STATE OF NEW YORK: DEPARTMENT OF LABOR
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In the Matter of

WND CONSTRUCTION LLC, and JORGE FIGUEROA, CARLOS F. ESCOBAR, CARLOS FIGUEROA, ALEXANDER DELISA, STEVEN DELISA, JONATHAN DELISA, DANIEL DELISA, NICHOLAS RAO, ROSA GARCIA, and LIZETTE PONCE, as officers and/or members of WND CONSTRUCTION LLC, and its successors or substantially-owned affiliated entities, C.M.C CONTRACTORS, INC. and CHAMPION MAINTENANCE CONTRACTORS, INC.,

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, workmen, and mechanics employed on a public work project for the Town of Marlborough Community/Rec Center.

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REPORT &

RECOMMENDATION

Prevailing Rate Case
PRC No. 2022004351
Case ID: PW01 2022006491
Ulster County

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

Pursuant to a Notice of Hearing issued on March 24, 2025, a hearing was held on May 14, 2025, in Albany, New York by videoconference with participating parties and/or witnesses appearing remotely at various other locations. 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 WND Construction, LLC, and Jorge Figueroa, Carlos F. Escobar, Carlos Figueroa, Alexander Delisa, Steven Delisa, Jonathan Delisa, Daniel Delisa, Nicholas Rao, Rosa Garcia, and Lizette Ponce, as officers and/or members of WND Construction LLC ("WND"), and its successors or substantially-owned affiliated entities C.M.C Contractors, Inc. and Champion Maintenance Contractors, Inc. (hereafter all "Respondents"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) to pay or provide the prevailing rates of

wages and supplements to laborers, workers or mechanics employed in the performance of the public work project outlined below.

HEARING OFFICER

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

APPEARANCES

The Bureau was represented by Department Deputy Commissioner and General Counsel, Jill Archambault, co-counsel, Elina Matot, Associate Attorney, and Philp Banazek, Senior Attorney, both of Counsel.

There was no appearance made by, and on behalf of the majority of the Respondents, although one of the Respondents, Nicolas Rao, appeared *pro se* and participated in the proceeding.

ISSUES

1. Did Respondents 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 Respondents to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any of the underpayment of wages and/or supplements by Respondents involve the falsification of payroll records?
4. Are any of the individual named Respondents, noted above, officers or members of WND Construction?
5. Did any of the individually named Respondents, knowingly participate in a willful violation of Labor Law article 8?
6. Should interest on the underpayment of wages and/or supplemental benefits be assessed against Respondents and, if so, in what amount?
7. Should a civil penalty be assessed and, if so, in what amount?

8. Whether C.M.C Contractors, Inc. and Champion Maintenance Contractors, Inc. are successors or substantially owned-affiliated entities of WND Construction, LLC as defined under Section 225-G and K of the Labor Law?

9. The disposition of any funds being withheld from Respondents by the Town of Marlborough pursuant to the Notices of Withholdings issued by the Bureau of Public Work and Prevailing Wage Enforcement as a result of the underpayments by Respondents to the workers as alleged.

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau involving a public work contract (T pp 56, 57) performed by Respondents[1].

On March 27, 2025, Department duly served a copy of the Notice of Hearing on all Respondents, via First Class and certified mail, return receipt requested. (HO 1 and 2). The Notice of Hearing scheduled a hearing to commence on May 14, 2025, and required all Respondents to serve an Answer at least fourteen days in advance of the scheduled hearing.

Respondents failed to file an Answer to the charges contained in the Notice of Hearing.

On or about September 23, 2022, WND entered into an agreement with the Town of Marlborough (hereinafter "Town") to furnish all labor, materials, equipment and incidentals required for the Town of Marlborough Community/Rec Center Phase 2: Alterations RE-BID-General Construction Contract Work, located at 1520 Route 9W, in the Town of Marlborough, County of Ulster, State of New York, (hereinafter "Marlborough Project") (DOL 7; T pp 54-59).

The agreement between Respondents and the Town involved the employment of laborers, workmen and mechanics in the Carpenter, Ironworker, Laborer, Bricklayer and Roofer classifications.

