled checks or supporting wage statements which the investigator could rely on to indicate whether the Quality Steel employees performed work on the Project during the weekend in question, it was reasonable for the investigator to reach the

conclusions he made. Additionally, there was no documentary evidence presented by Respondents showing that the 12" R-36 2-part Pro-Liner roof insulation system was installed by anyone other than Quality Steel and/or that it was installed on an alternate day if it wasn't performed on the holiday weekend in question. The subcontract agreement, however, between A3G and Quality Steel made it clear that Quality Steel was responsible for that work, and as such, were responsible for any man hours associated with the installation of that product.

Although there was no contrary documentary evidence that another contractor or workers installed the Pro-Liner roof installation, there is conflicting testimony as to who did that work. The foreman on the project intimated that another contractor installed the insulation while the testimony of ML's project manager and A3G's managing director both state the installation work was not subcontracted out to any other party.

The foreman testified that the workers on the roof during the day the pictures was taken were not members of Quality Steel. That he didn't know who they were, and that no Quality Steel workers worked on that holiday weekend, however he went on to state when asked specifically who put down the insulation on the roof: "No, the other company, I don't remember." Additionally stating: "Because you know that guy, the insulation guy, they only put the insulation on the roof. And later we go behind them to put the panels here." [7]

Michael Golden, project manager and estimator for ML, testified that Quality Steel was the company that installed the metal building for the Project. Mr. Golden further testified that ML did not subcontract out the insulation on the roof to another set of workers, ML had subcontracted that work to A3G. When asked if there was another contractor hired specifically to install the insulation on the roof, he said "No."

Eric John Stephan, president and managing director of A3G, testified that part of the work contracted to Quality Steel was the installation of the insulation. Mr. Stephen testified that he would not have subcontracted this specific work out to an additional subcontractor.

[7] Mr. Pineda also mentioned that: "They send the insulation guys to put insulation in later. We covered the roof insulation."

The factual statements made cannot all be true, either the work was subcontracted out as mentioned by the foremen or the work was not subcontracted out as mentioned by the officers of ML and A3G[8].

In addition, in order to effectuate payment for the work performed on the site, Mr. Golden testified that he had to submit an invoice/requisition to the owner accompanied by certified payrolls. The requisitions for payment during the time at issue were made on Quality Steel's behalf through A3G. The various certified payrolls entered into the record confirmed that A3G did not work during the period the funds were requisitioned, however Quality Steel did. Also, there are no additional certified payrolls tied to those requisitions from a third-tiered subcontractor which may have done the insulation work although it was alluded to by Mr. Pineda that some other crew may have done that work.

Mr. Stephen testified that once A3G received payment, A3G would in turn pay Quality Steel, and those payments were made according to the schedule of values (percentage of work performed and/or work completed and in place) contained as Exhibit D of the subcontract. The evidence shows that A3G paid Quality Steel out of their Chase account on July 8, 2022, in the amount of $29,500.00 for the framing balance on the Project. There was no evidence presented that those payments may have been made to someone else (third-tier subcontractor). All evidence points to Quality Steel performing the installation of the 12" R-36 2-part Pro-Liner roof insulation system as required under their subcontract with A3G.

Clearly, as evidenced by the progress payments, Quality Steel was paid for work performed during the period at issue. However, Respondents alluded in their Proposed Findings that they believe a third-tiered sub (another contractor) installed the installation[9]. If those

[8] This brings into question the foreman's testimony/credibility. If, his testimony had been, that when he returned from vacation that the roof insulation system was already installed and all his crew had to do from that point on was to lay down the panels (because the installation work was subcontracted out), or that the insulation that was seen in the holiday weekend pictures was placed on the roof prior to his vacation, so that his crew could install the insulation system when he got back, his testimony might have been more credible, and it would have bolstered the Respondents' allegations that the workers on the roof that weekend were actually other trades (or a third-tier sub), not Quality Steel workers. However, he did not mention that he or his crew ever touched the installation material, but that that work was actually subcontracted out.

[9] Paragraph 48 of Respondent's Proposed Findings state: Mr. Pineda's unrebutted testimony establishes that QSE installed metal panels on the Project *and another company installed the installation*. (emphasis added) Also, raised on Page 19 in the Conclusion section, second full paragraph stated that: "He also explained that QSE's scope on the Project was metal panel installation, while another contractor installed the insulation".

workers weren't Quality Steel employees, and the work was actually performed by a third-tier subcontractor, even on the holiday weekend at issue, then another set of certified payrolls would have had to be created covering these separate set of workers (other contractor) and a second audit would have had to been generated to cover these workers. Since the workers for the other contractor aren't known, the workers would have been added as John Does to this secondary audit, a zero credit for wages and supplemental benefits paid based on the estimate of hours worked should have been included in the audit and the new audit total could have potentially elevated the Prime's liability based on an estimate of how many hours the investigator calculated it would take to perform this task[10]. The fact that the investigator actually attributed the installation of the insulation system to Quality Steel based on a set number of hours in the audit is actually a benefit to the Prime, because it reduces the amount of wages and supplements that could have been potentially owed due to the fact that the investigator used set hours for each day worked rather than an estimate based on the overall task.

