

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

WESTERN NEW YORK CONTRACTORS, INC.; and
ROBERT VALERINO, as an officer and/or shareholder of
WESTERN NEW YORK 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, workers and mechanics
employed on a public work project for the
City of Rochester, New York.

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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
Town of Penfield, New York.

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**DEFAULT REPORT &
RECOMMENDATION**

Prevailing Wage Case
PRC No. 2007001435
Case ID: PW05 2009009943
Monroe County

Prevailing Wage Case
PRC No. 2008002738
Case ID: PW05 2009009942
Monroe County

Prevailing Wage Case
PRC No. 2007000288
Case ID: PW05 2009024145
Monroe County

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In the Matter of

WESTERN NEW YORK CONTRACTORS, INC.; and
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to or provided for the laborers, workers and mechanics
employed on a public work project for the
City of Rochester, New York.

Prevailing Wage Case
PRC No. 2008000024
Case ID: PW05 2008017311
Monroe County

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In the Matter of

WESTERN NEW YORK CONTRACTORS, INC.; and
ROBERT VALERINO, as an officer and/or shareholder of
WESTERN NEW YORK 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, workers and mechanics
employed on a public work project for the
Penfield Central School District.

Prevailing Wage Case
PRC No. 2007007936
Case ID: PW05 2009024144
Monroe County

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In the Matter of

WESTERN NEW YORK CONTRACTORS, INC.; and
ROBERT VALERINO, as an officer and/or shareholder of
WESTERN NEW YORK 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, workers and mechanics
employed on a public work project for the
Monroe County Water Authority.

Prevailing Wage Case
PRC No. 2006007405
Case ID: PW05 2009000221
Monroe County

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In the Matter of

WESTERN NEW YORK CONTRACTORS, INC.; and
ROBERT VALERINO, as an officer and/or shareholder of
WESTERN NEW YORK 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, workers and mechanics
employed on a public work project for the
Monroe County Water Authority.

Prevailing Wage Case
PRC No. 2007004429
Case ID: PW05 2009000221
Monroe County

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

Pursuant to a Notice of Hearing issued on September 17, 2018, and an adjournment at the request of the Respondents of the original hearing dates, a hearing was held on February 25, 2019, February 26, 2019, and March 28, 2019, in Albany, New York and by videoconference with Rochester, 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 Western New York Contractors, Inc., and Robert Valerino, as an officer and/or shareholder of Western New York Contractors, Inc., ("Western", "Respondents") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of public work contracts involving seven projects, to wit: furnishing labor, tools, and equipment necessary for the Water Main Extensions and Improvements Project (PRC No.: 2007001435) ("Project 1") for the City of Rochester ("Department of Jurisdiction 1"); furnishing labor, tools, and equipment necessary for the Bremen Street Group Improvements Project (PRC No.: 2008002738) ("Project 2") for the City of Rochester ("Department of Jurisdiction 2"); furnishing labor, tools, and equipment necessary

for the Extension No. 41 to the Penfield Consolidated Sewer District Project (PRC No.: 2007000288) (“Project 3”) for the Town of Penfield (“Department of Jurisdiction 3”); furnishing labor, tools, and equipment necessary for the Lead Water Service Replacement Project (PRC No.: 2008000024) (“Project 4”) for the City of Rochester (“Department of Jurisdiction 4”); furnishing labor, tools and equipment necessary for the Additions and Alterations at Bay Trail Middle School, and the Reconstruction of Scribner Elementary School Project (PRC No.: 2007007936) (“Project 5”) for the Penfield Central School District (“Department of Jurisdiction 5”); furnishing labor, tools, and equipment necessary for the Irondequoit and Paddy Hill Circle Water Main Replacements Project (PRC No.: 2006007405) (“Project 6”) for The Monroe County Water Authority (“Department of Jurisdiction 6”); and furnishing labor, tools, and equipment necessary for the Spencerport Water Main Replacement Project (PRC No.: 2007004429) (“Project 7”) for the Monroe County Water Authority (“Department of Jurisdiction 7”).

HEARING OFFICER

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

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz, (Larissa Bates, Senior Attorney, of Counsel).