On or about July 1, 2022, the Bureau issued Prevailing Wage Rate Schedule 2022 for Ulster County. That wage rate schedule detailed the amount of wages and supplements which were to be paid to or provided for the laborers, workmen and mechanics performing work on the Marlborough Project from July 1, 2022, through June 30, 2023, including the following classifications: Carpenter (Building/Heavy & Highway), with wages of $39.48 per hour, and supplements of $30.41 per hour;

[1] Documentary evidence will be referenced as follow: Hearing Officer Exhibits, HO X; and Department Exhibits, DOL X. Transcript references will be in the format: T p X or T pp X, X or T pp X–Y.

Ironworker, with wages of $51.38 per hour, and supplements of $42.71 per hour; Laborer, with wages of $40.40 per hour, and supplements of $31.65 per hour; Bricklayer, with wages of $43.94 per hour, and supplements of $36.44 per hour; and Roofer, with wages of $52.25 per hour, and supplements of $30.62 per hour (DOL 8; T pp 59-62).

On or about November 16, 2022, the Bureau conducted a routine field visit at the Marlborough Project work site and interviewed workers. While at the Marlborough Project work site, the Bureau spoke with an employee of WND who produced a money order which was issued to him in lieu of a paycheck by WND (DOL 2; T pp 22, 23, 27-31).

As a result of the site visit to the Marlborough Project, and noticed payroll disparity the investigators encountered while on the site, the Bureau initiated an investigation into whether WND failed to pay the proper prevailing wages and supplements to the labors, workmen and mechanics for work performed on the Marlborough Project. (DOL 1; T pp 23, 24)

On or about November 17, 2022, the Bureau requested that WND furnish payroll records and other documents related to the Marlborough Project (DOL 3; T pp 32-34).

On or about December 12, 2022, April 10, 2023, and July 19, 2023, the Bureau again requested that WND furnish certified payroll records and other documents related to the Marlborough Project (DOL 1; T pp 26, 35).

WND failed to provide any records related to the Marlborough Project (T pp 34, 35).

On or about April 14, 2023, the Town provided the Bureau with copies of WND's certified payroll records, the engineering reports, and change orders relating to the Marlborough Project.

During the course of the investigation, a representative from the Laborer's Local 17 provided to the Bureau information pertaining to its members who were working on the Marlborough Project, including their hours worked and pay received from WND (DOL 15 and 17; T pp 36, 90-101).

During the course of the investigation, a representative from the Carpenter's Local provided to the Bureau information pertaining to its members who were working on the Marlborough Project, including their hours worked and pay received from WND (DOL 9, 18; T pp 63, 64, 97, 104).

The information provided by the various sources enabled the Bureau to complete its investigation of the Marlborough Project.

Based on its investigation and scope of work that was performed on the project, the Bureau

determined that WND employed thirteen (13) laborers, workmen and mechanics on the Marlborough Project in the Carpenter, Ironworker, Laborer, Bricklayer and Roofer classifications and failed to pay or provide prevailing wages and supplements to those thirteen (13) workers in accordance with the prevailing wage schedule in effect at the time.

The investigator determined the work classifications for the non-union workers based on the classifications listed in the certified payrolls, and derived the classifications for union workers using the certified payrolls and/or union remittance hour reports. (T pp 115, 121, 128, 134, 141).

The Bureau investigators determined the days and hours worked using certified payroll records, the engineer's inspection report, union remittance/hour reports, and calendars maintained by workers. Wage rates were established from interview forms, statements from workers regarding what all workers were paid, information from the carpenter's and laborer's unions, and various canceled checks received by the Bureau. (DOL 11, 15, 16, 17, 18; T pp 76-78, 93-99, 100-103, 121-145).

The Bureau investigator obtained the rates that should have been paid to the workers on the Project from the prevailing wage rate schedule applicable in that county of jurisdiction during the period the work was performed (DOL 8; T pp 60, 118, 119, 131, 135).

Finally, the Bureau investigator gave the Respondents zero credit for payments made to the non-union workers, because he did not receive any proof of payment in regard to those workers, relied on information provided by the unions as to what those union workers were actually paid and utilized copies of the cancelled checks when available to evidence pay for certain weeks for the workers named on those checks (T pp 116 Dol 10, 12, 13, 14; T pp 64, 67-76, 79-90, 13, 136, 139, 143).

When the Bureau investigator found a conflict between the certified payrolls and union remittance/hours reports, the investigator gave deference to the data regarding hours worked and rates paid to the union information, because that information was a contemporaneous record generated by a third-party observer (T p 130).

The Bureau prepared a Detail of Underpayments and a Summary for the Project, using the information obtained during the investigation, which included certified payrolls, statements from the employees, interview sheets, questionnaires, union remittance reports, cancelled checks and the prevailing wage schedules. (DOL 21, 22; T pp 112, 145).

During the period from week ending October 16, 2022, through the week ending April 30, 2023[2], WND underpaid prevailing wages and supplements to thirteen (13) laborers, workman and mechanics performing work in the Carpenter, Ironworker, Laborer, Bricklayer and Roofer classifications on the Marlborough Project in the total amount of $261,540.08 (DOL 21, 22; T pp 112, 147-151).

On or about December 21, 2023, Arch Insurance Company paid $30,543.30 to the Laborer's Local 17 joint benefit fund on behalf of WND workers[3] (DOL 15, T pp 148).

On or about January 7, 2025, the Bureau issued to WND a Notice of Labor Law Inspection Findings notifying WND of the Bureau's findings on the Marlborough Project (DOL 23; T pp 153, 156-158).

On or about December 21, 2022, January 26, 2023, and June 12, 2023, the Bureau issued a Notice of Withhold Payment to the Department of Jurisdiction directing them to withhold various amounts from payments due to the Respondents, none of these amounts were acknowledged as withheld by the Town (DOL 24; T pp 158, 159).

During the period when work was performed on the Marlborough Project, the Bureau determined that Jorge Figueroa, Carlos F. Escobar, Carlos Figueroa, Alexander Delisa, Steven Delisa, Jonathan Delisa, Daniel Delisa, Nicholas Rao, Rosa Garcia, and Lizette Ponce were officers and members who knowingly participated in WND Construction's failure to pay or provide prevailing wages and supplements to or for the benefit of the employees who performed work on the contract outlined above for the project (DOL 29, 30, 31 and 32; T 181-194, 200, 205).

WND Construction LLC is a corporation, shown to be active in the New York State Department of State Division of Corporations records, with its principal office located at 411 Theodore, Suite 206, Rye, New York, 10580. Nicolas Rao is listed as the person eligible to receive service of process on behalf of the LLC[4] (DOL 27; T pp 127).

C.M.C Contractors, Inc. and Champion Maintenance Contractors, Inc. are substantially owned-

[2]The audit period listed in the PW-27 runs to week ending December 21, 2023, because that was the date of the payment made by the bonding company (DOL 22). The actual end date associated with the project according to the record is April 23, 2023 (T p 68).
[3] The direct payments listed in the PW-27 when totaled comes to $33,238.31, the summary sub-total for wages and supplements listed in the same PW-27 is $31,508.39, the pleading state the payment amount from the bonding company is $30,763.80, the PW-29 states the number is $30,543.30 and finally, the settlement payout to six laborers in DOL 15 totals $36,101.19, the correct direct payment needs to be verified and that number should be credited properly when the audit is recalculated.
[4] Although Mr. Rao was listed on that document, he testified that he did not know he was listed in that capacity, and he never filed the documents with the Secretary of State. Also, the initial DOS Filing was done on April 30, 2023, after the work on the project was completed.

affiliated entities or successor corporations to WND (DOL 28, 29, 30, 31, 32, 33; T pp 178-182, 204).

Respondent, Nicolas Rao, testified that he came in contact with Respondent, Steven Delisa, toward the end of the Marlborough Project, and that Respondents, Steven and Jonathan Delisa, were running the two companies (CMC and WND). (T pp. 200 – 212, 214, 223, 229) He also mentioned that he didn't know why he became a registered agent of WND and that he never filled anything out with New York State or Connecticut (T p 211). That he started working with or for Steven in April of 2023 or two months thereafter (T p 222).

