STATE OF NEW YORK DEPARTMENT OF LABOR
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REPORT & RECOMMENDATION

In the Matter of

THE HAYNER HOYT CORPORATION and GARY THURSTON and JEREMY THURSTON as shareholders of THE HAYNER HOYT CORPORATION,

Prime Contractor,

and

VERTICAL TECHNOLOGIES OF NY, LLC and MICHAEL P. HILLS, as an officer and/or managing member of VERTICAL TECHNOLOGIES OF NY, LLC.,

Subcontractor,

Prevailing Rate
Case No(s) 2016002519
Case ID No(s).
PW06 2016001547

concerning the underpayment of wages and supplements to laborers, workers and mechanics employed on a public work project in violation of Section 220 of the New York State Labor Law.
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To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued on August 1, 2017, a hearing was held on October 30, 2017, in Albany, New York and Syracuse, New York by videoconference. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Vertical Technologies of NY, LLC ("Sub") a subcontractor of The Hayner Hoyt Corporation ("Prime"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving the Commons on Saint Anthony ("the Project") pursuant to a modernization grant from the New York State Department of Health ("Department of Jurisdiction") to Mercy Health and Rehabilitation Center.

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz,

Erin Hayner, Senior Attorney, of Counsel.

Sub appeared *pro se* through Michael Hills, and did not file an Answer to the charges incorporated in the Notice of Hearing.

Prime and its attorneys did not appear; however, during the course of the hearing Department counsel offered a Stipulation between the Department and Prime which resolved Prime's liability in this matter.

ISSUES

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

FINDINGS OF FACT

On or about December 24, 2013, the Department of Jurisdiction entered into a grant contract with Mercy Health and Rehabilitation Center Nursing Home, Inc. ("Mercy"), located in Cayuga County, Auburn, New York. HO Ex. 5[1], Tr. pp. 168, 169, 171, 172

DOL took several days to determine whether the grant from the Department of Jurisdiction to Mercy resulted in the Project being subject to Labor Law article 8. Tr. pp. 175, 176

On or about August 1, 2012, Mercy entered into a subcontract with Prime for Renovations to the Mercy Health Facility Phase 1. DOL Ex. 4

The Specifications for the Project included a copy of the Prevailing Wage Rate Schedule ("PWRS 1") in effect for Cayuga County for the period July 1, 2012 through June 30, 2013. DOL Ex. 8

On or about July 1, 2013, the Department issued the Prevailing Wage Rate Schedule for Cayuga County for the period July 1, 2013 through June 30, 2014 ("PWRS 2"). PWRS 2 established the prevailing rate of wages and supplements for an Elevator Constructor as $40.84 and $25.185 – plus 6% of wage if fewer than 5 years of service, and 8% of wage if 5 years or more of service – respectively and Elevator Constructor Helper as $28.59 and $25.185 – plus 6% of the wage if fewer than 5 years of service, and 8% of the wage if 5 years or more of service – respectively. DOL Ex. 9

On or about July 31, 2013, Sub submitted to Prime its quote for its portion of the Project. In the quote, Sub stated that it was based upon non-prevailing wage costs. DOL Ex. 7

On or about September 30, 2013, Prime entered into a subcontract with Sub for elevator modernization. DOL Ex. 6, 7

On or about July 1, 2014, the Department issued the Prevailing Wage Rate Schedule for Cayuga County for the period July 1, 2014 through June 30, 2015 ("PWRS 3"). PWRS 3 established the prevailing rate of wages and supplements for an Elevator Constructor as $41.40

[1] At the close of the hearing, the Department presented the parties with a copy of a Stipulation entered into between the Department and Prime. That document was erroneously referred to in the record as Department Exhibit 5, a duplication of the number already assigned to a Department exhibit previously received in evidence. The Stipulation is in fact Hearing Officer 5 and is marked, and will be referred to, as such.

