STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

OUTDOOR ALUMINUM, INC.
Prime Contractor

and

RI, INC., and
SIT ON THIS, INC., d/b/a SEATING SOLUTIONS
and
SCOTT SUPRINA, LISA SUPRINA, and
CRISTIE SUPRINA,
as officers and/or one of the five largest stockholders of
RI, INC., SIT ON THIS, INC., d/b/a SEATING SOLUTIONS
Subcontractor

RESPONDENTS

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

REPORT
&
RECOMMENDATION

Prevailing Rate Cases:
04-0755 Nassau County
05-0439 Suffolk County
05-2178A Suffolk County
06-1030A Nassau County

To: Honorable M. Patricia Smith
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on January 3 and 4, and February 11, 2008, in Garden City, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether RI, Inc. (“RI”) and Sit On This, Inc., d/b/a Seating Solutions (“Sit On This”) subcontractors of Outdoor Aluminum, Inc. (“Outdoor”), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of four contracts involving the

installation of outdoor seating systems. Proposed Findings of Fact and Conclusions of Law were received from the Department and the Respondents on June 9 and 10, 2008, respectively.

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (John D. Charles, Senior Attorney, of Counsel). RI, Sit On This, Scott Suprina, Lisa Suprina and Christie Suprina were represented by their attorneys, Ogletree, Deakin, Nash, Smoak & Stewart (Patrick M. Stanton, Esq., of Counsel). There was no appearance made by, or on behalf of, Outdoor.

ISSUES

1. Did the contractor pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. What rate of interest should be assessed on any underpayment?
3. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
4. Are RI and Sit On This "substantially owned-affiliated entities"?
5. Who are the shareholders of RI and Sit On This who owned or controlled at least ten per centum of the outstanding stock?
6. Who are the officers of RI and Sit On This who knowingly participated in a willful violation of Article 8 of the Labor Law?
7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned investigations made by the Bureau on four separate projects involving public work performed by RI and Sit on This. The first involved a contract for new bleacher construction at the H. Frank Cary High School ("Project 1") for the Sewanhaka Central School District in Nassau County ("Sewanhaka Central School District") bearing prevailing rate case number 04-0755. The second involved press box

and bleacher reconstruction at the Smithtown High School and Middle School ("Project 2") for the Smithtown Central School District in Suffolk County ("Smithtown Central School District") bearing prevailing rate case number 05-0439. The third involved the Bald Hill Amphitheater seating ("Project 3") for the Town of Brookhaven ("Town of Brookhaven ") in Suffolk County bearing prevailing rate case number 06-2178A. The last involved the assembly of aluminum bleacher units at various locations (Project 4") for the Town of Oyster Bay ("Town of Oyster Bay") in Nassau County bearing prevailing rate case number 06-1030A.

As four separate projects are involved, the facts pertaining specifically to each will be separately discussed, after first addressing factual findings of general applicability to all four projects.

Facts of General Applicability

Outdoor is the prime contractor in each of the four prevailing wage cases that are the subject of this hearing (Dept. Exs. 3, 20, 30, 40). RI is a subcontractor of Outdoor (T. 23, 64-70). Lisa Suprina is the CEO or Chairman of RI and is a ninety percent shareholder of RI (T. 12, 22; Dept. Ex. 12). Neither Scott Suprina nor Christie Suprina have an ownership interest in RI (T. 11-12). Scott Suprina is Vice President of RI (T. 11). RI does business under the assumed business name "Seating Solutions" (T. 13, 15-16; Dept. Ex. 14). Sit On This operates as a payroll company for RI (T.16-19). There is no evidence in the record concerning the ownership of Sit On This. Christie Suprina is the CEO or Chairman of Sit On This (T. 22-23, Dept. Ex. 13). RI operates as a manufacturer's representative for Outdoor Aluminum (T. 23). Outdoor Aluminum manufactures, and RI installs, seating systems (*Id.*). Prior to a bid on a project by Outdoor, RI provides a quote of the labor costs for the assembly of the project, which Outdoor incorporates in its bid (T. 32, 34).