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[5]. 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 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 somewhat 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:

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

> (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, is a party to the instant public work contract. The contract involved the alteration and general contract work to a community recreation center, which required construction-like labor paid for by public funds. The work product, here renovating publicly owned facilities, is clearly for the use or other benefit of the general public. Additionally, the Department of Jurisdiction applied for a PRC number, and Article 27 of the contract specifically outlines that the wages and hours of work are subject to New York State Labor Law § 220, Article 8, so Labor Law Article 8 applies.

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workmen 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]).

The record contains ample evidence from the workers, the contract documents, worker interviews, WND Construction's certified payrolls, the engineering construction inspection report, union remittance/hours reports and investigator testimony to justify the classifications used in each instance. The Department classified the workers on the Marlborough Project pursuant to the scope of work performed on the Project and acknowledged those classifications through the union reports and listing on the certified payrolls; I find the classification used by the Bureau should not be disturbed.

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 Bureau received certified payrolls, as well as other relevant material including employee interview sheets, employee questionnaires, union remittance reports and employee hours, an engineer's inspection report and canceled checks. The Bureau investigator derived the days and hours worked directly from either the certified payroll records, the engineer's inspection report or the union remittance/hours reports. The classification of work was determined based on the scope of work performed by each worker and verified through either the union remittance/hours reports and/or the listing on the certified payrolls. He obtained the hourly wage rates paid to the employees either directly from the employee interview forms, the union remittance/hours reports and/or cancelled checks, and

compared these rates with the prevailing wage schedule applicable in the county at issue for the rates that should have been paid, to ultimately determine the amount of unpaid prevailing wages and supplements due to the workers.

If workers were identified and listed in the certified payrolls, the investigator utilized the hours and pay rates contained therein, and if those identified and listed workers were paid in full for all hours worked according to the information he had and the prevailing wage scheduled in affect at that time, those workers were zeroed out and were not included in the audit.

The investigator's detail of underpayments broke the laborers, workmen and mechanics down into three categories: 1) non-union workers; 2) union workers from Laborer's Local 17; and 3) union workers from Carpenter's Local 239.

Starting with the non-union workers; William Cruz, Jorge Cortes, Jorge Cortes 2, Carlos Figueroa, Joel Guitierrez, Kevin Tobar, the investigator used the certified payrolls to determine the classification of work and the hours worked each day for those workers. However, since he could not verify that the wage or supplement rates listed on the certified payrolls were actually paid (no proof of payment was supplied by the employer), those rates were not used, and he gave the employer zero credit for any wages and supplements paid to those workers in the audit. Using the classifications listed in the certified payrolls for those workers, he then determined what prevailing rates should have been paid according to the Prevailing Wage Rate Schedule 2022 for Ulster County to come up with the underpayment amount.

Moving on to the Local 279 carpenters[6]; Efren Hortega, Nolvin Perez, Carlos Pinto, Oscar Valdovinos, concluding that the information that the Carpenter's Local supplied regarding hours worked and rates paid had merit; the investigator used that information to assist him in determining the underpayment amount calculated in his audit. That information showed that each of the workers were paid a rate of $25.00 per hour for all hours worked and none of those workers received supplemental benefits. The hourly rates the union stated the employees received were supported by checks for two of the workers showing they were paid $1,000.00 a piece ($25.00 x 40 hours) for certain weeks. Applying the $25.00 per hour rate as the basis of rates paid, the investigator took those rates and hours worked, and compared them to the prevailing wage rate schedules applicable in that county of jurisdiction during the period the work was performed to determine the amount of the underpayment for these workers. It

[6] The Carpenter's Local was also referred to as Local 239 during the proceeding.

should be noted that the hourly rates supplied by the Carpenter's Local did not match the rates listed in the certified payrolls and that there were certain weeks and/or hours that the union presented that their members worked that were not contained in the certified payrolls as well.

In regard to the Laborer's Local 17 workers contained in the audit; Michael Christian and Brendon Lynch, the investigator used the hours provided by the union and relied on the indication from the union that all of its members wages were paid in full. He got the rates that should have been paid from the prevailing wage rate schedules applicable in that county of jurisdiction during the period the work was performed and used those rates to determine the amount of the underpayment (supplements[7]) for these workers.

Regarding worker Lamont Harris, the investigator used the prevailing wage rate to credit the employer with wages paid to that worker, although he had canceled checks listing a net amount which indicated that this worker was actually paid a higher hourly wage rate then was credited. The Department improperly blanked out all the statutory deductions listed in the certified payrolls, making it impossible to verify if the gross amount listed on those payrolls equated to the net amount once those deductions were taken into consideration. The net amounts listed in the certified payrolls did match the majority of the amounts listed in the handful of cashier's checks that were produced and issued to this worker (the checks were issued for the work performed in the prior week). Examples of which: week ending 10/30/22, Mr. Harris worked 40 hours. The certified payrolls state he was paid $44.20 in wages (this matches his interview form in which he states he was making approximately $44.00 per hour) and $32.30 in supplemental benefits for a total package of $76.50. That dollar amount times the 40 hours worked equals the gross amount of $3,060.00 (more likely the gross wages received were $1,760.00 in, wages, since no supplements were received). The net amount listed on the certified payrolls that week of $1,281.94 equals the net amount listed on the cashier's check issued on 11/04/25. Without being able to see the statutory deductions listed in the payrolls there is no way for this body to determine if the worker received the full amount he should have been credited. The prevailing wage rate listed in the audit and credited as the contractor payment is $40.40 per hour (from wage schedule) with zero credit for the supplemental benefits paid. The investigator based this payment on 32 hours worked (off of union report) although the certified payrolls show 40 hours were worked. Since the net wage amount listed in the certified payrolls matches the amount listed on the cashier's check, the contractor should

[7] 12 NYCRR § 220.2 (c)(3), The failure of an employer to provide the Commissioner of Labor with proof of any prevailing supplements paid or provided to or on behalf of its employees shall result in an investigatory finding that supplements were not paid or provided in violation of the second unnumbered paragraph of subdivision 3 of section 220 of the Labor Law.

have been credited with the $44.20 hourly rate amount paid ($40.40 in wages and $3.80 in supplements). The excess in wages paid over and above the prevailing wage rate amount should have been credited to the supplemental benefit portion of the rates received that week, and the investigator should adjust the audit amount to correct this minor error where appropriate. Although the union local confirmed that all wages were paid to this worker, and the investigator credited the employer with full payment of those wages in the audit, the evidence fails to show the excess hourly rate paid was credited to the supplements in the audit[8].

Evidence in the record established that the certified payrolls of the Respondents did not accurately reflect the wages and supplements paid to the workers who performed services on the Marlborough Project. Also, there is a clear absence of comprehensive payroll and time records on which the Bureau could rely to credit the Respondents with the full payment of wages and supplemental benefits to its workers. Under those circumstances, it was permissible and reasonable for the investigator to reach the conclusions made and employ the methodology he used, although it may have been imperfect, to determine the days and hours worked, as well as rates paid to the workers.

Labor Law § 661 requires an employer to establish, maintain, and preserve for not less than six years, contemporaneous, true, and accurate payroll records showing for each week worked the hours worked, the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other basis; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages for each employee, plus such other information as the Commissioner deems material and necessary. In January 2025, Respondents were put on notice of their violation of the labor law for their failure to pay prevailing wage and supplemental benefits to their employees, and that they were required and failed to produce accurate payroll records although given the time to do so.

Evidence in the record established that the Respondents' certified payrolls did not accurately reflect the wages paid to the workers who performed services on the Marlborough Project. Also, there is a clear absence of comprehensive payroll and time records on which the Bureau could rely to credit Respondents with the full payment of wages and supplemental benefits to their workers (thus the employer was given a zero credit for wages and supplements paid to the non-union workers). The limited payroll records that were submitted to the Bureau did not include any paystub information, e.g., hourly wage or supplements rates paid, the hours worked, or any statutory mandated withholding or tax

[8] Under Article 8, any supplemental benefits paid into a fund, plan or program in excess of the hourly supplemental benefit rate listed in the applicable wage schedule will not count as a credit towards any underpayment of the prevailing wage rate, however an overpayment in wages should be credited to supplements *See*, 12 NYCRR § 220.2 (b).

deductions. Under those circumstances, it was permissible and reasonable for the investigator to reach the conclusions made and employ the methodology he used to determine the days and hours worked, as well as rates paid to the workers.

Since Respondents failed to adhere to this statute and failed to maintain the time and payroll records required under the labor law to negate the reasonableness of the Bureau's calculations, the Bureau's audits should be sustained.

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]).

On or about December 21, 2023, the Bureau credited direct payments made to Laborer's Local 17 members, Michael Christian, Lamont Harris and Brendon Lynch, in the amount of $31,544.94[9] in its audit. Although those workers received the direct payments, Respondents are still responsible for the interest on the balance of wage and supplement underpayments for those named workers as well as the underpayment amounts for the remaining workers 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. 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*

[9] This amount needs to be verified.

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]).

The weight of the evidence in the record as a whole demonstrates that Respondents knew of the requirements to pay the prevailing rate of wages and supplements on the public work project at issue and in fact did not pay the full prevailing wage package as required, and therefore the violations which occurred on the Marlborough Project can only be considered a willful violation. There was clear evidence presented that the some of the workers were paid a flat hourly rate for all hours worked, and that flat rate was well below the prevailing wage and supplement rates in the jurisdictions they performed services in.

The Bureau sent Respondents numerous records requests for the project at issue and did not receive a response. The Bureau had to rely on collateral resources to secure the documents necessary to conduct its investigation, which included copies of cashier's checks issued to some of the workers, union remittance reports/hours and the engineer's report, all of which were inconsistent with certified payrolls that were provided. Respondents did not supply either time records, or specific paystub information detailing how checks were calculated, what statutory deductions were taken or what pay rates were provided

While the certified payrolls did not appear to be reliable with respect to what workers were actually paid, the Department did rely on them, as well as the Engineer's Construction Inspection Report maintained by the project engineer to determine what class of work employees were doing, how many workers were on site on a particular day and what prevailing rate was therefore required. In case of conflict between Respondents' records and worker self-reports (interview sheets and questionnaires), the Engineer's Construction Inspection Report or union remittance/hours reports, the Department also relied on the latter documents to determine how many hours an employee had worked, what days they were on the project and what they were paid.

In addition, there was nothing contained in the record which showed that the Respondents paid any supplemental benefits to its workers on the Marlborough Project.

The substantial evidence in this matter warrants a finding of willfulness by the Respondents.

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).

It is clear from the record that Respondents failed to meet its obligation to maintain true and accurate payroll records, and I find the evidence set forth, such as conflicts between the certified payrolls provided and other wage information concerning hours worked and payments made to workers on the Marlborough Project, coupled with the fact that there was no evidence established in the record to show that supplemental benefits were actually paid to any of the workers on the Marlborough Project (although the certified payrolls state otherwise) shows deliberate, intentional falsification, and, therefore, that Respondents' willful failure to pay or provide prevailing wages and/or supplements involved the falsification of payrolls.

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 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 Labor Law article 8 shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity (emphasis added).

The record shows that Jorge Figueroa, Carlos F. Escobar, Carlos Figueroa, Alexander Delisa, Steven Delisa, Jonathan Delisa, Daniel Delisa and Rosa Garcia were officers and owners of WND Construction LLC or its substantially owned affiliated entities and are therefore personally subject to the willful violations in this matter.

Where, as here, an administrative determination is made after an evidentiary hearing required by law, all findings must be supported by substantial evidence (*see* CPL 7803 [4]). "Substantial evidence is a minimal standard that requires less than the preponderance of the evidence and demands only the existence of a rational basis in the record as a whole to support the findings upon which the determination is based" (*Matter of C&C Tobacco/Chuck's Gas Mart, Inc. v Tompkins County Whole Health*, 233 AD3d 1237, 1238 [3d Dept 2024] [internal quotation marks and citations omitted]). Upon reviewing the record, as a whole, it is determined that there is not a rational basis to support the findings upon which the determination is based to show that either Lizette Ponce or Nicholas Rao were officers and/or members of the business. The record was not developed enough to show what involvement, if any, either of them had in the Marlborough Project or that they even held a position of authority that would have subjected them to the provisions of Labor Law § 220-b (3) (b) (1).

As such, I do not find there is an adequate basis to conclude that either of those two individuals knowingly participated in the willful violation of Labor Law article 8 on the project or that they owned or controlled any portion of the Limited Liability Company calling in question their financial liability or operational control in this case.

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 contractor was a medium sized contractor employing thirteen (13) laborers, workmen and mechanics and was an experienced public work contractor registered to do business in two states. Respondents failed to show good faith during

the investigation, failed to comply with mandatory record keeping requirements and refused to cooperate with the Department's investigation by providing records when requested or maintain time records on the project even though it was clear they were required to do so. The record shows a failure to cooperate, serious violations due to the falsification of payroll records and numerous record-keeping violations. Under these circumstances, the Department's request for 25% civil penalty is reasonable.

RECOMMENDATIONS

Based upon default of the Respondents, in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, and based 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 make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Respondents underpaid prevailing wages and supplemental benefits to its laborers, workmen and mechanics in the amount of $261,540.08 on the Marlborough Project, for the audit period week ending October 16, 2022, through the week ending April 30, 2023; and

DETERMINE that Respondents should be credited with the pre-direct payments made to the Laborer's Local 17 members; Michael Christian, Lamont Harris and Brendon Lynch, and interest should cease in regard to those payments, on the date the Bureau the received those funds from Arch Insurance Company and/or WND on or about December 21, 2023[10]; and

DETERMINE that after the Bureau credits Respondents with the lump sum payments made to Michael Christian, Lamont Harris and Brendon Lynch, and makes an audit adjustment for Mr. Harris, it shall determine the balance of wages and supplemental benefits owed to those workers; and

DETERMINE that Jorge Figueroa, Carolos F. Escobar, Carlos Figueroa, Alexander Delisa, Steven Delisa, Jonathan Delisa, Daniel Delisa and Rosa Garcia, were members and officers of WND Construction LLC; and

[10] The Bureau's audit summary ran interest to September 15, 2025, the interest needs to be adjusted to conform to the end date of the Notice of Filing of the Order associated with the matter.

DETERMINE that Jorge Figueroa, Carolos F. Escobar, Carlos Figueroa, Alexander Delisa, Steven Delisa, Jonathan Delisa, Daniel Delisa and Rosa Garcia knowingly participated in the violation of Labor Law article 8 on the project at issue; and

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

DETERMINE that the willful violation of Respondents involved the falsification of payroll records under Labor Law Article 8; and

DETERMINE, that as a result of the Respondents' knowing willful participation in the falsification of payroll records within the meaning of Section 220-b(3)(b) of the Labor Law on the named project, both the entity (WND Construction LLC), its' substantially owned-affiliated entities (C.M.C Contractors, Inc. and Champion Maintenance Contractors, Inc.) and the individuals (Jorge Figueroa, Carolos F. Escobar, Carlos Figueroa, Alexander Delisa, Steven Delisa, Jonathan Delisa, Daniel Delisa and Rosa Garcia) are 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 (5) years from the issuance of the Order & Determination associated with this report; and

DETERMINE that Respondents (both the entity and the named individuals) are responsible for any underpayment of wages or supplemental benefits determined to be owed to its laborers, workmen and/or mechanics on the project at issue; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Respondents are responsible for interest on the total underpayments on the named project at the statutorily mandated rate of sixteen (16%) per annum from the date of underpayment to the date of payment; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Respondents are assessed a civil penalty in the amount of twenty-five (25%) of the underpayment and interest due on the named project; and

ORDER that the Bureau compute the total amount due for the Marlborough Project (underpayment, interest and civil penalty), and provide the proper crediting for all pre-direct payments made; and

ORDER that to the extent that the Department of Jurisdiction has in its possession any withheld funds, it shall 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

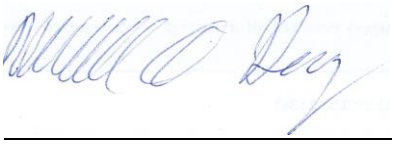
to the New York State Department of Labor, Bureau of Public Work at State Office Building Campus, Bldg. 12, Room 130, Albany, NY 12226; and

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

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

Dated: August 21, 2025
Albany, New York

Respectfully submitted,



Marshall H. Day, Hearing Officer