and $26.785 plus 6% of regular hourly rate for all hours worked, respectively and Elevator Constructor Helper as $28.98 and $26.785 plus 6% of the regular hourly rate for all hours worked, respectively. DOL Ex. 9

Sub stated that it never received the Specifications, PWRS 1, PWRS 2, or PWRS 3. R Ex. 2; Tr. pp. 28, 184 – 186, 229

On or about October 38, 2015, the Department received a claim for wages and supplements on the Project. The claim alleged hours worked on the Project by one worker, with a wage rate paid by Prime of $41.00 per hour and no supplements provided. DOL Ex. 1

Sub admitted that it bid the Project and paid workers as though it was not subject to the Article 8 wage and supplement requirements as embodied in the relevant Prevailing Wage Rate Schedules. See, for example, Tr. pp. 187, 188, 189, 199, 207

On or about October 11, 2016, the Department received Sub's certified payrolls for work performed on the Project. DOL Ex. 10

Under the worker classification column on Sub's certified payrolls, Sub described all workers as "Owner Operator Exempt." DOL Ex. 10

Sub classified its workers as Owner Operator Exempt in order to obtain payments from Prime which were being withheld. Tr. pp. 231 - 233

The Department prepared an audit for the Project, showing the hours worked and the amounts of wages and supplements actually paid to workers on the Project as well as the amounts of wages and supplements that should have been paid based upon the Prevailing Wage Rate Schedule in effect at the time the work was performed ("Audit"). DOL Ex. 30, 32

The Audit showed underpayments of wages and supplements to workers in the Project totaling $95,892.51.00. DOL Ex. 31

Prime entered into a stipulation with the Department in which it agreed to make restitution to the Department of $141,550.28, which amount comprises $95,892.51 in wages and supplements to three workers on the Project; interest of 10% on the underpayment amounting to

$32,78.56; and a penalty of 10% amounting to $12,868.21. The stipulation resolved all liability on the part of Prime with regard to Sub's violations. HO Ex. 5[2]

Sub did not initially comply with the Department's requests for records, but eventually did so. Tr. pp. 127, 128

Sub employed three workers on the Project. DOL Ex. 31, T. pp. 128, 129

The Department had no evidence of violations of the Labor Law by Sub prior to the Project. Tr. pp. 129, 130

Sub first learned that the Project was subject to Labor Law article 8 some time in May, 2014, approximately five months into the Project. Tr. p. 202

Michael Hills was the sole member of Sub, a limited liability company. Mr. Hills represented himself to be president of Sub. DOL Ex. 10, 25; Tr. pp. 74, 75

CONCLUSIONS OF LAW

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[3]. This constitutional mandate is implemented through Labor Law article 8. Labor Law §§ 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." (*Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 [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

[2] On May 22, 2018, the Department's General Counsel filed a Notice of Filing concerning this matter in the office of the Commissioner of Labor. The Notice had attached to it the Stipulation signed by the Department and Prime, and an affidavit of the president of Prime. As a public document filed with the Department, I take judicial notice of the Notice and its attached documents.

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

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 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:

> (1) the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and (2) 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.*

The Department Of Jurisdiction, a public entity, provided a grant of public money to Mercy. Mercy than entered into a contract with Prime for the Project. The contract involved elevator renovation, which required construction-like labor paid for by public funds. Finally, the work product, here a hospital, is clearly for the use or other benefit of the general public. Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts,* 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]).

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The 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]).

Workers on the Project were clearly engaged in work that fit the classifications assigned by the Department.

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]).

The Department used a combination of the Sub's payrolls and worker statements to determine the underpayments, which is consistent with the law.

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, Sub 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.

Prior to the hearing, Prime stipulated to pay interest on the underpayment at a rate of 10% per annum in the amount of $32,78.56. Sub is therefore liable for the remaining 6%.

