

IN THE MATTER OF

**JUBCO SITE DEVELOPMENT, LLC;**  
and  
**STEPHEN BIANCHI,**  
Individually as an officer of the company

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 workers employed on a public work project known as the installation of the water supply system for the Croton Falls Water District, in the Town of North Salem.

**REPORT  
&  
RECOMMENDATION**

Prevailing Rate Case  
2010002722; PW08  
2010025935

Westchester County

To: Honorable Peter M. Rivera  
Commissioner of Labor  
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on March 14, 2012 and June 28, 2012 in Albany, New York and by video conference with White Plains, 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. Subsequent to the hearing, the Department and Jubco Site Development, LLC. ("Jubco") filed Proposed Findings of Fact and Conclusions of Law.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Jubco complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving the installation of the water supply system ("Project") for the Croton Falls Water District in the Town of North Salem ("Department of Jurisdiction").

**HEARING OFFICER**

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

## **APPEARANCES**

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz, (Louise Roback, Esq., of counsel).

Jubco was represented at the March 14, 2012 hearing by Stephen Bianchi, pro se, individually and as an owner of Jubco, and at the June 28, 2012 hearing by Stephen Bianchi's son, Robert A. Bianchi.

## **ISSUES**

1. Did Jubco pay the rate of wages and/or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any willful underpayment involve the falsification of payroll records?
4. Was Stephen Bianchi an owner of Jubco who knowingly participated in a willful violation of Labor Law article 8?
5. Should a civil penalty be assessed against Jubco and, if so, in what amount?

## **FINDINGS OF FACT**

### **GENERAL**

On October 31, 2011, the Department duly served a copy of the Notice of Hearing (Hearing Officer Exhibit 1) on Jubco and the Department of Jurisdiction via regular first class mail and certified mail, return receipt requested. The certified mailings to Jubco were returned to the Department but the First Class mailings were not returned. (T 6) On November 8, 2011, the Department duly served a copy of the Notice of Hearing (Hearing Officer Exhibit 1) on Jubco by personal service on the New York Department of State. (Hearing Officer Ex. 3) The Notice of Hearing scheduled the hearing on January 24 and 25, 2012 and required Jubco to serve an Answer at least 14 days in advance of the scheduled hearing. The hearing was adjourned to March 14 and 15, 2012 by Notice of Adjournment that was duly served on the parties on January 17, 2012. (Hearing Officer Exs. 4, 5) The hearing was conducted on March 14, 2012 and June

28, 2012. Following the hearing, the parties requested the opportunity to file Proposed Findings of Fact and Conclusions of Law on or before November 20, 2012. Both Jubco and the Department complied with this post-hearing deadline.

The Notice of Hearing alleges that Jubco underpaid wages and supplements to its workers in the amount of \$20,274.08 on the Project. (Hearing Officer Exhibit 1)

On April 13, 2011, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction for direct withholding in the amount of \$34,269.50. (DOL Ex. 14) The Department of Jurisdiction acknowledged that no sum was withheld pursuant to the notice. (DOL Ex. 15)

### **THE BUREAU INVESTIGATION**

On July 15, 2009, Jubco entered into a contract with the Town of North Salem to furnish labor, material and equipment necessary to undertake the installation of the water supply system for the Croton Falls Water District, in the Town of North Salem, in Westchester County. (T 48; DOL Ex. 6) The work involved excavating trenches and connecting pipes to the existing pipes leading into the treatment building. (T 14; DOL Ex. 5) On July 1, 2009, the Department issued a Prevailing Wage Rate Schedule for Westchester County. (T 49; DOL Ex. 7) This Prevailing Wage Rate Schedule for Westchester County detailed the amount of wages and supplements which were to be paid to or provided for the workers on the Project from July 1, 2009, to June 30, 2010, including the following classifications: Laborer – Heavy & Highway (Group V) with wages of \$30.90 per hour, and supplements of \$17.30 per hour; and Operating Engineer – Heavy & Highway (Group I-A) with wages of \$42.14 per hour, and supplements of \$23.74 per hour, all effective July 1, 2009. (DOL Ex. 7)

Neither the Bidding Documents (DOL Ex. 5), nor the contract between Jubco and the Town of North Salem (DOL Ex. 6) include a specific reference indicating that the project was a public work project governed by the provisions of Article 8 of the New York State Labor Law or incorporate by reference the applicable Prevailing Wage Rate Schedule. (DOL Ex. 7) However, Stephen Bianchi was an experienced public work contractor (See, DOL Ex. 1). Mr. Bianchi indicated in his cross-examination of the complainant, Brian Pease, that he and Pease attended a pre-construction meeting when Mr. Zaino from the Westchester County Department of Public

