

IN THE MATTER OF

AMERICAN SITE DEVELOPERS, LLC

PATRICK R. DANDREA

Individually as an officer of the company and

WILLIAM E. DARIN

Individually as an officer of the company

Prime Contractor

and

COVEY TREE, INC, and KEVIN W. COVEY

Individually as President and one of the five largest shareholders

of the corporation

Subcontractor

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.

**REPORT
&
RECOMMENDATION**

Prevailing Rate Case
2006008181 Erie County

IN THE MATTER OF

GREAT LAKES CONSULTING SERVICES, LLC

and

WILLIAM E. DARIN

Individually as an officer of the company

Assignee Prime Contractor, substantially owned-affiliated entity

and/or successor of

SITE DEVELOPERS, LLC

and

COVEY TREE, INC and KEVIN W. COVEY,

Individually as President and one of the five largest shareholders

of the corporation

Subcontractor

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.

Prevailing Rate Case
2006008181 Erie County

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

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on February 23 and 24, 2010, in Buffalo, 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 Covey Tree, Inc. ("Covey"), complied with the requirements of Article 8 of the labor law (§§ 220 *et seq.*) in the performance of a contract involving the removal of trees and limbs from public-use areas in Erie County that resulted from a storm on October 12, 2006 ("Project") for Erie County ("County" or "Department of Jurisdiction").

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Louise G. Roback, Senior Attorney, of Counsel).

Covey, Kevin W. Covey, Great Lakes Consulting, LLC ("GLC"), and William E. Darin ("Darin") appeared personally and by and through their attorneys, Blair & Roach, LLC (Michael A. Smeader, Esq., of Counsel).

American Site Developers, LLC ("ASD") and Patrick R. Dandrea ("Dandrea") were found in default for failing to appear at the hearing or serve an answer. Subsequent to the hearing, the Hearing Officer received correspondence and an Affirmation from Michael J. Tallon, Esq. the attorney for ASD and Dandrea. In consultation with all parties, the Hearing Officer determined that ASD and Dandrea were still in default, but the Affirmation was made part of the record and ASD and Dandrea were permitted to serve proposed Findings of Fact and Conclusions of Law based solely upon the record as developed at the Hearing. (Hearing Officer Exs. 4 and 5)

HEARING OFFICER

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

ISSUES

1. Did Covey 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 Kevin Covey an officer of Covey who knowingly participated in a willful violation of Article 8 of the Labor Law?
 6. Should a civil penalty be assessed and, if so, in what amount?
 7. Whether pursuant to Labor Law Section 223, ASD, as a prime contractor, is liable for non-compliance or evasion by Covey of its obligation to pay prevailing wages and supplemental benefits?
 8. Whether pursuant to Labor Law Section 223, GLC, as a prime contractor, is liable for non-compliance or evasion by Covey of its obligation to pay prevailing wages and supplemental benefits?
 - 9.

FINDINGS OF FACT

The hearing concerned investigations made by the Bureau on a two-year project involving public work performed by Covey as a subcontractor on the Project in 2007 when ASD was the Prime Contractor, and in 2008 when GLC was the Prime Contractor.

The work that is the subject of this proceeding involved the removal of hazardous trees and limbs from public-use areas in Erie County, including sidewalks, trails, playgrounds, picnic areas, and roads. (DOL Exs. 12, 13) The 2007 phase involved a public work contract between ASD and Erie County for the removal and disposal of hazardous limbs from Erie County parks (DOL Ex. 13; T. 216, 244-245, 250) The 2008 phase involved an assignment of the public work contract between ASD and Erie County to GLC and involved tree removal and disposal, and restoration throughout the southeast quadrant of the Town of Amherst, NY. (DOL Exs. 21, 22; T. 245)

Facts of General Applicability

Kevin Covey is the President of Covey and was the President during the periods when the work was performed on the Project. (DOL Exs. 15, 40, 41, and 45; T. 277) Patrick Dandrea is an officer of ASD, and a managing member of the company. (DOL Exs. 13, 21, and 22) William E. Darin is an officer of GLC, and a managing member of the company. (T. 260) Darin was involved with all work performed during the years 2007 and 2008, since he worked as a consultant to ASD in 2007 and as an officer of GLC, the assignee of the Prime Contract from ASD for the 2008 work period. (DOL Exs. 21, 22; T. 260-265)

On October 12, 2006, Erie County experienced a surprise winter storm that resulted in downed trees, limbs, and debris in the roadways. (DOL Ex. 30; T. 243, 253) Immediately after the storm, Erie County hired contractors to remove downed trees, limbs, and debris from the roads. (T. 244) Following inquiries from numerous contractors as to whether the clean-up of roads was public work, Erie County issued a letter dated October 24, 2006 notifying the contractors that Article 8 did not apply to the clean-up of tree limbs and other debris scattered on or near the roadways in the area as a result of the October 13, 2006 surprise winter storm. (DOL Ex. 30; T. 243-244) The Department offered testimony at the hearing indicating that the emergency clean-up of the roads after the storm was completed within a few days of the storm and, once the streets were clear, the emergency nature of the work ceased. (T. 244)

Erie County requested bids for the two-year clean-up Project to commence in December 2006 (DOL Ex. 13; T. 216, 244-245, 250, 306-307), and on November 22, 2006, the Department issued a Prevailing Wage schedule to Erie County for the Project. (DOL Ex. 12; T. 256) On December 18, 2006, ASD entered into a contract with Erie County as Prime Contractor on the Project. (DOL Ex. 13) The contract provided that the work was subject to Section 220, subd. 3 of the Labor Law regarding the payment of prevailing wages and supplemental benefits. (DOL Ex. 13; T. 62)

Twenty-seven contractors bid on the Project, with quotes based upon the size of the tree. (DOL Ex. 17; T. 66) For example, for hazardous tree removal in public parks/trails, bids for trees between 24 inches to 35.99 inches were received from ASD in the amount of \$200.00 each; from Benson's in the amount of \$2500.00 each; and from Covey in the amount of \$900.00 each. (See, DOL Ex. 16; T. 65-66) ASD bid substantially lower than the other contractors. Investigator Stern testified that the disparity in the bid amounts was because ASD's bid was not

calculated by multiplying the prevailing wage rate by the estimated hour(s) required to remove the trees. (DOL Ex. 16; T. 65-66) Kevin Covey testified that the Covey bid on the contract, which was rejected since it was substantially higher than the ASD bid, was calculated using the prevailing wage rate. (DOL Ex. 16; T. 64-65, 297, 301) Covey ultimately worked on the Project performing tree removal during the 2007 and 2008 work periods for subcontractor Holloway Trucking (a subcontractor of ASD) and as a subcontractor of GLC. (T. 303) Covey is an experienced public work contractor. (T. 217, 277)

The Bureau Investigation

On May 21, 2008, Public Work Investigators Matthew Stern and Steven Sztuk observed the removal of trees on Jordan Road, Town of Amherst in Erie County, with a County vehicle nearby. (T. 50-51) Investigators Stern and Sztuk interviewed the workers and asked their rate of pay. (T. 50-51) Shawn Lundberg told the investigators that he was paid \$10.50 per hour; Derrick Dickerson told the investigators that he was paid \$10.00 per hour; and Brian Gunnell told the investigators that he earned \$9.00 per hour. (DOL Ex. 1; T. 51-52) Based upon the Investigators' observations and interviews, the Bureau commenced an investigation of the Project. (DOL Ex. 1; T. 51-52)

2007 Work Period

The Bureau sent a request to Covey and ASD for certified payroll records and a completed contractor profile. (DOL Ex. 2; T. 18) The requested documents were not immediately forthcoming. (T. 53-54) Covey explained to the Investigators that neither Prime Contractor nor the County required certified payroll records. (T. 292-293) Covey did produce partial payroll records that were certified on November 11, 2008 for the period of January 8, 2007 through April 22, 2007. (DOL Ex. 15; T. 55) Covey told the Investigators that, in lieu of contemporaneous payroll records, time was recorded on "tree tickets", which set forth the trees trimmed and/or removed on a specific day and the names of the workers who performed the work. (T. 308) The tree tickets were created or collected by the project manager, Malcolm Pirnie. (DOL Ex. 31; T. 88-89). The Bureau subpoenaed these tree tickets (DOL Ex. 6, 7; T. 20-21, 55), and on or about December 4, 2008, it received approximately 1129 tree tickets for the 2007 work period. (DOL Ex. 31; T. 58-60)

