

IN THE MATTER OF

TRI-RAIL CONSTRUCTION, INC.  
Prime Contractor

and

CBI CONTRACTING, INCORPORATED  
Subcontractor

and

NICOLE SPELLMAN  
Individually as an Officer and as one who own or control  
ten percent of the stock of  
CBI CONTRACTING, INCORPORATED

**DEFAULT  
REPORT  
&  
RECOMMENDATION**

Prevailing Rate Case  
2008-002181    Suffolk 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 Colleen C. Gardner  
         Commissioner of Labor  
         State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on March 9, 2010. 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 CBI Contracting, Incorporated ("CBI"), a subcontractor of Tri-Rail Construction, Inc. ("Tri-Rail"), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract involving the reconstruction of the Tanner

Park Band Shell in Copiague, Suffolk County, New York (“Project”) for Town of Babylon (“Babylon”).

### **APPEARANCES**

The Bureau was represented by Department Counsel, Maria Colavito (Richard Cucolo, Senior Attorney, of Counsel). There were no appearances made by, or on behalf of, CBI or Nicole Spellman. Tri-Rail appeared by its president, Charles Ventimiglia. Tri-Rail paid the amount of the underpayment the Bureau had determined CBI owed with interest in advance of the hearing, which payment the Bureau deemed sufficient to resolve Tri-Rail’s Article 8 liability.

### **FINDINGS AND CONCLUSIONS**

On January 26, 2010, the Department duly served a copy of the Notice of Hearing on CBI and Nicole Spellman, via regular and certified mail, return receipt requested. A signed a Return Receipt evidencing receipt of the document by Nicole Spellman was entered into evidence as Hearing Officer Exhibit 1. The Notice of Hearing scheduled a March 9, 2010 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 CBI underpaid wages and supplements to its workers and that the Tri-Rail is responsible for its subcontractor’s underpayment pursuant to Labor Law § 223.

Prior to the hearing, Tri-Rail paid \$18,740.19 on account of CBI’s underpayment, which included interest at a rate of 6% per annum.

CBI and Nicole Spellman failed to appear at the hearing. As a consequence, they are 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 CBI willfully underpaid \$15,544.92 to its workers for the audit period weeks ending May 25, 2008 to August 19, 2008; and that CBI falsified its payroll records in connection with that willful underpayment; and

that Nicole Spellman is an officer of CBI; and that Nicole Spellman knowingly participated in the violation of Article 8 of the Labor Law.

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

### **RECOMMENDATIONS**

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

DETERMINE that CBI underpaid its workers \$15,544.92 on the Project;

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

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

DETERMINE that Nicole Spellman is an officer of CBI;

DETERMINE that Nicole Spellman knowingly participated in the violation of Article 8 of the Labor Law;

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

DETERMINE that Tri-Rail shall be required to pay \$16,377.08 in underpayments and interest in complete performance of the stipulation of settlement entered into between Tri-Rail and the Department in order to satisfy its vicarious liability under Article 8 of the Labor Law; and

ORDER that the Bureau compute the total amount due (underpayment of \$15,544.92, interest at 16% from date of underpayment and 25% civil penalty);

ORDER that, upon payment of \$16,377.08 and complete performance of the stipulation entered into between Tri-Rail and the Department, Tri-Rail will have fully satisfied its liability under Article 8 of the Labor Law and will be entitled to a credit for the amount it paid in excess of that amount;

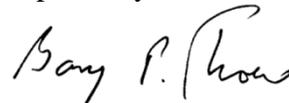
ORDER that CBI shall receive a credit for the \$16,377.08 paid by Tri-Rail;

ORDER that upon the Bureau's notification, CBI shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at 160 South Ocean Avenue, 2<sup>nd</sup> Floor, Patchogue, NY 11772; 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: June 3, 2010  
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer