STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

CNC GROUP, INC.
And
NICK SPARAKIS AND CARLOS POLANCO, as two of the five largest shareholders of, CNC GROUP, INC.
Prime Contractor

And

CITY GENERAL IRON WORK, INC., and/or its successor, CITY GENERAL BUILDERS, INC,
And
PEDRO RINCON, as an officer and as one of the five largest shareholders of both entities
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
98-0914 Bronx County

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

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on June 5 and 6 and September 28, 2008, and February 10, 2009 in New York, 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. Proposed Findings of Fact and Conclusions of Law were received from the Department of Labor and CNC Group Inc., Nick Sparakis and Carlos Polanco on July 27, 2009, and from City General Iron Work, Inc., City General Builders, Inc. and Pedro Rincon on July 29, 2009. The Department also submitted a revised audit and audit summary on August 12, 2009. No leave was requested during the course of the hearing to submit a revised

post-hearing audit. The Respondents object to the receipt of that audit in evidence because it was served after the hearing and record were closed, and therefore request that the revised audit not be considered as part of the Record in this matter.[1]

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether City General Iron Work, Inc. (“City General”) a subcontractor of CNC Group, Inc. (“CNC”), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a contract involving general construction at the Jacobi Medical Center (“Project”) for Dormitory Authority of the State of New York (“DASNY”).

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Marshall H. Day, Senior Attorney, of Counsel). CNC, Nick Sparakis and Carlos Polacono were represented by Milber, Makris, Plousadis & Beiden, LLP (Joseph J. Cooke, Esq., of counsel). City General, City General Builders, Inc. and Pedro Rincon were represented by Brian M. Limmer, Esq.

ISSUES

1. Did City General pay the rate of wages 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. Are City General and City General Builders, Inc. “substantially owned-affiliated entities”?
5. Is Pedro Rincon one of the five largest shareholders of City General?

[1] That revised audit was submitted in connection with the Department’s request, first made in its Proposed Findings of Fact and Conclusions of Law, to amend its allegations of underpayments to include additional workers based on the hearing testimony of Pedro Rincon that workers listed in the certified payrolls as labors performed tasks that it believes would properly be classified in the carpenter trade.

6. Is Pedro Rincon an officer of City General who knowingly participated in a willful violation of Article 8 of the Labor Law?

7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

On or about June 29, 1999, CNC entered into a contract with DASNY to furnish labor, tools and equipment necessary for the general construction and asbestos abatement of the Maternal & Newborn Care Unit at the Jacobi Medical Center (T. 178; Dept. Ex.3). The Project is located in Bronx County (T. 25, 26, 75- 79, 178, 179, 187; Dept. Ex. 3).

Thereafter, in or about July 1999, CNC entered into a agreement with City General under which City General agreed to furnish labor, tools and equipment necessary to perform certain aspects of the Project (T. 62- 64, 136, 696, 707- 711). The subcontract involved the employment of workers in framing and sheet rocking, which tasks are considered by the Department to be within the carpenter classification (T. 63, 218, 254-255, 696). The tasks that City General performed included the demolition of existing interior walls and ceilings, the assembling and layout of new metal framing, the sheet rocking of new interior walls, and the installing of new drop ceilings (T. 71, 73, 158, 255, 381-390, 395-396, 413). The value of the contract was one hundred fifty thousand dollars ($150,000.00) (T. 63, 136, 696).

The prime contract expressly stated that the Project was a public work project subject to prevailing wage rates (T. 64, 189). City General was provided with a copy of a prevailing rate schedule and was an experienced public work contractor (T. 64-65).

Prevailing Wage Rate Schedules 1999A and 2000A for the New York City area detailed the amount of wages and supplements which were to be paid to or provided for laborers, workers or mechanics performing work on the Jacobi Medical Center Project (Dept. Exs. 4, 5, respectively). Prevailing Wage Rate Schedule (PRS) 1999A covered the period from July 1, 1999 to June 30, 2000, and included the carpenter classification with wages of $31.30 an hour and supplements of $21.65 an hour; PRS 2000A covered the period from July 1, 2000 to June 30, 2001, and included the carpenter classification with

wages of $33.38 an hour and supplements of $21.65 an hour (T. 189, 190, 191, 192, 217; Dept. Exs. 4, 5).

