

IN THE MATTER OF

CHRISTA CONSTRUCTION, LLC
Prime Contractor

and

OWNER CONTROLLED FLOORING, INC.
and
FLOORS R US, LLC

AND

JOHN OATHOUT d/b/a JOHNNY O's QUALITY
FLOORING,
Subcontractor

**DEFAULT
REPORT
&
RECOMMENDATION**

Prevailing Rate Case
02-00264 Cayuga County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

To: Honorable M. Patricia Smith
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on January 6, 2009. 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 John Oathout, d/b/a Johnny O's Quality Flooring ("John Oathout"), a subcontractor of Owner Controlled Flooring, Inc., which was a subcontractor of the prime contractor, Christa Construction, LLC ("Christa") complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract involving the

installation of carpet and linoleum flooring at the Cayuga Community College (“Project”) for the County of Cayuga.

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Richard Cucolo, Senior Attorney, of Counsel). There was no appearance made by, or on behalf of, John Oathout. With the Department’s consent, Christa appeared by affidavit in lieu of personal appearance at the hearing. Christa had agreed to pay the amount of the underpayment the Bureau had determined John Oathout owed with interest out of withheld funds, and submitted an affidavit evidencing its compliance with the regulatory requirements necessary for a waiver of its responsibility for payment of any civil penalty that might be assessed against John Oathout. At the hearing, the Department consented to the admission of the affidavit into evidence in lieu of Christa’s personal appearance and consented to the relief sought therein.

FINDINGS AND CONCLUSIONS

On December 3, 2008, the Department duly served a copy of the Notice of Hearing on the Respondents, including John Oathout, via regular and certified mail, return receipt requested (H.O. 1). Certified mailing receipts acknowledging receipt of the Notice of Hearing were received from each of the respondents, with the exception of John Oathout. Although the certified mailing to Mr. Oathout was returned unclaimed, the regular mail envelope was not returned to the Department (T. 8). The Notice of Hearing scheduled a January 6, 2009 hearing and required that the Respondents serve an Answer at least 14 days in advance of the scheduled hearing.

The Notice of Hearing alleges that the John Oathout underpaid wages and supplements to its workers and that the Christa is responsible for its subcontractor’s underpayment pursuant to Labor Law § 223. John Oathout failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, he is in default in this proceeding.

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and documents describing the

underpayments, supporting the Bureau's charges that John Oathout willfully underpaid \$1,709.68 to its workers for the audit period weeks ending December 13, 2006 to January 3, 2007;

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

RECOMMENDATIONS

Based upon the default of John Oathout 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, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that John Oathout underpaid its workers \$1,709.68 on the Project;

DETERMINE that John Oathout is responsible for interest on the total underpayment at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment;

DETERMINE that the failure of John Oathout to pay the prevailing wage or supplement rate was a "willful" violation of Article 8 of the Labor Law;

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

DETERMINE that Christa is responsible for the underpayment and interest due pursuant to its liability under Article 8 of the Labor Law;

DETERMINE that Christa has satisfied the requirements of 12 NYCRR § 221.1 to be granted a waiver of responsibility for the civil penalty imposed against John Oathout; and

ORDER that the Bureau compute the total amount due (underpayment of \$1,709.68, interest at 16% from date of underpayment and 25% civil penalty);

ORDER that, upon payment of \$1,709.68, with interest, Christa will have fully satisfied its liability under Article 8 of the Labor Law;

ORDER that John Oathout shall receive a credit for the amount paid by Christa;

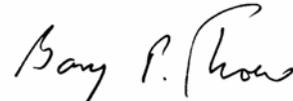
ORDER that the County of Cayuga remit payment of the withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 333 East Washington Street, Room 419, Syracuse, NY 13202;

ORDER that John Oathout, upon the Bureau's notification of the civil penalty amount due, shall immediately remit that amount, 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: February 2, 2009

Respectfully submitted,

A handwritten signature in cursive script that reads "Gary P. Troue".

Gary P. Troue, Hearing Officer