Work specifically advised them that Jubco was required to pay prevailing wages and wage supplements on the Project. (T 27-28) Stephen Bianchi further indicated that he probably signed a document acknowledging this requirement. (T 28) Finally, prior to the filing of the complaint in the within action, Stephen Bianchi entered into a stipulation on April 28, 2010 involving this Project and two other projects, wherein he acknowledged that the within Project was governed by Article 8 of the New York State Labor Law. (DOL Ex. 1)

On or about August 9, 2010, Brian Pease filed a complaint with the DOL regarding payment irregularities by Jubco, specifically alleging that Jubco failed to pay prevailing wage supplements on the Project. (DOL Ex. 2) In response to the complaint, the Bureau commenced an investigation of the Project. (T 41)

On March 30, 2011, the Bureau requested that Jubco furnish payroll records and other records relating to the Project. (T 44-45; DOL Ex. 3) On April 28, 2010, Jubco, Stephen Bianchi and the Department entered into a Stipulation and Order signed by the Commissioner as an Order on May 19, 2010 on this Project and two other public work projects, in which Jubco and Stephen Bianchi acknowledged that they underpaid prevailing wages and wage supplements to workers on these three projects, agreed to make restitution, admitted to a willful violation of the Labor Law, and agreed to submit to the Department certified payrolls for the duration of this Project. (T 39-40; DOL Ex. 1) The Stipulation and corresponding audit annexed to it covered the time period through March 12, 2010. (T 43; DOL Ex. 1) After entering into the Stipulation, Jubco and Stephen Bianchi continued to fail to pay prevailing wages and wage supplements to its workers on the Project. In this proceeding, the Department seeks to recover underpayments to Jubco's employees for weeks ending February 19, 2010 to April 30, 2010, the end of the Project, together with interest thereon, and payment of a civil penalty.

During the course of the Department's investigation, it acquired the following documents that were used in the calculation of the alleged underpayments: Prevailing Wage Rate Schedule – Westchester County (DOL Ex. 7); Jubco's certified payroll records (DOL Ex. 8); and payroll journals (DOL Ex. 9).

### **EMPLOYEE TESTIMONY**

Brian Pease worked for Jubco on the Project, and submitted a complaint to the DOL asserting that Jubco underpaid wages on the Project. (T 14, 21-23; DOL Ex. 2) Specifically, Mr.

Pease asserted that Jubco failed to pay him supplemental benefits. (T 23; DOL Ex. 2) Brian Pease operated an excavator on the Project. (T 15, 33, 42) He also oversaw the Project and maintained the daily logs for the Project. (T 14-15) Mr. Pease testified that he worked with Alfredo Perez, Francisco Ramirez, Victor Lojano, Alvin Ramirez and Teodoro Perez. (T 16) These workers were all laborers. (T 16-17) Mr. Pease testified that he spoke with Mr. Bianchi on more than one occasion concerning his failure to pay prevailing wages and wage supplements to the workers on the Project. (T 17-18, 26)

Alfredo Perez testified that he worked on the Project for Stephen Bianchi, the owner of Jubco. (T 31) Mr. Perez cut and installed pipes, and, working with a shovel, evened out the ground for the pipes to be laid after Mr. Pease excavated by machine. (T 33) Mr. Perez worked eight hours a day, and sometimes longer days when a longer trench was dug and the workers had to lay the pipe. (T 33-34) He worked for four months on the Project. (T 34) Mr. Perez was paid \$120 per day for his work on the Project. (T 32) He received no wage supplements. (T 32) Stephen Bianchi or Brian Pease gave him his paycheck. (T 32) Mr. Perez testified that Brian Pease drove a machine or truck and performed excavating by machine. (T 32-33) Mr. Perez testified that he worked with his cousin, Alvin Ramirez, as well as Teodoro Perez, Francisco and Victor. (T 34)

### **TESTIMONY OF JACQUELINE MARTINEZ**

The Department's investigation commenced with the filing of a complaint by Brian Pease. (T 41; DOL Ex. 2) Investigator Martinez spoke with Mr. Pease who verified the complaint, stating particularly that he did not receive supplemental benefits. (T 41-42) Brian Pease told Investigator Martinez that he operated the excavator and backhoe on the Project, (T 42), and he also ran the Project as a foreman. (T 129-130) Mr. Pease was paid \$42.14 per hour in wages. (T 43) Mr. Pease was also paid benefits in cash but stopped receiving benefits after the Stipulation of Settlement was entered into in March 2010. (T 43-44)

Jubco provided payroll records up to the time of the Stipulation and Order, but not afterwards. (T 53-54) Investigator Martinez obtained Paychex payroll journals pursuant to subpoena. (T 55; DOL Ex. 9) Investigator Martinez also obtained daily project logs for the Project from Brian Pease. (T 55-57; DOL Ex. 10)

## AUDIT METHODOLOGY

Investigator Martinez interviewed all of Jubco's workers on the Project. (T 141) Investigator Martinez went to the job site, and observed and talked with the workers to gain an understanding of the scope of their work. (T 130-31) She observed two workers digging a trench. (T 131) Alvin Ramirez told Investigator Martinez that he worked as a laborer assisting other workers who were digging trenches. (T 133) Jubco did not pay its workers any wage supplements during the entire length of the Project. (T 77) To prepare the audit, Investigator Martinez relied on the certified payroll records, the payroll journal and the daily logs, as well as what the workers told her. (T 72-73, 76; DOL Exs. 8, 9 & 10) Overall, Investigator Martinez used the daily logs, (DOL Ex. 10), to show hours worked, and used the payroll journals, (DOL Ex. 9), for hours worked and wages paid. (T 94) Where Investigator Martinez had no other evidence, she used Jubco's payroll records which she did not deem reliable. (T 94; DOL Ex. 8)

Investigator Martinez determined that Jubco's payroll records were not reliable because they were not consistent with the other documentary evidence of the number of workers employed on a daily basis, the number of hours worked by these employees, and the wages paid to the employees. (T 82-83) As an example, for the entire week ending March 5, 2010, Jubco's payroll records list Brian Pease as the sole worker. (T 84; DOL Ex. 8) There were actually seven persons working on March 5, 2010, as reflected in the daily logs. (T 84; DOL Ex. 10) As a further example, for week ending February 19, 2010, Jubco's payroll records list only Brian Pease working that week. (T 87; DOL Ex. 8) This is contrary to the daily logs which show four workers on February 16, three workers on February 17, and two workers on February 18. (T 87-88; DOL Ex. 10) Jubco's payroll records and the daily logs do not consistently reflect the total number of workers on the Project. (T 88) For week ending March 5, 2010, Jubco's payroll records list only Brian Pease working that week. (T 90; DOL Ex. 8) This is again contrary to the daily logs which show six workers on March 2 and 3, eight workers on March 4, and seven workers on March 5, 2010. (T 91; DOL Ex. 10)

All of the workers except Brian Pease are classified in the audit as laborers. (T 94; DOL Ex. 11) They did some digging and adjusted the pipe in the trench. (T 94) There does not appear to be any real dispute with this Laborer classification as Jubco classified all workers as laborers on its certified payroll records. (DOL Ex. 8; T 128) Brian Pease is classified in the Audit as an

Operating Engineer. (T 95; DOL Ex. 11) He operated an excavator and backhoe. (T 95) Brian Pease also worked on the Project as the Foreman. (T 130) Investigator Martinez acknowledged that a foreman working with tools must be paid at the prevailing rate for the classification of work being performed but, when the foreman is strictly overseeing workers, he is not covered under Article 8. (T 154)

Victor Lojano first appears on the Department's audit for week ending March 5, 2010. (T 73; DOL Ex. 11) He is on the audit for twelve hours regular time and 1.5 hours overtime. (T 73; DOL Ex. 11) This information came from the daily logs, (DOL Ex. 10), which shows that Mr. Lojano worked 9.5 hours on March 5, 2010. (T 74) Mr. Lojano does not appear on Jubco's payroll records as having worked that day. (T 75; DOL Ex. 8) The payroll journal shows that Jubco paid Mr. Lojano \$30.70 hour throughout the Project, and did not pay an increased rate for overtime worked. (DOL Ex. 9) The Department credited Jubco with having paid Mr. Lojano \$30.70 per hour based on what Mr. Lojano told the Investigator. (T 76-78)

For week ending April 2, 2010, Victor Lojano is on the audit for 24 hours of regular time and one hour of overtime. (T 78; DOL Ex. 11) This information came from the payroll records, which list Mr. Lojano working a total of 25 hours over three days, and the payroll journal which also shows 25 hours worked. (T 78-80; DOL Exh. 8 & 9) Investigator Martinez changed the nine hours on the payroll record to eight hours on the audit, which is consistent with the hours worked by others that day. (T 80)