On or about November 4, 2002, Louis Batista filed a complaint with the Department of Labor alleging that City General failed to pay him prevailing wages and supplements on the Jacobi Medical Center Project (T. 149-165, 446-454, 509, 512, 528, 595- 598, 618, 623; Dept. Exs. 1A, 1B, 1C, 1D, 1E, 1F). The complainant specifically alleged that that he was paid $6.25 an hour in wages for a 40 hour work week (which equals $250.00 a week [*see*, Dept Ex. 1C pay stubs]) and received no supplemental benefits (T. 157-158, 165; Dept. Exs. 1A).[2] In response to the complaint, the Bureau commenced an investigation of the Project (T. 149).

On or about December 2, 2002, the Bureau requested that City General furnish payroll records relating to the Project (Tr. 174, 175, 176, 177, 178; Dept. Ex. 2). In response, City General provided 18 weeks of certified payrolls (T. 87-91; 192- 193; Dept. Ex 6). None of these payrolls listed the complainant on them (T. 110, 196; Dept Ex 6). The payrolls listed other workers classified as carpenters and laborers who were paid the appropriate prevailing rates for those classifications, which the Bureau accepted and which resulted in no finding of underpayments on their behalf (T. 257; *cf*. Dept. Ex. 6 and Dept. Exs. 8 & 9). City General also provided the Bureau with payroll journals, which listed Mr. Bautista as a salaried employee (T. 198-200; Dept Ex. 7). The remaining payroll records were apparently lost in a flood (T. 114). Due to the lapse of time, no records were maintained by DASNY either (T. 131-132, 702-704). CNC had also destroyed its records after the Bureau completed its investigation of CNC on the Project, which occurred before records were requested in connection with the City General matter (T. 127-128, 131, 134, 704).

In preparing its audit, the Bureau relied upon Mr. Bautista's complaint to determine his daily and weekly hours (T. 214-215, 271-275, 278-279, 322). To determine his rate of pay, the Bureau looked to a variety of sources, including the claimant's statements, his cancelled pay checks, pay stubs, payroll journal and W-2s (T. 215-216). Based on its review of that information, and the employee's statement that he received no

2 During its investigation, the Bureau, recognizing the very low wage rate the claimant alleged he had received, specifically asked him whether he received any additional monies, to which he replied that he had not (T. 281, 293, 316-318).

payment other than a $250.00 weekly check, the Department accepted that Mr. Bautista was paid at the hourly rate of $6.25 as stated in his complaint (T. 281, 293, 316-318, 343). The Bureau estimated the duration of weeks worked based on an analysis of Mr. Bautista's complaint, paystubs and documentation showing his employment in 2001 (T. 220-234; 270-271; 285-288). It classified the work he performed as that of a carpenter based upon Mr. Bautista's complaint, his statements and the nature of the work City General performed on the Project (T. 254-255, 272-273, 275, 341-342). It then compared his rate of pay for the hours he worked against the rate that should have been paid according to the applicable prevailing wage rate schedules for the time period in question to determine the amount that the claimant was underpaid on the Project (T. 215-219; Dept Ex. 8). Applying the aforesaid methodology, the Bureau determined that for the period week-ending October 7, 1999 through week-ending March 29, 2001, City General underpaid prevailing wages and supplements to Mr. Bautista in the amount of $122,129.52 (T. 235-237; Dept. Ex. 9)

On or about December 30, 2004, the Bureau issued a Notice to Withhold payment to DASNY, directing that DASNY withhold payment of $271,997.28 from payments due to the prime contractor, CNC (T. 244-246; Dept. Ex. 11). On June 6 and again on August 10, 2005, the Bureau issued City General and CNC a Notice of Labor Law Inspection Findings notifying City General and CNC of the Bureau's findings on the Project (T. 239-243; Dept. Exs. 10A, 10B). On or about August 18, 2005, DASNY sent an acknowledgement from the Department of Jurisdiction stating that no money was being withheld from payments due to CNC, however there existed $30,702.54 in retainage that potentially could be made available (T. 247-249; Dept. Ex. 12).

Mr. Bautista testified at the hearing (T. 371-646). He testified that he had worked on the Project from approximately October 1999 to April or May 2001 (when he was injured on the job) (T. 380, 425-427), and that he was there every day, Monday through Friday, with the exception of two weeks when he was sent to a private job (T. 415-417). The work began with the erection of temporary partitions in preparation for demolition work; then proceeded with demolition of the walls, doors and ceilings on the 7th floor in preparation for a new floor layout, which lasted a month or two (T. 413); continued with

cleaning and the setting of the 7th floor layout; and finally involved the framing of walls and sheet rocking, the installation of ceilings and doors, and the placement of furniture (T. 381- 390, 395-396). Mr. Bautista worked with a group of usually four or five other men, who were from Mexico and were inexperienced, so he would show them how to perform required tasks (T. 391-393, 481). As these Mexican workers spoke little or no English, Mr. Bautista, who spoke Spanish, would also translate instructions (T. 476-491). Despite that role, and the lack of any other City General supervisor on site (T. 508-509), Mr. Bautista denied being the job foreman (T. 393, 395). He testified that the work directions came from Pedro Rincon and Carlos Polanco, and that, in fact, Carlos Polanco of CNC supervised the City General employees most of the time (T. 393-394, 399-402). According to Mr. Bautista, and contrary to his complaint and the Department's audit, the City General crew typically worked a seven and one-half hour day, from 8:00 a.m. to 4:00 p.m., with a ½ hour lunch (T. 404-408, 453), not an eight hour day.