RI paid its workers the rates it negotiated with an in-house union (T. 33). Those rates are contained in a collective bargaining agreement ("CBA") between RI and it in-house union, the "United Federation of Installers and Assemblers of Audience and Spectator Seating Systems" (the "Federation") (T.35; Dept. Ex. 9). Those rates do not correspond to any rates published in the relevant Prevailing Rate Schedules ("PRSs")

published by the Department. In addition, pursuant to that CBA, in exchange for a no-lay-off-guaranteed work provision, which guaranteed a continuous twelve months of work, employees stipulated to waive the payment of supplemental fringe benefits required under various prevailing wage laws on public work projects and agreed that no-lay-off provision would constitute the equivalent of the supplemental benefits required to be paid or provided under prevailing wage laws and would be reported as the equivalent of those benefits (T. 106; Dept Ex. 9; Resp. Ex. 4). RI never made any application to the Commissioner of Labor to have those contract rates recognized by the Department of Labor (*See,* Dept. Ex. 50, pp. 6, 14; T-61-63, 103-107). RI did not pay its workers premium pay for overtime worked on either a daily (after 7 hours for ironworker work) or weekly (after 40 hours) basis (T. 131-135).

Classification

The Bureau determined that the removal of an existing seating system and its replacement with a new prefabricated aluminum seating systems, as well as the installation of new prefabricated aluminum seating systems, fell within the scope of the Ironworkers' CBA; and that RI's workers, for the most part, were engaged in the work of ornamental ironworkers (T. 106, 107, 193-197; Dept. Exs. 51, 52). The ornamental ironworker classification required the payment of premium overtime rates for work in excess of 7 hours a day and 40 hours a week (Dept Exs. 51, 52).

RI did not pay any wage rate listed in the relevant PRSs to its workers for work performed on any of the Projects, but instead paid a rate it established in a CBA with the Federation (T. 33-35; Dept. Ex. 9). Mr. Suprina testified that RI was the largest seating installer in the United States during the period the projects had been performed and that it had performed approximately 300 to 400 bleacher installations during the past 25 years (T. 341, 422). Of those, the ironworkers claimed the work in fewer than 20 installations, which was approximately the same number of times the carpenters claimed the work (T. 342-343). The record lacks any evidence of how many of these jobs involved public work projects in the relevant locality, as opposed to private work or public work outside the relevant locality. In any event, the rates were never incorporated into a PRS.

Mr. Suprina testified that he was aware of a smaller competitor who utilized employees represented by a carpenters' union to perform bleacher installation (T. 420, 422). Occasionally, workers from the carpenters' and laborers' unions worked together on bleacher installation projects (T. 343). The carpenter's local CBA claimed bleacher seating installation at schools, stadiums and open air structures (Resp. Ex. 3, Article 21). The laborers' local union claimed demolition and removal work, as well as the work of staging material for installation by other trades (Resp. Ex. 2, Articles 2 and 4). The ironworkers' local union claimed the handling upon arrival at site and the erection of, *inter alia*, metal seats, seating and bench seats, as well as the dismantling of such items when they were not to be junked (Dept. Ex. 51, Article V). The Bureau determined that the ironworker classification was the proper classification for the work in question (T. 193-194). In making that determination, the Bureau gave no consideration to either the carpenters' or the laborers' CBAs (T. 194, 208-209).

Project 1

Sewanhaka Central School District

On February 16, 2005, Outdoor entered into a contract with the Sewanhaka Central School District for the construction of new bleachers at the H. Frank Carey High School in Franklin Square, Nassau County, New York (T. 93; Dept. Exs. 3, 4). Thereafter, Outdoor entered into a subcontract with RI in which RI agreed to perform the project in accordance with the contract specifications (T. 23; 64-70).

