

Office of the Comptroller v. Abbey Painting Corp.

OATH Index No. 2544/11 (June 26, 2012), *adopted*, Comptroller's Dec. (Aug. 2012),
appended

Contractor violated the Labor Law by failing to pay prevailing wages and supplemental benefits to six employees on four public work contracts and is liable for underpayments and interest. Based upon willful nature of underpayment, deliberate falsification of payroll records and kickback scheme, 25% civil penalty and five-year debarment are recommended.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
OFFICE OF THE COMPTROLLER
Petitioner
-against-
ABBEY PAINTING CORP. and SHAHZAD ALAM
Respondents

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

Petitioner, the Office of the Comptroller, brought this proceeding pursuant to section 220(8) of the Labor Law and Title 44, Chapter 2 of the Rules of the City of New York ("RCNY"). Petitioner alleges that in 2006 and 2007, Abbey Painting Corp. ("Abbey"), willfully failed to pay prevailing wages and supplements to six painters on four public work contracts and tried to conceal its underpayments by submitting falsified payroll documents and demanding kickbacks of wages and supplements from its employees. Petitioner contends that Shahzad Alam is an officer and the sole owner of Abbey who knowingly participated in the willful underpayments, falsification, and/or kickbacks. Petitioner seeks a recommendation of restitution to the workers, a civil penalty of twenty-five percent, and an order that Abbey and Mr. Alam are barred for five years from bidding on or being awarded any public work contract.

A hearing was held over six days. Petitioner presented three witnesses: its investigator, José Quiroz, and two employees who were allegedly underpaid, José Garate and Alberto Burgos. Essentially, petitioner's theory of its case was that Mr. Alam, on behalf of Abbey, issued checks

made out to his workers for prevailing wages and supplements, but did not actually give the workers their checks. Instead, petitioner contends, the workers were required, as a condition of employment, to endorse the back of the checks, which Mr. Alam kept. The workers were then paid in cash at the rate of \$100 to \$130 a day. All of the checks -- 143 checks issued over a 21-month period -- were cashed at one of three Atlantic Bank of New York branches in Queens, where Mr. Alam was a customer. Petitioner also introduced videotapes made by David Alvia, another of the complainant workers, purportedly showing Mr. Alam paying the workers in cash and having the workers endorse the back of the payroll checks.

Respondents contend that Mr. Alvia and the other complainants are lying, and that Mr. Alvia demanded money from Mr. Alam and when Mr. Alam did not pay, caused other workers to file false complaints in retaliation. In support of this claim, respondents introduced a copy of a recording of a telephone conversation between Mr. Alam and Mr. Alvia, as well as text messages received by Mr. Alam from Mr. Alvia. Respondents assert that the workers were paid prevailing wages and supplements by check, except on private, weekend jobs when they were paid cash. Their position is that the workers cashed their own checks. Because the workers did not have identification, sometimes Mr. Alam accompanied them to the bank to facilitate their cashing of the checks. On those occasions, Mr. Alam endorsed the back of the workers' checks when requested to do so by bank personnel.

Mr. Alam testified in his own behalf and presented three witnesses, Jesus Coello, Franklin Tisalema and Alexandra Laskari. Mr. Coello and Mr. Tisalema are former employees who testified that they worked on the government jobs in issue and were paid by check. Ms. Laskari is a manager at the 30th Avenue, Astoria branch of Atlantic Bank of New York, where 36 of the 143 checks were cashed. She testified that one or more employees of Abbey came into her branch weekly to cash their checks and that when they did not have identification, she telephoned Mr. Alam, a long-term customer, to obtain his approval to cash the checks, according to an arrangement the bank had worked out with Mr. Alam.

For the reasons below, the petition should be granted and respondents found liable for willfully failing to pay the prevailing rate of wages and supplemental benefits to six employees on four public work projects. I also recommend imposition of a 25% civil penalty and respondents' debarment for five years, because the underpayments were willful and because

respondents deliberately falsified their payroll records and required kickbacks from their workers.

ANALYSIS

Section 220 of the Labor Law provides that entities that contract with the City under public works contracts must pay their employees “not less than the prevailing rate of wages.” Labor Law § 220(3). See *Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 532 (4th Dep't 1983), *aff'd*, 63 N.Y.2d 810 (1984); *Office of the Comptroller v. Picone*, OATH Index No. 976-78/97 (Apr. 21, 1997), *rev. and remanded*, Comptroller's Dec. (June 17, 1997). The statute implements the constitutional mandate that contractors and subcontractors on public works projects pay their workers, laborers and mechanics no less than the rate of wages and supplements prevailing for the applicable trade or occupation in the locality where the project is located. N.Y. Const., art. I, § 17. The Comptroller, as “fiscal officer” for New York City, determines the prevailing wage and supplements on an annual basis. Labor Law § 220(5)(e).

This case involves four public work contracts between Abbey Painting and various agencies of the City of New York: contract 20050012452 with the Fire Department (Pet. Ex. 7), contract 20070013468 with the Administration for Children’s Services (“ACS”) (Pet. Ex. 8), contract 20070017662 with the Police Department (Pet. Ex. 9), and contract 20070017866 with the Fire Department (Pet. Ex. 10). The contracts all required payment of prevailing wages and supplements to painters, and included prevailing wage schedules (Quiroz: Tr. 323-27). Mr. Alam is Abbey’s President and sole owner (Tr. 7; Pet. Exs. 11a-c).

The Comptroller’s investigation of Abbey and Mr. Alam began when David Alvia filed a complaint in 2007. Investigator Quiroz, who is assigned to the Bureau of Labor Law, explained that the Comptroller’s initial audit was based solely upon Mr. Alvia’s complaint. However, when Mr. Alam rejected the audit and claimed that Mr. Alvia was lying, the Comptroller “reached out to other workers” (Tr. 388). José Garate, Luis Garate, and Alberto Burgos filed their complaints in late 2010 and early 2011. A worker named Mr. Sambrano also visited the Comptroller’s office and complained about the method of payment; however, Mr. Sambrano was not comfortable filling out a formal complaint and chose not to do so (Tr. 303-04).

The Comptroller reviewed certified payroll records, cancelled checks, quarterly income tax and unemployment tax returns submitted by Abbey (Pet. Exs. 13b, 13c, 13d, 13e, 13f), bank

records produced by Atlantic Bank of New York (Pet. Ex. 15Aa, 15b, 15c), employee complaints (Pet. Exs. 1a, 4a, 4b, 5a, 5b, 6), and videotapes presented by Mr. Alvia (Pet. Ex. 3a-f).

The Comptroller then prepared an audit, covering the multiple contracts from January 2006 through September 2007. The audit took the days, hours worked, and names of workers from the contractor's certified payrolls (Tr. 391; Pet. Exs. 13a-d). The audit assumed that the employees were paid in cash, in the amounts they claimed, rather than the amounts shown on the checks and in the certified payrolls. Thus, the audit concluded that respondents had not paid employees prevailing wages and supplements as shown on the payroll records but had instead paid them at a much lower daily or weekly rate (Tr. 391-97; Pet. Ex. 17). The audit found underpayments owing to the six workers named in the petition: David Alvia, Juan Alvia, Alberto Burgos, José Garate, Luis Garate, and Jorge Yopez, as well as to Mr. Tisalema and Mr. Coello (Tr. 388). However, Mr. Tisalema's and Mr. Coello's names were dropped from the audit after they came into the Comptroller's office, along with Mr. Alam and his attorney, and told the Comptroller that they were paid at the prevailing rate (Tr. 388-89).

A final audit was prepared showing underpayments to David and Juan Alvia, Mr. Burgos, José and Luis Garate, and Mr. Yopez. This audit included two individuals who had not filed complaints: Mr. Yopez and Mr. Coello. Mr. Yopez worked for a brief period of time with Mr. Burgos in August and September 2006 (Pet. Ex. 13a, 13b). Juan Alvia was David Alvia's father, according to Mr. Burgos (Tr. 264-65); he worked for just two days on April 30 and May 1, 2007 (Pet. Ex. 13d).¹ Investigator Quiroz testified that Mr. Yopez and Juan Alvia were included in the audit because of the evidence of the kickback scheme (Tr. 417-18).

The alleged underpayment amount, with interest, totaled \$174,343.16 (Pet. Ex. 17).

Documentary Evidence: Checks, Bank Documents, and Payrolls

Bank records showed that between January 20, 2006 and September 21, 2007, Abbey issued 143 checks to José Garate, Luis Garate, Jesus Coello, Alberto Burgos, Jorge Yopez, David Alvia, Juan Alvia, and Franklin Tisalema. The checks issued by Abbey were largely consistent with the amounts shown on its certified payrolls, with some exceptions.² From January 20, 2006

¹ Mr. Alam testified that he asked David Alvia if he knew of extra workers, so David brought Juan, who he said was his father. Subsequently, however, David denied that Juan was his father (Tr. 677-78).

² There are some checks that do not appear consistent with the payrolls. For example, two checks (2280 and 2281) were issued to Luis Garate on February 3, 2006, in the same amount, seemingly paying him double the amount

through May 19, 2006, the checks were consistent with the initial payrolls (Pet. Ex. 13d), which reflected payment of the correct prevailing wage but underpayments as to supplements. The supplement rate was \$17.91 an hour, but originally, Abbey had paid \$17.91 a week in supplements, rather than multiplying the rate by the number of hours worked (Pet. Ex. 13d). Mr. Alam testified that after an investigation by the Fire Department, initiated as a result of a complaint by Mr. Alvia, checks were re-issued for the difference (Tr. 748; Resp. Exs. E1-E5). Amended payrolls were also prepared showing the corrected payments (Pet. Ex. 13b). Beginning July 28, 2006 through the end of the year, the checks were consistent with payrolls showing the correct amount of supplements paid (Pet. Ex. 13b). From 2007 on, the checks were largely consistent with the 2007 payrolls (Pet. Ex. 13c).

All of the checks were cashed at one of three Atlantic Bank of New York branches in Queens (Pet. Ex. 15c). In response to the Comptroller's subpoena, the bank represented:

As per the branch where Abbey Painting's account was housed, an arrangement was made to allow employees of Abbey Painting (who were non customers of Atlantic Bank of New York) to cash their payroll checks at the Bank with ID. If ID was not presented, the owner would be contacted for verification.