It was also mentioned other prime contractors could have been on the roof that weekend (plumbers, electricians, HVAC) [11], however, even though ML was the general contractor on the project and would have had access to all payment documents, they failed to produce certified payrolls for those alternate trades or payment requisitions which would have shown that actually other trades were working on the roof during that time period and/or the holiday weekend at issue (rather than Quality Steel).

Given the conflicting testimony and lack of any documentary evidence showing otherwise, Quality Steel's known or unknown workers installed the Pro-Liner roof insulation system and Quality Steel is responsible for the underpayments associated with the work tied thereto.

Since Quality Steel failed to produce accurate certified payroll records and failed to maintain the time and payroll records required under the labor law to negate the reasonableness

[10] The creation of a second audit for the new John Does, would have eliminated some of the workers in the Quality Steel audit, but it would not have eliminated the audit completely due to the rate pay change issue, and the failure of Quality Steel to pay their non-registered apprentice full journeymen wages.

[11] It was alluded that these workers might have been electricians on the roof, which seems implausible seeing that there were no benders, electrical metallic tubing/pvc, connectors, junction boxes or wire shown anywhere in the pictures of the roof that day. Also, mentioned that they might have been plumbers, but there was also no pvc conduit displayed either and HVAC workers don't touch the type of insulation shown.

of the Bureau's calculations, the Bureau's audits should be sustained, and the weight of the evidence in the record supports the Department's methodology.

INTEREST RATE

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. (*Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). Consequently, Quality Steel is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayments 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) [12] provides, among other things, that when two final

[12] "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has willfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work

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 (emphasis added).

For the purpose of Labor Law article 8, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. (*Matter of Cam-Ful Industries, Inc. v Roberts,* 128 AD2d 1006, 1006-1007 [1987]). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." (*Matter of Fast Trak Structures, Inc. v Hartnett,* 181 AD2d 1013, 1013 [1992]; s*ee also, Matter of Otis Eastern Services, Inc. v Hudacs,* 185 AD2d 483, 485 [1992]). The violator's knowledge may be actual or, where he should have known of the violation, implied. (*Matter of Roze Assocs. v Department of Labor*, 143 AD2d 510 [1988]; *Matter of Cam-Ful Industries, supra)* An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

The weight of the evidence in the record as a whole demonstrates that Quality Steel knew of the requirements to pay the prevailing rate of wages and supplements on the public work projects at issue and in fact did not pay the prevailing rates as required, and therefore the violations which occurred on the Project can only be considered a willful violation, and the substantial evidence in this matter warrants a finding of willfulness by the Respondents.

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

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contract with the state, any municipal corporation or public body for a period of five years from the first final determination." Labor Law § 220-b (3) (b) (1), as amended effective November 1, 2002.

of payroll records, the contractor shall be ineligible to bid on or be awarded any public work contract for a period of five (5) years from the first final determination. For this section of the law to be meaningful, the term "falsification of payroll records" must mean more than a mere arithmetic error; if it did not, in any case where the certified payrolls did not perfectly match the payments to workers such payrolls could be deemed falsified, and the contractor debarred. The definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify" *Merriam-Webster*, 2011, http://www.merriam-webster.com/dictionary/falsify). In the absence of a statutory definition, the meaning ascribed by lexicographers is a useful guide. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 537-538; *Quotron Systems v. Gallman,* 39 NY2d 428, 431 (1976).

It is clear from the record that Quality Steel failed to meet its obligation to maintain true and accurate payroll records on the Project, and I find, especially in light of the documentary evidence presented, the various witnesses' testimony and the fact that no one associated with the project could confirm who actually performed the installation of the 12" R-36 2-part Pro-Liner roof insulation system that was required under the terms of Quality Steels' contract during the period in question, although the work was recognizably performed, that Quality Steel willful failed to properly pay or provide prevailing wages and/or supplemental benefits during the period at issue and what willful underpayment involved the falsification of payroll records on the project Quality Steel maintained them on.

The substantial evidence in this matter warrants the finding of the falsification of payroll records by Quality Steel on the Project.

SHAREHOLDERS OR OFFICERS

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

In the present cases, the evidence showed that Daniel Lohan was an officer and/or shareholder owning or controlling at least ten per centum of the outstanding stock and was one of the five largest shareholders of Quality Steel during the project outlined above. Daniel Lohan executed both the subcontract agreement between Quality Steel and A3G and the certified payrolls during the period that Quality Steel performed work on the project. There was also testimony that Mr. Lohan was the owner of the business.