On August 22, 2005, a complaint was filed with the Department by an employee of RI alleging that RI failed to pay prevailing wages and supplements on the project (Dept. Ex. 1). In response to the claim, the Bureau commenced an investigation of the project (T. 89, 90). On March 16, 2006, the Bureau requested that RI furnish payroll records relating to the project (T. 91-92; Dept Ex 2). In response, RI provided, *inter alia*, certified payroll records (T. 92, 103; Dept Ex. 8). The Bureau also obtained the prime contract and project specifications from the school district (T. 93-96; Dept. Exs. 3, 4). The prime contract and specifications called for the installation of an outdoor bleacher system and expressly provided that prevailing rates were required to be paid on the Project (T. 94-95; Dept Exs 3, 4). The work generally involved the removal of an existing

steel and wooden bleacher system and the installation of a new prefabricated aluminum seating system (T. 343-354). The Bureau determined that, for the most part, both the removal and new erection involved the work of ornamental ironworkers (T.106, 107).

The Bureau thereafter proceeded to conduct an audit of the project. The audits were based entirely on the records submitted by RI regarding the hours worked by its employees (T.103). The Bureau provided RI with credit in the audits for the amounts it stated it paid to its employees (T. 103, 104; Dept. Exs. 10, 11). The Bureau then compared the rates actually paid by RI against the rates that should have been paid according to the relevant PRS for the classification of work involved.[1] Based on that methodology, the Bureau determined that RI employed twenty-nine (29) workers on the project in the ornamental ironworker and building laborer classifications, and failed to pay or provide the required prevailing wages and supplements in accordance with the prevailing wage schedules in effect at the time (Dept. Exs. 10, 11). Specifically, the Bureau determined that from the period from week-ending April 10, 2005 through week-ending July 30, 2005, RI underpaid prevailing wages and supplements to its workers performing work on the project in the amount of $44,473.70 (Dept. Ex. 11). The underpayment resulted from RI's payment of rates established in its collective bargaining agreement with the Federation, rather than rates established for the applicable classification by the relevant PRSs; its failure to pay for overtime hours at overtime rates; and its failure to pay supplements (T. 109-110).

On November 6, 2006, the Bureau issued RI a Notice of Labor Law Inspection Findings notifying RI of its findings on the project **(**Dept. Ex. 16**)**. On April 17, 2006, the Bureau issued Notices to Withhold payment to the Sewanhaka Central School District, directing that the district withhold payment of $46,400.00 from payments due to the

[1] Effective July 1, 2004, the Bureau issued PRS 2004 for Nassau County. Effective July 1, 2005, the Bureau issued PRS 2005 for Nassau County (T. 96-99; Dept. Exs. 5, 6). PRS 2004 for Nassau County detailed the wages and supplements that were required to be paid to or provided for the workers performing work on the project from the week-ending July 1, 2004 to June 30, 2005, and included the ornamental ironworker classification, which required the payment of wages of $40.94 per hour and supplements of $29.41 per hour (Dept. Ex. 5). PRS 2005 for Nassau County detailed the wages and supplements that were required to be paid to or provided for the workers performing work on the project from the week-ending July 1, 2005 to June 30, 2006, and included the ornamental ironworker classification, which required the payment of wages of $38.05 per hour and supplements of $32.92 per hour; and the building laborer classification, which required the payment of wages of $25.85 per hour and supplements of $19.44 per hour (Dept. Ex. 6).

prime contractor, Outdoor (Dept. Ex 17). The Bureau was advised by the District that no monies were available to withhold in this matter (T. 122; Dept. Ex. 17).

Project 2

Smithtown Central School District

On June 28, 2005, Outdoor entered into a contract with the Smithtown Central School District for the construction of a press box and new bleachers at the Smithtown High School West and at the Smithtown Middle School, both of which are located in Suffolk County (T. 129, 130; DOL Ex 20). Thereafter, Outdoor entered into a subcontract with RI to perform the construction work required under the contract with Smithtown (T. 23, 64-70). The work involved the stripping down of an existing bleacher system to its existing metal frame and the erection of a prefabricated aluminum seating system utilizing the existing frame together with the installation of a prefabricated press box, which was dropped into the structural frame by a crane and then bolted to the structure (T. 356-362). Based on the nature of the work performed and its review of the relevant collective bargaining agreements, the Bureau determined that this work involved the employment of workers in the ornamental ironworker and building laborer classifications (T. 98-100, 106-107, 139-141; Dept. Exs. 24, 51, 52).