(Pet. Ex. 15c). According to the bank records that were produced (Pet. Exs. 15a, 15c), multiple checks issued to different workers were often cashed at the same time. For example, on February 3, 2006, four checks dated February 3, 2006 were cashed at the Northern Boulevard branch of Atlantic Bank, two payable to Luis Garate, two payable to José Garate. Many times, as with the February 3, 2006 checks, there was a temporal proximity between the dates of the checks and the dates they were cashed. For example, there were four checks cashed June 29, 2007: one to Jesus Coello, dated June 24; two to David Alvia, dated June 24 and June 29; and one to Franklin Tisalema, dated June 29, 2007. There were four checks cashed on February 17, 2006, one each to Luis Garate and José Garate, and two to Jesus Coello. All but one of the checks -- to Jesus Coello -- were dated February 17. The other check was dated February 10.

However, this was not always the case. There were four checks cashed on February 27, 2006, to José Garate, Luis Garate, and Jesus Coello (2 checks). Three of these checks were dated February 17, 2006, ten days prior, while one check was dated February 24, just three days

shown on the payrolls for the week. On the same date, two checks (2282 and 2283) were also issued to José Garate. Each of these checks was for the identical amount. The total was double that shown on the weekly payrolls.

prior. Much bigger gaps are also found. For example, a check made out to Luis Garate, dated November 3, 2006, was cashed on December 1, 2006. On July 21, 2006, a check to Jesus Coello, dated May 21, 2006, was cashed. On January 23, 2007, two checks made out to Alberto Burgos were cashed: while one was dated January 19, the other was dated January 5. On February 2, 2007, two checks made out to Alberto Burgos were cashed, dated January 22, 2007 and January 10, 2007. On February 8, 2007, a check to Alberto Burgos, dated January 28, 2007, and a check to David Alvia, dated January 26, 2007, were both cashed. On May 11, 2007, there were three checks cashed: two to Alberto Burgos, dated April 13 and May 10, and one to David Alvia, dated April 13. On May 14, 2007, two checks dated April 20, 2007, issued to David Alvia and Alberto Burgos, were cashed.

The biggest gap is found in a check to Jesus Coello, dated October 21, 2005, but not cashed until July 10, 2006.

Additionally, there are several dates that are significant both because of the gap between the date that the checks were cashed and the date of the checks, and because of the volume of checks cashed on that date. On September 22, 2006, at the 30th Avenue branch of Atlantic Bank, there were ten checks cashed: six to Alberto Burgos, three to Jorge Yepez, and one to Luis Garate. The checks to Mr. Burgos were dated August 18, August 25, September 1, September 8, September 15 and September 22, 2006. The checks to Mr. Yepez were dated September 1, 8, and 16, 2006. The remaining check to Mr. Garate was dated September 22, 2006.

Similarly, on October 27, 2006, there were nine checks cashed at the 30th Avenue branch. Of these, five checks were issued to Alberto Burgos, dated September 29, October 6, October 13, October 20, and October 27. Four checks were issued to Luis Garate, dated September 29, October 20, October 23, and October 27.

On June 22, 2007, there were five checks cashed at the Ditmars branch of Atlantic Bank. Of these, two were issued to Jesus Coello, dated May 4 and June 17; one was issued to Franklin Tisalema, dated June 15; and two were issued to David Alvia, dated June 5 and June 17, 2007.

Regarding the checks themselves, the vast majority had two endorsements on the back, the signature of the worker to whom the check was issued, and the signature or initials of Mr. Alam (Alam: Tr. 732, 733, 734), or in a few cases, the printing "Abbey Painting Corp." (Pet. Ex. 15a, checks 2300 and 2301). Respondent's counsel asserted, and petitioner's counsel did not challenge, that 40 of the 143 checks, however, were endorsed only by the employee payees: José

Garate (3 checks), Luis Garate (8 checks), David Alvia (18 checks), and Alberto Burgos (11 checks) (Tr. 843). My review of the evidence (Pet. Ex. 15a), however, showed that there were 53 checks endorsed only by the individual workers. These 53 checks included eight checks issued to Luis Garate, two checks to Jose Garate, eight checks to Jesus Coello, nine checks to Alberto Burgos, 18 checks to David Alvia, one check to Juan Alvia, and seven checks to Franklin Tisalema.³ Check 2678, addressed to Mr. Burgos, has not only his signature on the back, but also the words, “resident alien,” and what looks to be an identifying number and an expiration date. The vast majority of the single-endorsed checks were cashed at the Ditmars branch of Atlantic bank. Only two checks were cashed at the Northern Boulevard branch, one issued to Luis Garate, cashed on April 14, 2006, and the other issued to Mr. Burgos, cashed on February 28, 2007. Only six single-endorsed checks were cashed at 30th Avenue, where Ms. Laskari worked, and all on the same date, October 27, 2006.

Almost all of the checks contain the initial of bank personnel at the different branches, written either on the back of the check or the front (Laskari: Tr. 775, 796). This is the case for checks containing two endorsements as well as for checks containing one endorsement (Pet. Ex. 15A).

Complainant Statements, Videotapes and Testimony

Petitioner’s case rested on both documentary evidence and complainant statements and testimony. The complaints all allege that Mr. Alam paid in cash but required the workers to endorse the back of the paychecks which they were not permitted to keep.

Mr. Alvia filed his complaint on October 12, 2007 (Pet. Ex. 1a, 1b).⁴ He did not testify at trial, telling Investigator Quiroz over the telephone that he is out of the country (Tr. 301). Mr. Alvia personally met with the investigator who had the case prior to Investigator Quiroz (Tr. 309). Luis Garate was also out of the country at the time of the trial (Tr. 301).

³ These checks are as follows: Luis Garate (2288, 2306, 2336, 2338, 2341, 2472, 2478, 2484), Jose Garate (2289, 2305), Jesus Coello (2226, 2715, 2725, 2792, 2794, 2802, 2820, 2827), Alberto Burgos (2469, 2471, 2477, 2483, 2598, 2634, 2678, 2663, 2676); David Alvia (2666, 2675, 2679, 2698, 2716, 2720, 2726, 2731, 2736, 2745, 2746, 2751, 2757, 2761, 2775, 2778, 2793, 2788); Juan Alvia (2674), and Franklin Tisalema (2699, 2732, 2721, 2734, 2752, 2776, 2779).

⁴ Mr. Alvia wrote his complaint in Spanish (Pet. Ex. 1A); the Comptroller’s office then translated it into English (Pet. Ex. 1B; Tr. 291, 291).

In his complaint, Mr. Alvia alleged that Mr. Alam made him sign “blank checks,” which were made out to “the actual quantities,” while paying him only \$100 or \$110 a day in cash. Mr. Alvia contended that Mr. Alam reported paying him at the rate of about \$50 an hour -- \$33 an hour plus benefits of about \$17 an hour (Pet. Ex. 1b at 9, 5, 6). Mr. Alvia wrote that he “found out” about this through “the inspector” and complained, but Mr. Alam said there was “no proof” so Mr. Alvia “decided to film videos,” which he sent to the Comptroller (Pet. Ex. 1b at 9).

Mr. Alvia further alleged that Mr. Alam said that if he did not sign the blank checks, Mr. Alam would not pay him and “there would be no more work” for him (Pet. Ex. 1b at 9). He wrote that he wanted “justice to be done” and his salary “to be paid as it should be.” Although he was “a little afraid of doing this,” he was “not well” and had a “need” for the money (Pet. Ex. 1b at 10).

Although Mr. Alvia did not explain how he discovered that Mr. Alam was falsely reporting the workers’ salaries, Mr. Alam testified that Mr. Alvia had complained to an inspector at a Fire Department job site in 2007, leading to a review of his “paperwork” and a finding that he was underpaying prevailing supplemental benefits. Mr. Alam testified that he corrected the error by issuing checks for the underpayments (Tr. 648, 649, 671).

The videos submitted by Mr. Alvia to the Comptroller consist of five separate videos, on a single disc, designated as follows: Pet. Ex. 3a (0607-2007); 3b (1609-2007); 3c (1909-2007); 3d (2007-2007); 3e (2107-2007), and 3f (2809-2007). Exhibit 3a shows an unidentified person being presented with two rectangular-shaped documents to sign on the back of a clipboard, near a white van with the words, “Abbey Painting” on it. The documents are consistent in size with checks that have been folded over in two. While the images on the videotape are sometimes shaky, the videotape shows that a person is signing the two documents and then reveals that Mr. Alam is the person holding the clipboard and that he is standing in front of the Abbey Painting van (Pet. Ex. 3a).

Exhibit 3b shows a man standing in front of a firehouse, recognizable from the fire truck parked inside. The man is shown in profile, so it is hard to see his face.

Exhibit 3c seems to show the same location, and shows one man handing the other man a bank envelope, marked “NY Commercial Bank.” This person’s face is not clearly depicted in the videotape. David is written on the front of the envelope. The man receiving the envelope opens

it and counts bills, including one \$100 bill that is visible. The denominations of the other bills can not be seen from the video. The man holding the envelope then says, "\$550."

Exhibit 3d shows Mr. Alam sitting behind a desk in an interior room. There is wooden molding around the floor and doorways and plaster molding near the ceilings. There are also two boxes piled on a table with "GILDAN" printed on them in large blue letters. Mr. Alam says to someone, "David Alvia, A-l-v-i-a, right?" and a voice responds, "Yes, David Alvia."

Exhibit 3e also showed Mr. Alam sitting behind a desk in an interior room. The location is different as there is a dropped ceiling and much more fluorescent lighting. There are also posters on the wall, including one of a doctor and a child. A discussion is heard between Mr. Alam and someone else who identifies himself as "Alvia" and says that he would like money because he is trying to send money and there is a Western Union downstairs. Mr. Alam picks up a pile containing several bank-sized envelopes. He selects one of the envelopes and hands it to the person, who takes it. On one side of the envelope, there are handwritten notations: "770," "7 days," and "David." The person says, "7 days," "That's how much I get." The person is then shown standing in front of an elevator door, opening the envelope, and saying, "In 7 days. 770 days. 7 dollars." He then says, "Let me count it," and proceeds to count the bills, all of which are depicted in the videotape and appear to equal \$770. Then he says, "\$770 for 7 days."