The Bureau sent worker questionnaires to all employees that were found to be on the site. (DOL Ex. 10; T. 60-61) In their completed questionnaires, Derrick Dickerson reported that he operated a skidsteer or Bobcat, and was paid \$10.00 per hour (DOL Ex. 1, 10), and Shawn Rexford reported that he did tree work and operated a skidster and was paid \$10.00 or \$11.00 per hour. (DOL Ex. 11; T. 61) Dickerson and Rexford identified other Covey employees with whom they worked. (DOL Ex. 11; T. 61)

2008 Work Period

Covey was also a subcontractor for GLC on the Project in 2008, and performed work on the project between March 2008 and August 2008 (“2008 work period”). (T. 303) The 2008 work period was based upon the same contract as the 2007 work period. (DOL Exs. 12, 13) On February 9, 2008 and May 13, 2008, ASD and GLC signed agreements assigning the duty of performance of the contract with Erie County for the Project from ASD to GLC. (DOL Exs. 21, 22; T. 77-78) According to the terms of the assignment documents, the Assignee acknowledged that it had received an exact copy of the Agreement and stated that it had read and was fully familiar with all terms and conditions contained therein. (DOL Ex. 21, pp2-3) The Agreement referred to is the original contract between ASD and Erie County and it specifically provided that, “Each laborer, workman or mechanic employed by the contractor, subcontractor or other person doing or contracting to do the whole or part of the work contemplated by the contract shall be paid not less than the hourly minimum rate of wage and provided supplements not less than the prevailing supplements as designated by the New York State Industrial Commission.” (Section 220, subd. 3, N.Y. State Labor Law) (DOL Ex. 13, at Exhibit C, par. 2(b))

The Bureau’s investigation of the 2008 work period commenced in the same manner as the 2007 work period, to wit: the Public Work Investigators observed the cutting of tree limbs by the side of the road in Erie County. (DOL Ex. 1; T. 51-52) The Bureau determined that between March 2008 and August 2008, Covey was a subcontractor on the Project, and employed workers to remove trees and tree limbs. (DOL Ex. 26; T. 78-91)

The Bureau requested certified payroll records and a completed contractor profile from Covey and GLC. (DOL Exs. 32, 33, 34; T. 109-110) However, as with the 2007 work period, neither the prime contractor nor Erie County collected certified payroll records from Covey to ensure compliance with the prevailing wage law. (T. 292-293) Ultimately, the Bureau received

certified payroll records for the periods March 2008 and weeks ending April 6, 2008 through June 1, 2008 that Covey produced after the work on the project ended at the request of Investigator Sztuk. (DOL Ex. 40; T. 113, 118,288) Additionally, the Bureau received payroll journals from Covey's payroll service (DOL Exs. 39A, 41; T. 113), and the 2008 tree tickets (Resp. Ex. B; T. 36, 174-177, 183-184)

Classification

The Bureau determined the job classifications of Covey's workers based upon interviews of the workers and review of the tree tickets. (T. 92, 98) Covey's payroll records for 2007 did not identify job classifications. (DOL Ex. 15; T. 98) However, for the 2008 work period, the Bureau could rely on Covey's certified payroll records to determine job classifications. (T. 127, 130) Covey was a subcontractor on the Project, and performed work on the Project from January 2007 to May 2007 (T. 303), and from between March 2008 and August 2008. (T. 303) During the 2007 work period, Covey employed workers in the Laborer-Heavy & Highway Class A and Class B, and Operating Engineer-Heavy & Highway (Class A) classifications. (DOL Ex. 25; T. 92) These classifications were based upon the findings that Covey's employees worked as flag persons, cut trees and limbs with chain saws, picked up limbs from the ground and transported the debris to a truck, which is Laborer job classification. (T. 93-95) Covey's employees also operated a bucket truck, a skidsteer or Bobcat, which activities fall under an Operating Engineer classification. (T. 92, 95)

Investigator Stern testified that, based upon the records supplied to the Bureau, it was determined that during the 2007 work period, Covey employed three to seven persons on the Project. (T. 93) As confirmed by the tree tickets and worker interviews, Covey's crew would be employed as follows: there would be two or three workers on the ground, one flag person, one or two workers who picked tree material up off the ground, and one or two workers cutting limbs or trees. (T. 93, 98)

During the 2008 work period, Covey's workers were employed in the following classifications: Laborer-Heavy & Highway (Group A); Laborer-Heavy & Highway (Group B); Lineman Electric-Tree Trimmer (Tree Trimmer); Lineman Electric-Tree Trimmer (Equipment Operator); Lineman Electric-Tree Trimmer (Ground Person); and Operating Engineer-Heavy & Highway (Class A). (DOL Ex. 42; T. 127, 130, 132-133) Investigator Stern testified that he

determined job classifications of the workers based on interviews with the workers, the certified payroll records and seeing the men on the work site. (DOL Ex. 40; T. 127, 130) With respect to the Linemen Electric classifications, Investigator Stern testified that these classifications were based on the tree tickets and Investigator Sztuk's worksheet. Investigator Sztuk drove to all work sites for the 2008 work period and determined which sites were near power lines. (DOL Exs. 41A, 44; Resp. Ex. B; T. 133, 135-137, 147-177, 183-184, 215-216)

Falsification of Payroll Records

Investigator Stern testified that the partial payroll records submitted by Covey for the 2007 work period were false. Based upon a comparison of these payroll records that were certified on November 11, 2008 (DOL Ex. 17) to the tree tickets and employee questionnaires, Covey's records under-report hours worked by its employees and omitted workers on various days, though these men were working on the Project as indicated on the tree tickets and worker questionnaires. (T. 85-87, 98-99, 195-197)

The Bureau further alleges that the certified payroll records submitted by Covey for the 2008 work period were false since Covey used its payroll journals to "back into" payroll records by reducing the actual number of hours worked, and then dividing by the gross wages indicated on the payroll journal. Investigator Stern testified that Covey's calculations never worked out to the exact dollar figure of wages, and the wage rate shown on the payroll records varied each week. (T. 114-118)

Covey testified that he saw the Department's October letter and he understood the letter to indicate that Article 8 of the Labor Law did not apply to this project. (T. 265-266, 289, and 307) Additionally, Prevailing Wage Rate Schedules were not attached to the Invitation to Bid for this project. (DOL Ex. 13; T. 230-231) Finally, contractors received payment on this project based upon tree tickets and not certified payroll records further reinforcing Covey's belief that this was not prevailing wage rate work. (T. 292-293). Covey testified that he produced the payroll records the Department is alleging were falsified at the request of Investigator Sztuk. He never intended these records to be certified because they were not required by the County or the prime contractor as a condition of payment and he did not believe this was a prevailing wage rate job. (T. 288)

AUDIT

2007 WORK PERIOD

The Bureau determined that Covey used a crew of three to seven men. (T. 93) Generally, two or three men would be on the ground clearing debris or flagging cars, and one of two men would be cutting limbs or trees. This determination was supported by the tree tickets and worker interviews. (T. 93, 98) The Bureau classified the work and assigned the classifications based upon the stated division of jobs. For example, Investigator Stern testified that for January 31, 2007, the audit reflects that Kevin Covey worked as a Laborer Heavy & Highway, Group B, clearing debris on the ground or using a chain saw; Derrick Dickerson is classified as an Operating Engineer Heavy & Highway based upon his operating a skidsteer or bucket truck; Kelby Feldt worked as a Laborer Heavy & Highway for operating a chain saw; and Larry Oaks is classified as Laborer Heavy & Highway. (DOL Ex. 25; T. 95-98)

The Investigator relied on the tree tickets to determine the number of employees working on a given day, and the number of hours they worked. (DOL Ex. 31; T. 85-78) The Investigator did not rely on the payroll records because they did not list all of the workers or hours that were listed on the tree tickets. (T. 86)

The Bureau's audit credits Covey with payments made to its workers as reflected in the payroll records. The audit does not credit Covey for any supplemental payments. (T. 99-101, 103-104, 106)

The wage rates used in the audit were taken from the prevailing wage rate scheduled. (DOL Ex. 14; T. 106-107)

The Bureau determined that for the period of January 14, 2007 through May 13, 2007, Covey underpaid prevailing wages and supplements to eight workers performing work on the Project in the amount of \$27,561.38. (DOL Ex. 27) On June 30, 2009, Erie County acknowledged that it was withholding \$200,000.00 as against ASD on the Project. (Resp. Ex. A)

2008 WORK PERIOD

The Bureau relied on the payroll records, payroll journals and tree tickets to ascertain the hours that Covey's employees worked. (DOL Ex. 31, 39A, 40, and 44; T. 120-125) The Bureau primarily used the tree tickets to determine the hours worked and to identify who was working on a particular day because the tree tickets had times and names written on them. (DOL Ex. 44; T. 79, 86-88) When there were no tree tickets, the Bureau relied on payroll records. (T. 79) For the reasons set forth above, the certified payroll records were deemed false and not reliable for the amount of wages paid to the workers. The Bureau applied credits for wages paid by Covey to its employees based upon the wages stated to have been paid in Covey's payroll journals. (DOL Ex. 39A; T. 131-132) There was no credit given for payment of supplemental benefits because Covey did not produce any records evidencing payment of these benefits. (T. 106) The wage rates used in the audit were taken from the prevailing wage rate scheduled. (DOL Ex. 39; T. 127-128)

The Bureau determined that Covey employed nine employees on the Project during the 2008 work period in the classification listed above. (DOL Exs. 23, 42) During the period of week ending March 9, 2008 through week ending August 31, 2008, the Bureau determined that Covey underpaid prevailing wages and supplements to these nine employees who performed work on the Project in the amount of \$45,362.03. (DOL Ex. 43) On June 30, 2009, Erie County acknowledged that it was withholding \$17,122.50 as against GLC on the Project. (Resp. Ex. A)

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 Erie County, 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).

The Department of Labor sent a letter to interested parties indicating that the emergency removal of storm damaged trees on or near roadways was not subject to Article 8 of the Labor Law. (DOL Ex. 30; T. 243-244) Covey testified that, in reliance on this letter, it did not pay its employees prevailing wage rates. In the Respondents’ proposed Findings of Fact and Conclusions of Law their attorney argues that the Respondents reasonably interpreted the October Letter and prior Department Opinions to mean that Article 8 did not apply to the work performed under the contract and acted in justifiable reliance on the Department of Labor’s written notice exempting the contract from the jurisdiction of the Bureau of Public Work. The Respondents request a finding that the Department of Labor be equitably and judicially estopped from taking the position that Article 8 of the Labor Law is applicable to the work performed under the contract in 2007 and 2008.

The dispute with regard to the amount of the underpayment of wages and supplements relates to whether Article 8 of the Labor Law applies to the storm clean-up work performed by the Respondents, or whether the Department should be estopped from requiring the Respondents to pay wages and supplemental benefits pursuant to the Prevailing Wage Rate Scheduled because of the October letter sent by the Department to the interested parties indicating that the emergency removal of storm damaged trees on or near roadways was not subject to Article 8 of the Labor Law.

There is ample evidence in the record to support the Respondents’ argument that Covey relied on the Department’s letter indicating that Article 8 did not apply to removal of storm damaged trees on or near roadways. Covey offered credible testimony indicating that it originally bid on the project based upon the belief that this was a prevailing wage rate project (T. 283-285). However, the record contains further credible evidence indicating that Covey thereafter was led to believe that the contract was awarded to ASD as if Article 8 did not apply,

and the contractors were not required to pay prevailing wages. Covey testified this is why he agreed to work as a subcontractor for ASD at a rate that was approximately one-third of the amount he originally bid for the contract (T. 284). Finally, Investigator Stern testified that Covey did not know that this project was prevailing wage work (T. 201).

The Court of Appeals has repeatedly ruled that estoppel is not available against a governmental agency in the exercise of its governmental functions (*See, for ex.: Matter of Hamptons Hosp. & Medical Center v. Moore*, 52 NY2d 88 (1981); *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984)). Furthermore, with regard to a claim of manifest injustice, the Court has held, “the law is clear that those who deal with the government are expected to know the law, and cannot rely on the conduct of government agents contrary to law as a basis for manifest injustice claims.” (cites omitted) *Matter of New York State Medical Transporters Assoc. v. Perales*, 77 NY2d 126,131(1990). Thus the Court, invoking Justice Holmes famous admonition that “Men must turn square corners when they deal with the Government”¹, held that the doctrine of estoppel is not available to allow appellants to avoid the consequences of their own knowing failure to follow the law. (*id.*) *See, also, HMI Mechanical Systems, Inc. v. McGowan*, 277 AD2d 657, 659 (3d Dept 2000). Based upon the foregoing, Article 8 of the Labor Law is applicable to the work performed under the contract in 2007 and 2008 and the Department will not be estopped from applying Article 8 by virtue of the respondents’ reliance on the Department’s letters.

Finally, in the Respondents’ proposed Findings of Fact and Conclusions of Law their attorney argues that Section 611(j)(8) of the Stafford Act requires the payment of locally prevailing wages to laborers and mechanics employed on construction projects related to emergency preparedness, but prevailing wages do not apply to repair or reconstruction projects involving state or local public facilities following a major disaster. (citations omitted) Since the Stafford Act excludes a prevailing wage requirement for work performed under the contract, Erie County could not have obtained reimbursement under the Stafford Act from FEMA for payments under the contract at prevailing wage rates. This argument is not persuasive since there is no indication that the Stafford Act intended to preempt the Commissioner of Labor from exercising her authority to ascertain the prevailing wage rate, as well as the prevailing

¹ *Rock Is., Ark. & La R.R. Co. v. United States*, 254 US 141, 143 (1920).

'supplements' to be paid in the locality. (See, *Matter of Beltrone Constr. Co. v McGowan*, 260 A.D.2d 870, 871-872 (3d Dept. 1999).

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).

In their Answer (Hearing Officer Ex. 3), GLC, Covey, Darin, and Kevin W. Covey entered a general denial to the Department's allegation in the Notice of Hearing regarding the classification of the Covey employees in both the 2007 work period and the 2008 work period. Additionally, the Respondents have challenged the hours assigned for the workers in the various classifications and the assumptions made by the Bureau as to whether the trees and limbs removed during the 2007 and 2008 work periods were near roadways and power lines. However, in the presentation of their case during the hearing, and in their Proposed Findings of Fact and Conclusions of Law, none of the Respondents have presented any evidence, in the nature of work records or logs, indicating the actual work that was performed by the Covey employees during the 2007 and 2008 work periods. The tree tickets that were utilized by the Bureau, together with the Investigators observations and interviews with the workers, and the

personal observations of the Investigator of the work being performed by the Covey employees and confirming which trees were cut in the immediate vicinity of power lines, is the best evidence available to the Bureau and constitutes a reasonable basis for the Department's classifications of the Covey employees and determination of hours worked for both the 2007 work period or the 2008 work period. Therefore, the Department's determinations as to the classification of Covey's employees during the 2007 work period and the 2008 work period are supported by sufficient credible evidence and should be sustained.

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).

Kevin Covey told Investigator Sztuk that in lieu of contemporaneous payroll records, time was recorded on "tree tickets" which set forth trees trimmed and/or removed on specific days and the names of the workers. (T. 308) Neither the prime contractor nor Erie County required certified payroll records as a condition of payment or collected certified payroll records to ensure compliance with the prevailing wage law. (T. 292-293) Covey did produce certified payroll records for the 2008 period of the Project. (DOL Ex. 40, 41) However, Covey testified that the three versions of certified payroll records it provided to the Bureau were created after the fact at the request of the Bureau Investigator. (T. 312-313) Covey testified that his payroll

records were not certified because he did not believe this was a prevailing wage rate job. (T. 288)

In the absence of accurate and detailed time records, Investigator Stern testified that he determined the number of employees, the hours they worked, and the classification of the work primarily from the tree tickets. The rates of pay were determined from the prevailing wage rate schedules. Finally, the employer was given a credit for the wages paid to the employees as indicated on the employer's payroll records. The employer did not produce any records indicating that the employees were paid supplemental benefits so there was no credit given the employer for these payments.

The Respondents contend that the Department's reliance on the tree tickets was not reasonable because the employees spent significant time waiting for the jobs to start, and that the severe winter weather made it physically impossible for the employees to work the number of hours determined by the Investigators. (T. 286, 287-288) The argument is not persuasive since the employer has not produced credible contemporaneous records indicating the actual hours worked by the employees that support this argument.

The Bureau was required to craft a reasonable methodology to determine whether Covey underpaid its employees based upon Covey's failure to maintain and provide accurate records. The Bureau's method of arriving at the underpayment determination is reasonable and supported by sufficient credible evidence in the record. Covey has failed to meet its burden of negating the reasonableness of the Bureau's calculations through the production of any evidence to refute the information and assumptions relied on by the Bureau to determine underpayments. The Department's calculation that Covey underpaid its employees in the total amount of \$72,923.41 in wages and supplements for 2007 and 2008 should be sustained as this finding is rational and reasonably supported by the credible evidence in the record.

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, Covey 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) 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 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.