The Respondents were represented by Dribble & Miller, P. C. (John J. Jakubek, Esq., of counsel). Mr. Jakubek appeared on behalf of Respondents on the first two scheduled dates of the hearing. After opening remarks on the first day of hearing, the hearing was suspended, and off the record settlement discussions were broached among the parties. Those discussion proved unfruitful, and since no resolution was achieved, the Department commenced with its case-in-chief on the second day of hearing. The Department concluded its examination of the Department’s witness toward the end of the second day of hearing, and the matter was continued on an alternate date to provide the Respondents the opportunity to prepare their cross

examination and put on their case-in-chief once the Department had rested. Prior to the continuation date, Mr. Jakubek submitted a letter¹ to the Adjudication Unit outlining the fact that neither Mr. Jakubek or the Respondents would participate in the hearing going forward or present a defense to the pleadings in the matter; As such, the hearing continued in their absence on default.

Although Respondents noticed their intent not to defend the matter, the Respondents were given the opportunity to present any documentary evidence they had in their possession to contradict the Department's allegations. Respondents were given to close of business, March 29, 2019, to produce such documentation, and failed to produce those documents timely.²

FINDINGS AND CONCLUSIONS

On September 18, 2018, the Department duly served a copy of the Notice of Hearing on Respondents, via regular and certified mail, return receipt requested (Hearing Officer Ex. 2). The Notice of Hearing scheduled a hearing on December 3, 2018 and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing. The Respondents responded to the Notice in a letter dated November 16, 2008 (Hearing Officer Ex. 3), and two phone conferences were held with Mr. Valerino and Department counsel, and at one of those phone conferences Mr. Valerino requested an adjournment of the original matter to afford him the opportunity to retain counsel.

As noted above counsel originally appeared at the hearing, however he and/or Respondents failed to appear at subsequent hearing dates, and as a consequence, Respondents are in default in this proceeding.

The Notice of Hearing alleges that Western underpaid supplemental benefits to its workers in Projects 1 through 7.

¹ The letter dated, March 31, 2019, that was received by the Hearing Officer on April 3, 2019, was treated as an Answer on behalf of Respondents, and entered into evidence as Hearing Officer Ex. 8.

² The Respondents did not produce any documents in the time prescribed by the Hearing Officer. Accordingly, none of the documents received from Respondents after that date will be made part of the record or be available on appeal, However, judicial notice will be taken of any court related documents submitted after the deadline and those documents will be discussed herein (Respondents' counsel submitted Corporate Bankruptcy filings at 5:29 pm on March 29, 2019 and Mr. Valerino submitted additional documents related to his criminal plea in regard to the public work projects at issue on Saturday, March 30, 2019).

On or about July 17, 2009, the bonding company for Western made direct restitution payments to the respective unions on the Respondents' behalf to cover the supplemental benefits the employees did not receive and paid interest at a rate of 3% per annum calculated through July 17, 2009³. The Department in its pleadings sought to recover the difference between the amount of interest rate paid by the bonding company and the amount of interest the Bureau applies when it settles cases at the district level up until the July 17, 2009 date when the bonding company tendered payment to the benefit funds. The interest rate the Department was seeking to recover in the pleadings is interest at a rate of 6% per annum. They were also seeking to recover civil penalties that the bonding company would not cover.

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and documents describing the underpayments, which supported the Bureau's charges that:⁴

Project No. 1

Project 1 was subject to Labor Law article 8; and

Western entered into a contract for Project 1 with Department of Jurisdiction 1; and

Western willfully underpaid \$91,584.13 to its workers for the audit period weeks ending 01/12/2008 to 10/25/2008; and

³ Although it is not clear from the records submitted into evidence where the interest paid by the bonding company was paid to, it is assumed it was paid to, and held by, the Bureau rather than turned over to the Union fund offices. Also, it should be noted that Exhibit 3 attached to the September 17, 2018, Notice of Hearing and Designation of Hearing Officer (Hearing Officer Ex. 1) has an interest date of August 10, 2009 while all the other Bureau's audit summaries attached to that document have an interest date of July 17, 2009, and should be corrected.

⁴ Respondents submitted certified payrolls to each of the Department of Jurisdictions certifying that supplemental benefits were paid to the respective unions' benefit funds on each of the projects, when in fact the supplemental benefits had not been paid. The Department relied upon those certified payrolls to determine the prevailing wages paid, the days and hours worked and the classification of the workers. Labor Law § 220-b (3) (b) (1) 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. 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). Here, the Department found that although the contractor attested to the payment of supplemental benefits to the union benefit funds listed in the certified payrolls, those unions had no record of any payments made and as a result, workers lost their health and welfare benefits and the employees' pension funds were affected. The fact that the Respondents did not pay the benefits to the unions as attested to on the certified payrolls clearly evidences the contractor's intent to misrepresent or deceive which ultimately leads to the finding of the willful falsification of payroll records. In addition, Mr. Valerino plead guilty to the falsification of business records in connection with his failure to pay the benefits to the unions on all seven projects in 2014, and was not directed to as a result of that plea, to make restitution of any additional interest or civil penalty even though additional funds were owed. This plea in the criminal matter, sets a much higher standard of proof "beyond a reasonable doubt" then an administrative hearing "preponderance of evidence", and adds certainty to the finding that Mr. Valerino willfully falsified payroll records.