Exhibit 3f shows an outside location. The nature of the location can not be discerned from the video. A man's hand is shown holding an envelope which says, "David" and "9 days." He opens the envelope and counts the bills. There are some smaller denominations as well as some \$100 bills, but the precise amount of money in the envelope is difficult to discern.

Following receipt of Mr. Alvia's complaint in 2007, petitioner's investigator sent a letter to all of Abbey's employees regarding the investigation (Tr. 413). Nobody came forward at that time (Tr. 413-14). Petitioner's primary witnesses, José Garate and Alberto Burgos, filed complaints with the Comptroller dated December 28, 2010 (Pet. Exs. 4a, 5a). José Garate also wrote and signed a complaint in the name of his brother, Luis Garate, dated January 15, 2011 (Pet. Ex. 6).⁵ José acknowledged that he filled out Luis's complaint and signed Luis's name because Luis was in Ecuador and unable to get a visa to return to the United States (Tr. 48, 64).

⁵ Mr. Burgos and Mr. Garate submitted complaint forms from the Comptroller's office that had questions translated into Spanish. Mr. Burgos completed most of his form in Spanish (Pet. Ex. 4a); thus petitioner submitted a copy of his complaint translated into English (Pet. Ex. 4b). Similarly, although José Garate completed his form and Luis's

All of the complaints allege that the workers were paid in cash: Mr. Burgos at \$650 per week (Pet. Ex. 4a at 4), Luis Garate at \$120 per day (Pet. Ex.6 at 5), and José Garate at \$125 per day (Pet. Ex. 5A at 4). Moreover, all of the complaints contain identical language in the “additional comments” section on page six:

The employer do [sic] not let me take a break. Very arrogant. Every week he presented me a check for my salary but he forced me to sign the back of the check and exchanged for cash. I objected and [he] told me if I do not sign the check I will lose the job

(Pet. Exs. 4a at 6; 5a at 6; 6 at 6).

José Garate testified that because he is not fluent in English, his tax preparer helped him fill out the “additional comments” by translating his answer from Spanish into English and writing it down (Tr. 43). His teenage daughter helped him fill out the remainder of the form, also by translating his answers from Spanish into English (Tr. 39-42). He copied this portion of the form onto Mr. Burgos’s complaint form because Mr. Burgos did not understand how to fill it out (Garate: Tr. 128; Burgos: Tr. 182, 183, 231).⁶

José Garate and Mr. Burgos testified about the kickbacks through a Spanish-speaking interpreter. Both testified that Mr. Alam paid their salary in cash on a weekly basis yet required them to sign the back of checks. Mr. Garate testified, “He [Alam] had checks but I was never able to see them” (Tr. 23). Instead, Mr. Alam “would just have me sign the back . . . He had a clipboard, and he would have the check put on there, and would have me sign it” (Tr. 24). While Mr. Alam never showed him the front of the check, Mr. Garate knew he was signing the back of a check because it had an endorsement area and was the size of a check (Tr. 24). Mr. Alam would not let him keep the checks and Mr. Garate did not know what Mr. Alam did with them. Mr. Alam would pay in cash, but Mr. Garate did not recall whether Mr. Alam put the cash in an envelope (Tr. 120, 124). This happened every payday (Tr. 79). He was paid at different locations (Tr. 101, 123-24). He never went to the bank to cash a paycheck with anybody else who worked for Abbey (Tr. 32, 124).

form in English, the questions were still in Spanish, so petitioner submitted a copy of a blank complaint form with questions written in English (Pet. Ex. 5b).

⁶ Initially Mr. Burgos testified that Luis Garate helped him fill out the complaint form (Tr. 182); later, however, he testified that José helped him fill out the form (Tr. 231). It appears that Mr. Burgos simply confused the brothers.

Mr. Garate was shown Exhibit 3a, and said the video showed the way that Mr. Alam presented him with checks to sign (Tr. 76). The van in the video was the same van that Mr. Alam used to pick him and his brother up near Northern Boulevard and 96th Street in Queens, to drive them to work. Mr. Alam would have them sign the checks at that time (Tr. 78, 100). Sometimes he would ask them to sign the back of the checks inside the van, other times outside the van (Tr. 78).

Mr. Garate testified that he saw the employees with whom he worked being paid the same way -- paid in cash and made to sign the back of checks. He said he worked with only two or three other employees: his brother Luis, Mr. Burgos, Elio, and Elio's nephew, Pedro (Tr. 29). However, he later recalled Tito Santos (Tr. 103), and when asked about Jesus Coello, said a man from Honduras was there when Mr. Alam handed out the cash (Tr. 201). Further, the payroll records show that he worked with Mr. Yopez from August 28, 2006 through September 17, 2006 (Pet. Ex. 13b). Mr. Garate denied knowing Mr. Tisalema or Mr. Yopez (Tr. 102). He never went to the bank with Mr. Coello (Tr. 180). He had a checking and savings bank account of his own at Citibank (Tr. 25).

Mr. Burgos, like Mr. Garate, testified that Mr. Alam required him to sign the back of checks, above the line for the endorsement; the check was always presented to him on a clipboard and Mr. Alam always kept the check (Tr. 147, 157, 159, 160, 230). He said the videotape, Exhibit 3a, portrayed the way that he was made to sign checks (Tr. 207, 208, 215). Mr. Alam gave him cash after he signed the back of the checks; the cash would be in a yellow bank envelope with his name written on the outside (Tr. 147, 251-53). He was paid every Friday (Tr. 156). The rate of pay never changed (Tr. 157).

Mr. Burgos also testified that he worked with other employees, including Luis and José Garate and Mr. Alvia. However, the only person who was present when he was paid was Mr. Alvia, and that was just on one occasion (Tr. 177, 264). At that time he saw Mr. Alvia sign his check on the clipboard; then Mr. Alvia was paid in cash (Tr. 171, 264). Mr. Burgos signed his check at the same time that Mr. Alvia signed his (Tr. 171). Mr. Burgos did not see any other employee signing checks on the clipboard this way (Tr. 260). He was never present when Luis Garate was paid and never worked with Mr. Tisalema (Tr. 179).

Both Mr. Garate and Mr. Burgos testified that they did not work on private jobs, except one Saturday spent painting Mr. Alam's house (Garate: Tr. 26-28; Burgos: Tr. 249). Mr. Garate

said he worked on firehouse stations and police precincts in 2006 (Tr. 21, 25) and Mr. Burgos said he painted firehouses and precincts in 2006 and 2007 (Tr. 154, 161), along with “government offices” (Tr. 248). Mr. Garate said he did not know if Abbey did private jobs in 2006 and 2007 (Tr. 119), then he said that he thought other workers might have done private jobs (Tr. 120), and finally, he said he had “no idea” if Mr. Alvia did any private work for Abbey (Tr. 120).

Both employees testified that Mr. Alam told them they had to accept this method of payment if they wanted to keep their jobs. Mr. Garate testified that he asked Mr. Alam about it once. “I did ask one time, and he said that’s how he paid. And that if I wanted to work, that was the way to do it” (Tr. 25). Mr. Garate found this odd, unfair, and wrong (Tr. 33, 106, 122). However, he complied with Mr. Alam’s situation because he did not have any other work and he “needed to work” (Tr. 25).

Mr. Burgos testified similarly. “I did say once why he didn’t just give it [the check] to me and he said that’s how he paid and if I wanted to work there then I would keep doing it that way with that pay. And since there was no other job, I just kept working like that” (Tr. 160). He gave a virtually identical answer on cross-examination. “. . . I asked him to show me the check. And he said he paid that way and if I didn’t like it [I] could leave the job. And . . . since there wasn’t work, I would take it” (Tr. 210).

Both Mr. Garate and Mr. Burgos acknowledged receiving a Form W2, wage and tax statement, in 2007 showing income for 2006 that far exceeded what they earned from Mr. Alam (Garate: Tr. 45, 115, Pet. Ex. 5A; Burgos: Tr. 27, 190, 240; Pet. Ex. 4A). Mr. Garate said that he did not file a complaint at that time because he did not know how. Although his daughter spoke English, she was only a teenager. He did not think about asking anyone at his bank for help (Tr. 118). When asked why he had not taken some action when he saw the W-2, Mr. Burgos testified that he “didn’t know what was going on” (Tr. 241). Both denied that Mr. Alvia was responsible for their filing complaints. Mr. Garate denied knowing Mr. Alvia or being told by Mr. Alvia to file his complaint (Tr. 119). Mr. Burgos denied ever discussing Abbey’s method of payment with Mr. Alvia, or ever getting any text message from Mr. Alvia regarding payments (Tr. 210, 212, 240). He acknowledged that he was born in the same country as Mr. Alvia and had been responsible for getting Mr. Alvia his job with Mr. Alam (Tr. 169-70, 211).

José Garate said he got the complaint form from Mr. Sambrano, a friend (Tr. 35, 36, 108), but later testified that he got the form from another friend, Mr. Santos, who got it from Mr. Sambrano (Tr. 111). Mr. Burgos vacillated over whether it was Mr. Sambrano (Tr. 181, 223, 224) or José Garate (Tr. 231, 233) who gave him the form. He said that Mr. Santos told him that the pay was unfair and that they could do something about it (Tr. 117).

Respondents' Case

Mr. Alam denied paying the workers in cash on public jobs and cashing their paychecks. He testified that from 2005 through 2008, Abbey worked on both private and public work jobs. The city jobs were Monday through Friday and he paid by check every Friday, once the work was done (Tr. 617, 619, 620). He paid on the site and generally would pay the workers together (Tr. 620). He denied ever having employees endorse or sign the checks (Tr. 718, 719).