Pursuant to Labor Law §220-b(g)(ii) and (iii), Daniel Lohan is individually liable for the underpayments of wages and wage supplements on the Project subject to these proceedings.

Daniel Lohan by virtue of his control over the project at issue knowingly participated in Quality Steel's failure to pay or provide prevailing wages and supplements to or for the benefit of the laborers, workmen and/or mechanics who performed work on the project at issue.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some indicia of a controlling ownership relationship exists or as "…an entity which exhibits any other indicia of control over the …contractor…, regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions…, power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity." The Legislature intended the definition to be read expansively to address the realities of whether entities are substantially owned-affiliated entities. *Matter of Bistrian Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

The payment and performance bonds between Endurance Assurance Corporation and ML was signed by Lucyna Mroczek, on behalf of ML, as President. The subcontract between ML and A3G for the Project was also signed by Lucyna Mroczek, on behalf of ML, as President. On or about January 2, 2013, ML registered ML of New Jersey as a foreign business corporation with the New York State Department of State. ML New Jersey's entity status is listed as

"Active" with the New York State Department of State. Finally, Lucyna Mroczek is listed as the Chief Executive Officer for ML of New Jersey.

As such, I find that ML of New Jersey is a substantially owned-affiliated entity of ML, Inc. as defined in Sections 220(5) (g) of the Labor Law.

CIVIL PENALTY

Labor Law §§ 220 (8) and 220-b (2) (d) provide for the imposition of a civil penalty in an amount not to exceed twenty-five percent (25%) of the total amount due (underpayment and interest). In assessing the penalty amount, consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations, and the failure to comply with record-keeping and other non-wage requirements.

The contractor was a medium sized contractor employing eleven (11) laborers, workmen and mechanics and was an experienced public work contractor registered to do business in two states. Respondent, Quality Steel, failed to show good faith during the investigation, failed to comply with mandatory record keeping requirements and refused to cooperate with the Department's investigation by providing records when requested or maintain time records on the project even though it was clear they were required to do so. The record shows a failure to cooperate, serious violations due to the falsification of payroll records and numerous record-keeping violations. Under these circumstances, viewing the record as a whole, I find that a twenty-five percent (25%) penalty is appropriate against Quality Steel.

LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor's failure to comply with, or evasion of, the provisions of Labor Law article 8. (Labor Law § 223; *Konski Engineers PC v Commissioner of Labor,* 229 AD2d 950 [1996], *lv denied* 89 NY2d 802 [1996]). Such contractor's responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor's violation. *(Canarsie Plumbing and Heating Corp. v*

Goldin, 151 AD2d 331 [1989]). Quality Steel performed work on the Project as a second-tiered subcontractor to ML. Consequently, ML, in their capacity as prime contractor, is responsible for the total amount found due by its subcontractor on this Project.

12 NYCRR § 221.1 provides that when after a hearing it is determined that a subcontractor failed to pay prevailing wages and/or supplements, and the prime contractor makes restitution, the Commissioner of Labor may waive the civil penalty to be assessed in accordance with subdivision 8 of section 220 and subdivision 2 of section 220-b of the Labor Law, where uncontroverted evidence of all the following factors exist: 1) the prime contractor provided the subcontractor with the applicable prevailing wage rate schedule for the project; 2) the prime contractor made a good faith effort to assure that the subcontractor complied with all Labor Law requirements; 3) the subcontractor cannot be located, despite the prime contractor having made a good faith attempt to locate the subcontractor; 4) the prime contractor has paid the subcontractor in full in accordance with the terms of the subcontract agreement; 5) the prime contractor has fully cooperated with the Department of Labor's investigation; and 6) the prime contractor will be unable to receive indemnification from the subcontractor for the restitution it has paid.

During the course of the investigation, ML turned over $100,000.00 to the Department to hold in escrow pending resolution of this proceeding. This escrow holding allowed the Department to release its withholding and in turn allowed the jurisdiction of record to access some grants it needed to fund other projects it was involved in. The Prime requests that, pursuant to 12 NYCRR § 221.1, any penalty assessed against Quality Steel be waived insofar as it would normally apply to Prime under Labor Law § 223. I note that this regulation contains, in §221.1(a)(1) – (6), the six requirements noted above, all of which must be met if the Commissioner is to waive the assessment of any penalty. The prime contractor has failed to establish all of the factors set forth in the regulation and, therefore, the penalty assessed against Quality Steel cannot be waived as to ML.

