STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

ALBANY SPECIALTIES, INC.
Prime Contractor

and

VENDITTI BROS., INC.
and
LUCIANO A. VENDITTI, CHRISTOPHER VENDITTI
and
TIMOTHY VENDITTI

as officers and shareholders of

VENDITTI BROS., INC.
and/or its successor or substantially owned-affiliated entity
VBI, LLC.
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 known as the Monroe-Woodbury Central High School, located in Central Valley, New York.

REPORT
&
RECOMMENDATION

Prevailing Rate Case
96-07432C
Orange County

IN THE MATTER OF

SWEET ASSOCIATES, INC.
Prime Contractor

and

ALBANY SPECIALTIES, INC.
Subcontractor

and

VENDITTI BROS., INC.
and
LUCIANO A. VENDITTI, CHRISTOPHER VENDITTI
and
TIMOTHY VENDITTI

as officers and shareholders of

VENDITTI BROS., INC.
and/or its successor or substantially owned-affiliated entity
VBI, LLC.
Sub-Sub-contractor

For a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project known as the general construction of the Rensselaer County Courthouse Facility in Troy, New York.

Prevailing Rate Case
98-08145 B
Albany County

IN THE MATTER OF

VENDITTI BROS., LUCIANO A. VENDITTI,
CHRISTOPHER VENDITTI

And
TIMOTHY VENDITTI
as officers and shareholders of

VENDITTI BROS., INC.

And/or its successor or substantially owned-affiliated entity
VBS, LLC
Prime Contractor

For a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project known as the general construction of the Rensselaer County Courthouse Facility in Troy, New York.

Prevailing Rate Case
99-02898 A
Rensselaer County

IN THE MATTER OF

VENDITTI BROS., LUCIANO A. VENDITTI,
CHRISTOPHER VENDITTI

And
TIMOTHY VENDITTI
as officers and shareholders of

VENDITTI BROS., INC.

And/or its successor or substantially owned-affiliated entity
VBS, LLC
Prime Contractor

For a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project known as the State University of New York at Cobleskill, Cobleskill, New York.

Prevailing Rate Case
99-01615-A
Schoharie County

To: Honorable Colleen Gardner
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on January 21, concluding on January 22, 2010, in Albany, 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 Venditti Bros., Inc. (“Venditti”), and Luciano A. Venditti, Christopher Venditti, and Timothy Venditti, as officers and shareholders of Venditti, and/or Venditti’s successor or substantially owned-affiliated entity VBI, LLC, as prime contractor and as a subcontractor of Albany Specialties, Inc. (“Albany Specialties”), and/or Sweet Associates, Inc. (“Sweet”), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of the following contracts:

1. The Monroe-Woodbury New High School (“Monroe-Woodbury Project”) for the Monroe-Woodbury Central School District (“MWCSD”);
2. State University of New York at Albany Library (“SUNY Albany Project”) for the State University Construction Fund (“SUCF”);
3. Rensselaer County Courthouse (“Courthouse Project”) for Rensselaer County, and;
4. State University of New York at Cobleskill (“SUNY Cobleskill Project”) for the Office of General Services (“OGS”).

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito, Louse D. Roback, of Counsel.

Venditti appeared, with its attorney, John H. Dennis, Esq.

Albany Specialties appeared with its attorney, Mark W. Couch, Esq.

Sweet appeared with its attorney, Brendan R. Wolf, Esq.

ISSUES

1. Did the Venditti pay the rate of wages or provide the supplements prevailing in the locality on the four projects in question and, if not, what is the amount of underpayment?
2. Was any failure 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 VBI, LLC a "substantially owned-affiliated entity" of Venditti?
5. Are Luciano A. Venditti, Christopher Venditti, and Timothy Venditti each among the five largest shareholders of Venditti?
6. Are Luciano A. Venditti, Christopher Venditti, and Timothy Venditti shareholders of Venditti who owned or controlled at least ten per centum of the outstanding stock of the Venditti?
7. Are Luciano A. Venditti, Christopher Venditti, and Timothy Venditti officers of Venditti who knowingly participated in a willful violation of Article 8 of the Labor Law?
8. 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 Venditti.

MONROE-WOODBURY PROJECT

The Monroe-Woodbury Project involved a public work contract between Albany Specialties and the MWCSD in Orange County, entered into on or about April 10, 1997, for work at the New High School, PRC No. 96-07432 C (DOL Ex. 7, 8).

On or about April 28, 1997, Albany Specialties entered into a subcontract with Venditti for the performance of "all sheetmetal (sic) work" on the Monroe-Woodbury Project (DOL Ex. 9).

On or about July 1, 1996, the Department issued a Prevailing Wage Rate Schedule for Orange County, in effect from July 1, 1996 through June 30, 1997, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Orange County Schedule 1") (DOL Ex. 10).

On or about July 1, 1997, the Department issued a Prevailing Wage Rate Schedule for Orange County, in effect from July 1, 1997 through June 30, 1998, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Orange County Schedule 2") (DOL Ex. 11).

On or about July 1, 1998, the Department issued a Prevailing Wage Rate Schedule for Orange County, in effect from July 1, 1998 through June 30, 1999, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Orange County Schedule 3") (DOL Ex. 12).

On or about August 18, 1999, the Bureau received a complaint from Shane A. Russell, alleging underpayments of wages and/or supplements to him by Venditti on the Monroe-Woodbury Project (DOL Ex. 1).

The Bureau received a complaint dated November 7, 2000, from Martin R. VanBuren, alleging underpayments of wages and/or supplements to him by Venditti on the Monroe-Woodbury Project, the SUNY Albany Project, the Courthouse Project, and the SUNY Cobleskill Project (DOL Ex. 2).

On or about December 15, 1998, August 19, 1999, and January 2, 2002, the Bureau requested from Venditti various payroll records, including supplemental benefit payments, for work performed on the Monroe-Woodbury Project (DOL Ex. 4, 5, 6).

Venditti provided the Bureau with all requested information concerning the payment of wages on the Monroe-Woodbury Project (Tr. p. 48).

Venditti failed to provide the Bureau with information concerning payment into supplemental benefit plans, at first because the authority of the Bureau to request such information during an investigation was the subject of State and federal litigation, and then, after such litigation had been concluded in the Department's favor, without explanation (Tr. pp. 49 – 51).

If health care supplemental benefit payments were noted on Venditti's payroll records, the Bureau credited them on its audit (Tr. pp. 24, 25).

In creating its audit, the Bureau followed Department regulations concerning the annualization of supplemental benefit payments as set forth in 12 NYCRR Section 22.2(d) (Tr. pp. 53 – 56).

Based upon information received during its investigation, the Bureau prepared an audit which found that Venditti employed nineteen workers on the Monroe-Woodbury Project as sheet metal workers, and from week ending June 8, 1997 through week ending December 20, 1998, failed to pay or provide the workers required wages and supplements in the amount of $102,109.55 (DOL Ex. 15, 16; Tr. pp. 55, 56).

Albany Specialties merged into another corporation in January 2005 (DOL Ex. 55).

SUNY ALBANY PROJECT

The SUNY Albany Project involved a public work contract between Sweet and the SUCF in Albany County for general construction work at the SUNYAlbany library expansion, PRC No. 98-08145 B (DOL Ex. 20).

On or about June 10, 1996, Sweet entered into a subcontract with Albany Specialties for mechanical systems work on the SUNY Albany Project (DOL Ex. 20).

On or about July 22, 1996, Albany Specialties entered into a subcontract with Venditti for "all sheetmetal (sic) work" on the SUNY Albany Project (DOL Ex. 20).

On or about July 1, 1996, the Department issued a Prevailing Wage Rate Schedule for Albany County, in effect from July 1, 1996 through June 30, 1997, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Albany County Schedule 1") (DOL Ex. 22).

On or about July 1, 1997, the Department issued a Prevailing Wage Rate Schedule for Albany County, in effect from July 1, 1997 through June 30, 1998, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Albany County Schedule 2") (DOL Ex. 23).

On or about July 1, 1998, the Department issued a Prevailing Wage Rate Schedule for Albany County, in effect from July 1, 1998 through June 30, 1999, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Albany County Schedule 3") (DOL Ex. 24).

On or about July 1, 1999, the Department issued a Prevailing Wage Rate Schedule for Albany County, in effect from July 1, 1999 through June 30, 2000, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Albany County Schedule 4") (DOL Ex. 25).

On or about August 18, 1999, the Bureau received a complaint from Shane A. Russell, alleging underpayments of wages and/or supplements to him by Venditti on the SUNY Albany Project (DOL Ex. 18).

On or about August 19, 1999, the Bureau requested from Venditti various payroll records, including supplemental benefit payments, for work performed on the SUNY Albany Project (DOL Ex. 19).

Venditti failed to provide the Bureau with all of the requested information concerning the payment of supplemental benefits. (Tr. pp. 20, 24, 25).

If health care supplemental benefit payments were noted on Venditti's payroll records, the Bureau credited them on its audit (Tr. pp. 24, 25).

In creating its audit, the Bureau followed Department regulations concerning the annualization of supplemental benefit payments as set forth in 12 NYCRR Section 22.2(d) (Tr. pp. 53 – 56).

Based upon information received during its investigation, the Bureau prepared an audit which found that Venditti employed twenty-two workers on the SUNY Albany Project as sheet metal workers, and from week ending March 9, 1997 through week ending August 29, 1999, failed to pay or provide the workers required wages and supplements in the amount of $71,782.97 (DOL Ex. 28, 29; Tr. pp. 39, 40)

On April 23, 2007, the Bureau issued a Notice of Labor Law Investigation findings which stated, in part, that Thomas Colloton was the Owner of Albany Specialties, the prime contractor on the SUNY Albany Project (DOL Ex. 30).

Thomas Colloton never owned stock, or had an ownership interest, in Albany Specialties (Tr. p. 296).

COURTHOUSE PROJECT

The Courthouse Project involved a public work contract for HVAC work between Venditti and Rensselaer County (Tr. p. 337).

On or about July 1, 1999, the Department issued a Prevailing Wage Rate Schedule for Rensselaer County, in effect from July 1, 1997 through June 30, 2000, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Rensselaer County Schedule") (DOL Ex. 34).

On or about November 7, 2000, the Bureau received a complaint from Martin R. Van Buren, alleging underpayments of wages and/or supplements to him by Venditti on the Courthouse Project (DOL Ex. 31).

On or about July 18, 2000, the Bureau requested Venditti to supply payroll records for the Courthouse Project (DOL Ex. 32).

The Bureau credited Venditti for certain supplemental benefit payments it made to workers on the Courthouse Project based upon information it received in response to its request (Tr. p. 335).

Venditti failed to provide the Bureau with information concerning supplemental benefit payments made for pension benefits on the Courthouse Project (Tr. pp. 334, 335).

In creating its audit, the Bureau followed Department regulations concerning the annualization of supplemental benefit payments as set forth in 12 NYCRR Section 22.2(d) (Tr. pp. 53 – 56).

Based upon information received during its investigation, the Bureau prepared an audit which found that Venditti employed seven workers on the Courthouse Project as sheet metal workers, and from week ending July 25, 1999, through week ending June 25, 2000, failed to pay or provide the workers required wages and supplements in the amount of $11,590.72 (DOL Ex. 38, 39; Tr. p. 336)

SUNY COBLESKILL PROJECT

The SUNY Cobleskill Project involved a public work contract between Venditti and OGS, entered into on or about November 17, 1999, for "…repair or replacement of materials relating to condensate leaks …"(DOL Ex. 42).

On or about July 1, 1999, the Department issued a Prevailing Wage Rate Schedule for Schoharie County, in effect from July 1, 1999 through June 30, 2000, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects ("Schoharie County Schedule") (DOL Ex. 23).

On or about June 19, 2000, the Bureau received a complaint from Julia A. Russell, alleging underpayments of wages and/or supplements to her by Venditti on the SUNY Cobleskill Project (DOL Ex. 40).

On or about July 18, 2000, the Bureau requested Venditti to provide payroll records for the SUNY Cobleskill Project (DOL Ex. 41; Tr. p. 349).

The Bureau used the hours and rates of pay set forth in the payroll records submitted by Venditti (Tr. pp. 354, 355).

The Bureau credited Venditti for payment of supplements when such payments showed on the certified payrolls (Tr. pp. 355 - 357).

Venditti failed to provide the Bureau with information regarding the payment of supplemental pension benefits (Tr. p. 356).

In creating its audit, the Bureau followed Department regulations concerning the annualization of supplemental benefit payments as set forth in 12 NYCRR Section 22.2(d) (Tr. pp. 53 – 56).

Based upon information received during its investigation, the Bureau prepared an audit which found that Venditti employed ten workers on the Courthouse Project as sheet metal workers, and from week ending November 14, 1999, through week ending May 21, 2000, failed to pay or provide the workers required wages and supplements in the amount of $1,582.91 (DOL Ex. 46; Tr. pp. 358, 359).

SUPPLEMENTAL BENEFIT RECORDS

Venditti maintained a pension benefit plan with Compensation Programs, Inc. ("CPI") for workers on the Projects in question (Venditti Ex. 1, Tr. pp. 217, 227, 230).

Venditti did not provide records concerning specific contributions made on behalf of employees on the Projects, setting forth the hours worked by each employee and the amount of the contribution, because it did not possess the records in question, having supplied them to the United States Department of Labor ("USDOL")(Tr. pp. 227, 233, 235).

The records in question were never returned to Venditti by the USDOL (Tr. p. 227).

No one from the federal government informed Luciano Venditti of the conclusion of the matter for which the CPI records had been taken or of their availability at any location (Tr. p235, 236).

Without information concerning the amount of pension benefit payments made by Venditti to CPI on behalf of each employee, the Bureau investigator calculated underpayments based upon Department regulations concerning the annualization of supplemental benefit payments as set forth in 12 NYCRR Section 22.2(d) (Tr. pp. 53 – 56).

OWNERSHIP OF VENDITTI AND VBI, LLC

Luciano Venditti was the president and a fifty per cent shareholder of Venditti during the period the Projects were performed. (Tr. pp. 215, 249, 250, 291).

Timothy Avery and Christopher Venditti were each twenty-five per cent shareholders of Venditti during the period the Projects were performed (Tr. p. 291).

Timothy Avery was secretary of Venditti during the period the Projects were performed (Tr. p. 250).

Timothy Venditti is a managing member of, and has the authority to sign checks on behalf of, VBI, LLC (Tr. p. 280, 281).

The remaining members of VBI, LLC are Dorothy Venditti, Luciano Venditti's wife; Tamara Venditti, Luciano Venditti's daughter-in-law and Sally Ann Avery, Luciano Venditt's sister(Tr. pp. 286, 287).

VBI, LLC performs substantially the same work as did Venditti (Tr. p. 290).

Venditti and VBI, LLC have the same address (Tr. pp. 58, 59).

VBI, LLC has some employees who previously worked for Venditti. (Tr. pp. 105, 108, 113).

Luciano Venditti is a "manager," but not a managing member, of VBI, LLC (Tr. p. 287).

Venditti ceased doing business in 2002 as a result of financial difficulties (Tr. pp. 262, 281-284).

VBI, LLC was created in 2002 (DOL Ex. 54).

PROSECUTION DELAYS

Prosecution of these Projects was delayed because the Bureau "lost track" of Venditti, the cases "stalled," and they were "put on the back burner (Tr. p. 148, 360, 363).

Prosecution was also delayed because the Projects involved supplemental benefit payments to CPI, which was in litigation with the Department for several years (Tr. pp. 50, 51, 363).

The Department failed to notify Albany Specialties of its potential liability for underpayments as a prime contractor on the Monroe-Woodbury Project for ten years (Tr. pp. 130 -140).

The Department failed to notify Sweet of its potential liability for underpayments as a prime contractor on the SUNY Albany Project for ten years (Tr. pp. 151 – 153).

PRIOR HISTORY

Venditti has over thirty years of experience with public work projects (Tr. p. 61, 99). During that time, Venditti was not investigated or found to have violated the Labor Law (Tr. p. 99). Venditti complied with the Labor Law and paid prevailing wages and supplements to its workers on public work projects over approximately three decades (Tr. p. 107).

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). 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 the four Projects in question, because each Department Of Jurisdiction – MWCSD, SUCF, Rensselaer County, and OGS - was a public entity and a party to a public work contract, Article 8 of the Labor Law applies. Labor Law § 220 (2); and *see, Matter of Erie County Industrial Development Agency v Roberts,* 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). Ancillary contracts such as purchase orders are also covered by Labor Law § 220. *See, Matter of Pyramid Company of Onandaga v Hudacs,* 193 A.D.2d 924 (3d Dept. 1993).

CLASSIFICATION

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.3 905, 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 investigator determined the appropriate classification for workers on the Projects to be sheet metal worker; the Respondents to this proceeding did not object to such classification.

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 A.D.2d 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 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

The main and, for almost all workers on the four Projects the only, question concerning underpayments is whether Respondent Venditti paid or provided prevailing supplemental pension benefits to its workers. Venditti contends that it paid the required dollar amounts into a pension benefit plan run by CPI, a plan administrator whose plans the Department contends failed to meet the requirements of Article 8 and were the subject of extensive State and federal litigation over a period of several years.

Venditti argues that its CPI plan was different from the plans known to the Department and that the changes to the plan made it acceptable to the Department. Venditti also argues that it would have proof that its plan met Department requirements but for the fact that the United States Department of Labor required Venditti to send to it all of its records, including proof of the hours worked and the amount of money contributed for each employee in the plan as part of a federal investigation and never returned the records to Venditti.

Based upon the evidence produce at the hearing, it is clear that Venditti did make certain supplemental benefit payments, and that the Department credited it with such payments when proof that they were made was supplied. It is also clear that Venditti did

not submit all of the required proof of payment concerning the CPI pension plan. It may well be that the reason for such failure is that the U. S. Department of Labor now holds these records and either will not or can not release them to Venditti. While it is unfortunate for Venditti if that is the case, the Labor Law is clear that it is the employer's responsibility to maintain appropriate payroll records and provide them to the Department upon request, and the failure to provide such records cannot inure to the benefit of the employer. (See *Matter of TPK Constr. Co. v Dillon,* above).

For their part, Respondents Albany Specialties and Sweet contend that the Department's failure to notify them of their potential liability for a period of ten years amounts to a violation of their Constitutional due process rights, as their ability to respond to the charges and mount a defense was irreparably compromised by the passage of so extended a period of time. Respondents may reassert such a violation of their Constitutional rights should they choose to appeal the Commissioner's Order. Insofar as this hearing concerns allegations that Venditti violated certain provisions of Labor Law Article 8, I leave the decision concerning an alleged violation of Constitutional law to a court of competent jurisdiction. *Matter of Finn's Liquor Shop v State Liquor Authority,* 24 NY2d 647 (1969).

INTEREST

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, Venditti 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.

However, substantial periods of time amounting to approximately eight years elapsed during the Department's investigation of this matter, and interest should not be allowed to accrue for that time during which the Department simply lost, laid aside, or otherwise failed to pursue this matter. Furthermore, the Department, in its Proposed

Findings of Fact and Conclusions of Law, admits that assessing interest for the full period of time would be inappropriate. Accordingly, interest on any underpayments found should run only from the date of underpayments to the date of payment, less a period of eight years.

WILLFULNESS

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) [1] 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

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

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 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.

Venditti was an experienced contractor that complied with the prevailing wage laws throughout most of its existence. Clearly, Venditti knew or should have known of its obligation to pay or provide prevailing wages or supplements. Along with the obligation to pay or provide the correct wages or supplements is that to maintain appropriate records so that proof of such payments can be provided to the Department should an investigation occur. But for one glaring exception, Venditti maintained such proof. Venditti claims that its failure to maintain proof of payments for pension benefits arose from its having to turn over those records to the federal government, which claim is consistent with the proof produced at the hearing. However, an employer cannot evade its responsibility simply by saying that it handed over its records to another investigatory body. At a minimum, any prudent employer would keep copies of every document given over, so that it could prove compliance with other laws that involve those same documents. Venditti apparently failed to take this simple and crucial precaution, even though it was familiar with the prevailing wage law and, presumably, its obligations thereunder. Given the definition of willfulness set forth above, I find such failure to comply with the law to be willful.

The question remains as to whether four separate findings of willfulness should be made. Here, I find the Department's request excessive. Given the nature of the violation,

the employer's overall compliance with the law and the unique interposition of a federal investigation, a single finding of willfulness for all four cases is sufficient.

SUCCESSOR OR SUBSTANTIALLY OWNED – AFFILIATED ENTITES

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

The question here is whether VBI, LLC is a substantially-owned-affiliated entity of, or successor to, Venditti. There is no question that the members of VBI, LLC are related to Luciano Venditti. Given the timing of Venditti's cessation of operations and VBI, LLC's creation, as well as the familial relationships involved, I cannot find that VBI, LLC is a substantially owned - affiliated entity of Venditti. Luciano Venditti, Timothy Avery and Christopher Venditti, the shareholders of Venditti, are not members of VBI, LLC, nor have they been shown to have the kind of power and responsibility needed to make such a finding. However, there is also a question as to whether VBI, LLC is a successor to Venditti. Labor Law § 220(5)(k) defines a successor as "…an entity engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor."

The record shows evidence of continuity of operations, as VBI, LLC engages in the same kind of projects as Venditti did. Furthermore, in addition to Luciano Venditti, there are multiple family members who were affiliated with Venditti who are involved in VBI, LLC, either as members or employees. Also, former Venditti employees work for VBI, LLC.

Taken as a whole, the evidence supports a finding that VBI, LLC is a successor to Venditti.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any such contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the five major shareholders 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.

Luciano Venditti was president and a fifty per cent shareholder of Venditti at the time of the Projects; based upon the record there is evidence that he knowingly participated in the willful violation of the Labor Law.

Christopher Venditti and Timothy Avery each owned twenty-five per cent of the shares of Venditti and thus owned or controlled at least ten per cent of the outstanding stock of Venditti and also were among Venditti's top five shareholders. There is no evidence in that either Christopher Venditti or Timothy Avery was an officer of Venditti who knowingly violated the Labor Law.

CIVIL PENALTY

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

The employer had a thirty year record of public work projects, with no violations other than those arising in these four cases. Furthermore, while the employer cannot be exonerated from its obligation to maintain records because of an intervening federal

investigation, neither should it be subjected to the full twenty-five per cent penalty, given its history of compliance. Accordingly, I recommend a civil penalty of ten per cent.

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). Venditti was a subcontractor of Albany Specialties on the Monroe Woodbury Project, and of Sweet on the SUNY Albany Project. Consequently, Albany Specialties and Sweet, in their capacities as prime contractor, are responsible for the amount found due from Venditti on their respective Projects.

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 Venditti underpaid wages and supplements due the identified employees in the four projects as follows:

Monroe-Woodbury Project: $102,109.55;

SUNY Albany Project: $71,782.97;

Courthouse Project: $11,590.72; and

SUNY Cobleskill Project: $1,582.91.

DETERMINE that Venditti 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, less a period of eight years; and

DETERMINE that the failure of Venditti to pay or provide prevailing wages or supplements on all four Projects shall constitute a single "willful" violation of Article 8 of the Labor Law; and

DETERMINE that Luciano Venditti and Timothy Avery were officers of Venditti; and

DETERMINE that Luciano Venditti owned fifty per cent of shares of Venditti, and that Christopher Venditti, and Timothy Avery each owned twenty-five per cent of the shares of Venditti and thus all three owned or controlled at least ten per cent of the outstanding stock of Venditti and also were among Venditti's top five shareholders.; and

DETERMINE that Luciano Venditti knowingly participated in the violation of Article 8 of the Labor Law; and

DETERMINE that VBI, LLC is a successor to Venditti; and

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

DETERMINE that Albany Specialties is responsible for the underpayment, interest and civil penalty due on the Monroe-Woodbury Project pursuant to its liability as a prime contractor under Article 8 of the Labor Law; and

DETERMINE that Sweet is responsible for the underpayment, interest and civil penalty due on the SUNY Albany Project pursuant to its liability as a prime contractor under Article 8 of the Labor Law; and

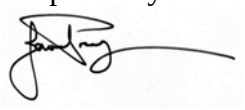
ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty); and

ORDER that upon the Bureau's notification, Venditti shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau's Albany Office, SOB Campus Bldg 12 Room 130, Albany, NY 12240; 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: March 28, 2011
Albany, New York

Respectfully submitted,



Jerome Tracy, Hearing Officer