According to Mr. Alam, some of his employees asked him to take them to the bank to get their checks cashed. One of the bank branches was open late, until 7:00 p.m. on Fridays (Tr. 639). The workers would also travel on their own to the bank (Tr. 621). Mr. Alam denied that he ever cashed their checks. All he did was transport the workers to the bank (Tr. 624). However, sometimes he would go into the bank with them, because he was also on the payroll and needed to cash his own check (Tr. 625, 627). Because the employees sometimes did not have identification, the bank would ask that he sign the checks to verify their identification (Tr. 625, 627, 729). He stressed that employees at Atlantic Bank knew him, because he had an account there, and they told him that if employees did not have identification, he should sign the back of their paychecks (Tr. 729). But the bank always gave the money to the workers, never to him (Tr. 637, 729). He never cashed a check at the bank without an employee being there (Tr. 729, 730). The workers who went to the bank included David Alvia, Jesus Coello, Franklin Tisalema, Luis Garate, and Alberto Burgos (Tr. 637, 638). He never asked any of the workers to give him cash from their paychecks (Tr. 638), and none of his workers ever complained to him about how much they were paid (Tr. 623). He did not recall whether Ms. Laskari, the bank manager at the 30th Avenue branch, ever telephoned him about employees wanting to cash checks (Tr. 822).

Further, Mr. Alam denied ever having any employee sign a paycheck at the jobsite and then taking the paycheck to the bank to get it cashed (Tr. 639). Asked about the first video (Pet.

Ex. 3a), he acknowledged seeing someone endorsing the backs of two checks on a clipboard (Tr. 715), but said he did not issue those two checks and did not know who did (Tr. 715, 716).

Regarding private jobs, Mr. Alam testified that his company painted offices on Saturdays and Sundays (Tr. 642). David Alvia, Jesus Coello, Luis Garate, and Franklin Tisalema all worked on private jobs. He paid for private work at the rate of 100 to 120 dollars per day, and put cash in an envelope prior to handing it to the workers. Mr. Alam said that he did not keep a payroll record or register for these private jobs, because they were too small (Tr. 813). He testified that the video showing him handing out cash (Pet. Ex. 3e) was for a private job (Tr. 720). He also said that the notation on the envelope for “david, 770, 7 days,” referred to paying David Alvia \$770 for seven days of work (Tr. 720).

Mr. Alam acknowledged that both the original (Pet. Ex. 13b) and the amended payroll records for 2006 (Pet. Ex. 13b) contain his signed certification that they are correct. However, although the amended copies were filled out after the original payrolls, the date on the certifications is identical. For example, on both sets of payroll reports for February 13-February 19, 2006, the certification is dated February 17, 2006 (Pet. Exs. 13b, 13d). When asked about this, Mr. Alam initially had no explanation, insisting to opposing counsel that he should instead concentrate on the amounts written on the payrolls (Tr. 751, 752). On re-direct, he said that the Fire Department told him to put the same date on the payrolls (Tr. 821).

Mr. Alam also testified that Mr. Alvia had asked him to be paid in cash and he had refused as he only pays in cash on private jobs (Tr. 673). After that, Mr. Alvia’s attitude changed; he wanted Mr. Alam to fire him so he could claim unemployment insurance benefits (Tr. 674). Mr. Alam did not fire him, but Mr. Alvia left on his own and filed for unemployment insurance benefits. Mr. Alam did not find out promptly about the unemployment insurance claim since Mr. Alvia had put the old address for Abbey Painting on his claim forms (Tr. 676).

Mr. Alam testified that he got text messages from Mr. Alvia as well as a telephone call, which he recorded, asking him for money. There are multiple text messages (Resp. Ex. G). The first, sent on November 4⁷ at 8:58 p.m., says ““by western union 8000.” The second, sent on November 4 at 9:26 p.m., says “send western union can u reply.” The third, sent on November 4 at 9:29 p.m., says, “I need this fast also write ur full name.” The fourth, sent November 5 at 6:56 p.m., says, “if u are going to send please send the amount in 2 parts im not going to talk anymore

⁷ The text messages do not indicate the year that they were sent.

bye.” The fifth, and final text message, sent November 12 at 2:54 p.m., says “If u wanna talk” and then provides a phone number (Resp. Ex. G).

Mr. Alam testified that he and Mr. Alvia did not talk for a few months after that, but then Mr. Alvia called him. Respondent introduced a recording of the telephone conversation (Resp. Ex. F), which is mostly audible. Mr. Alvia tells Mr. Alam that he did not know that “they” would take Mr. Alam’s license. Mr. Alvia says all he wants is his money, and that if Mr. Alam pays him “by the law,” he will not be in court and there will not be enough witnesses. Mr. Alam asks Mr. Alvia for a letter saying that he will drop the case and that it is wrong. Mr. Alvia says he needs his money first and that “they” are asking him to get three more videos. Mr. Alam says he needs to talk with his attorney first. Mr. Alvia says that if Mr. Alam wants to go to court, Mr. Alvia will be there and that “they” are asking him for two more witnesses. Mr. Alvia says he doesn’t want this to continue, he did not think “they” would take Mr. Alam’s license, and he did not expect this. Mr. Alam repeats that he wants Mr. Alvia to write a letter, saying that Mr. Alvia made a mistake and he is dropping his case. Mr. Alvia says he is “just trying to fix this.” Mr. Alam says again that he wants to talk to his attorney. Mr. Alvia says again that he is just trying to fix this and refers to there being “more” if Mr. Alam goes to court (Resp. Ex. G).

Mr. Alam provided an affidavit to the Comptroller (Pet. Ex. 14), dated November 5, 2008, in which he said that Abbey has paid “all employees by check since its incorporation on June 18, 1999,” except during the week of December 22, 2006, when it paid Luis Garate \$569.30 in cash for two days work, because Mr. Garate had been injured on the job and had requested cash payment as he could not get to a bank to cash his check.

Former employees Franklin Tisalema and Jesus Coello testified that Mr. Alam paid them by check on public jobs, and in cash on private, weekend jobs. Mr. Tisalema, who is currently unemployed, testified that he worked for Abbey for about ten years, including 2007. He recalled being paid on Fridays and said he was handed his paycheck at the bank (Tr. 515). However, he acknowledged having told the Comptroller’s office when interviewed previously that Mr. Alam would give him a paycheck in his car (Tr. 516). One or two times he was handed the check in a cafeteria (Tr. 517). Mr. Alam never presented him with a check on a clipboard to sign (Tr. 472), and he never saw employees signing the backs of checks (Tr. 513).

Regarding the times he went to the bank, Mr. Tisalema testified that there were “many times” when he went to the bank with Mr. Alam to cash his check because he needed the money

(Tr. 516). They went to the bank together and he would ask Mr. Alam “to go ahead and sign the check” (Tr. 460). Mr. Tisalema also signed the check at the bank. Mr. Tisalema was inconsistent when asked who he recalled going to the bank with, other than Jesus Coello, who he clearly remembered (Tr. 461, 462, 503). Asked how often the other workers would accompany Mr. Alam to the bank, he testified that for Mr. Coello, “it was on Fridays” (Tr. 521). For Mr. Burgos and Mr. Alvia, it was “some of the time” (Tr. 421). Mr. Tisalema testified that he never saw a bank employee giving cash back to Mr. Alam (Tr. 463).

Mr. Tisalema testified that he had his own account at HSBC and sometimes he would deposit or cash his paychecks at HSBC (Tr. 506). When advised by petitioner’s counsel that the Atlantic Bank records had shown that none of his paychecks from Abbey were deposited or cashed at HSBC, Mr. Tisalema said, “It doesn’t change. The thing is that I don’t remember. There were times when I did deposit at my bank, and there were times when I needed the cash. So I would tell Mr. Harvey [Mr. Alam] to cash it” (Tr. 507).

Regarding payment on the private weekend jobs, Mr. Tisalema said he was given cash in a bank-sized envelope (Tr. 465, 466; Resp. Ex. B). He was paid \$110 or \$120 per day for the private jobs. The pay envelope would be for the number of days worked: it could be two or four days, sometimes even seven, if it was a large job (Tr. 497-98). His name, the amount of cash, and the number of days worked would be written on the envelope (Tr. 457). He was never given cash envelopes in firehouses or precincts, only in offices (Tr. 483, 522).

Mr. Coello also testified that he got paid in cash for the private jobs on Saturday or Sunday. Mr. Alam would hand them the cash in envelopes, which would show the number of days worked (Tr. 536). The workers would not be paid during the first weekend that they worked; rather, Mr. Alam would wait until the following weekend to pay them (Tr. 534, 536, 537, 564, 566).

Mr. Coello testified that he worked for Abbey Painting from 2005 to 2010 (Tr. 529). Like Mr. Tisalema, he said that Mr. Alam paid for work on government jobs by check. When he got his check he also saw other employees getting their check (Tr. 546). He would take the train to cash his check at Atlantic Bank when he was done with work (Tr. 531), although “a few times” Mr. Alam took “the whole group” working at Abbey to the bank and dropped them off (Tr. 532, 550). Mr. Coello testified that David, Luis, and Franklin Tisalema cashed their checks on Friday night many times (Tr. 550, 586). Mr. Coello further testified that sometimes workers

would not have their identification so Mr. Alam would have to talk to the manager (Tr. 533, 551). The employee then got his money; no one ever complained about not getting money (Tr. 533).

However, Mr. Coello later contradicted himself, testifying that he never saw Mr. Alam go to the bank with David, Franklin, or Luis (Tr. 586), and that Mr. Alam “maybe sometimes” went to the bank with him (Tr. 586).

Mr. Coello said he recalled going to the Comptroller’s office with Mr. Alam and Mr. Alam’s attorney, and giving a signed statement (Tr. 552). He recalled writing in that statement that his co-workers were David, Franklin, and Luis and that they were also paid by check, and then writing, “I don’t know if someone gave the check back to the owners because they were cashed in the bank every Friday without the owner. I saw them when they cashed their checks at Atlantic bank” (Tr. 553; Pet. Ex. C1, C2).

Regarding that written statement, Mr. Coello testified, “I don’t know why I wrote that. . . I did write that, but I thought that was going to stop right there. I didn’t think I was going to be in a courtroom talking for this long” (Tr. 559).

Mr. Coello denied having an account at Citibank in 2006 and 2007 (Tr. 559). However, he acknowledged writing in his statement to the Comptroller, “I would receive the check by the owner of the company in my Citibank account” (Tr. 560; Resp. Ex. C1).

Mr. Coello denied that employees signed their checks at firehouses, prior to Mr. Alam going to the bank to get the money in cash to pay the workers. He never saw Mr. Alam leave the firehouse on a Friday by himself and return with bank envelopes for the workers (Tr. 533).