On August 22, 2005, a complaint was filed with the Department by an employee of RI alleging that RI failed to pay prevailing wages and supplements on the project (T. 126; Dept. Ex. 18). On March 16, 2006, the Bureau requested that RI furnish payroll records relating to the project (T. 127, 128; Dept. Ex. 19). In response, RI provided, *inter alia*, the certified payroll for the project (T.129, 131; Dept. Ex. 21).

The Bureau thereafter proceeded to conduct an audit of the project. In conducting its audit, the Bureau compared the rates actually paid by RI against the rates that should have been paid according to the relevant PRS for the classification of work involved.[2]

[2] Effective July 1, 2005, the Bureau issued PRS 2005 for Suffolk County (T. 134; Dept. Ex 22). PRS 2005 for Suffolk County detailed the wages and supplements which were to be paid to or provided for the workers performing work on the project from the week-ending July 1, 2005 to June 30, 2006, and included the ornamental ironworker classification, which required the payment of wages of $38.05 per hour and supplements of $32.92 per hour; and the building laborer classification, which required the payment of wages of $25.85 per hour, supplements of $19.44 per hour (Dept. Ex. 22).

Based on that methodology, the Bureau determined that RI employed thirty-eight (38) workers on the project in the ornamental ironworker and building laborer classifications, and failed to pay or provide prevailing wages and supplements to the workers for work performed in accordance with the PRSs in effect at the time (Dept. Ex. 24). Specifically, the Bureau determined that during the period from week-ending August 3, 2005 through week-ending October 15, 2005, RI underpaid prevailing wages and supplements to its workers performing work on the project in the amount of $115,006.18 (T. 138-142; Dept. Ex. 24, 25). The underpayment resulted from RI's payment of rates established in its collective bargaining agreement with the Federation, rather than rates established by the relevant PRSs; its failure to pay for overtime hours at overtime rates; and its failure to pay supplements (T. 109-110, 131-135).

On June 5, 2006, the Bureau issued RI a Notice of Labor Law Inspection Findings notifying RI of its findings on the project (T. 144; Dept. Ex. 26). On April 17, 2006, the Bureau issued Notices to Withhold payment to the Smithtown Central School District, directing that the district withhold payment of $94,250.00 from payments due to the prime contractor, Outdoor. Smithtown confirmed that the amount would be withheld (T. 146; Dept. Ex. 27).

Project 3

Town of Brookhaven

On April 25, 2005, Outdoor submitted a bid to the Town of Brookhaven for the construction of amphitheater seating at Bald Hill, which is located in Suffolk County. May 17, 2005, the Town of Brookhaven accepted Outdoor's bid and issued a purchase order to Outdoor for project (T. 151, 152, 153; Dept. Ex. 30). Thereafter, Outdoor entered into a subcontract with RI to perform the contract with the Town (T. 23; 64-70). The subcontract involved the removal of wooden tiles and the changing of the slope of the existing amphitheater, the cutting of aluminum decks to length for the installation of floorboards, and the attaching of plastic seats to aluminum decking (T. 363-366). Based on the nature of the work involved and its review of collective bargaining agreements, the Bureau classified the work in the ornamental ironworker and building laborer classifications (T. 98-100, 106-107, 139-141, 162; Dept Exs. 50, 51, 52).

On August 22, 2005, a complaint was filed with the Department by an employee of RI alleging that RI failed to pay prevailing wages and supplements on the project (T. 147, 148; Dept. Ex. 28). On March 16, 2006, the Bureau requested that RI and the Town furnish payroll records relating to the project (Dept. Ex. 29). Over the next several months, the Bureau received some of the requested records from RI and the Town (T. 151-154).

