STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

James and Son Construction Co., Inc.; and
James T. Alibramdi, as an officer and/ or shareholder of
James and Son Construction Co., Inc.,

Prime Contractor,

and

Tersal Construction Services, Inc.; and Salvatore A. Fresina, aka Sam Fresina, as an officer and/or shareholder of Tersal Construction Services, Inc.; and its successors or substantially owned-affiliated entities Tersal Contractors, Inc., Sal Masonry Contractors, Inc., Salfree Enterprises, Inc., Tersal Development Corp., and Sal Fresina Masonry Contractors, 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 Jordan-Elbridge Central School District.

DEFAULT REPORT & RECOMMENDATION

Prevailing Wage Rate
PRC No. 2009008573
Case ID: PW062012006319
Onondaga County

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In the Matter of

Daniel S. Snyder and D. Ian Snyder, T/A Snyder and Snyder Construction Services; and

Prime Contractor,

and

Tersal Construction Services, Inc.; and Salvatore A. Fresina, aka Sam Fresina, as an officer and/or shareholder of Tersal Construction Services, Inc.; and its successors or substantially owned-affiliated entities Tersal Contractors, Inc., Sal Masonry Contractors, Inc., Salfree Enterprises, Inc., Tersal Development Corp., and Sal Fresina Masonry Contractors, 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 New York State Office of Parks and Recreation.

Prevailing Wage Rate
PRC No. 2013010942
Case ID: PW062014006288
Madison County

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

Pursuant to a Notice of Hearing issued by the Commissioner of Labor on September 17, 2020, a videoconference hearing was held on March 2, 2021, in Albany, New York, with participating parties and witnesses located at various other sites. 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 Tersal Construction Services, Inc.; and Salvatore A. Fresina, aka, Sam Fresina, as an officer and/or shareholder of Tersal Construction Services, Inc.; and its successors or substantially owned-affiliated entities, Tersal Contractors, Inc., Sal Masonry Contractors, Inc., Salfree Enterprises, Inc., Tersal Development Corp., and Sal Fresina Masonry Contractors, Inc.; (hereafter all known as "Tersal"), subcontractor to James and Son Construction Co., Inc. ("James and Son") on Prevailing Rate Case No. 200900857; and a subcontractor to Daniel S. Snyder and D. Ian Snyder, T/A Snyder and Snyder Construction Services ("Snyder") on Prevailing Rate Case No. 2013010942 (all "Respondents"), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) to pay or provide the prevailing rates of wages and supplements to laborers, workers or mechanics employed in the performance of the two public work contracts it was involved in. The first captioned matter involved a contract between James and Son, and Jordan Elbridge Central School District ("School District") for the additions and renovations at the High School, New Field House, and New Storage Building at the Jordan Elbridge High School, located in Jordan, New York, Onondaga County ("Project 1") in which Tersal performed construction services as required as a subcontractor on the project. The second captioned matter involved a contract between Snyder and New York State Office of Parks, Recreation & Historical Preservation ("NYS") for the repair of the stone Ha Ha wall at the Lorenzo State Historic Site, including rebuilding the existing dry lay historic stone wall, and repointing existing

historic stone columns, located in Cazenovia, New York, Madison County ("Project 2") in which Tersal performed construction services required as a subcontractor on the project.

HEARING OFFICER

Marshall H. Day was designated as Hearing Officer and conducted the hearing in this matter.

APPEARANCES

The Bureau was represented by Department Acting Counsel, Jill Archambault, (Elina Matot, Senior Attorney, of Counsel).

Respondents, James and Son, appeared through its attorneys, Melvin & Melvin, PLLC (Elizabeth A. Genung, Esq., of counsel).

There was no appearance made by, and on behalf of the Respondents, Tersal.

There was no appearance made by, and on behalf of the Respondents, Snyder.

FINDINGS AND CONCLUSIONS

On or about December 14, 2020, the Department duly served a copy of the Notice of Hearing on all Respondents, via regular and certified mail, return receipt requested (Hearing Officer Exs. 2, 3). The Notice of Hearing scheduled a hearing on March 2, 2021 and required all Respondents to serve an Answer at least fourteen days in advance of the scheduled hearing.

Respondents, Tersal failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. Consequently, Respondents, Tersal, are in default in this proceeding.

Respondents, Snyder, failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. Consequently, Respondents, Snyder, are in default in this proceeding.

Respondents, James and Son, filed an Answer to the charges contained in the Notice of Hearing and counsel appeared on their behalf at the hearing. (Hearing Officer Ex. 4)

The Notice of Hearing alleges that Respondents, Tersal, willfully failed to pay prevailing wages and supplemental benefits to or for the benefit for its workers employed in the performance of the two public work contracts with the respective Department of Jurisdictions during the claim period, and that the Respondent Primes, James and Son, and Snyder, are responsible for Tersal's underpayment pursuant to Labor Law § 223.