Mr. Alam also presented the testimony of Alexandra Laskari, the branch manager at the 30th Avenue branch of Commercial Bank, formerly Atlantic Bank. Ms. Laskari, who was accompanied by an attorney for the bank, testified that she has worked at the bank for 26 years and was the branch manager in 2005 and 2006 (Tr. 7676, 769). She confirmed that Mr. Alam has been a customer of the bank for years. She recalled employees of Abbey Painting coming into the bank to cash checks, although she did not recall exactly who they were, since it was “a long time ago” (Tr. 770). As indicated in the statement the bank provided to the Comptroller, the bank had a “verbal arrangement” with Mr. Alam which permitted his employees to cash paychecks there, even if they were not Abbey customers. If the employees did not have identification, the bank would contact Mr. Alam or someone else at Abbey Painting (“Mr.

John”)⁸ over the telephone and get approval to cash the check (Tr. 774). The bank would rely upon what Mr. Alam or Mr. John said. In that case, Ms. Laskari might put her initials on the check to show that it could be cashed (Tr. 776; Pet. Ex. 15a – check 2469, showing her initials on the back of a check payable to Mr. Burgos).

Ms. Laskari said that the bank follows this practice with other companies as well. If the owner of the company is present at the bank, and an employee does not have identification, the bank would ask the owner to sign, or initial the back of the check, “in order to make valid the check and for the bank to cash it” (Tr. 780). The owner -- here, Mr. Alam -- would not be permitted to cash a check with just the employee’s signature (Tr. 775). However, if both he and the employee had endorsed the check, either could cash it (Tr. 808).

Ms. Laskari testified that she did not know for certain what happens at other branches (Tr. 789-90). She also acknowledged that where there is a general endorsement on a check -- meaning the check has been endorsed on the back -- the bearer of the check is permitted under banking law to cash it without identification (Tr. 786). However, although Mr. Alam is a long-term customer who the bank would try to accommodate (Tr. 787), she would not permit him to cash a check if the only signature on the rear was the employee’s (Tr. 774).

Ms. Laskari testified that there were a “few” employees who cashed checks (Tr. 789), but then said she could not say if there were “several” employees (Tr. 806). “I don’t remember if it was three, four, ten. I see employees come in” (Tr. 806). “I can not say several. Like I told you, maybe one or two or three or 100, but it was in [sic] weekly basis” (Tr. 806). Subsequently, when asked if it was more than one person each week who came in to cash a check, she testified, “Yes, I think it was one or more” (Tr. 807). She did not recall if it was a particular day of the week (Tr. 807).

Assessing the Conflicting Evidence

The essence of petitioner’s case is that Mr. Alam issued paychecks to his workers for prevailing wages and supplements (with the exception of the checks in 2006 which underpaid supplements) but did not permit his workers to keep the checks. Rather, he made the workers endorse the checks on the back and he paid the workers in cash at illegally low rates of pay.

⁸ Ms. Laskari did not explain who Mr. John was.

The evidence as to the kickback/falsification was in part documentary, in part testimonial. Factors to be considered in assessing the credibility of the witnesses include their demeanor, the consistency of their testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience. *See Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

With the exception of Investigator Quiroz and Ms. Laskari, all of respondents' witnesses had a financial stake in the outcome of this proceeding. Mr. Alam risks debarment for five years and the payment of substantial restitution and a civil penalty. Mr. Garate and Mr. Burgos stand to gain tens of thousands of dollars in restitution, as do the complainants who did not testify, including Mr. Alvia. Mr. Tisalema is currently unemployed and acknowledged that he might like to work for Mr. Alam again (Tr. 496). Similarly, Mr. Coello has a job now, but might like to work for Mr. Alam in the future (Tr. 548-49).

That said, I found Mr. Garate and Mr. Burgos to be generally credible witnesses, whose testimony was largely corroborated by the documentary evidence, including the videotapes submitted by Mr. Alvia and the bank checks and records. Both testified without hesitation that Petitioner's Exhibit 3a, the videotape, depicted how Mr. Alam made them sign the back of their paychecks. Both testified that they were not permitted to keep these checks and were instead paid in cash. And both said that when they asked Mr. Alam why, he said that was how he paid and they needed to go along with it if they wanted to work. Thus, they continued to endorse the back of the checks so they could keep their jobs. This presented an entirely plausible scenario, consistent with the common-sense notion that a day laborer would do what was required in order to maintain employment.

Additionally, José Garate's testimony corroborated the allegations in his brother Luis's complaint. While José Garate completed and signed Luis's complaint on Luis's behalf, the evidence established that he had an ample basis for doing so. José testified that he worked at the same jobsites with Luis, indeed that Mr. Alam had transported both of them to work. José said that he saw his brother signing checks and giving them back to Mr. Alam and also saw Luis receiving cash payments from Mr. Alam. Further, he credibly testified that he spoke with Luis over the telephone about filing a complaint over "unfair wages" paid by Abbey (Tr. 54).

Additionally, the certified payrolls (Pet. Exs. 13b, 13d) corroborate José's testimony that he worked with Luis in 2006.

Along similar lines, Mr. Burgos testified that he saw Mr. Alvia signing the back of paychecks, albeit only once, which corroborated the allegations in Mr. Alvia's complaint. The certified payrolls (Pet. Ex. 13d) are consistent with this testimony, showing that Mr. Burgos worked with Mr. Alvia from January 2007 through September 2007, including on the ten weekend days in June and July 2007 that Mr. Alvia listed in his complaint (Pet. Ex. 1b). Mr. Burgos also worked with Mr. Yopez and Mr. Alam from August 28, 2006 through September 17, 2006 (Pet. Ex. 13b).

Respondents' counsel stressed that Mr. Alvia filed his complaint in October 2007, while Mr. Burgos and Jose Garate did not file their complaints until the end of 2010, and Luis Garate did not file his complaint until January 2011. Counsel posits that the delay in filing diminishes the reliability of José Garate's and Mr. Burgos's testimony and suggests that they were unduly influenced by Mr. Alvia. Counsel further contends that Mr. Garate and Mr. Burgos must have realized something was wrong if they were forced to sign the back of checks but not actually given the checks, and that any uncertainty would have been removed when they received wage and tax statements in 2007 showing earnings from Abbey far in excess of what they actually earned (Tr. 841, 851).

Counsel has a point but it only goes so far. Neither Mr. Burgos nor Mr. Garate are fluent in English, and neither presented as particularly sophisticated people. Moreover, as day laborers, it is likely that both had an interest in securing future work with Mr. Alam and Abbey Painting, should it become available. It appears that they did not file their complaints until spurred to do so by Mr. Santos and/or Mr. Sambrano, despite having received wage and tax statements in 2007 showing higher income than they received. I credited Mr. Garate's testimony that he did not know how to file a complaint, as well as Mr. Burgos's testimony that he was perplexed and "didn't know what was going on." Consistent with this testimony, Mr. Garate and Mr. Burgos testified that they had some help filling out the complaint forms in 2010. Mr. Garate said that his tax preparer and teenage daughter helped him fill out the form, and that he helped Mr. Burgos complete his complaint form.

Both Mr. Burgos and Mr. Garate denied that Mr. Alvia was responsible for their filing their complaints with the Comptroller. I credited their testimony, particularly that of Mr. Garate.

There is no basis to believe that Mr. Garate and Mr. Alvia were particularly close. While Mr. Burgos acknowledged knowing Mr. Alvia and having helped Mr. Alvia get his job with Mr. Alam, Mr. Garate's assertion that he did not know Mr. Alvia was credible. The certified payrolls, which Mr. Alam prepared (Pet. Exs. 13b, c, d) show that Mr. Alvia began working for Abbey in January 2007 and worked with Mr. Alam, Mr. Tisalema, Mr. Burgos, and Mr. Coello through September 2007. By contrast, Jose and Luis Garate worked in 2006 (Pet. Exs. 13b, d). Indeed, had Mr. Garate and/or Mr. Burgos been particularly close with Mr. Alvia, it is more plausible that they would have filed their complaints around the same time that Mr. Alvia did, rather than several years later.

Counsel notes that Mr. Alvia sent text messages to Mr. Alam asking for money and that he told Mr. Alam on the telephone that if Mr. Alam paid him, he would not appear in court and there would not be enough witnesses. In the same telephone conversation Mr. Alvia said that if Mr. Alam wanted to go to court, "they" were asking him for two more witnesses. Given this conversation it is plausible that, after Mr. Alam did not pay Mr. Alvia, Mr. Alvia continued to cooperate with the Comptroller's office by attempting to get additional employees to come forward with complaints against Mr. Alam.

Yet this is beside the point. Even if Mr. Alvia had asked Mr. Burgos and/or Mr. Garate to file complaints against Mr. Alam, this does not mean that Mr. Burgos and Mr. Garate lied in their complaints and trial testimony about how Abbey paid them on city jobs. As will be discussed, the bank evidence, albeit circumstantial, as well as the videotapes, strongly support Mr. Burgos's and Mr. Garate's testimony.

Respondents further assert that Mr. Alvia's complaint should be disregarded because of his demands for money from Mr. Alam. I disagree. The telephone call between Mr. Alvia and Mr. Alam is consistent with Mr. Alvia's allegation that Mr. Alam underpaid him on city jobs and required him to endorse the back of checks which he was not permitted to keep. Indeed, Mr. Alvia appeared to reference the prevailing wage law, albeit indirectly, in his call, stating that he did not know that Mr. Alam could lose his license (debarment) and that all he wanted was for Mr. Alam to pay him "by the law" (the prevailing wage law).

Respondents' counsel posits that Mr. Alvia made the videos because he was angry that Mr. Alam would not pay him "off the books" (Tr. 598), no doubt relying upon Mr. Alam's testimony that he refused to pay Mr. Alvia in cash, as the latter had requested. Perhaps Mr.

Alvia was angry, because he wanted to quit and collect unemployment, while Mr. Alam insisted upon issuing paychecks on the public work jobs. It is plausible that this may have spurred Mr. Alvia to shoot his videotapes, in addition to learning from a Fire Department inspector that Mr. Alam was reporting wages paid to Mr. Alvia far in excess of what was actually paid. But Mr. Alvia's motivation in shooting the videos is irrelevant absent some proof that the videos were fabricated or altered. Mr. Alam offered no such proof.

Counsel further contends that Mr. Alvia's unemployment filing was inconsistent with his claim that he was only being paid \$100 or \$110 a day in cash. Counsel asserts that Mr. Alvia's unemployment benefits were based upon the income he reported, that he received \$405 a week in benefits, and that this benefit amount is consistent with a much higher income (Tr. 601; Resp. Ex. D). However, as petitioner's counsel noted (Tr. 602-03), Abbey filed federal unemployment tax returns in which it reported the amount of wages, tips, and compensation paid to each of its employees. Abbey specifically reported the gross wages or distribution paid to Mr. Alvia, as well as the total unemployment tax that was withheld (Pet. Ex. 13f).

It is undisputed that the payrolls, as corrected, show the payment of prevailing wages and supplements, that checks were issued consistent with the payrolls, and that 143 checks issued to eight different workers were cashed at the Atlantic Bank of New York, where Mr. Alam and Abbey had their account. That fact alone is problematic since three of the workers, Mr. Garate, Mr. Tisalema, and Mr. Coello, had their own bank accounts, at Citibank and HSBC, but did not deposit or cash a single paycheck into their own accounts.

Further, Mr. Alam testified that he took the workers to an Atlantic bank branch on Friday nights, because it was open late, so they could cash their checks even if they did not have identification. Mr. Tisalema, similarly, said he was paid on Fridays and sometimes handed his paycheck at the bank, and that Mr. Coello accompanied Mr. Alam to the bank on Fridays. Although he later denied it, Mr. Coello said that he, Mr. Alvia, José Garate, and Mr. Tisalema cashed their checks on Friday nights many times. However, the bank records show that on 11 occasions in 2006 and 18 occasions in 2007, checks were cashed on days other than Fridays (Pet. Ex. 15c).⁹ The checks that were cashed on these non-Fridays included checks issued to José and

⁹ Exhibit 15c lists the dates that the payroll checks were cashed. The 2006 non-Friday dates listed are February 27, March 20, April 3, April 20, May 8, July 10, July 31, August 7, August 14, September 21, and December 27, none of which were Fridays. The 2007 non-Friday dates listed are January 23, February 5, February 8, February 17,

Luis Garate, Mr. Coello, Mr. Burgos, David Alvia, Juan Alvia, and Mr. Tisalema. Mr. Alam offered no explanation for why checks would be cashed on other weekdays or, on four occasions in 2007 (February 17, March 31, April 7, and July 28) on a Saturday.

Moreover, in many instances, detailed above, there were large gaps between the dates written on the checks (the issue dates) and the dates they were cashed. On September 22, 2006 alone, there were six checks cashed, all issued to Mr. Burgos, which were issued every week beginning August 18. There were three checks cashed on the same date, all issued to Mr. Yopez, going back about three weeks. It is implausible that an unskilled day laborer would want to or be able to wait this long to receive his salary.

Additionally, it is undisputed that the majority of these 143 checks contained both the signature of the individual worker and the signature of Mr. Alam. This fact is troubling, because Ms. Laskari acknowledged that Mr. Alam would be permitted to cash any of these double-endorsed checks, even if the worker to whom the check was issued was not present at the bank. Thus, as to the double-endorsed checks, her testimony was consistent with petitioner's theory that Mr. Alam cashed the paychecks, not the workers.

Even as to the checks that were only endorsed by a worker, Ms. Laskari acknowledged that the Banking Law would permit the bearer of the check to cash it, even if he were not the person to whom the check was issued.

Regarding the videotapes, Mr. Alam acknowledged that Petitioner's Exhibit 3a showed somebody signing the back of two checks on a clipboard. The videotape revealed that Mr. Alam was holding the clipboard and that he was standing in front of the Abbey Painting van. Both Mr. Garate and Mr. Burgos testified that this was the way that they were made to sign their paychecks and that they were subsequently paid in cash. Mr. Alam did not really explain the videotape, apart from saying these were not his checks and he did not pay employees two checks, only one a week (Tr. 716). When asked whether one of his employees endorsed the two checks, respondent said he could not see a face in the videotape, so he did not know (Tr. 716). This answer utterly failed to explain why an unknown person would be signing checks on his clipboard. When asked if it was possible that one of his employees would sign two checks on a clipboard, Mr. Alam appeared to focus on the number of checks, replying, "I've never given

February 28, March 20, March 29, March 31, April 7, May 14, May 16, May 24, July 16, July 25, July 28, August 9, August 28, and September 10.

them two checks. Every week, there is one check, and they sign on one check only” (Tr. 708). This was a curious answer because it fell far short of a whole-hearted denial that he forced employees to sign the back of their checks on a clipboard, without permitting them to keep the checks. Only when asked the follow-up question, whether he forced his employees to sign in front of him, did Mr. Alam say he did not (Tr. 708).

Mr. Alam also did not suggest that Petitioner’s Exhibit 3e, which showed him handing out a bank envelope filled with cash to Mr. Alvia, was fabricated. Instead, his explanation as to that videotape, and the other videotapes showing bank envelopes made out to “David” (Pet. Exs. 3c, 3f) was that he paid in cash on private, weekend jobs. Indeed, respondents’ counsel suggested that Exhibit 3e, which shows a dropped ceiling, fluorescent lighting, and an elevator, had to have been shot on a private job, since, he argued, these characteristics were not consistent with a firehouse, nor a police precinct (Tr. 846). However, although counsel urged me to take “judicial notice” that firehouses do not have elevators, this is not a fact of which judicial or official notice may be taken. It is possible that some firehouses or police precincts have elevators, dropped ceilings, and fluorescent lighting. *See* 48 RCNY § 1-48 (a) (Lexis 2012) (“In reaching a decision, the administrative law judge may take official notice, before or after submission of the case for decision, on request of a party or *sua sponte* on notice to the parties, of any fact which may be judicially noticed by the courts of this state”); *Dollas v. W.R. Grace & Co.*, 225 A.D.2d 319, 320 (1st Dep’t 1996) (official or judicial notice may be taken of matters “of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof”).

Moreover, although much of Abbey’s work was done at police precincts or firehouses, and both counsel focused on these worksites, one of the public work contracts at issue was with ACS (Pet. Ex. 8). According to the certified payrolls (Pet. Ex. 13c), Mr. Alvia worked on the ACS contract for a total of ten weekend days in June and July 2007, at 345 Adams Street, Brooklyn. Official notice can be taken that 345 Adams Street is an office building whose tenants include ACS. *See Dep’t of Correction v. Rodriguez*, OATH Index No. 277/06 at 10 n.2 (Mar. 27, 2006) (official notice taken of information on federal agency website).¹⁰ Thus, it is plausible that

¹⁰ A n e-mail was sent to counsel for the parties on April 20, 2012, notifying them of my intent to take official notice of this fact. E-mail to Constantine Kokkoris and Stephen Hans, dated April 20, 2012.

Exhibit 3e, showing Mr. Alam handing out cash in an envelope, depicts the interior of 345 Adams Street, the site of one of the public work jobs.

As compared to the two complainants who testified, respondent and his two former employees were less credible. As just discussed, respondent failed to give any explanation of Exhibit 3a, showing an individual signing the back of two checks on his clipboard. And despite his assertion that he paid in cash only on private weekend jobs, respondent submitted an affidavit to the Comptroller on November 5, 2008, which, remarkably, omitted any mention of this purported fact. Instead, the affidavit said Abbey paid “all employees” by check except for on one occasion when it paid Luis Garate in cash for two days’ work at the latter’s request. Respondent acknowledged that his previous attorney had drafted the affidavit which he signed (Tr. 724). When asked why he did not state in the affidavit that Abbey paid cash on private jobs, Mr. Alam replied that he did not have an answer and would have to talk to his lawyer (Tr. 726). On re-direct examination the next trial day, he testified that he did not mention the private jobs because the affidavit was only intended to address the city jobs (Tr. 818). This explanation was not compelling given the broad language in the affidavit that Abbey has paid “all employees” by check except during the two-day period when it paid Luis in cash.

Mr. Alam had no documentary evidence of paying on private jobs, as he testified that he did not keep a payroll record or register. Nor did he testify, even in generalities, about what private jobs he worked on during this time period. Moreover, his testimony that he paid in cash on private weekend jobs was difficult to reconcile with the videotape evidence showing that he paid Mr. Alvia in cash for seven days at a time (Pet. Ex. 3e), and also showing bank envelopes with “David” on the front of the envelope for 9 days worth of pay (Pet. Ex. 3f) and for \$550 (Pet. Ex. 3c). It is fair to infer that “David” means David Alvia, and that the envelope for \$550 was for five days of pay, since Mr. Alvia alleged that he was paid \$100 or \$115 a day. Just as it is implausible that a day laborer would be willing or able to wait many weeks before cashing their paychecks, it is implausible that a day laborer would be able to wait three or more weekends before receiving their pay. Yet unless the videotapes were fabricated -- which was not alleged -- Mr. Alam was paying in cash for five, six, or even seven days at a time. If, as Mr. Alam insisted, he was paying in cash only for weekend work, a worker might have to wait a month before being paid. This was unlikely.

Mr. Alam's testimony concerning the bank was strikingly at odds with Ms. Laskari's, the bank manager at the 30th Avenue branch. Mr. Alam testified that many times he would transport his workers to the bank on Fridays; sometimes he would go into the bank with the workers, including Mr. Alvia, Mr. Coello, Mr. Tisalema, and Mr. Burgos, and the bank would ask him to endorse the checks because the workers did not have identification. Mr. Alam said he did not recall whether Ms. Laskari ever called him on the telephone about employees wanting to cash checks. By contrast, Ms. Laskari testified that one or more bank employees would come into the bank to cash their checks, without identification, and that she would call Mr. Alam or Mr. John to verify their identity. She said nothing about Mr. Alam coming into the bank with a number of employees. She could not recall how many employees of Abbey Painting came into the bank to cash their checks, ultimately concluding it was "one or more." The disparity in their testimony casts doubt upon Mr. Alam's assertion that he accompanied multiple employees to the bank on Fridays and double endorsed their checks at the request of bank personnel.