For week ending April 9, 2010, Victor Lojano is on the audit for 14 hours of regular time and one hour of overtime. (T 80-81; DOL Ex. 11) This information came from the payroll records, which list Mr. Lojano as working nine hours one day and five hours a second day. (T 81; DOL Ex. 8) Investigator Martinez credited Jubco with payment of \$30.70 per hour based on the payroll journal. (T 81; DOL Ex. 9) Investigator Martinez completed the audit with respect to Victor Lojano by calculating the underpayment for week ending April 30, 2010 in substantially the same manner as she prepared the audit for week ending April 9, 2010. (T 81)

Brian Pease first appears on the audit for 40 hours worked during week ending March 26, 2010. (T 81; DOL Ex. 11) This information came from Jubco's payroll records, which show he worked eight hours a day for five days. (T 81-82; DOL Ex. 8) The payroll records reflect that Mr. Pease was paid \$44.14 per hour. (DOL Ex. 8) The payroll journal reflects that Mr. Pease

was paid \$42.14 per hour. (T 82; DOL Ex. 9) For the audit, Investigator Martinez used the hourly wage rate as reflected in the payroll journal. (T 82; DOL Ex. 9)

For week ending April 2, 2010, Brian Pease is on the audit for 32 hours at regular pay and two hours of overtime. (T 85; DOL Ex. 11) These hours came from the payroll records, which list him working two days for nine hours and two days for eight hours. (T 85; DOL Ex. 8) Investigator Martinez credited Jubco on the audit with paying Mr. Pease \$42.14 per hour, based on the payroll journal. (T 85; DOL Exs. 9 & 11) When she created the audit, Investigator Martinez did not segregate the hours Brian Pease worked on the Project as an operator Investigator versus when he worked as a foreman. (DOL Exs. 11, 12) Martinez prepared the audit with respect to Brian Pease for the remaining weeks in substantially the same manner as she did for weeks ending March 26 and April 2, 2010. (T 86)

Alfredo Perez first appears on the audit for week ending February 19, 2010. (T 86; DOL Ex. 11) On February 16, he is on the audit for five hours. (DOL Ex. 11) He is on the daily logs that day for five hours – under his nickname of “Freddie.” (T 87; DOL Ex. 10) Investigator Martinez obtained his hours for that week solely from the daily logs. (T 88; DOL Ex. 10) Investigator Martinez credited Jubco with payment to Alfredo Perez of \$30.35 per hour based upon what Mr. Perez told her he was paid. (T 89, 91-92; DOL Ex. 11) Jubco did not pay Alfredo Perez any wage supplements. (T 89)

For week ending February 26, 2010, Alfredo Perez is on the audit for seven hours on Saturday, February 20. (DOL Ex. 11) This is based on the daily log for that day. (T 89; DOL Ex. 10)

For week ending March 5, 2010, Alfredo Perez is on the audit for 39-1/2 hours: ten hours on March 2, ten hours on March 3, ten hours on March 4 and 9.5 hours on March 5. (T 89-90; DOL Ex. 11) This information came from the daily logs. (T 91; DOL Ex. 10) Mr. Perez is not listed on Jubco’s payroll records for week ending March 5, 2010. (T 90; DOL Ex. 8)

For week ending April 16, 2010, Alfredo Perez is on the audit for 36 hours – 32 hours at regular time, and four hours overtime. (T 92-93; DOL Ex. 11) These hours came from the payroll journal. (T 93; DOL Ex. 9) Jubco is credited with paying Mr. Perez \$30.35 per hour, based on the payroll journal. (T 93; DOL Ex. 9)

Investigator Martinez prepared the audit for Alfredo Perez for week ending April 23, 2010 in substantially the same manner as she did for week ending April 16, 2010. (T 93)

For the remaining workers on the Project – Teodoro Perez, Alvin Ramirez and Francisco Ramirez – Investigator Martinez prepared the audit in substantially the same manner as she did for Victor Lojano, Brian Pease and Alfredo Perez. (T 93-94)

Stephen Bianchi’s son presented his analysis bifurcating the time Brian Pease spent as an Operating Engineer versus foreman. (T 184; Respondent’s Ex. 4) The Department accepted Mr. Bianchi’s analysis regarding Brian Pease and Investigator Martinez revised her audit. The revised audit that was created on June 28, 2012, reflects changes for Brian Pease based on daily logs. (T 205-8; Resp. Ex. 6) The revisions were made for weeks ending March 26, 2010 through April 30, 2010, except for week ending March 26, 2010 for which no daily logs were provided. The Respondent made assumptions in his analysis that supplemental benefits were paid to the employees but did not offer any evidence supporting this assumption. (T 191-193) Therefore, the revisions reflect only the changes to the underpayment to Brian Pease based upon the bifurcation of his time between hours worked as an operator and a foreman. The revised audit that was created after the hearing concluded, and which is deemed a part of the record as Hearing Officer Ex. 8, finds that Jubco underpaid wages and supplements to its workers in the amount of \$16,186.50.

## **CONCLUSIONS OF LAW**

### **JURISDICTION OF ARTICLE 8**

New York Constitution, article 1, § 17 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 AD2d 870, 871-872 [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.

The New York State Court of Appeals recently adopted a three-prong test to determine whether a particular project constitutes a public works project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, \_ NY3d \_, 2013 NY Lexis 1731, 2013 NY Slip Op 4842 (June 27, 2013). The Court stated the 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.*

Since the Croton Falls Water District in the Town of North Salem, a public entity, is a party to the instant public work contract, Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts*, 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]).

### **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 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]). There is no real dispute in the Department’s classification of the laborer employees as the Department utilized the classification used by Jubco in its certified payroll records. Jubco did argue during the hearing that some of the laborers worked as flagmen or stickmen and, therefore, should have been paid at a lesser rate than the laborer rate. (T. 127) However, Jubco did not offer any testimony or evidence in support of this argument. Additionally, the Department accepted Jubco’s analysis of the classification of Brian Pease as a foreman and operator and its bifurcation of Mr. Pease’s time between these specific jobs for the purpose of underpayment calculation. As

there is an absence of a “clear showing that a classification does not reflect ‘the nature of the work actually performed,’” the Department’s classification will not be disturbed. (*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]).

### 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]).

To prepare the audit, Investigator Martinez relied on the certified payroll records, the payroll journal and the daily logs, as well as what the workers told her. (T 72-73, 76; DOL Exs. 8, 9 & 10) Overall, Investigator Martinez used the daily logs, (DOL Ex. 10), to show hours worked, and used the payroll journals, (DOL Ex. 9), for hours worked and wages paid. (T 94) Where Investigator Martinez had no other evidence, she used Jubco’s payroll records. (T 94; DOL Ex. 8) Investigator Martinez testified that the Jubco payroll records are inaccurate because they are not consistent with the payroll journal regarding the number of workers who worked on any given day or the hours worked by the employees. (See, for ex., T. 82-84) Jubco offered no evidence or testimony to explain these discrepancies or to negate the reasonableness of the Department’s calculations. As a result of Jubco’s failure to keep accurate records as required by

statute, the Department calculated back wages due employees by using the best available evidence, that included adopting Jubco's analysis for calculating the underpayment to Brian Pease.

### **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]). Consequently, Jubco 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) <sup>1</sup> 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

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<sup>1</sup> “When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the five largest shareholders of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be 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 years from the first final determination.” Labor Law § 220-b (3) (b) (1), prior to amendment effective November 1, 2002.

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 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 Hartnett*, 181 AD2d 1013, 1013 [1992]; see 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]).

Jubco and Steven Bianchi entered into a written Stipulation of Settlement involving this project, among others. (DOL Ex. 1) The Stipulation, as it relates to this project, governs a period of work that pre-dates the audit period herein. Jubco acknowledged underpayments to its workers that constituted a Willful violation of Article 8 of the Labor Law on the part of Jubco and Steven Bianchi. Jubco offered an exhibit (Resp. Ex. 3) and testimony (T. 217-221) indicating the effects of certain medications taken by Steven Bianchi at the time he entered into the Stipulation as indicative of Mr. Bianchi’s lack of capacity to enter into the Stipulation. Steven Bianchi also testified that Ms. Martinez advised him that he did not need an attorney at the time he entered into the Stipulation. I find this testimony and evidence not persuasive. Regarding attorney representation, Steven Bianchi retained an attorney and later dismissed him because of financial considerations. (T. 225-226) Also, in the absence of medical testimony establishing the possible side effects of the prescription medications Steven Bianchi was taking at the time he entered into the Stipulation as indicated in Respondent’s Exhibit 3, Steven Bianchi’s self-serving testimony on this issue is not sufficient to show he was not competent to execute the Stipulation. Jubco was clearly aware of its obligation to comply with Article 8 of the Labor Law as it relates to this

project and its failure to pay its workers in accordance with Article 8 of the Labor Law after it entered into the Stipulation constitutes a further Willful violation on the part of Jubco and Steven Bianchi.

### **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>).

It is clear from the record that Jubco failed to meet its obligation to maintain true and accurate payroll records. I further find, in light of evidence set forth above showing that Jubco acknowledged a willful violation of Article 8 of the Labor Law regarding this project, and then continued to underpay its workers and produce payroll records that were not accurate regarding the number men on the job, the hours worked, and the wages paid to be deliberate, intentional falsification, and that Jubco’s 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 five largest shareholders 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.

Stephen Bianchi acknowledged in the Stipulation that he is the President of Jubco. (DOL Ex. 1) Further, Stephen Bianchi signed the contract (DOL Ex. 6) and the certified payroll records (DOL Ex. 8) as President of Jubco.

I find that the term “officer” as used in Labor Law should be read broadly and in its generic sense, as one who holds a position of authority of trust in any organization. The Department points to Labor Law §220-b(2)(g)(iii) and notes the fact that the language of this section does not reference a corporate officer but instead merely says “*any officer* of the contractor or subcontractor...” (emphasis added).

At the outset, it is important to note that Jubco is a Limited Liability Company and the term “limited liability company” is not found in Article 8. But the analysis of this issue does not end there. As set forth earlier, Article 8 of the Labor Law is the statutory implementation of a New York State Constitutional mandate for the payment of prevailing wages on public work projects. Article 8 is remedial in nature. *Matter of Mid Hudson Pam Corporation et al. v Thomas F. Hartnett*, 156 A.D.2d 818, 821 (3d Dept. 1989) “The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee (citations omitted). *See also, Matter of Armco, supra.* Given its remedial nature, §220 should be construed liberally. *Austin v City of New York*, 258 N.Y. 113, 117. “[§220] is to be interpreted with the degree of liberality essential to the attainment of the end in view.” (citations omitted). *See also, Bucci v Village of Port Chester*, 22 N.Y.2d 195, 201. “This court has more than once noted that *section 220* must be construed with the liberality needed to carry out its beneficent purposes.” (citations omitted).

As set forth above, §220-b(3)(b)(1) concerns the parties to which a finding of willfulness may attach, including “the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, *any officer of the contractor or subcontractor* who knowingly participated in the violation of this article, any of the shareholders who own or control at least 10% of the outstanding stock of the contractor or subcontractor or any successor...” (emphasis added). The statute does not require that an officer must be an officer of a corporation. The dictionary definition of the term “officer” is: “one who holds an office of trust, authority, or command.” *Merriam-Webster Online* (2009). Steven Bianchi identifies himself as the President of Jubco in all documents he signed that are relevant to this proceeding and, as such, he identifies

himself as holding a position of trust, authority and command in Jubco. Evidence that Steven Bianchi signed certified payrolls and contract documents, that he distributed paychecks to employees (T. 32), that he held himself out as president of Jubco, and conferred with representatives of the Department of Jurisdiction, show that he controlled Jubco and that his actions were knowing. Accordingly, Steven Bianchi is personally subject to a finding of willfulness by the Commissioner.

### **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. Considering the evidence presented herein regarding the history of prior violations, including a prior violation involving the within project, and the gravity of failing to pay wages and supplements pursuant to Article 8 of the Labor Law, I find that a civil penalty in the amount of 25% as requested by the Department should be imposed by the Commissioner.

### **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 Jubco underpaid wages and supplements due the identified employees in the amount of \$16,186.50; and

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

DETERMINE that the willful violation of Jubco did involve the falsification of payroll records under Labor Law article 8; and

DETERMINE that Steven Bianchi acted in a position of trust, authority, and command in Jubco and, as such, is in a position that is tantamount to an officer of Jubco; and

DETERMINE that Steven Bianchi knowingly participated in the violation of Labor Law article 8; and

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

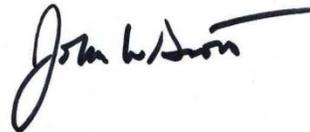
ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty); and

ORDER that upon the Bureau's notification, Jubco shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605; 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: December 10, 2013  
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott", with a long horizontal flourish extending to the right.

John W. Scott, Hearing Officer