The Bureau thereafter proceeded to conduct an audit of the project. In conducting its audit, the Bureau compared the rates actually paid by RI against the rates that should have been paid according to the relevant PRS for the classification of work involved.[3] Based on that methodology, the Bureau determined that RI employed thirty-three (33) workers on the project, in the ornamental ironworker and building laborer classifications, and failed to pay or provide prevailing wages and supplements to the workers for work performed in accordance with the prevailing wage schedules in effect at the time (Dept. Ex. 34, 35). Specifically, the Bureau determined that during the period from the week-ending June 18, 2005, through week-ending August 6, 2005, RI, Inc. underpaid prevailing wages and supplements to its workers performing work on the project in the amount of $78,167.44 (T. 160-165; Dept. Ex. 34, 35). The underpayment resulted from RI's payment of rates established in its collective bargaining agreement with the Federation, rather than rates established by the relevant PRSs; its failure to pay overtime hours at overtime rates; and its failure to pay supplements (T. 109-110, 131-135, 155, 158).

On June 15, 2006, the Bureau issued RI a Notice of Labor Law Inspection Findings notifying RI of its findings on the project (T. 164; Dept. Ex. 36). On June 26,

[3] Effective July 1, 2004, the Bureau issued PRS 2004 for Suffolk County. Effective July 1, 2005, the Bureau issued PRS 2005 for Suffolk County (Dept. Ex. 33). PRS 2004 for Suffolk County detailed the wages and supplements that were to be paid to or provided for the workers performing work on the project from the week-ending July 1, 2004 to June 30, 2005, and included the ornamental ironworker classification, which required the payment of wages of $40.94 per hour and supplements of $29.41 per hour; and the building laborer classification, which required the payment of wages of $25.85 per hour and supplements of $19.44 per hour (T. 158; Dept. Ex. 33). PRS 2005 for Suffolk County detailed the wages and supplements which were to be paid to or provided for the workers performing work on the project from the week-ending July 1, 2005 to June 30, 2006, and included the ornamental ironworker classification, which required the payment of wages of $38.05 per hour and supplements of $32.92 per hour; and the building laborer classification, which required the payment of wages of $25.85 per hour and supplements of $19.44 per hour (T. 158; Dept. Ex. 33).

2006, the Bureau issued Notices to Withhold payment to the Town of Brookhaven, directing that the Town withhold payment of $125,138.58 from payments due to Outdoor. The Town confirmed that $89,450.00 would be withheld (T. 165, 166; Dept. Ex. 37).

Project 4

Town of Oyster Bay

On February 28, 2005, Outdoor submitted a bid to the Town of Oyster Bay for the construction of bleacher seating at various locations within the Town of Oyster Bay, which is located in Nassau County. By purchase orders dated April 27, August 11, and October 19, 2005, the Town ordered certain bleacher units from Outdoor (T. 170-172; Dept. Exs. 41, 42). The General Specifications for Oyster Bay projects include a provision requiring its contractors to comply with all applicable provisions of the Labor Law (T. 173; Dept. Ex. 42).

Thereafter, Outdoor entered into a subcontract with RI whereby RI agreed to provide the construction services necessary to assemble the prefabricated aluminum bleachers (T. 23; 64-70, 369-373, 379). The Bureau determined that the subcontract involved the employment of workers in the ornamental ironworker and building laborer classifications (T. 193-197; DOL Exhibits 51, 52).

On August 22, 2005, a complaint was filed with the Department by an employee of RI alleging that RI failed to pay prevailing wages and supplements on the project (T. 167, 168; Dept. Ex. 38). On March 16, 2006, the Bureau requested that RI and the Town furnish payroll records relating to the project (T. 168, 169; Dept. Ex. 39). Over the next several months, the Bureau received some of the requested records from RI and the Town (T. 170-174).