Additionally, Mr. Alam's testimony that the bank asked him to endorse the back of the checks of workers who did not have identification does not explain why he double-endorsed the checks of José Garate, Mr. Tisalema, and Mr. Coello, who had their own bank accounts and thus would have had some sort of identification. Nor does it explain why he double endorsed the check of Mr. Burgos, who had a resident alien number, written on the back of one check below Mr. Burgos's signature (Pet. Ex. 15a, check number 2678). Likewise, Mr. Alam's testimony that he endorsed the checks when he accompanied workers to the bank on Fridays fails to explain what happened on the numerous non-Fridays that checks were also cashed.

Beyond this, Mr. Alam's testimony did not explain what happened on February 27, 2006, a Monday, when four checks were cashed at the Ditmars branch, two endorsed by Mr. Coello and Mr. Alam, and two endorsed only by José and Luis Garate, respectively. According to Mr. Alam, he would have accompanied Mr. Coello to the bank and double-endorsed the checks to Mr. Coello at the request of the bank. It follows that the bank would have also asked Mr. Alam to double-endorse José and Luis Garate's checks, but their checks are single-endorsed. It is difficult to explain this under respondent's theory of the case. The more likely scenario is that Mr. Alam came into the bank by himself and the bank cashed all the checks as a courtesy to him. Similarly, Mr. Alam's testimony about accompanying workers to the bank did not explain October 27, 2006, a Friday, when five checks to Alberto Burgos and four checks to Luis Garate

were cashed at the 30th Avenue branch. On that date only one check to Mr. Burgos and one check to Mr. Garate were double-endorsed; the remainder were single-endorsed (Pet. Ex. 15a).

The testimony of Mr. Coello and Mr. Tisalema was riddled with inconsistencies and was not credible. Most tellingly, Mr. Tisalema testified that he would sometimes deposit or cash his paychecks at HSBC. This was untrue, since all of the Abbey Painting paychecks were cashed at Atlantic Bank. This called into question the remainder of Mr. Tisalema's testimony.

Additionally, although Mr. Tisalema testified that he got his paycheck at the bank on Fridays, he told the Comptroller's office previously that he got his paycheck in the car. This is consistent with Mr. Garate's testimony that Mr. Alam would sometimes have him and Luis sign their paychecks inside the Abbey Painting van.

Mr. Tisalema testified that he went to the bank many times with Mr. Alam to cash his check, yet his choice of language as to who cashed the check suggested that sometimes he would cash the check with Mr. Alam and sometimes Mr. Alam would cash the check by himself. For example, he testified, alternatively, "Sometimes, we would cash it at the bank" (Tr. 459); "I will go with him to the bank . . . and he would cash it" (Tr. 513); and ". . . sometimes, I would receive my check, and because I have things to do, other times, if I needed it immediately, he would cash it at the bank" (Tr. 515).

Further, Mr. Tisalema's testimony about how many other employees he went to the bank with was inconsistent and not entirely coherent. For example, he testified that he recalled three or four employees going to the bank, but he did not remember their names, other than Jesus (Tr. 462). He said that he did not recall Mr. Alvia going to the bank with Mr. Alam (Tr. 461). Later in his testimony, however, Mr. Tisalema acknowledged telling the Comptroller's office previously that he, Mr. Alvia, Mr. Burgos, and Mr. Coello all went to the bank with Mr. Alam to cash their checks (Tr. 509, 517). When asked if Mr. Burgos or Mr. Alvia would go to the bank by themselves, he said, "Yes, correct" (Tr. 521); when the question was asked one more time, he said, "I don't remember" (Tr. 522).

Like Mr. Tisalema, Mr. Coello testified untruthfully at trial, denying that he had an account at Citibank in 2006 and 2007 despite acknowledging in a statement to the Comptroller that his paychecks from Abbey would be "received" into his Citibank account. His prior statement was also false, since all the Abbey paychecks were cashed at Atlantic Bank. As the heart of petitioner's case is that Mr. Alam cashed his employees' paychecks rather than give

them the checks, Mr. Tisalema's statement about checks going into his Citibank account was not only false but appeared deliberately calculated to assist his former employer of ten years. Mr. Coello's testimony that "maybe" he had deposited checks from another company into his Citibank account (Tr. 560) appeared closer to the truth, particularly when considered with his acknowledgement that he did not know that he would be under oath at trial and did not want to lie (Tr. 560, 574, 575).

Further, Mr. Coello said that he was paid on Fridays and went to the bank to cash his check since it was open late. While consistent with Mr. Alam's testimony about dropping off the workers at the bank on Friday night, or accompanying them into the branch, Mr. Coello's testimony failed to address what happened when his checks were cashed on a day other than Friday.

Mr. Coello was also inconsistent about whether Mr. Alam came into the bank when he and the other workers cashed their checks, or whether the workers cashed their checks by themselves. He testified on direct examination that Mr. Alam sometimes took "the whole group" working at Abbey to the bank; he testified on cross examination that Mr. Alam did not come with him to the bank (Tr. 551), but then testified that he "never said never" and that Mr. Alam may have come with him "possibly" more than once (Tr. 552); and, finally, on re-direct examination, said he never saw Mr. Alam go to the bank with the workers. In short, his testimony was so contradictory on this point that it was virtually worthless.

Moreover, Mr. Coello was defensive when questioned about a prior statement in which he said he saw workers cashing their checks by themselves and that he did not know whether the workers ever gave the checks "back to the owners." His testimony that he thought giving the written statement would end the matter and that he did not know that he would have to testify suggests that he may not have been scrupulously honest in providing the prior statement.

Finally, Mr. Coello's testimony suggested that he was not paid for six or seven days of weekend work at a time, despite the videotapes that show payment in cash for five, six or seven days of work. When asked how he was paid on the weekends, Mr. Coello testified that he would be paid in cash, sometimes for two weekends at a time (Tr. 566). On these occasions he would be paid for four days work on the second weekend he worked (Tr. 566). Mr. Coello said that he never got paid for seven weekends in a row (Tr. 566). On re-direct, however, Mr. Coello was asked if he ever worked for six days, over three weekends, and then got paid; he replied, "Yes"

(Tr. 568-69). That answer seemed a calculated response to the question that was asked, and thus less reliable than Mr. Coello's original testimony that he was paid on the second weekend for weekend work.

Despite the documentary and testimonial evidence that it is more likely than not that Mr. Alam required his employees to endorse their checks but did not in fact give them the checks, Ms. Laskari testified that she recalled one or more employees of Mr. Alam coming into the bank to cash their checks. However, it was not clear that Ms. Laskari recalled what in fact happened in 2006 and 2007. She noted that this was "a long time ago" and she fluctuated wildly in her estimation of how many employees came into the bank, at one point saying that there were anywhere from one to a hundred people, and ultimately concluding that it was "one or more" person. And while she testified that this happened on a weekly basis, she did not recall if it was the same employee every week.

Moreover, Ms. Laskari's testimony was strikingly at odds with Mr. Alam in that she never testified that Mr. Alam accompanied employees to the bank, and instead testified that she telephoned Mr. Alam for his verbal authorization to cash a check, which Mr. Alam said he did not remember.

Additionally, Ms. Laskari's testimony that bank policy would have permitted Mr. Alam to cash double-endorsed checks is fully consistent with petitioner's theory that Mr. Alam required employees to endorse their paychecks and then cashed them himself, since 89 of the 143 checks cashed at Atlantic Bank were double-endorsed.

Finally, while Ms. Laskari testified that she would not have permitted Mr. Alam to cash checks that he had not endorsed, only six of the 53 double endorsed checks were cashed at her branch, all on October 27, 2006. 46 of these checks were cashed at the Ditmars branch. Ms. Laskari admitted that she did not really know what happens at other branches. As for October 27, 2006, nine checks were cashed that day, seven of which had only Mr. Burgos's or Luis Garate's signature, and two of which were double-endorsed (check 2465, endorsed by Mr. Alam and Luis Garate, and check 2466, endorsed by Mr. Alam and Mr. Burgos). Ms. Laskari acknowledged that Mr. Alam was a long-term customer whom the bank tried to accommodate. She also acknowledged that once a check is endorsed, the Banking Law permits the bearer of the check to cash it. It is more likely than not that Mr. Alam was present in the bank on October 27 as his signature was on two of the checks. Despite Ms. Laskari's testimony that she would not

have permitted Mr. Alam to cash checks that he did not endorse, it is plausible that she permitted Mr. Alam to cash all the checks despite Mr. Garate and Mr. Burgos not being present in the bank, as an accommodation or favor to a long-term customer.

Conclusions

In sum, although the evidence is conflicting, a preponderance of the credible testimonial and documentary evidence establishes that it is more likely than not that Mr. Alam, the President and sole owner of Abbey Painting, issued checks to his workers for prevailing wages and benefits,¹¹ required the workers to endorse the back of the checks but did not permit them to keep the checks, and instead paid them in cash at much lower daily or weekly rates. As all of the 143 checks were cashed and Mr. Alam maintained possession of the checks, the only reasonable inference to be drawn is that either Mr. Alam or someone acting on his behalf cashed the checks. *See Ridings v. Vaccarello*, 55 A.D.2d 650, 651 (2d Dep't 1976) ("In order to prove a fact by circumstances, there must be positive proof of some fact which . . . affords a reasonable inference of its existence . . . it must then appear that the inference drawn is the only one that is fair and reasonable"); *see also Dep't of Sanitation v. Rivera*, OATH Index No. 2056/09 at 5 (June 4, 2009), *adopted in part, modified in part*, Comm'r Dec. (June 22, 2009) ("to establish a fact in issue by circumstantial evidence, the inference sought to be drawn must be based on proven facts . . . [and] must be reasonably taken from the proven collateral facts").

By so doing, Mr. Alam engaged in a kickback scheme. Labor Law section 220-b(3)(b)(1) provides for a five-year debarment upon a single determination that a contractor willfully failed to pay prevailing wages and supplements while engaging in "the kickback of wages or supplements," but does not define what a "kickback" is. Nor is the term defined elsewhere in Article 8 of the Labor Law, which covers public work. However, within Article 6 of the Labor Law ("payment of wages"), section 198-b provides:

198-b. "Kick-back" of wages prohibited

2. Whenever any employee . . . shall be entitled to be paid or provided prevailing wages or supplements pursuant to article eight or nine of this chapter, it shall be unlawful for any person . . . to request, demand, or receive, either before or after such employee is engaged, a return, donation or contribution of any part or all of said

¹¹ This is apart from the initial 2006 checks on which supplements were underpaid.

employee's wages, salary, supplements, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment.