Western falsified its payroll records in connection with that willful underpayment; and
Robert Valerino is an officer and shareholder of Western; and
Robert Valerino knowingly participated in the violation of Labor Law article 8.

Project No. 2

Project 2 was subject to Labor Law article 8; and
Western entered into a contract for the Project 2 with Department of Jurisdiction 2; and
Western willfully underpaid its workers for the audit period weeks ending 07/26/2008 to
12/20/2008; and

Western falsified its payroll records in connection with that willful underpayment; and
Robert Valerino is an officer and shareholder of Western; and
Robert Valerino knowingly participated in the violation of Labor Law article 8.

Project No. 3

Project 3 was subject to Labor Law article 8; and
Western entered into a contract for the Project 3 with Department of Jurisdiction 3; and
Western willfully underpaid its workers for the audit period weeks ending 12/01/2007 to
10/11/2008; and

Western falsified its payroll records in connection with that willful underpayment; and
Robert Valerino is an officer and shareholder of Western; and
Robert Valerino knowingly participated in the violation of Labor Law article 8.

Project No. 4

Project 4 was subject to Labor Law article 8; and
Western entered into a contract for the Project 4 with Department of Jurisdiction 4; and
Western willfully underpaid its workers for the audit period weeks ending 04/19/2008 to
10/18/2008; and

Western falsified its payroll records in connection with that willful underpayment; and
Robert Valerino is an officer and shareholder of Western; and
Robert Valerino knowingly participated in the violation of Labor Law article 8.

Project No. 5

Project 5 was subject to Labor Law article 8; and
Western entered into a contract for the Project 5 with Department of Jurisdiction 5; and
Western willfully underpaid its workers for the audit period weeks ending 06/14/2008 to
12/20/2008; and

Western falsified its payroll records in connection with that willful underpayment; and
Robert Valerino is an officer and shareholder of Western; and
Robert Valerino knowingly participated in the violation of Labor Law article 8.

Project No. 6

Project 6 was subject to Labor Law article 8; and
Western entered into a contract for the Project 6 with Department of Jurisdiction 6; and
Western willfully underpaid its workers for the audit period weeks ending 07/19/2008 to
01/03/2009; and

Western falsified its payroll records in connection with that willful underpayment; and
Robert Valerino is an officer and shareholder of Western; and
Robert Valerino knowingly participated in the violation of Labor Law article 8.

Project No. 7

Project 7 was subject to Labor Law article 8; and
Western entered into a contract for the Project 7 with Department of Jurisdiction 7; and
Western willfully underpaid its workers for the audit period weeks ending 01/26/2008 to
11/08/2008; and

Western falsified its payroll records in connection with that willful underpayment; and
Robert Valerino is an officer and shareholder of Western; and
Robert Valerino knowingly participated in the violation of Labor Law article 8.

GENERAL

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 recordkeeping and other non-wage requirements. The Respondents were an experienced public work contractor, of medium size, with over thirty years of work history who knew that supplemental benefits were required to be paid to the union benefit funds or his workers benefits would be affected. Respondents' failure to pay prevailing supplements to the union funds in these seven public work cases, affected approximately forty workers, and constituted serious violations of Labor Law article 8. Additionally, Respondent's falsification of the payroll documents is clearly a failure to comply with recordkeeping requirements mandated by the labor law. Finally, Respondent's failure to fully cooperate with the Bureau and participate in this hearing are indicia of bad faith. I find the totality of the evidence sufficient to support the Department's request that the Commissioner assess a 25% civil penalty on the underpayments and interest assessed in this case.

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).