Thereafter, the Bureau proceeded to conduct an audit. In conducting its audit, the Bureau compared the rates actually paid by RI against the rates that should have been paid according to the relevant PRS for the classification of work involved.[4] Based on that

[4] Effective July 1, 2004, the Bureau issued PRS 2004 for Nassau County. Effective July 1, 2005, the Bureau issued PRS 2005 for Nassau County (T. 178-182; DOL Exhibits 44, 45). PRS 2004 for Nassau County detailed the amount of wages and supplements that were to be paid to or provided for the workers

methodology, the Bureau determined that RI employed thirty (30) workers on the project, in the ornamental ironworker and building laborer classifications, and failed to pay or provide prevailing wages and supplements to the workers for work performed in accordance with the prevailing wage schedules in effect at the time (Dept. Ex. 46, 47). Specifically, the Bureau determined that during the period from week-ending June 4, 2005 through week-ending August 6, 2005, RI underpaid prevailing wages and supplements on the project in the amount of $69,993.14 (Dept. Ex. 46, 47) The underpayment resulted from RI's payment of rates established in its collective bargaining agreement with the Federation, rather than rates established by the relevant PRSs; its failure to pay overtime hours at overtime rates; and its failure to pay supplements (T. 109-110, 131-135, 155, 158, 176-185).

On May 30, 2006, the Bureau issued RI a Notice of Labor Law Inspection Findings notifying RI of its findings on the project (T. 188; Dept. Ex. 48). On November 13, 2006, in response to an inquiry from the Bureau, the Town of Oyster Bay confirmed that no funds were withheld on the project (T. 188,189; Dept. Ex. 49).

Substantially Owned-Affiliated Entity

Lisa Suprina is the CEO or Chairman of RI and is a ninety percent shareholder of RI (T. 12, 22; Dept. Ex. 12). Lisa Suprina's husband, Scott Suprina, is Vice President and sales manager of RI (T. 11, 18). Sit On This operates as a payroll company for RI and is controlled by RI (T.16-19). Scott Suprina's sister, Christie Suprina, is the CEO or Chairman of Sit On This and had served as the office administrator of RI during the period of time the involved projects were performed (T. 18, 22-23, Dept. Ex. 13). There thus exists a familial relationship among the owners and operators of RI and Sit On This.

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performing work on the project from the week-ending July 1, 2004 to June 30, 2005, and included the ornamental ironworker classification, which required the payment of wages of $40.94 per hour and supplements of $29.41 per hour; and the building laborer classification, which required the payment of wages of $25.85 per hour and supplements of $19.44 per hour (Dept. Ex. 44). PRS 2005 for Nassau County detailed the amount of wages and supplements which were to be paid to or provided for the workers performing work on the project from the week-ending July 1, 2005 to June 30, 2006, and included the ornamental ironworker classification, which required the payment of wages of $38.05 per hour and supplements of $32.92 per hour; and the building laborer classification, which required the payment of wages of $25.85 per hour and supplements of $19.44 per hour (DOL Exhibit 45).

CONCLUSIONS OF LAW

Jurisdiction of Article 8

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages and supplements to workers employed on public work. 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 A.D.2d 870, 871-872 (3d Dept. 1999). It has long been recognized that state minimum labor standards are independent of the collective bargaining process and may not be waived through the collective bargaining process. *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 US 724, 755 (1985). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

Since School Districts and Municipalities, public entities, are parties to the instant public work contracts, Article 8 of the Labor Law applies. Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). Although the Oyster Bay (Project 4) contract was performed pursuant to work orders rather than formal contracts, ancillary contracts are covered by Labor Law § 220. *Matter of Pyramid Company of Onandaga v Hudacs,* 193 A.D.2d 924 (3d Dept. 1993).

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 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York,* 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor,* 34 A.D.3 905, 906 (3d Dept. 2006), *lv denied,* 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.' " *Matter of Nash v New York State Dept of Labor,* 34 A.D.3d 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor,* 154 A.D.2d 117, 120 (3d Dept. 1990), *affd* 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v Beame,* 15 N.Y. 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 A.D.2d 665 (3d Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