The Bureau indicated in the October letter that the initial phases of the work would not be covered by Article 8 of the Labor Law because of the emergency nature of the work. Covey has offered credible evidence indicating that, although it initially believed that this project was a public work project and bid on the contract accordingly, it was later led to believe that the

project was not governed by Article 8. Covey's belief was reasonably based on the amount of the payments provided for in the contracts that were awarded to the prime contractors, and the failure of the prime contractors and Erie County to require certified payroll records as a condition precedent to being paid. The record supports a finding that, although Covey is admittedly an experienced public work contractor and is familiar with the prevailing wage law requirement for public work projects, Covey did not know that its actions with respect to this Project were illegal. For these reasons, there is no basis for finding that Covey's failure to pay prevailing wages and supplements on this Project was willful.

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.

Covey testified that it recorded its time and work activities on the tree tickets. Covey further testified that it did not create contemporaneous certified payroll records because it did not know that this project was covered by the prevailing wage law. Further, Investigator Stern testified that he was satisfied that Covey was not aware that this was a prevailing wage project. Finally, it has not been controverted that Covey created the certified payroll records after the fact at the request of Investigator Sztuk. Covey did not consider these records accurate or certified because during the duration of the project it believed that the project was not a public work project. As set forth above, the record does not support a finding of a willful failure to pay prevailing wage benefits. I further find that the record does not contain sufficient evidence to support a finding that Covey engaged in a falsification of payroll records.

Substantially Owned-Affiliated Entities

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some indicia of a controlling ownership relationship exists or as "...an entity which exhibits any other indicia of control over the ...subcontractor..., regardless of whether or not the

controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,... power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity.

The Department alleged upon information and belief in the Notice of Hearing (HO Ex. 1) that GLC is a substantially owned-affiliated entity and/or successor to ASD. At the hearing the Department attempted to elicit testimony indicating that William E. Darin, as an officer of GLC and a consultant to ASD, had sufficient authority to bind ASD by his decisions and, therefore, create a relationship under which GLC could be found liable for the acts and omissions of ASD. In its post-hearing Proposed Findings of Fact and Conclusions of Law, the Department does not propose any findings or conclusions of law to support the allegation that GLC is a substantially owned-affiliated entity and/or successor to ASD. I find that the record does not contain sufficient evidence to support a finding of sufficient indicia of control or ownership of ASD by GLC or William E. Darin to allow a finding that ASD and GLC should be deemed “substantially owned-affiliated entities” on this Project.

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 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. It is not disputed that Patrick R. Dandrea was an officer of ASD, that William E. Darin was an officer of GLC, and that Kevin W. Covey was an officer of Covey Tree, Inc. However, in the absence of a finding of a willful violation of Article 8 of the Labor Law, their status as officers of the respective corporations is not relevant.

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.

Covey is not a large business, having employed at the most only 8 or 9 workers on this project. The Department has offered no evidence of prior Labor Law violations by this contractor, although the record indicates that Covey was an experienced public work contractor. As set forth above, the record does not support a finding of a willful violation of the Labor Law or of falsification of records. I find that the record supports an assessment of a civil penalty in the amount of ten percent (10%) of the total amount due (underpayment and interest).

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). Covey performed work on the Project as a subcontractor of ASD and GLC. Consequently, ASD and GLC, in their capacity as the prime contractors, are responsible for the total amount found due from their subcontractor on this Project. ASD is responsible for the underpayment for the work performed in 2007, and GLC is responsible for the underpayment for the work performed in 2008.

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 Covey underpaid wages and supplements due the identified employees in the amount of \$27,561.38 for the year 2007, and \$45,362.03 for the year 2008, for a total underpayment of wages and supplements in the amount of \$77,923.41; and

DETERMINE that Covey 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 Covey to pay the prevailing wage or supplement rate was not a “willful” violation of Article 8 of the Labor Law; and

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

DETERMINE that Kevin W. Covey is an officer of Covey; and

DETERMINE that Kevin W. Covey knowingly participated in the violation of Article 8 of the Labor Law; and

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

DETERMINE that ASD is responsible for the underpayment of \$27,561.38 for the work performed in 2007, together with interest and civil penalty due on that amount pursuant to its liability under Article 8 of the Labor Law; and

DETERMINE that GLC is responsible for the underpayment of \$45,362.03 for the work performed in 2008, together with interest and civil penalty due on that amount 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 Erie County 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 at State Office Building, 65 Court Street Room 201, Buffalo, NY 14202); and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Covey, upon the Bureau’s notification of the deficit amount, shall immediately remit the

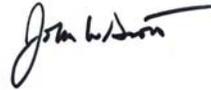
outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; and

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 27, 2011

Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott". The signature is written in a cursive style with a long horizontal stroke at the end.

John W. Scott, Hearing Officer