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) [4] provides, among other things, that when <u>two final determinations</u> of a "willful" failure to pay the prevailing rate have

[4] "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.

been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Labor Law article 8, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. (*Matter of Cam-Ful Industries, Inc. v Roberts*, 128 AD2d 1006, 1006-1007 [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]).

In this matter, Sub appears to have been unaware of the requirement to pay prevailing wages and supplements at the time he bid on the Project. In fact, he affirmatively stated in his bid that the Project was not subject to that requirement. Furthermore, it appears that the Department itself took some time to determine the applicability of the law to this Project. It appears, therefore, that Sub may not have known or been in a position to know that the prevailing wage law applied to the Project. However, at some point prior to the conclusion of the Project, Sub was given sufficient notice by Prime that it should, at a minimum, have confirmed that status of the Project with the Department. Instead, it chose not to issue a change order to the Prime, or otherwise confirm the prevailing wage law requirement. As a result, I find that Sub knew or should have known of the applicability of the law, and its failure to pay or provide prevailing wages and supplements was therefore willful.

FALSIFICATION OF PAYROLL RECORDS

Labor Law § 220-b (3) (b) (1) further provides that if a contractor is determined to have willfully failed to pay the prevailing rates of pay, and that willful failure involves a falsification of payroll records, the contractor shall be ineligible to bid on, or be awarded any public work contract for a period of five (5) years from the first final determination. For this section of the law to be meaningful, the term "falsification of payroll records" must mean more than a mere arithmetic error; if it did not, in any case where the certified payrolls did not perfectly match the payments to workers such payrolls could be deemed falsified, and the contractor debarred. 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).

While it is clear from the record that Prime/Sub failed to meet its obligation to maintain true and accurate payroll records with regard to the classification of its workers, further examination of the reason for Sub's failure to do so is warranted. Sub admits that it classified its workers incorrectly, but explains that the only reason it did so was to comply with demands from Prime that placed Sub in financial hardship. Furthermore, it is far from clear if Sub misclassified its workers with the intent that the Department should find the employees to be "owners" of their own businesses. It is as easy to read Sub's testimony to mean that he understood himself to be an owner but the workers to be "exempt" from the prevailing wage law. Given that the penalty for falsifying payroll records is severe - debarment for six years - I do not find that Sub's misclassification on its payroll rises to the level of falsification as contemplated by this section of the Labor Law.

PARTNERS, SHAREHOLDERS OR OFFICERS

Sub was a limited liability company owned solely by Michael Hills who, although the law does not provide for such a title in limited liability companies, labeled himself as Sub's "president" on multiple occasions.

Labor Law §220-b(3)(b)(1) states, in part, "When two final determinations have been rendered against a contractor, subcontractor, successor or any substantially-owned affiliated

entity of the contractor or subcontractor, and if 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…" such entities shall be debarred from bidding on or being awarded public work projects for a period of five years from the date of the second willful determination. Insofar as the Commissioner must determine the issue of willfulness when a hearing is held, it is appropriate to determine, to the extent possible, the facts concerning the entities listed in §220-b(3)(b)(1).

The term "officer" as used in Labor Law should be read broadly and in its generic sense, as one who holds a position of authority of trust in any organization. Labor Law §220-b(2)(g)(iii) does not reference a corporate officer but instead merely says "*any officer* of the contractor or subcontractor…" (emphasis added).

It can be argued that a strict interpretation of the Limited Liability Company Law would result in absolute immunity for Mr. Hills from any financial liability incurred by Sub as a result of its violations of Article 8.

At the outset, it is important to note that the term "limited liability company" is not found in Article 8. However, as set forth earlier, Article 8 of the Labor Law is the statutory implementation of a New York State Constitutional mandate for the payment of prevailing wages on public work projects. Article 8 is remedial in nature. *Matter of Mid Hudson Pam Corporation et al. v Thomas F. Hartnett,* 156 A.D.2d 818, 821 (3d Dept. 1989) "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee (citations omitted). *See also, Matter of Armco, supra.*.

Given its remedial nature, §220 should be construed liberally. *Austin v City of New York,* 258 N.Y. 113, 117. "[§220] is to be interpreted with the degree of liberality essential to the attainment of the end in view." (citations omitted). *See also, Bucci v Village of Port Chester,* 22 N.Y.2d 195, 201. "This court has more than once noted that *section 220* must be construed with the liberality needed to carry out its beneficent purposes." (citations omitted).

As set forth above, §220-b(3)(b)(1) concerns the parties to which a finding of willfulness may attach, including "the 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 10% of the outstanding stock of the contractor or subcontractor or any successor…" (emphasis added). The statute does not specifically state that an officer must be an officer of a corporation. The dictionary definition of the term "officer" is: "one who holds an office of trust, authority, or command." *Merriam-Webster Online* (2009). As the sole owner and member of Sub, Mr. Hills held the one and only position of trust, authority and command in Sub. Evidence that Mr. Hills signed certified payrolls and contract documents, visited the Project worksite on multiple occasions, held himself out as president of Sub and conferred with representatives of Prime and the Department of Jurisdiction, show that he controlled Sub and that his actions were knowing. Accordingly, Mr. Hills is personally subject to a finding of willfulness by the Commissioner.[5]

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.

Sub ultimately complied with the Department's investigation. Sub was a relatively small contractor, with no prior history of violations. The underpayment amounts were significant even if only to three workers. Based upon the factors set forth in the law, I find that a civil penalty of 10% is appropriate.

[5] As for the issue of Mr. Hills' protection from liability by the Limited Liability Company Law, assuming for the moment that such protection exists in this case, the courts of New York have shown that the doctrine of piercing the corporate veil applies to limited liability companies as well as corporations. *Retropolis, Inc. v 14th Street Development LLC et al.*, 17 A.D.3d 209 (1st Dept. 2005); *Williams Oil Co. v Randy Luce E-Z Mart One*, 302 AD2d 736 (3d Dept. 2003). While there is a heavy burden attached to finding liability in these circumstances, the facts in this matter show that Mr. Hill had knowledge of the relevant facts and complete control or "domination" of Sub to the point that he alone was responsible and liable for its actions, and therefore may be found liable to have willfully violated Article 8. *TNS Holdings, Inc. v. MKI Securities Corp.*, 92 N.Y.2d 335 (1998); *Matter of Morris v New York State Dept. of Taxation & Finance*, 82 N.Y.2d 135 (1993). More to the point, Labor Law §220-b specifically provides for the liability of a corporate shareholders and officers under certain circumstances set forth above.

Prime has entered into a stipulation with the Department under which it agreed to pay a civil penalty of 10%, amounting to $12,868.21. Sub will receive credit for the full 10% paid by Prime.

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]). Sub performed work on the Project as a subcontractor of Prime. Consequently, Prime, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on this Project.

As previously noted, Prime has entered into a stipulation with the Department, resolving all outstanding issues in this matter.

RECOMMENDATIONS

Based upon the weight of the evidence set forth in 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:

DETERMINE that Sub underpaid wages and supplements due the identified employees in the amount of $95,892.51 and

DETERMINE that Sub is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment; and

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

DETERMINE that the willful violation of Sub did not involve the falsification of payroll records under Labor Law article 8; and

DETERMINE that Michael Hills is an officer of Sub; and

DETERMINE that Michael Hills knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Sub be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

DETERMINE that, upon Prime's complete performance of the stipulation it entered into with the Department, Prime has fully satisfied its liability in this case under Labor Law article 8; and

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

ORDER that Sub shall receive a credit for the wage, supplement, interest, and penalty amounts paid by Prime; and

ORDER that upon the Bureau's notification, Sub shall immediately remit payment of the total amount due, 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: 6/11/2018
Albany, New York

Respectfully submitted,

Jerome Tracy, Hearing Officer