The testimony from the project manager for ML indicates that he was aware that A3G subcontracted the work out, however he didn't see the subcontract between A3G and Quality Steel, didn't know what the contract was or how much they were paid and didn't know the role that Daneil Lohan served with Quality Steel. Given that, there is nothing in the record which shows that the prime contractor provided the subcontractor with the applicable prevailing wage

rate schedule for the project (can't leverage this responsibility to the first-tiered sub), that the prime contractor made a good faith effort to assure that Quality Steel complied with all Labor Law requirements, or that the prime contractor paid the subcontractor in full in accordance with the terms of the subcontract agreement, since they had no oversight on that contract to determine if it was fully fulfilled. The record demonstrates that Prime somewhat cooperated with the Department of Labor's investigation by putting up the escrow money to cover the underpayment amounts and interest. Quality Steel's failure to interpose an Answer in this action or appear at the hearing is also some indication the Prime may not be able to locate the Sub or obtain indemnification for the restitution paid, however only meeting a portion of the regulations doesn't allow this body to waive civil penalties in full or even reduce it based on the issues raised herein. I therefore find that, ML, pursuant to Labor Law § 223, in its capacity as the prime contractor on the Project, be held vicariously liable for the total amount found due, including interest and civil penalty, due to its subcontractor Quality Steel's failure to comply with, or evasion of, the provisions of Labor Law article 8.

There is nothing in the statute requiring the intermediate (first-tiered sub) subcontractor to contribute toward the financial obligation of the prime, however there is also nothing preventing the same intermediate subcontractor from making a monetary contribution towards the underpayments. The prime contractor can take a private right of action against the intermediate subcontractor for any financial liability associated with the public work project, however that financial recovery from the intermediate subcontractor (first-tier sub) is not addressed in the labor law. As such I make no findings against the first-tiered subcontractor A3G.

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

RECOMMENDATIONS

Based upon the default of Quality Steel in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at the hearing in support of those charges, and based upon the record as a whole, I

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

DETERMINE that Quality Steel underpaid prevailing wages and supplemental benefits to its laborers, workmen and mechanics in the amount of $32,808.08[13] on the Project, for the audit period week ending June 26, 2022, through the week ending July 10, 2022; and

DETERMINE that Daniel Lohan is an officer and owner of Quality Steel; and

DETERMINE that Daniel Lohan knowingly participated in the violation of Labor Law Article 8 on the project at issue; and

DETERMINE that the failure of Quality Steel to pay the prevailing wage or supplement rate on the project was a "willful" violation of Labor Law Article 8; and

DETERMINE that the willful violation of Quality Steel involved the falsification of payroll records on the Project under Labor Law Article 8; and

DETERMINE, that as a result of Quality Steel's knowing willful participation in the falsification of payroll records within the meaning of Section 220-b(3)(b) of the Labor Law on the named Project, both the entity (Quality Steel) and the individual (Daniel Lohan) are 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 (5) years from the issuance of the Order & Determination associated with this report; and

DETERMINE that Quality Steel (both the entity and the individual) is responsible for any underpayment of wages or supplemental benefits determined to be owed to its laborers, workmen and/or mechanics on the Project at issue; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Quality Steel is responsible for interest on the total underpayments on the named Project at the

[13] The $34,353.52, stated in the final audit minus $1,505.44, representing the 8 hours calculated as worked by Mr. Pineda on July 3, 2022, and paid at the double time rate in the audit ($102.76 and $85.42 per hour, wages and supplements, respectfully). The Bureau should verify this is the correct amount and recalculate as needed.

statutorily mandated rate of sixteen (16%) per annum from the date of underpayment to the date of payment; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Quality Steel is assessed a civil penalty in the amount of twenty-five (25%) of the underpayment and interest due on the named Project; and

DETERMINE that ML of New Jersey is a substantially owned-affiliated entity of ML, as defined in Section 220 (5) (g) of the Labor Law; and

DETERMINE that ML, as the prime contractor on the Project, is vicariously liable for non-compliance or evasion by Quality Steel of its obligation to properly pay prevailing wages and/or supplemental benefits pursuant to Labor Law Section 223, and is responsible for the underpayment of wages and supplemental benefits and interest at the statutorily mandated rate of sixteen (16%) per annum from the date of underpayment to the date of payment associated with the Project, and ML is responsible for the payment of all civil penalties assessed against Quality Steel, pursuant to 12 NYCRR Section 221.1; and

ORDER that the Bureau compute the total amount due on the Project; and

ORDER that the amount held in escrow (trust) with the Department be applied to satisfy the total amount of underpayments, interest and civil penalty due, and any balance left over after deduction of those amounts be returned to the Prime, ML; and

ORDER that Quality Steel shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, and sent to the Bureau at: Bureau of Public Work, New York State Department of Labor, Harriman State Office Campus, Building 12, 1st Floor, Room 130, Albany, New York 12226; 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 20, 2026
Albany, New York

Respectfully submitted,



Marshall H. Day, Hearing Officer