Labor Law § 198-b(2). By issuing checks to the workers and requiring them to endorse their checks, Mr. Alam demanded a return of part of their wages, with the understanding that if the employees did not cooperate, they would lose their jobs. Thus, his actions constituted a “kickback” under the Labor Law, even though the workers were never permitted to keep their paychecks and thus never received prevailing wages and supplements.

This interpretation is consistent with federal and state case law interpreting the predecessor kick-back statute, Penal Law section 962. *See People ex rel. Falzia v. Meyer*, 167 Misc. 287 (City Magistrate’s Court of NY, NY Co. 1938) (paying complainants in cash with pay envelopes that indicated the prevailing wage on the outside but contained less than the prevailing rate constituted a kickback, even though workers never received the full amount of the prevailing wages owed). The Court rejected the contention that taking away part of the wages due did not constitute a “kick-back” because this money was never in the possession of the employees. “[A]s long as . . . the employee is deprived by the employer of a part of the prevailing wage agreed upon, irrespective of the *modus operandi* employed to effectuate such a result, the prohibition of the statute has been disregarded.” 167 Misc. at 291. *See also Marques Enterprises v. Secretary of Labor*, 1993 U.S. Dist. LEXIS 9199 (E.D. Pa. 1993), *aff’d*, 30 F.3d 1487 (3d Cir. 1994) (federal anti-kickback act was violated when an employer demanded that his employees endorse checks for back wages back over to the company upon threat of making future deductions from their pay).

The fact that respondent falsified his payrolls and issued paychecks to show payment of prevailing wages and supplements yet cashed the paychecks and paid his workers much less money in cash is ample evidence of a willful violation of the prevailing wage law. *See Office of the Comptroller v. Jetstream Maintenance Corp.*, OATH Index No. 997/11 at 5-6 (Jan. 24, 2011), *adopted*, Comptroller’s Dec. (Apr. 28, 2011); *Office of the Comptroller v. Kelly’s Sheet Metal, Inc.*, OATH Index No. 266/08 at 8 (Dec. 28, 2007); *Office of the Comptroller v. A & R Paterno Construction, Inc.*, OATH Index No. 2248/00, at 9-10 (Oct. 19, 2000); *see generally Hull-Hazard, Inc. v. Roberts*, 129 A.D.2d 348, 352 (3rd Dep’t 1987), *aff’d*, 72 N.Y.2d 900

(1988) (prevailing wage violation is willful when where employer “knew or should have known” of the underpayments).

Moreover, petitioner’s audit reasonably calculated the amount of underpayments. A contractor on a public works job is required to keep and maintain accurate payroll records and to produce them upon request of the Comptroller. Labor Law § 220 (3-a) (a) (iii). Where, as here, the contractor fails to keep accurate records of wages and supplements actually paid, the fiscal officer may calculate back wages by using the best evidence available. *See Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 821 (3d Dep’t 1989) (“When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence. . . In such a situation the amount and extent of underpayment is a matter of just and reasonable inference and may be based upon the testimony of employees”); *Office of the Comptroller v. Jetstream Maintenance Corp.*, OATH 997/11 at 4 (“the audit . . . , which took into account the available information as well as the complainants’ statements, provides a reasonable estimate of the amounts due to the three complainants”); *see generally Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

Thus, petitioner should be required to pay restitution to the six individuals named in petition and audit. Petitioner’s audit calculated the interest due on the underpayment at a rate of 16% through August 3, 2010 (Pet. Ex. 22a). That calculation should be updated to include additional interest until payment is tendered. Labor Law § 220(8); *Jetstream Maintenance Corp.*, Comptroller’s Dec. at 1; *Kelly’s Sheet Metal, Inc.*, OATH. 266/08 at 8; *Office of the Comptroller v. Kallo Building Construction Co., Inc.*, OATH Index No. 868/97 at 5 (Mar. 11, 1997).

Additionally, section 220(8) of the Labor Law permits a civil penalty of up to 25% of the total underpayments to be imposed for prevailing wage violations. The factors to be considered are “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 or other nonwage requirements.” Labor Law § 220(8). Abbey Painting was formed in 1987 and has an annual gross income of between \$100,000 and \$499,999, with one to nine employees working in New York City (Pet. Exs. 11a, 11b, 11cc). In 2006 and 2007, 90 to 95 percent of Abbey’s work was public work (Alam: Tr. 812; Pet. Ex. 12). More significantly, Abbey and its President, Mr. Alam, flagrantly and willfully violated the prevailing wage law, falsifying payroll

records and engaging in a kickback scheme. Hence, the maximum civil penalty of 25%, as requested by the Comptroller, is appropriate. See *Jetstream*, OATH 266/08 at 5; *Kelly's Sheet Metal*, OATH 266/08 at 9.

Finally, petitioner has sought a finding that respondents, including Mr. Alam individually, be debarred for a period of five years from bidding on future public work contracts within New York State. That request is also appropriate. Section 220-b(3)(b) of the Labor Law provides three separate and independent bases for debarment: willful violations on one or more public work projects; falsification of payroll records; and the kickback of wages and supplements. Here, all of these bases are satisfied. Respondents willfully underpaid prevailing wages and supplements on four different public work contracts, falsified payroll records, and engaged in a kickback scheme. Thus, respondent Abbey Painting, and Mr. Alam individually, should be barred under Section 220-b(3)(b) from bidding on future public work contracts within New York State for five years.

FINDINGS AND CONCLUSIONS

1. Respondents failed to pay prevailing wages and supplemental benefits to six employees on four public work projects, listed in the audit, in violation of section 220 of the Labor Law.
2. The six complainants are entitled to additional interest, at the annual rate of 16%, until payment is tendered.
3. Respondents' violation of the prevailing wage law was willful.
4. Respondents deliberately falsified its payroll records to conceal the underpayment of prevailing wages and supplemental benefits.
5. Respondents demanded the kickback of wages and supplements from the complainants by requiring them to endorse the back of their checks and then cashing the checks.
6. Due to the gravity and flagrancy of respondents' violation of the law, the maximum civil penalty of 25% of the total underpayment should be assessed.
7. Respondent Abbey Painting Corp. and respondent Shahzad Alam, the President and sole owner of Abbey Painting, should

be barred from bidding on future public work contracts within New York State for five years.

RECOMMENDATION

For the reasons stated above, I recommend that the petition should be granted.

Faye Lewis
Administrative Law Judge

June 26, 2012

SUBMITTED TO:

JOHN C. LIU
Comptroller

APPEARANCES:

CONSTANTINE KOKKORIS, ESQ.
Attorney for Petitioner

STEPHEN D. HANS, ESQ.
Attorney for Respondents

THE COMPTROLLER OF THE CITY OF NEW YORK

-----X

In the Matter of the Complainant

OATH Index No. 2544/11

Against

ABBEY PAINTING CORP. and SHAHZAD ALAM

For violations of Labor law Section 220, et. seq.

- -----X

-

ORDER AND DETERMINATION

WHEREAS:

The Comptroller’s Bureau of Labor Law (“Petitioner”) brought proceedings, pursuant to Labor Law §220, et seq. to determine whether respondent Abbey Painting Corp. and Shahzad Alam (“Respondents”) paid the prevailing rate of wages to six (6) employees, David Alvia, Juan Alvia, Alberto Burgos, Jose Garate, Luis Garate and Jorge Yepez, who worked on one or more projects under public works contracts at the Fire Department, Administration for Children’s Services and at the Police Department.

Honorable Faye Lewis, Administrative Law Judge (“ALJ”) of the Office of Administrative Trials and Hearings (“OATH”) conducted a six day hearing on February 6 - 10 and 27, 2012. ALJ Lewis issued a Report and Recommendation dated June 26, 2012.

NOW:

After reviewing the ALJ’s Report and Recommendation and relevant portions of the record and exhibits thereto, and due deliberation having been had thereon, pursuant to the powers and duties vested in me by the Comptroller under Labor Law §220, et seq., I adopt, as the Comptroller’s Order and Determination, the ALJ’s Report and Recommendation, which is annexed hereto, in full.

The amount owed to each employee, including interest at 16% per annum through August 3, 2010 is listed in the “Summary of Underpayment,” Petitioner’s Exhibit 17 at the hearing, a copy of which is attached hereto. Interest will continue to accrue at 16% per annum from August 3, 2010 until the date of payment.

If any of the employees fail to claim their awards within six (6) years from the date of this Order and Determination, the unclaimed awards shall be retained by the City of New York as revenue.

Pursuant to Labor Law §220-b(3)(b), respondents Abbey Painting Corp. and Shahzad Alam, having falsified its payroll records and willfully violated the prevailing wage laws, which violation involved the kickback of wages, shall be ineligible to bid on or be awarded any public work contract for five (5) years from the date hereof, and pursuant to Labor Law §220(8), the maximum fine of 25% of the total violations is hereby imposed.

Finally, Shahzad Alam, as the sole owner and as an officer of Abbey Painting Corp., who knowingly participated in the violation is financially responsible pursuant to Labor Law §220-b(3)(b) for the underpayments, interest and civil penalty assessed against the contractor, Abbey Painting Corp.

Order this 2nd day of July 2012

Ricardo E. Morales
1st Deputy Comptroller

SUMMARY OF UNDERPAYMENT
ABBEY PAINTING CORP.
BLL#: 20071105

EMPLOYEE	VIOLATION	INTEREST 16% cal to 8/3/10	TOTAL VIOLATION with interest
1 DAVID ALVIA	\$23,459.37	\$11,846.03	\$35,305.40
2 JUAN ALVIA	\$473.60	\$247.15	\$720.75
3 ALBERTO BURGOS	\$31,382.29	\$18,327.22	\$49,709.50*
4 JOSE R. GARATE	\$9,201.62	\$6,596 .29	\$15,797.90*
5 LUIS GARATE	\$20,591.49	\$13,666.17	\$34,257.66
6 JOSE YEPEZ	\$2,266.51	\$1,416 .79	\$3,683.30
	\$87,374.38	\$52,099.64	\$139,474.53
	Civil Penalty @ 25%		\$34,868.63
			\$174,343.16

*Difference due to rounding