The Bureau determined that the removal of an existing seating system and its replacement with a new prefabricated aluminum seating systems, and the installation of new prefabricated aluminum seating systems, fell within the scope of the ironworkers CBA. The ironworkers' CBA claimed the handling and erection of metal seats, seating and bench seats, as well as the dismantling of such items when they were not to be junked. Given that the seating systems involved prefabricated aluminum product, rather than wood, and did not involve pure demolition (i.e., dismantling without replacement of the structure), it is not unreasonable that the Bureau did not give serious consideration to the CBA jurisdictional claims of either the carpenters' or the laborers' unions. The Department has previously recognized that the installation of prefabricated aluminum product by metal clips is properly classified in the ironworker classification. *Matter of Lantry v State of New York,* 6 N.Y.3d 49, 55. The fact that other trades may make claim to the involved work does not create a clear showing that the classification of work does not reflect the nature of the work actually performed. *Id.* With respect to RI's CBA, those rates were not incorporated into the relevant PRSs and could not therefore constitute either a proper classification or rate of pay on any of the involved projects (NY Labor Law § 220 [3]). Substantial evidence supports the Bureau's classification determination.

Underpayment Methodology

The Bureau's audits were based entirely on the records submitted by RI regarding the hours worked by its employees (T.103). The Bureau provided RI with full credit for the amounts it stated it paid to its employees (T. 103, 104; Dept. Exs. 10, 11). The Bureau then compared the rates actually paid by RI against the rates that should have been paid according to the relevant PRS for the classification of work, which calculation resulted in the Bureau's audit determinations of the underpayment amounts involved on each project. The methodology is both reasonable and supported by substantial evidence. *See, Matter of Mid Hudson Pam Corp. v Hartnett*, 156 A.D.2d 818, 821 (3d Dept. 1989); *Matter of TPK Constr. Co. v Dillon*, 266 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

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 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, RI is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

Willfulness of Violation

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation.

This inquiry is significant because Labor Law § 220-b (3) (b) (1) [5] 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 Article 8 of the Labor Law, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v Roberts,* 128 A.D.2d 1006, 1006-1007 (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 A.D.2d 1013, 1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v Hudacs,* 185 A.D.2d 483, 485 (3d Dept. 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 A.D.2d 510; *Matter of Cam-Ful Industries, supra.* An inadvertent violation

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

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 A.D.2d 421.

RI is an experienced public work contractor and, as evidenced by its CBA with the Federation, it is clearly familiar with prevailing wage laws. In fact, it stated that a principal reason for its employees organizing and entering into the CBA was to waive prevailing wage law requirements in exchange for guaranteed 12-month employment. The Agreement itself states that the waiver is intended to "better enable the Company to 'fairly compete' in Public Works Projects…" (Dept. Ex. 9, Appendix A, Section 3 [c]). It is clear that RI both understood of the requirements of the prevailing wage laws and intended to avoid the requirements imposed thereby. As such, it willfully violated Article 8 of the Labor Law on each of the projects.[6] Those violations constitute four separate and distinct willful violations of Article 8. Labor Law § 220-b (3) (b) (1).

Substantially Owned-Affiliated Entities

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one were some indicia of a controlling ownership relationship exists or as "…an entity which exhibits any other indicia of control over the …subcontractor…, regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,… power or responsibility over contracts of the entity, responsibility for

[6] In their proposed conclusions of law, Respondents assert that none of the public entities that awarded the work specified the classifications to be used and that the Respondents were thus left to their own devises to classify the work (Respondents' Proposed Findings of Fact and Conclusions of Law, p. 36). Labor Law § 220 (3-a) (a) provides that the Department of Jurisdiction (the public entity awarding the contract) is to file with the Commissioner the classification of workers to be employed on public work projects. That duty is discharged by preparing written plans and specifications describing the work to be performed. *Matter of Sierra Telcom Services, Inc. v. Hartnett*, 174 AD2d 279, 284 (3d Dept. 1992). Respondents elected to ignore the prevailing rate schedules, which were incorporated in the project plans and specification, and the classifications identified therein, entirely. It cannot therefore be said that the failure of the public entities to point the Respondents to a specific classification caused the violations. It was the Respondents' election to ignore the schedules entirely, knowing that they did not contain the classifications or rates contained in the federated CBA. If Respondents had an issue with the Department's schedules, Labor Law § 220 (6) provided a procedure to challenge them.

maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity. The Legislature intended this provision to be read expansively. *Bistrian Materials, Inc. v. Angello*, 296 AD 2d 495, 497 (2d Dept. 2002).

Lisa Suprina is the CEO or Chairman of RI and is a ninety percent shareholder of RI. Lisa Suprina's husband, Scott Suprina, is Vice President and sales manager of RI. Sit On This operates as a payroll company for RI. Scott Suprina's sister, Christie Suprina, is the CEO or Chairman of Sit on This and had served as the office administrator of RI during the period of time the involved projects were performed (T. 18, 22-23, Dept. Ex. 13). There thus exists a familial relationship among the owners and operators of RI and Sit On This. Under these circumstances, RI and Sit On This are substantially owned-affiliated entities within the contemplation of Labor Law § 220 (5) (g). *Bistrian Materials, Inc. v. Angello*, 296 AD 2d at 497.

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 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 Article 8 of the Labor Law shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

Lisa Suprina owns 90% of the outstanding stock of RI and is therefore subject to the provisions of Labor Law § 220-b (3) (b) (1) regardless of whether she knowingly participated in the willful violation of Article 8.

Scott Suprina is a vice president of RI. In that capacity he executed the CBA with the Federation that established the prevailing rate avoidance goals and the wages to be paid to RI's employees that resulted in the prevailing rate underpayments on each of the involved projects. He was aware that the workers on each of the projects were being paid rates established in the federated CBA rather than those established in the relevant PRSs. As such, he knowingly participated in the willful violations of Article 8.

Although Christie Suprina is the CEO or Chairman of Sit on This, and had served as the office administrator of RI during the period of time the involved projects were performed, there is no evidence that she knowingly participated in the willful violations of Article 8.

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.

Inasmuch as RI, by its own admission, was the largest seating system contractor in the country, which intentionally sought to evade the requirements of the prevailing wage laws on public work contracts through its CBA with the Federation, the result of which was a substantial underpayment of prevailing rate wages and supplements to numerous employees on the four involved projects, the Department's requested penalty of 25% of the total amount found due is warranted.

Liability under Labor Law § 223

Under Article 8 of the Labor Law, a prime contractor is responsible for its subcontractor's failure to comply with or evasion of the provisions of this article. Labor Law § 223; *Konski Engineers PC v Commissioner of Labor,* 229 A.D.2d 950 (1996), *lv denied* 89 N.Y.2d 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 A.D.2d 331 (1989). RI performed work on the Project as a subcontractor of Outdoor. Consequently, Outdoor, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on this 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 RI underpaid wages and supplements due the identified employees in the amount of $44,473.70 on Project 1;

DETERMINE that RI underpaid wages and supplements due the identified employees in the amount of $115,006.18 on Project 2;

DETERMINE that RI underpaid wages and supplements due the identified employees in the amount of $78,167.44 on Project 3;

DETERMINE that RI underpaid wages and supplements due the identified employees in the amount of $69,993.14 on Project 4;

DETERMINE that RI 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;

DETERMINE that the failure of RI to pay the prevailing wage or supplement rate on each of the four projects constitutes four separate and distinct "willful" violation of Article 8 of the Labor Law; and

DETERMINE that RI and Sit On This were "substantially owned-affiliated entities" on the Projects;

DETERMINE that Scott Suprina is an officer of RI; and

DETERMINE that Scott Suprina knowingly participated in the violation of Article 8 of the Labor Law; and

DETERMINE that Lisa Suprina is a shareholder of RI who owned or controlled at least ten per centum of the outstanding stock of RI; and

DETERMINE that RI be assessed a civil penalty in the Department's requested amount of 25% of the underpayment and interest due; and

DETERMINE that Outdoor is responsible for the underpayment, interest and civil penalty due pursuant to its liability under article 8 of the Labor Law; and

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

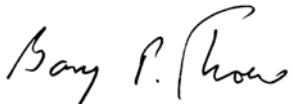
ORDER that the Smithtown Central School District and the Town of Brookhaven remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 400 Oak Street, Suite 101, Garden City, NY 11530-6551); and

ORDER that RI, 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: November 26, 2008
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer