

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

NATIONAL RESTORATION SYSTEMS, INC.

Prime Contractor

and

WB COMPANY, INC.

Subcontractor

and

James L. White Jr., as an officer of WB COMPANY, INC.

and

as an individual who owns or controls at least ten percent of
the shares of WB Company, Inc.

**REPORT
&
RECOMMENDATION**

Prevailing Rate Case #'s
2007004084
01 2008013042
Albany County

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 New York State
Office of General Services.

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
December 14, 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 WB
Company, Inc. ("Sub"), a subcontractor of National Restoration Systems, Inc. ("Prime"),
complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the
performance of a contract involving general construction on the Swan Street Parking
Garage ("Project") for the New York State Office of General Services ("Department of
Jurisdiction").

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito, Richard Cucolo, Senior Attorney, of Counsel.

Sub appeared without counsel and was represented by James L. White, Jr., and Desiree White. Sub submitted an Answer to the Notice of Hearing prior to commencement of the hearing.

Prime appeared through its attorney, Asa S. Neff, Esq. Prime submitted an Answer to the Notice of Hearing prior to commencement of the hearing.

ISSUES

1. Did the contractor pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. What rate of interest should be assessed on any underpayment?
3. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality “willful”?
4. Did any willful underpayment involve the falsification of payroll records?
5. Is James L. White, Jr. a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of the Sub?
6. Is James L. White, Jr. an officer of Sub who knowingly participated in a willful violation of Article 8 of the Labor Law?
7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau involving public work performed by Sub on the Project; the Project involved a public work contract between Sub and the Department Of Jurisdiction in Albany County to rehabilitate the parking garage in the Swan Street Building of the Empire State Plaza, PRC No. 2007004084, (DOL Ex 4, 5).

Prime retained Sub to perform certain work on the Project (DOL Ex. 11, 12, 13).

On or about July 1, 2007, the Department issued a Prevailing Wage Rate Schedule for Albany County, in effect from July 1, 2007 through June 30, 2008, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects (“2007 Schedule”) (DOL Ex. 6).

The 2007 Schedule contained the wages and supplements required to be paid to workers on the Project, including those for the worker classification of mason, at \$25.49 per hour wages and \$14.59 per hour supplements, and laborer, at \$21.01 per hour wages and \$12.58 per hour supplements (DOL Ex. 6).

On or about July 1, 2008, the Department issued a Prevailing Wage Rate Schedule for Albany County, in effect from July 1, 2008 through June 30, 2009, which Schedule set forth the prevailing rates of wages and supplements for workers employed on public work projects (“2008 Schedule”) (DOL Ex. 7).

The 2008 Schedule contained the wages and supplements required to be paid to workers on the Project, including those for the worker classification of mason, at \$26.29 per hour wages and \$15.39 per hour supplements, and laborer, at \$21.26 per hour wages and \$13.83 per hour supplements (DOL Ex. 7).

Sub received copies of the 2007 and 2008 Schedules on or about July 17, 2008 (R. Ex. B, J).

The investigation of the Project was initiated by a telephone complaint to the Bureau on or about July 30, 2008 (DOL Ex. 19; T. p. 18).

On or about October 1, 2008, the Bureau received a written complaint from a worker on the Project alleging the underpayment of wages (DOL Ex. 1).

On or about September 17, 2008 and December 1, 2008, the Bureau requested that Sub provide certified payrolls and certain other payroll related documents (DOL Ex. 2, 3).

In response to the Bureau’s requests, Prime and Sub submitted certified payrolls and other documentation, including paystubs, to the Bureau on or about April 23, 2009 (DOL Ex. 9, 10; T. p. 13).

The Department investigator obtained information concerning wages, hours worked, overtime pay, and the type of work performed from workers on the Project through on-site employee interviews on August 5, 2008, as well as through telephone interviews and questionnaires that were sent to Project workers and returned (DOL Ex. 14; T. p. 14, 23).

The Department investigator obtained from the Department of Jurisdiction copies of documentation relating to the date of concrete pours on the Project (DOL Ex. 15; T. p. 15, 20).

Upon conducting the on-site interviews with workers, the Department investigator was told by the workers that they received varying amounts of money as wages, none of which were the prevailing wage as set forth in the 2007 Schedule or the 2008 Schedule (DOL Ex. 14; T. p. 19, 20).

Some of the workers interviewed by the Department investigator did not appear on the certified payrolls on the day they were interviewed on the Project work site (DOL Ex. 10; T. p. 22).

Some worker statements concerning hours worked on the Project did not reconcile with either the paystubs or the certified payrolls submitted to the Department (T. p. 22).

Workers were paid in differing manners, sometimes in cash, sometimes by check, and sometimes by a mix of both (DOL Ex. 14; T. p. 23).

Sub did not pay overtime properly to the workers (Ex. 14; T. p. 23).

The Department investigator examined the records received concerning concrete pours and compared that information with that given by the workers to determine when workers on the Project would have needed to work late or overtime (DOL Ex. 15; T. p. 21).

The Department credited Sub with whatever payments the workers reported (T. p. 24).

After crediting Sub for payments to its workers, the Department investigator calculated and compared the hourly rate of pay the workers received for the

classifications of mason and laborer with the hourly rate of pay and supplements required by the 2007 Schedule and the 2008 Schedule and determined the difference in the hourly rate of pay by Sub (DOL Ex. DOL 18; T. pp. 24 – 26).

The Department investigator calculated the days and hours worked by Sub's workers on the Project by comparing interview information, pay stubs, certified payrolls, concrete pour times and a calendar (T. pp. 43 – 46).

After determining the amount of money paid to Sub's workers on the Project, the hours worked, the classification and the required amount of wages and supplements required to be paid by the 2007 and 2008 Schedules, the Department issued an audit which found underpayments to thirteen workers totaling \$18,995.54 (DOL Ex. 18).

On or about November 26, 2008, the Department issued a Notice to Department of Jurisdiction (“Withholding Notice”) to Withhold Payment to the Department of Jurisdiction, directing it to withhold funds in the amount of \$55,338.53 (DOL Ex. 17).

On or about December 11, 2008, the Department of Jurisdiction acknowledged receipt of the Withholding Notice and confirmed that it had withheld payment of \$55,338.53 to Prime (DOL Ex. 17).

The accountant used by Sub to prepare its certified payrolls was critically ill during the period in question and made errors while preparing them (T. p. 50).

Respondent James L. White signed the certified payrolls as president of W. B. Company, Inc. (DOL Ex. 20).

James L. White owns one hundred per cent of W. B. Company, Inc. (DOL Ex. 8).

Sub had little to no experience with Labor Law Article 8 and prevailing wage projects in New York State (T. pp. 26, 47).

Prime provided Sub with the 2007 and 2008 Schedules (HO Ex. 2; R. Ex. B, J; T. p. 27).

Prime made a good faith effort to assure Sub complied with the Labor Law (HO Ex. 2; T. p. 27, 28).

Prime complied fully and in a timely manner with the Department investigator (HO T. p. 28).

It is likely that Sub cannot indemnify Prime for any underpayments found on the Project (HO Ex. 2).

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.

Since the Department Of Jurisdiction, a public entity, is a party to the instant 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).

Classification of Work

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less

than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as “classification.” *Matter of Armco Drainage & Metal Products, Inc. v State of New York*, 285 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor*, 34 A.D.3 905, 906 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). The Department’s classification will not be disturbed “absent a clear showing that a classification does not reflect ‘the nature of the work actually performed.’ ” *Matter of Nash v New York State Dept of Labor*, 34 A.D.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). Sub took no issue with the classifications of mason and laborer used 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 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).

During the investigation and at the hearing, Sub failed to provide certified payrolls, cancelled checks or other material that could substantiate its claims concerning the hours and days worked by its employees. Nor did Sub provide any explanation for its failure to provide such information other than the fact that the accountant used to prepare the payrolls was ill during that time. Alternatively, the vast majority of Sub's employees provided credible information that substantiated the Department's estimation of the amount of work performed on the Project. And, the Department investigator had firsthand evidence of the unreliability of Sub's certified payrolls when those records failed to record workers on the Project on the very day the investigator appeared there and interviewed them. Given such facts, the Department's audit is a reasonable reconstruction of work on the Project and the calculation of underpayments of wages and supplements to thirteen workers in the amount of \$55,338.53 should be accepted.

Interest Rate

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, 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.

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) 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 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

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

may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. *Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 A.D.2d 421.

Sub admits that it received the prevailing wage schedules applicable to the Project, yet it failed to abide by the requirements set forth therein. The kinds of underpayments involved – lack of overtime pay, unreported hours and the like – is more than a simple bookkeeping error. Accordingly, Sub’s violation of the Labor Law was willful within the meaning of the term.

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>). While it is clear from the record that Sub failed to meet its obligation to maintain true and accurate payroll records, I do not find, particularly in light of the serious illness suffered by Sub’s accountant, that such failure rises to the level of falsification as contemplated by this section of the Labor Law.

Partners, Shareholders or Officers

Labor Law § 220-b (3) (b) (1) further provides that any contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the shareholders who own or control at least ten per

centum of the outstanding stock of the contractor or subcontractor, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of 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.

As sole shareholder and president of Sub, James L. White is subject to the restrictions set forth in this section of the 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. Sub clearly failed to comply with recordkeeping requirements, and the gravity of the violations here are severe, as they cover most of Sub's workforce. There is also little evidence of good faith on the part of Sub. Under such circumstances, I agree with the Department's request to assess a civil penalty of twenty-five per cent against Sub.

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). 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, including interest and penalty.

However, I note that Prime submitted an affidavit, unopposed by the Department and made a part of the record as HO 2, in which it requests that, pursuant to 12 NYCRR §221.1, any penalty assessed against Sub be waived insofar as it would normally apply to Prime under Labor Law §223. I further note that this regulation contains, in §221.1(a)(1) – (6), six requirements, all of which must be met if the Commissioner is to waive the assessment of any penalty. In Prime’s case, it failed to prove that – in fact, it admitted that it had not – “paid the subcontractor in full...” as is required by §221.1(a)(4). Therefore, the Commissioner may not waive the penalty in full. However, §221.1(b) states that, when uncontroverted evidence of some, but not all, of the factors set forth in the regulation exist, the Commissioner may reduce the civil penalty to an amount less than that which would otherwise be assessed. I therefore recommend that, in the event the Commissioner needs to collect funds directly from the Prime, the penalty assessed against the Prime be five per cent.

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 Sub underpaid wages and supplements due the identified employees in the amount of \$18,995.54; 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 Article 8 of the Labor Law; and

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

DETERMINE that James L. White is an officer of Sub; and

DETERMINE that James L. White is the sole shareholder of Sub; and

DETERMINE that James L. White knowingly participated in the violation of Article 8 of the Labor Law; and

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

DETERMINE that Prime is responsible for the underpayment, interest and a civil penalty of five per cent pursuant to its liability under Article 8 of the Labor Law; and

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

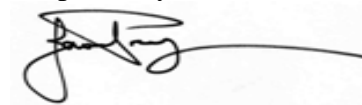
ORDER that the Office of General Services remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau of Public Work, SOB Campus Bldg 12 Room 130, Albany, NY 12240; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Sub, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; and

ORDER that the Bureau compute and pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: April 7, 2011
Albany, New York

Respectfully submitted,



Jerome Tracy, Hearing Officer