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

Both Projects were subject to Labor Law Article 8; and

Project No. 1

Prime, James and Son, entered into a contract for Project 1 with the Department of Jurisdiction, School District; and

Tersal entered into a contract with James and Son for work on the Project 1; and

Tersal willfully underpaid $10,163.84 to its workers for the audit period week ending October 3, 2010, through week ending May 15, 2011; and

Project No. 2

Prime, Synder, entered into a contract for Project 2 with the Department of Jurisdiction, NYS; and

Tersal entered into a contract with Snyder for work on the Project 2; and

Tersal willfully underpaid $13,579.13 to its workers for the audit period week ending June 7, 2014, through week ending June 21, 2014; and

GENERAL FINDINGS

Respondent, Tersal Construction Services, Inc., is an incorporated business owned by Salvatore Fresina, who is an officer (President) and shareholder of Tersal Construction Services, Inc..[1]; and

Salvatore A. Fresina aka Sam Fresina is an officer who knowingly participated in the violation of Labor Law article 8; and

On Project 1, the Bureau used certified payrolls, PW-4 claim forms, paystubs, questionnaires, benefit plan information from GMR Associates Benefits Plan and Tersal, and conversations with the employees to determine the days and hours worked, and wage and supplement rates paid for each employee, and compared these rates with the prevailing wage schedule applicable in the county at issue for the rates that should have been paid, to ultimately determine the amount of unpaid supplemental benefits due to the workers; and

On Project 2, the Bureau used PW-4 claim forms, employee handwritten calendars and copies of checks to determine the days and hours worked, and wage and supplement rates paid for each employee, and compared these rates with the 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.

CONCLUSIONS OF LAW

UNDERPAYMENT METHODOLOGY

Project 1

"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

[1] The Certification of Officer of Contractor, the subcontract on Project 1 and Contractor Profile submitted as Department Exs. 4, 6, and 19, 20, respectfully) all state that Mr. Fresina is president and chief executive officer of Tersal Construction Services, Inc.

calculations to the employer…." *Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821 (3d Dept. 1989) (citation omitted). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." Id. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. *Matter of TPK Constr. Co. v. Dillon*, 266 AD2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v. Sweeney*, 251 AD2d 169, 169-170 (1st Dept. 1998). As noted above the Bureau relied on the certified payrolls, PW-4 claim forms, paystubs, questionnaires and benefit plan information from GMR Associates Benefits Plan and Tersal to establish the days and hours of work and the rates paid for those employees that appeared on the certified payrolls. The employee complaints submitted to the Bureau outlined that money was being withheld from their pay, and that those withheld funds were put into an annuity bucket fund maintained by GMR Associates ("GMR"). The annuity funds maintained by GMR in each bucket (health, vacation or pension) were supposed to be paid out to each individual worker in either the form of a monthly annuity or paid out upon termination. Neither of which was shown to occur on Project 1. The Bureau requested that Tersal and GMR provide detailed benefit contribution and account information on behalf of each employee to establish that the money withheld from each employee was in fact contributed to that plan, how those funds were maintained for each individual worker (among the distinct buckets), and to show how, or if, funds were actually distributed to each employee from that plan. Both Tersal and GMR each provided a summary of fringe deposits for roughly the same three-year period, however the total amounts held for each individual employee on those two competing documents did not match. Neither summary recorded job specific data, neither showed individual employee contributions into the plan, neither showed how the funds were broken down in discreet buckets supposedly maintained in the plan, and both failed to show any distributions from the plan to any of the individual workers. (DOL Ex. 12 and 13) When the Bureau requested clarification of the summary information, Mr. Fresina directed GMR not to provide any additional information, and

later rather than providing further detail on summary information, he chose to provide a handwritten outline showing the rates provided to each classification of worker, how those rates were broken down between wages and pension based on those classifications, and indicating that the money in the form of what he termed pension was paid to GMR through an unnamed outside payroll service[2]. This outline further indicated that the payroll service paid the pension directly to GMR "where each employee had their own account controlled by them (employee), 100%", thereby suggesting that once the funds were in the plan the employer had no responsibility to ensure his employees received any funds maintained in that plan.

In light of the fact that there were no indication from the contractor or the plan provider that the employees received any payout of their funds, either monthly or upon termination, the Bureau was entitled to use information from investigatory interviews with employees and employee complaint forms, to reach the conclusion no supplemental benefits were paid. *Matter of A. Uliano & Son. Ltd. v. New York State Department of Labor*, 97 AD3d 664, 667 (2d Dept. 2012). Moreover, hearsay evidence, if sufficiently believable, relevant and probative, constitutes substantial evidence. *Matter of Tsakonas v. Dowling*, 227 AD2d at 730. The Bureau's reliance on employee claim forms interviews and testimony, and the inferences drawn therefrom, was necessitated by Tersal's failure to maintain accurate records of the supplemental benefits held on each employee's behalf on Project 1 and their failure to conclusively show any of their employees received the benefits purported to be maintained by the third party plan provider. Due to Tersal's failure to maintain accurate supplemental benefit records for its employees, the Bureau's methodology is reasonable and supported by substantial evidence.