As mentioned above, the Department in its pleadings sought to recover the difference between the amount of interest rate paid by the bonding company and the amount of interest the Bureau applies when it settles cases at the district level up until the July 17, 2009 date when the bonding company tendered payment to the union benefit funds. The interest rate the Department was seeking to recover in the pleadings is interest at a rate of 6% per annum. However, I find that the full statutory interest rate is applicable under the circumstances of this case, and the Respondents are responsible for the difference between the 16% per annum rate as prescribed by section 14-a of the Banking Law and the 3% per annum already paid. The statutory interest will cease on the day the bonding company paid the benefit funds, which the majority of the PW-27 audit summaries state is July 17, 2009. This cessation of interest will also apply to any additional wages that may be found owed to the workers on the various projects when the Bureau adjusts its audits as ordered below.

RESPONSE PLEADINGS

After the deadline for submissions, Respondents presented documents showing that the corporation was liquidated in a Chapter 7 bankruptcy proceeding. That proceeding was wrapped up on or about August 15, 2013, and that the Department was listed as a priority unsecured creditor (although what debt the Department is listed for is unclear). That final accounting shows that mainly only administrative fees were paid out, and little or none of the claims were paid to any of the creditors in that proceeding. Furthermore, the liquidation only applies to the corporate structure as there is no mention that Mr. Valerino was joined in those documents in an individual capacity, so even if it could be found that the corporation is completely absolved from any further liability, Mr. Valerino is not, and he is still individually liable for his failure to fully pay prevailing wages and supplemental benefits to his workers, and the interest and civil penalty that attaches to those wages and benefits.

Also, after the deadline for submissions, Mr. Valerino presented documents which purport to show that Mr. Valerino was absolved from any further restitution as part of his plea in the criminal case. He submitted an email in which the Monroe County District Attorney notes that he believes that case law does not allow for restitution for penalties and interest in a criminal

case, and he submitted a copy of his certificate of conviction which was already made part of the record as Department's Ex. 1. The certificate of conviction outlined that Mr. Valerino plead guilty to nine felonies, two for grand larceny and seven for falsifying business records in relation to the seven public work projects at issue. Mr. Valerino was given five years probation as a result of his plea associated with the public work projects subject to this proceeding. However, the District Attorney did not seek further restitution as part of the plea arrangement, partly because the bonding company paid the benefits to the unions and a portion of the interest owed in 2009, and partly because the District Attorney believed that the criminal statute Mr. Valerino was prosecuted under didn't allow for the recovery of interest and civil penalty once the underlying obligation had been paid. This non-action by the prosecuting attorney in the criminal action did not prevent the Department from pursuing its civil remedies under the Labor Law, and although, this non-pursuit of interest and civil penalty may be the standard followed in criminal prosecution cases, it is not the standard followed in civil proceedings regulated by the labor law and does not relieve the Commissioner from her obligation to uphold the labor law and seek full restitution for workers she is charged to protect or alleviate the Commissioner from her responsibility to recover civil penalties against a non-compliant contractor.

EQUITABLE ESTOPPEL AND LACHES

Respondents in their March 28, 2019 letter ask that this matter be terminated in the interests of justice. That they believe that the proceeding is subject to equitable estoppel and laches. Respondents fails to cite any legal prescient that would bolster their position that equitable estoppel or laches would apply to this type of administrative proceeding and given the fact that the only motion that can be made by the Respondents in an administrative hearing is a motion to dismiss the Respondent has failed to articulate relief which can be granted in this proceeding. Accordingly, I find no basis to grant the relief requested.

The purpose of laches is to ensure legal claims are brought in a reasonable time period, so that evidence and reliable witnesses can easily be found. Laches is case-specific, relying on the determination of whether the Department simply waited too long that the Respondents cannot put on a reasonable defense. The Respondents never alluded to being so prejudiced by the time

delay that it prevented it from putting on a defense. There was never any mention that, as a result of this delay, witnesses and/or evidence had been lost or were no longer available. It only argued that financial circumstances have changed such that it is no longer just to grant the workers' claims, and because of this delay the Department should estopped from pursuing the Respondents any longer. Respondents mention that it took ten to twelve years after the incidents complained of in the Notice of Hearing to finally bring an administrative hearing to address the issues, when in actuality the matter should have been addressed by the Department immediately after the criminal sentencing phase in which Mr. Valerino plead to the nine felony counts on July 7, 2014, so the time lapse is not as abhorrent as Mr. Valerino makes it appear, and the since interest only runs to the date the bonding company paid the underpayments and a portion of the interest on Mr. Valerino's behalf, July 17, 2009, he was not prejudiced any further by any delay.

Additionally, this equitable defense cannot not just be looked in a vacuum from the Respondent's perspective, equity also has to be applied to the forty something workers on the various public work projects that were deprived of their pension, welfare and health benefits based on Mr. Valerino's non-payment into the various pension plans he falsely affirmed he paid. A number of workers and their families were affected by Mr. Valerino's actions. Mr. Valerino never made any attempt to make restitution to his own workers who toiled for his company and who his company employed on multiple projects over multiple years in order to try to assist them to recover any benefits that may have been reduced or lost as a result of his actions, instead he relied on a third party (the bonding company) to step in and make those payments on his behalf. Equity would demand that he would have assisted the individuals that he suffered and permitted to work for him over the years, and that these workers be made whole for any deprivation of benefits that were caused by the direct result of his actions. The assessment of the statutory interest should aide in making those workers whole.

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

RECOMMENDATIONS

Based upon the default of the Respondent 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 Western underpaid its workers \$91,584.13 in supplemental benefits on Project 1, PRC No.: 2007001435; and

DETERMINE that Western underpaid its workers' wages and supplemental benefits on Project 2, PRC No.: 2008002738⁵; and

DETERMINE that Western underpaid its workers' wages and supplemental benefits on Project 3, PRC No.: 2007000288; and

DETERMINE that Western underpaid its workers' wages and supplemental benefits on Project 4, PRC No.: 2008000024; and

DETERMINE that Western underpaid its workers' wages and supplemental benefits on Project 5, PRC No.: 2007007936; and

DETERMINE that Western underpaid its workers' wages and supplemental benefits on Project 6, PRC No.: 2006007405; and

DETERMINE that Western underpaid its workers' wages and supplemental benefits on Project 7, PRC No.: 2007004429; and

DETERMINE that Robert Valerino is an officer and shareholder of Western; and

DETERMINE that Robert Valerino was the owner and officer of Western who knowingly participated in the violation of Labor Law article 8 in all seven projects; and

⁵Based on the review of the record it is determined that the Bureau failed to calculate the underpayment of wages and supplements correctly, and they are hereby directed to recalculate their audit calculations for projects two through seven. The Bureau failed to apply the correct prevailing wage rates in their audits, using the Monroe County 2007 prevailing wage schedule when the Monroe County 2008 prevailing wage schedule applied, or in the alternate, used the correct wage rate, but used the prior year supplemental rate as the rate that applied in its audit details. All those audits need to be recalculated, and the correct underpayment of wages and supplements has to be determined. The Bureau also used wage rates for certain workers that are not listed in the 2007 or 2008 wage schedules and that needs to be corrected as well.

DETERMINE that the failure of Western and Robert Valerino to pay the prevailing supplement rates on these seven projects was a “willful” violation of Labor Law article 8; and

DETERMINE that the willful violation of Western in all seven projects involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Western and Robert Valerino knowingly participated in the falsification of payroll records within the meaning of Labor Law article 8, and should be ineligible to submit a bid, on or be awarded any public contract with the state, any municipal corporation or public body for a period of five years; and

DETERMINE that Robert Valerino is responsible for any underpayment of wages or supplemental benefits determined to be owed on the seven projects; and

DETERMINE that Robert Valerino is responsible for interest on the total underpayments in these seven projects at the statutorily mandated rate of 16% per annum from the date of underpayment to the date the bonding company made payment, July 17, 2009; and

DETERMINE that Robert Valerino be assessed a civil penalty in the Department’s requested amount of 25% of the underpayment and interest due in each of the seven projects; and

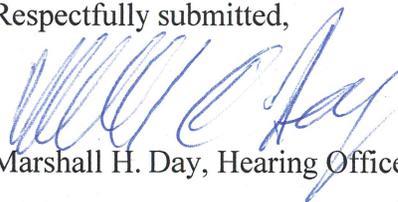
ORDER that the Bureau recompute the wages and supplements due on Projects 2 through 7, and pay the appropriate amount due for each employee in each of the seven Projects once received, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury; and

ORDER that once the Bureau recomputes the total amount due on each of the seven projects that it take into effect the difference in interest now assessed and the interest already paid, and credits be given for supplemental benefits already paid by the bonding company, (interest accrued at 16% interest from date of underpayment to the date of payment, July 17, 2009 and 25% civil penalty); and

ORDER that upon the Bureau’s notification, Western shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at: 109 South Union Street, Room 312, Rochester, NY 14607; and

Dated: July 9, 2019
Albany, New York

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "M. H. Day", written over the printed name.

Marshall H. Day, Hearing Officer