

IN THE MATTER OF

PLATO CONSTRUCTION CORP

Prime Contractor

and

CAZ CONTRACTING CORP.

and

CONSTANTINOS ZERVAS,

Individually as an officer of the corporation, among the five
largest shareholders, and/or owner of in excess of 10% of
the shares of the corporation

Subcontractor

**REPORT
&
RECOMMENDATION**

Prevailing Wage Rate
Case No. 2008001165
PW12 2009022306

Suffolk County

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 Roof Replacement of the North County
Learning Center, in Stonybrook.

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 April 26, 2011, December 21, 2011, December 22, 2011, and March 2, 2012 in Albany, New York and by video conference with Garden City, 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 Plato Construction Corp. ("Prime" or "Plato") filed Proposed Findings of Fact and Conclusions of Law and a Post-Hearing brief, respectively.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether CAZ Contracting Corp. ("Sub" or "Caz") a subcontractor of Plato complied with the requirements of

Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving the removal of 2800 square feet of asbestos containing roofing material at the North Country Learning Center in Stony Brook (“Project”) for the Three Village School District (“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).

Plato was represented by Hollander & Strauss, LLP (Michael R. Strauss, Esq., of counsel). There was no appearance made by, or on behalf of Caz or Constantinos Zervas, individually or as an officer and/or shareholder of Caz.

ISSUES

1. Did Caz 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 Constantinos Zervas an officer of Caz who knowingly participated in a willful violation of Article 8 of the Labor Law?
5. Was Constantinos Zervas a shareholder of Caz who owned or controlled at least ten per centum of the outstanding stock of Mutual of America?
6. Should a civil penalty be assessed against Caz and, if so, in what amount?
7. Is Plato responsible for any underpayment, interest, and civil penalty assessed against

Caz pursuant to Labor Law article 8?

FINDINGS OF FACT

GENERAL

On February 22, 2011, the Department duly served a copy of the Notice of Hearing (Hearing Officer Exhibit 1) on Caz, Constantinos Zervas, Plato, and the Department of Jurisdiction via regular first class mail and certified mail, return receipt requested. Signed Return Receipts evidencing receipt of the Notice of Hearing by all parties, were entered into evidence as Hearing Officer Exhibit 2. The Notice of Hearing scheduled an April 26, 2011 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

Plato, by and through its attorneys, timely filed an Answer. (Hearing Officer Exhibit 3) Caz and Constantinos Zervas failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, Caz and Constantinos Zervas are in default in this proceeding.

The Notice of Hearing alleges that Caz underpaid wages and supplements to its workers in the amount of \$50,527.26 on the Project (Hearing Officer Exhibit 1) and that Plato is responsible for Caz's underpayment pursuant to Labor Law § 223.

On November 16, 2009, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction for direct withholding in the amount of \$100,000.00. (Dept. Ex. 13) The Department of Jurisdiction acknowledged withholdings of \$68,247.40. (Dept. Ex. 13A)

THE BUREAU INVESTIGATION

Plato was the Prime Contractor for the Project that is the subject of this proceeding. (Dept. Ex. 6, T. 20) Themistoklis Mpourdis is the president and chairman and/or chief executive officer of Plato. (Dept. Ex. 15; Plato Ex. 5; T. 76-77) The Prime Contractor entered into a contract with Caz to furnish labor, material, and equipment necessary to remove 2800 square feet

of roof flashing (“the Subcontract”). (Dept. Ex. 7) The Subcontract required the employment of workers in the Roofer classification. (T. 29-30)

On or about August 31, 2009, the Bureau received a complaint from Diego Alvarez stating that he worked on the Project and that he was not paid for his work. (Dept. Ex. 1; T. 14-15) In response to these complaints, the Bureau commenced an investigation, which included requesting that Caz furnish payroll records, daily time records, a copy of the Subcontract, and other documents relating to the Project. (Dept. Ex. 2; T. 15-16) Although the Bureau Investigator had numerous conversations with Constantinos Zervas requesting records on the project, Caz was uncooperative and did not supply any of the requested records. (T. 16, 24, 73-75, 94)

The Bureau received payroll records and project logs from Plato and the Department of Jurisdiction (Dept. Exs. 8, 9; T. 27, 94-95), and payroll reports, receipts, and other documents from the attorney for Plato. (Dept. Ex. 8; T. 27) Caz’s payroll records, which were certified by Constantinos Zervas, as president of Caz. (Dept. Ex. 8A; T. 53-54, 91), listed the workers as asbestos handlers. (Dept. Ex. 8A; T. 29-30)