[2] According to the handwritten notes, the total hourly amounts paid to the employees and the pension plan were supposed to equal the total hourly package of wages and supplements due to each individual worker by classification. The computations contained in the outline, intimated that Tersal provided $4.00 per worker, per hour, toward the employee's pension and the balance of the package was given to the employees in what he termed an envelope (weekly wages). Although these handwritten notes indicate that supplements were paid to a benefit plan by a payroll service, Tersal failed to provide anything from the payroll service to substantiate that payments were made to GMR on the employee's behalf. Tersal also failed to show that GMR paid out any funds to the individual workers associated with that plan. (Dept. Ex. 11)

Project 2

As mentioned above, the Bureau used PW-4 claim forms, employee handwritten calendars and copies of checks to determine the days and hours worked, and wage and supplement rates paid for each employee, and compared these rates with the 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. The claim forms indicated that the workers did not receive any wages or supplements on Project 2 during the time period listed in the audit, and the last paychecks received by the employees were dishonored. As a result, the Bureau gave zero credit to the contractor for any wages or supplements paid to its workers. Based on the fact that the Respondents, Tersal, did not provide any evidence the employees were paid during the audit period, the Bureau's methodology is reasonable and supported by substantial evidence.

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)[3].

Respondents, James and Son, contend that the Department has failed to expeditiously investigate and bring Project 1 to hearing, and on that basis, among others, urges that substantial interest be abated as a result of their delay. (HO Ex. 5) Labor Law § 220 (8) requires that a hearing on a compliance investigation be conducted expeditiously. Although the courts have consistently sustained agencies in not dismissing administrative proceedings brought to vindicate important public policies based upon extensive delay *Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 624 (1994); *Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v. Sweeney*, 224 AD2d 989 (4th Dept. 1996), *affd* 89 NY2d 395 (1996), the courts have both

[3] Both Respondent, James and Son, and the Department, were afforded the opportunity to submit post submission memorandum on the waiver of interest due to Department delay on Project 1. Those post submissions are made part of the record and are hereby identified as Hearing Officer Exs: 5 and 6, respectfully.

endorsed and directed agencies to exclude interest from an award for that period of time attributable solely to the agency's unreasonable delay. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928, *lv denied*, 8 NY3d 802; *Matter of Nelson's Lamplighters, Inc. v. New York State Department of Labor*, 267 AD2d 937, 938 (3d Dept. 1999); *Matter of M. Passucci General Constr. Co., Inc. v. Hudacs*, 221 AD2d 987, 988 (4th Dept. 1995); *Matter of Georgakis Painting Corp. v. Hartnett*, 170 AD2d 726, 729 (3d Dept. 1991). Contrariwise, where the delay is attributable, at least in part, to Respondents' failure to produce payroll records, the retirement of key Department personnel, and settlement negotiations, the Appellate Division has found that there exists "…no basis on which to conclude that the delay was attributable to unreasonableness by the Department of Labor (see *Matter of D & D Mason Contrs., Inc. v Smith*, 81 AD3d 943, 945, 917 NYS2d 283 [2011], *lv denied* 17 NY3d 714, 957 NE2d 1158, 933 NYS2d 654 [2011])." *Pascazi v. Gardner*, 106 AD3d 1143, 1145-1146 (3d Dept., 2013), *appeal dismissed*, 21 NY3d 1057 (2013), lv denied., 22 NY3d 857 (2013). The majority of those factors are a cause, in part, to the extensive delay in these cases. However, James and Son has affirmatively plead in its Answer and outlined in its post memorandum a sufficient foundation to warrant, on a limited basis, a determination that interest should be abated for periods of such unreasonable delay of non-action by the Department. In addition, I note that, due to circumstances beyond control of any of the parties (pandemic) that there was roughly a one year delay in the issuance of the Notice of Hearing in this matter which should be taken into consideration.

The Department witness did not adequately explain the reason for the Department's lack of significant investigatory action between 2014 when Tersal sought Chapter 11 bankruptcy protection (which the Bureau was aware) and 2016 when the witness started review of the file, stating only that during that time the Department was waiting on Tersal to provide additional information in relation to the benefit plan which caused a delay in the investigation. On or about August 16, 2017, the senior investigator sent out a Notice of Labor Law Inspection Findings to the Tersal and the jurisdiction of record on Project 1, however, after the issuance of that notice, there is also little or nothing in the record which indicates that the Bureau took any further action to recover the amounts owed until on or about April 15, 2019 when it garnered additional

documents from Respondents, James and Son, in relation to Project 1. Taking into account these periods of inaction on a project that commenced in 2010, a delay of three years and eight months is warranted based upon the facts presented at the hearing and in the record as a whole.

As a result of the Department's delay, and the health crisis mentioned above, there was a period of four years, eight months, attributable to the Department inaction and during that time period the interest should be abated. The Respondents are therefore responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment, less four years, eight months, on Project 1.

Since Respondents Tersal and Snyder did not appear and create a record of particularized specific periods of time it contends resulted in delays attributable solely to the unreasonableness of the Department, interest will not be abated on Project 2.

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 recordkeeping and other non-wage requirements. The Respondents, Tersal, was an experienced public work contractor, of medium size, with over thirty years of work history who owned multiple entities engaged in work on various public work projects. Two of the entities owned by the Respondent, Salvatore A. Fresina, received willful violations on other projects he was engaged in. Respondents' failed to ensure that the supplemental benefits paid to the GMR Associates Benefit plans were properly dispersed to its workers, affecting approximately twenty employees, and constitutes serious violations of Labor Law article 8 on Project 1. Additionally, Respondents, Tersal, issued paychecks that they knew would not be honored, and never made up those funds to its employees on Project 2. Finally, Respondents' failure to cooperate and participate in this hearing are additional indicia of bad faith. I find the totality of the evidence sufficient to support the Department's request that the Commissioner assess a 25% civil penalty on both projects.

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]). Tersal performed work on both projects as a subcontractor to James and Son, and Snyder. Consequently, James and Son, and Snyder, in their capacity as prime contractors, are responsible for the total amount found due from its subcontractor on their respective projects they were involved in, this includes interest and penalty as outlined above.

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

RECOMMENDATIONS

Based upon the default of the Respondents, Tersal and Snyder, in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, and based on the record as a whole, I recommend that the Commissioner of Labor adopt the within findings of fact and conclusions of law, and make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Respondents, Tersal, underpaid supplemental benefits to its workers in the amount of $10,163.84 on the Project 1, PRC No. 2009008573; and

DETERMINE that Respondents, Tersal, underpaid prevailing wages and supplemental benefits its workers in the amount of $13,579.13 on the Project 2, PRC No. 2013010942; and

DETERMINE that Salvatore A. Fresina aka Sam Fresina is an officer and shareholder of Tersal Construction Services, Inc. who owned or controlled at least ten per centum of the outstanding stock of Tersal Construction Services, Inc.; and

DETERMINE that Salvatore A. Fresina aka Sam Fresina was the owner and officer of Tersal Construction Services, Inc. who knowingly participated in the violation of Labor Law Article 8 on Projects 1 and 2; and

DETERMINE that on each of the two projects the failure of Respondents, Tersal, to pay the prevailing wage or supplement rates was a separate and distinct "willful" violation of Labor Law Article 8; and

DETERMINE that Tersal Contractors, Inc, Sal Masonry Contractors, Inc., Salfree Enterprises, Inc., Tersal Development Corp. and Sal Fresina Masonry Contractors, Inc. are all "substantially owned-affiliated entities or successor corporations" of Tersal Construction Services, Inc, as defined in Section 220 (5)(g and k) of the Labor Law.; and

DETERMINE that as a result of Respondents, Tersal, knowing willful participation in the violation of Labor Law article 8 on the two projects, both the entity (including affiliated and successors) and the individual are ineligible to submit a bid, on or be awarded any public contract with the state, any municipal corporation or public body for a period of five years; and

DETERMINE that Respondents are responsible for any underpayment of wages and/or supplemental benefits determined to be owed on the two projects; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Respondents are responsible for interest on the total underpayments on Project 1 at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment, less four years and eight months of interest; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Respondents are responsible for interest on the total underpayments on Project 2 at the statutorily mandated rate of 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, Respondents be assessed a civil penalty in the Department's requested amount of 25% of the underpayment and interest due on the named projects; and

DETERMINE that James and Son, as prime contractor on Project 1, is vicariously liable for non-compliance or evasion by Tersal of its obligation to properly pay supplemental benefits pursuant to Labor Law Section 223; and

DETERMINE that Snyder, as prime contractor on Project 2, is vicariously liable for non-compliance or evasion by Tersal of its obligation to properly pay prevailing wages and/or supplemental benefits pursuant to Labor Law Section 223; and

ORDER that the Bureau compute the total amount due on both projects, with interest at 16% from date of underpayment to date of payment (adjusting for delay mentioned above on Project 1) and 25% civil penalty; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Respondents, 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: State Office Building, 333 East Washington Street, Room 419, Syracuse, NY 13202; 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: July 9, 2021
Albany, New York

Respectfully submitted,

Marshall H. Day, Hearing Officer