With regard to his rate of pay, Mr. Bautista testified that when the job commenced he was being paid at a rate of $650 a week in cash and that that arrangement continued through the first month he was on the Project (T. 433, 451-452, 556).[3] He also testified that at the time the job commenced he was unaware that it was a public work job on which prevailing wages were required to be paid (T. 430). Thereafter, apparently as a result of a child support order, he requested that Mr. Rincon pay him at a rate of $250.00 a week by check, and defer the weekly $400.00 balance until the job was completed, at which time he expected to be paid in a lump sum of about $25,000.00 to $30,000.00 (T. 433-434, 498-501, 556-557).[4] Mr. Bautista denied ever having told a union representative that he was a carpenter foreman on the job being paid $250.00 a week by check and $675.00 in cash (T. 443-445). A representative of the Labors' Union had written to DASNY with a complaint about the wages being paid at the Project and reported that an individual named Louis Bello who worked for City General claimed he was a carpenter foreman on the job and was being paid $250.00 a week by check and $675.00 in cash (Resp. Ex 5). The Department only learned that Mr. Bautista also used the name "Bello"

[3] Mr. Bautista's complaint claims that he was being paid at a rate of $6.25 an hour during this period (Dept. Ex 1).

[4] Mr. Rincon, in his earlier testimony, admitted to paying Mr. Bautista $250.00 a week by check as a result of Mr. Bautista's child support issue, but maintained that he also paid him $675.00 a week in cash because Mr. Bautista did not want these cash payments to show as income (T. 103-104).

at the first day of the hearing (T. 332). Under cross-examination, after numerous questions suggesting the implausibility that he could have received only $250.00 a week in pay in view of his expenses, Mr. Bautista reluctantly acknowledged that he received an additional cash payment of $675.00 a week from Mr. Rincon, but insisted that this was for other work he performed for Mr. Ricon, not for work on the Jacobi Project (T. 586-587).[5] He also reluctantly acknowledged that Bello was his mother's maiden name, which he had used on occasion (see, T. 600-602, 687-688). He nevertheless continued to maintain that he never told a union representative that he was paid $675.00 in cash for work on the Project (T. 525, 614, 616-617). Mr. Bautista's testimony with regard to his rate of pay is not credible. I credit what the union representative reported to the Department, to-wit: that Mr. Bautista (a/k/a Bello) was paid $675.00 a week in cash in addition to $250.00 weekly check.

Post-hearing, the Department submitted a revised audit and audit summary, through which it seeks to amend its allegations of underpayments to conform to the hearing testimony of Messrs. Rincon and Sutton that workers listed in the certified payrolls as labors performed tasks that should properly be classified in the carpenter trade (see, e.g., T. 254-255). During Supervising Investigator Sutton's testimony, it was clearly stated that the investigation only involved Mr. Bautista and the audit determined that only one employee was underpaid (T. 255-257). At the time of that testimony, Mr. Rincon had already testified that workers on the Project were engaged in framing and sheet rock work, which the Department classifies as carpenter work (T. 70-74). No amendment of the allegations or audit was sought during the hearing, however, which would have provided the Respondents' with notice of the Department's intention to expand its allegations to include additional employees. A motion to expand the allegation and revise the audit made during the hearing would have presumably resulted in the Department's offering a specific explanation on the record of the methodology employed in amending the audit, which explanation is now lacking, and would have afforded the Respondents the opportunity to challenge the allegations and methodology employed.

[5] During his direct examination he testified that he performed no weekend work on the Project, but that sometimes Mr. Rincon would call him on weekends and that he "would go and do little things" (T. 448).

During the period when work was performed on the Project, Pedro Rincon was City General's sole shareholder and president (T. 52-53, 662). He was responsible for the hiring, employment terms, and supervision of Mr. Bautista and signed the payroll certifications (Tr. 52, 62, 249, 250, 662, 668; Dept. Ex. 6).

City General Builders, Inc. operates from the same business address that City General did; employs some of the same workers; engages in a similar line of work; is owned by the mother of children of Pedro Rincon, the sole owner and president of City General; and it employs Mr. Rincon as a "consultant" to advise on prospective work and job operations (Tr. 44-53, 58-62, 353, 460-465).

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.

It is undisputed that since the DASNY 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 Statute of Limitations

The relevant statute of limitations in an administrative proceeding under Labor Law §220 is governed by Labor Law §220-b (2). Labor Law §220-b (2) directs that the relevant period be computed from the date of the completion of the work to the date of the filing of the complaint with the Bureau. S*ee, Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v. Sweeney*, 224 AD2d 989 (4th Dept. 1996) *aff'd* 89 NY2d 395 (1996); *Matter of Pav-Lak Contracting Inc. v. McGowan*, 184 Misc. 2d 386, 388 (Sup. Ct., Nassau Co. 2000). Since the complaint was filed on November 4, 2002 for work completed on week-ending March 29, 2001, the statute of limitations had not expired.

The Post Hearing Audit

A revised audit was submitted in connection with the Department's request, first made in its Proposed Findings of Fact and Conclusions of Law, to amend its allegations of underpayments to include additional workers based on the hearing testimony of Pedro Rincon that workers listed in the certified payrolls as labors performed tasks that would properly be classified in the carpenter trade. During Supervising Investigator Sutton's testimony, it was clearly stated that the investigation only involved Mr. Bautista and the audit determined that only one employee was underpaid. At the time of that testimony, Mr. Rincon had already testified that workers on the Project were engaged in framing and sheet rock work, which the Department classifies as carpentry work. No amendment of the allegations or audit was sought during the hearing, however, which would have provided the Respondents with notice of the Department's intention to expand its allegations to include additional employees. A motion to expand the allegation and revise the audit made during the hearing would have also presumably resulted in the Department's calling of an investigator to provide a specific explanation on the record of the methodology employed in amending its audit, which explanation is now lacking, and would have afforded the Respondents the opportunity to challenge the allegations and methodology employed, which opportunity they would be deprived of if the post-hearing audit were received in evidence and considered. The failure of the Department to give notice of its intention to expand the allegations, or to provide a meaningful opportunity for the Respondents to confront the evidenced offered, requires that the post-hearing

request to expand the allegations and receive into evidence a revised audit be denied on the grounds of fundamental fairness and due process. *See, generally, Melendez-Diaz v. Massachusetts*, 557 U. S. __; 129 S. Ct. 2527; 174 L. Ed. 2d 314 (2009)

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). The subcontract principally involved framing and sheet rocking, which are tasks that fall within the carpenter classification. Mr. Bautista testified that he was engaged in such tasks and as such his work was properly classified in the carpenter classification. Respondents have failed to clearly demonstrate that the classification does not reflect the nature of the work actually performed.

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).

Inasmuch as City General failed to report Mr. Bautista on its certified payrolls, the Department properly relied on the best evidence available to it, to-wit: (1) the statements of Mr. Bautista that he worked as a carpenter, corroborated by the carpentry nature of the work called for by the subcontract; and (2) the documentary evidence produced by Mr. Bautista that corroborated his general employment for the period he alleged. That methodology was reasonable and should be sustained with two exceptions. First, City General should be credited with the payment of $675.00 a week on account of cash payments it made to Mr. Bautista. Mr. Bautista's claim to have been paid $6.25 an hour is not credible. City General's claim to have paid him $675.00 a week in cash, corroborated by the admission Mr. Bautista made to a union official, which was relayed to DASNY in a contemporaneous letter complaint, is credible. Second, the daily work hours should be reduced to 7.5 hours from 8.0 based on Mr. Bautista's testimony that he received at least a ½ hour lunch period each day.

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, City General 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. However, Labor Law § 220 (7) directs that an investigation should be completed within six months from the filing of a complaint. Labor Law §§ 220 (8) and 220-b (2) (c) require that an investigation and hearing be expeditiously conducted. CNC maintains that the investigation was not expeditiously conducted as to it as the Project was completed in 2001, a complaint was filed in 2002, it was notified of the claim until 2005 and a Notice of hearing was not issued until June 25, 2007. It therefore urges that the Department be equitably stopped from collecting any underpayments from it. Although the courts have consistently sustained agencies in not dismissing administrative proceedings brought to vindicate important public policies based upon extensive delay, *Matter of Corning Glass Works v Ovsanik*, 84 NY2d 619, 624 (1994), the courts have both endorsed and directed agencies to exclude interest from an award for that period of time attributable to the agency's delay. *Matter of Nelson's Lamplighters, Inc. v New York State Department of Labor*, 267 AD2d 937, 938 (3d Dept. 1999). *Matter of M. Passucci General Constr. Co., Inc. v Hudacs*, 221 AD2d 987, 988 (4th Dept. 1995). *Matter of Georgakis Painting Corp. v Hartnett*, 170 AD2d 726, 729 (3d Dept. 1991).