Initially, the checks the Bureau received did not indicate that they were cashed by the workers or cleared by the bank. (Dept. Ex. 8; T. 35-36, 41-42, 44-48, 92) Additionally, the payment affidavits received by the Bureau were not notarized. (Dept. Ex. 8; T. 31-32, 37) The Bureau investigator did not give Caz any credit for checks that did not evidence that they were cashed (T. 36, 42, 44, 48, 92), and created an audit calculating underpayments of \$60,884.14. (Dept. Ex. 11; T. 69)

In reliance on this audit, the Bureau Investigator served a Notice to Withhold on the Department of Jurisdiction (Dept. Ex. 13; T. 70-71). The Department of Jurisdiction acknowledged that it was withholding \$68,247.40. (Dept. Ex. 13-A; T. 71-72)

The Bureau Investigator subsequently received additional copies of payroll checks from Plato’s attorney reflecting payments to Caz’s workers. The Investigator used these checks to revise her audit to give Caz credit for these payments and recalculated the underpayments in the amount of \$38,336.72. (Dept. Ex. 17; T. 231-58)

CLASSIFICATION

Matthew Myers, Supervising Public Work Wage Investigator, testified as to the appropriate job classification for Caz’s workers on the Project. (T. 182-99) Mr. Myers’ responsibilities include determining job classifications for workers on public work projects that

are determined based on the nature of the work, collective bargaining agreements, historical work practice, jurisdictional agreements between organizations, case history with the Bureau, and jurisdictional agreements of the National Labor Relations Board. (T. 183-84) Mr. Myers testified that Caz's workers on the project were Roofers even though they removed asbestos and did not themselves replace the existing roof on this Project. (T. 184-187) Accordingly, all of the Caz workers on the Project are classified by the Bureau as Roofers. (T. 185; 186-87) Mr. Meyer opined that workers removing a roof are classified as Roofers, whether or not asbestos is involved. (T. 198) The applicable prevailing wage schedule supports this opinion since asbestos workers on a reroofing project are listed in the Roofer job classification. (Dept. Ex. 4; T. 195, 197)

Plato introduced into evidence an unauthenticated Mason Tender Agreement and the Memorandum of Understanding that were found on the internet and offered to show that Caz's employees should not be classified as roofers since the laborers have assumed jurisdiction over the type of asbestos removal and hazardous waste removal involved in this project. (Plato Ex. 3A & 3B; See T 260-261, 267, 269, 271-76, 281-82) Plato presented no witnesses to testify how the agreements are relevant to the determination of job classification in this case, or even to authenticate the documents. Mr. Myers testified to his review of the agreements claiming jurisdiction over removal of asbestos and hazardous material. (T 272) He testified that notwithstanding laborers claiming jurisdiction over asbestos work, the work on the Project removing roofing material – including hazardous material – is within the Roofer job classification. (T 272-78, 281-82) This is true even for a subcontractor hired solely to remove a roof. (T 277-78)

UNDERPAYMENT METHODOLOGY

Investigator Norma Leggio explained the methodology she initially employed to prepare the original audit in this case. (Dept. Ex. 10; T.78-90) After Investigator Leggio received bank checks from Plato's attorney reflecting payments to Caz's workers, she revised her audit. Investigator Leggio testified at the hearing as to her methodology she employed for the revised audit. (Dept. Ex. 17; T. 231-58)

The Bureau classified all of Caz's workers on the project as "roofer." (Dept. Ex. 10; T. 87) All of the workers were performing substantially the same job. (T. 87) The job was classified as

Roofer because the removal of asbestos material as part of replacing a roof is the work of a roofer. (T. 87, 272) The days and number of hours worked, which the investigator credited on the audit as time worked by Caz's workers, were taken solely from Caz's payroll records. (Dept. Ex. 8A; T. 80-83, 90) The investigator gave no credit to Caz for wage supplements because she did not receive any information from Caz, or anyone else, that Caz paid wage supplements for the workers on the project. (T. 86-87)

Caz's payroll records reflect an hourly rate of pay of \$38.65. (Dept. Ex. 8A; T. 91) The prevailing wage rate for a roofer in week ending November 23, 2008 according to the Prevailing Rate Schedule for Suffolk County is \$37.75, with an additional \$2.50 per hour after October 21, 2008, for a total of \$40.25 per hour. (Dept. Ex. 5, p. 1754; T. 79-80) Wage supplements due are \$22.62, for a combined total due of \$62.87 per hour. (Dept. Ex. 5, p. 1755)

In support of her audit, Investigator Leggio testified to her calculations for Nelson Lopez, Luis Diaz, and Wimper Briones as representative of her methodology. Nelson Lopez is listed on the payroll records as an "asbestos handler" with wages paid of \$38.65/hour. (Dept. Ex. 8A; T. 81-82) Ms. Leggio classified him as a roofer. (T. 79) For Nelson Lopez, week ending December 7, 2008, Caz's payroll record shows him working 22 hours, though the payroll does not indicate Caz paid Mr. Lopez overtime wages for Saturday work, which pursuant to the Prevailing Wage Rate Schedule should be paid at time and a half rate. (Dept. Ex. 5; T. 83) The investigator credited the amount shown on the payroll record, and the audit reflects an underpayment of wages for Saturday work. (Dept. Ex. 10; T. 83)

Luis Diaz is included on the certified payrolls for the first time in week ending November 23, 2008. (Dept. Ex. 8A; T. 84) The investigator transferred the hours shown on the payrolls to the audit. (Dept. Exs. 8A, 10; T. 84-85) The Investigator listed Mr. Diaz in the roofer classification. (Dept. Ex. 10; T. 87) On Saturday, December 6, 2008, Mr. Diaz worked 7.5 hours. (Dept. Ex. 8A; T. 85) The Investigator entered these hours into the audit and changed the straight time pay to overtime pay due. (Dept. Ex. 10; T. 85)

Investigator Leggio used the days and hours as listed in the payroll records for Wimper Briones and transferred these entries to the audit. (Dept. Ex. 8A, 10; T. 87-90) For Saturday, December 13, 2008, Caz's payroll records list Mr. Briones as working eight hours at regular time and three hours overtime. (Dept. Ex. 8A; T. 88-89) The Investigator changed those Saturday hours from straight time to all time and a half in her audit. (Dept. Ex. 10; T. 89)

For the remaining workers, the Investigator employed the same methodology in compiling her audit as she did for Messrs. Lopez, Diaz and Briones. (T. 90)

Upon receiving Caz's checks from Plato's attorney, the Bureau's investigator revised the audit to give credit to Caz for wages paid to workers on the Project. (Dept. Ex. 16; Plato Ex. 1C; T. 231-34, 238) She did this by comparing the payroll records with the dates of the checks for each worker. (T. 238)

Generally, the Bureau's investigator credited Caz for the payment of wages to its workers on the Project where she found checks dated ten days to two weeks after the week ending date, with the check memo line reading: "100 Suffolk." (Plato Ex. 1C; T. 237-48) However, if there was no signature of the back of the checks indicating the checks were cashed by the employee, the investigator did not credit those checks on the audit as payment to the workers. (T. 251-252)

Where there were no checks for a worker, the Bureau's investigator credited Caz with having paid that worker minimum wage. (T. 239-45, 248) The only exception was with respect to the complainant, Diego Alvarez, who stated in his complaint that he received no pay, and the audit reflects that Caz failed to pay Mr. Alvarez either the prevailing wages and supplements or the minimum wage. (Dept. Ex. 17; T. 240, 245) Mr. Diego is on the audit for only one day. (Dept. Ex. 16; T. 240)

Where there were checks but the person was not listed on the payroll records, the Investigator applied no credit to Caz on the audit for these payments. (T. 240)

WILLFULNESS

In the Notice of Hearing and in closing arguments the Department raised the issue that Caz willfully underpaid its workers on both projects. (Hearing Officer Ex. 1; T. 65) This inquiry into the willfulness of the underpayments 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 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]).

A review of the record indicates that the Department did produce the sub-contract documents for the subject project. (Dept. Ex. 7) This sub-contract does not indicate that Caz was informed in this document that the project was a public work project or what the prevailing rate of wages was for this project. However, the record does contain Payroll Reports prepared by Caz indicating that Caz was aware that it was required to pay prevailing wages and supplemental benefits to the employees. (Dept. Ex. 8A and 8B) The record indicates that these Payroll Reports were accepted by the Department as accurate with respect to the days and hours reported. (T. 80-83, 90) The Payroll Reports were false with respect to the payment of wages and supplemental benefits as determined by the Department through a comparison of the wages paid as represented in the payroll records with the checks provided to the Department by the Prime Contractor. (Dept. Ex. 16; Plato Ex. 1C; T. 231-234, 238) Constantinos Zervas, on behalf of Caz, certified that the payroll records were accurate and that supplemental benefits were paid to the employees in cash. (Dept. Ex. 8A) The statements on the Payroll Reports indicates that Caz was aware it was required to pay prevailing wages and supplemental benefits to its employees. I find this is sufficient to find that Caz’s failure to pay supplemental benefits was willful.

FALSIFICATION

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, 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 Caz failed to meet its obligation to maintain true and accurate payroll records. It is also clear from the record that such failure rises to the level of falsification as contemplated by this section of the Labor Law. It is clear that Caz indicated in its Payroll Reports for the Project that it paid prevailing wages and supplemental benefits to its employees when, in fact, as evidenced by the checks produced by the Prime Contractor (Plato Ex. 8A) it did not make such payments. I find, in light of the evidence set forth above, that Caz’s willful failure to pay or provide prevailing wages and supplemental benefits as indicated on the payroll reports involved the falsification of these payroll reports.

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, Caz is responsible for the interest on the aforesaid underpayments in the Project at the 16% per annum rate from the date of underpayment to the date of payment.

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.

The Department offered evidence indicating that Caz failed to cooperate in the investigation of the Project in that it failed to produce records that were requested by the Department on duly served requests. (DOL Ex. 2, T. 16). Additionally, the Department offered evidence indicating that Caz willfully falsified its payroll records to conceal its underpayment of prevailing wages and supplemental benefits to its workers. The Department produced substantial and credible evidence to support its request that the maximum civil penalty of 25% be assessed against Caz in both the Project.

LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor's failure to comply with, or evasion of, the provisions of Labor Law article 8. (Labor Law § 223; *Konski Engineers PC v Commissioner of Labor*, 229 AD2d 950 [1996], *lv denied* 89 NY2d 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 AD2d 331 [1989]). Caz performed work on the Project as a subcontractor of Plato. Consequently, Plato, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor, Caz, on this Project.

Plato submitted an affidavit made part of the record as Plato Ex. 8, in which it requests that, pursuant to 12 NYCRR § 221.1, any penalty assessed against Caz be waived insofar as it would normally apply to Plato under Labor Law § 223. The Department opposed this request and argued in its post-hearing brief that Plato failed to demonstrate that it made a good faith effort to assure that Caz complied with the Labor Law and that it is unlikely that Plato will be able to receive indemnification from Caz if restitution is made on its behalf. However, the Department requests that, while a civil penalty in the amount of twenty-five percent of the underpayment and interest be assessed against Caz and Constantinos Zervas, a civil penalty in the amount of ten percent is appropriate to be imposed against Plato.

I note that § 221.1(a)(1) – (6), six requirements, all of which must be met if the Commissioner is to waive the assessment of any penalty. Plato produced an affidavit from Themistokis Mpouroudis, president of Plato, wherein he deposes and says that: Plato provided Caz with the applicable prevailing wage rate schedule for the project; Plato attempted to ensure

that Caz complied with the requirements of the Labor Law, including receiving and reviewing Caz's certified payroll records; Caz has ceased operations as of November 2009 and is no longer in business; Plato paid Caz in full as required by the terms of the sub-contract; Plato fully cooperated with the Department's investigation of Caz; and Plato will be unable to receive indemnification from Caz for the amount to be paid by Plato in connection with the Department's investigation.

I find that Plato has established all of the factors set forth in the regulation and, therefore, any civil penalty against Plato is waived.

CONCLUSIONS OF LAW

Caz willfully underpaid \$ 38,336.72 to its workers for the audit period weeks ending 11/23/2008 to 2/15/2009; and

Caz falsified its payroll records in connection with that willful underpayment; and

Constantinos Zervas is an officer of Caz; and

Constantinos Zervas knowingly participated in the violation of Labor Law article 8.

On November 16, 2009, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction for direct withholding in the amount of \$100,000.00 and the Department of Jurisdiction has withheld \$68,247.40.

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

RECOMMENDATIONS

Based upon the default of Caz in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn testimonial and documentary evidence adduced at hearing in support of those charges and the sworn testimonial and documentary evidence adduced at hearing from Plato in opposition to 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 Caz underpaid its workers \$38,336.72 on the Project, PRC No. 2008001165; and

DETERMINE that Caz was responsible for interest on the total underpayment on the Project at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Caz to pay the prevailing wage or supplement rate on the Project was a “willful” violation of Labor Law article 8; and

DETERMINE that the willful violation of Caz in the Project involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Constantinos Zervas was an officer of Caz at the time Caz performed the work on the Project; and

DETERMINE that Constantinos Zervas knowingly participated in the violation of Labor Law article 8 in the Project; and

DETERMINE that Caz be assessed a civil penalty in the Department’s requested amount of 25% of the underpayment and interest due on the Project; and

DETERMINE that Plato is responsible for the underpayment and interest due on the Project pursuant to its liability under Labor Law article 8 and that pursuant to 12 NYCRR § 221.1, any penalty assessed against Caz be waived insofar as it would normally apply to Plato under Labor Law § 223 ; and

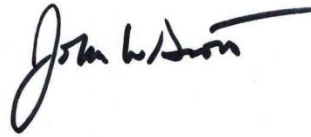
ORDER that the Department of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at: 160 South Ocean Avenue, 2nd Floor, Patchogue, NY 11772; and

ORDER that if the withheld amount is insufficient to satisfy the total amount due, Caz, 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: August 23, 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