In *Matter of M. Passucci*, the Appellate Division found that a three year delay in conducting a hearing was not expeditious and modified the determination by annulling the order to pay interest for the period *from the completion of the investigation to the commencement of the hearing* and further remitted the matter for a determination of whether any of the delay was caused by the contractor, and if so, for computing the time that interest should be imposed on the underpayment. *Matter of M. Passucci Gen. Constr. Co. v Hudacs*, 221 AD2d at 988. On remand, the Department waived interest for the period between the completion of the first audit and the commencement of the hearing, a period somewhat in excess of three years. *Matter of M. Passucci Gen. Constr. Co.*, PRC 87-1499 (1996).

In this case the record discloses that a complaint was filed in December 2002 and that the Bureau commenced an investigation that same day by serving a records request notice on City General. Thereafter, it apparently completed its investigation in or about June 2005 with the service of a Notice of Labor Law Inspection Findings. The record

lacks any explanation for the 2 ½ year delay, but I note that the Department never received a complete set of the records demanded in its records request. A hearing was not thereafter scheduled until June 2007 – two years later. Based on the *Matter of M. Passucci* precedent, 2 years of interest should be deducted from the final interest computation.

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) [6] 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.

[6] "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.

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.* City General was an experienced public work contractor, was aware that the Project was a public work job, and had received a copy of the prevailing rate schedule. As such, its failure to pay prevailing wages and supplements to Mr. Bautista was a willful violation of Article 8 of the Labor Law.

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. City General's failure to list Mr. Bautista on the Project's certified payrolls constitutes 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."

City General Builders, Inc. operates from the same business address that City General did; employs some of the same workers; engages in a similar line of work; is owned by the mother of children of Pedro Rincon, the sole owner and president of City General; and it employs Mr. Rincon as a "consultant" to advise on prospective work and job operations. Under these circumstances, City General Builders and City General are substantially owned- affiliated entities within the contemplation of Labor Law § 220 (5) (g). *Bistrian Materials, Inc. v. Angello*, 296 AD 2d 495, 497 (2d Dept. 2002).

Partners, Shareholders or Officers

Labor Law § 220-b (3) (b) (1) further provides that any substantially owned-affiliated entity of the contractor or subcontractor, 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 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. City General Builders, Inc., for the reasons previously stated, is a substantially owned-affiliated entity of City General. Pedro Rincon was City General's sole shareholder and president. As City General's sole shareholder, Mr. Rincon is subject to the provisions of Labor Law § 220-b (3) (b) (1) regardless of whether he knowingly participated in City General's willful violation. It is therefore unnecessary to determine whether he knowingly participated in City General's willful violation.

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. In view of the substantial underpayment extending over the life of the Project, together with the falsification of the payroll

records, the Department's requested penalty of 25% of the amount found due is warranted.

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). City General performed work on the Project as a subcontractor of CNC. Consequently, CNC, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on this Project.

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 City General underpaid wages and supplements due to Mr. Bautista in the amount of $122,129.52, less a credit against that amount of $675.00 for each week an underpayment was determined due, which credit reflects the weekly cash payments made by City General to Mr. Bautista that were not reported to the Bureau; and less a ½ hour credit for each work day on account of a lunch period not being deducted from the Department's audit of daily hours;

DETERMINE that City General 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, except that a period of two (2) years should be deducted therefrom as a result of delay from the completion of the investigation to the scheduling of the hearing;

DETERMINE that the failure of City General 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 City General involved the falsification of payroll records under Article 8 of the Labor Law;

DETERMINE that City General and City General Builders, Inc. are "substantially owned-affiliated entities";

DETERMINE that Pedro Rincon is the president of City General;

DETERMINE that Pedro Rincon is one of the five largest shareholders of City General;

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

DETERMINE that CNC is responsible for the underpayment, interest and civil penalty due 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);

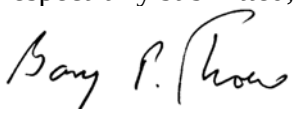
ORDER that DASNY remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 75 Varick Street, 7th Floor, New York, NY 10013;

ORDER that if any withheld amount is insufficient to satisfy the total amount due, City General, 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: January 26, 2010
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer