STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
MADDALONE & ASSOCIATES, INC., AND MADDALONE CONSTRUCTION, INC., (T/A MADDALONE & ASSOCIATES),	
Petitioners,	DOCKET NO. PR 08-157
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 19 of the Labor Law, both dated September 9, 2008,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Girvin & Ferlazzo, PC, Scott P. Quesnel, of Counsel, for Petitioners.
Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Wasyl, of Counsel, for Respondent.

WITNESSES

Christopher Maddalone, for the Petitioners. Robert Smith, Christopher Maddalone, Elizabeth Ares and Robert Orphan, for Respondent.

WHEREAS

Petitioners Maddalone & Associates, Inc. ("M & A") and Maddalone Construction, Inc. filed a petition with the Industrial Board of Appeals (Board) on October 27, 2008 challenging two Orders to Comply issued by the Commissioner of Labor (Commissioner) on September 9, 2008. The first Order (Wage Order) directs Petitioners to pay to the Commissioner wages found due to Robert aka "Nick" Orphan (Claimant), from April 19, 2004, through September 28, 2007, in the amount of $6,555.34 together with interest in the

amount of $995.89 and a civil penalty in the amount of $1,639.00 for a total amount due and owing of $9,190.23. The second Order (Penalty Order) (together with the Wage Order, "Orders") imposes a $250.00 civil penalty for failure to maintain and/or furnish true and accurate payroll records in violation of Article 19 § 661 and Title 12 NYCRR Part 142-2.6.

The petition alleges Petitioners failed to pay overtime wages to Claimant because the Commissioner, in an April 2006 audit, considered Claimant to be an exempt employee. This, according to the petition, resulted in Petitioners treating the Claimant in a manner that caused Petitioners to incur unwarranted financial liability.

The Commissioner filed an answer denying the petition's material allegations and argues that she cannot be estopped from issuing an order to comply because of an earlier determination that Claimant was an exempt employee.

Upon notice to the parties, a hearing was held on October 22, 2009, and continued on November 10, 2009, in Albany, New York before Board Deputy Counsel and designated Hearing Officer, Sandra M. Nathan. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

At the commencement of the October 22nd hearing, Petitioners made an application to amend the petition clarifying that it challenges both Orders, including Claimant's entitlement to overtime pay and whether Petitioners failed to keep and/or furnish accurate payroll records. The application, over Commissioner's objection, was granted.

SUMMARY OF THE EVIDENCE

Maddalone's Testimony

Petitioner M & A is a property management company that manages single-family, two-family, multi-family and multiple-unit properties. Maddalone Construction, Inc. builds or renovates buildings. The companies maintain separate payrolls, insurance policies, federal employment identifications, and filed as separate entities with the state.

M & A hired Claimant on October 20, 2003, as a maintenance supervisor. Claimant's responsibilities included, "[i]nterviewing, hiring, counseling, setting up daily task assignments for employees, ordering materials, following up on job tasks that employees completed, responding to tenant complaints, estimating jobs, [and] informing [Maddalone] of issues. . . ."

Claimant was told that he would be paid a weekly salary, and he signed an undated "Employee Agreement" listing him as a supervisor of maintenance and stating that he would be paid a $560 weekly salary. In mid 2005, Claimant was promoted to maintenance manager, with no change in duties, and his weekly salary was increased to $620. Claimant's salary was guaranteed regardless of the number of hours that he worked. While other

employees had to punch a clock, Claimant did not because he was considered a supervising manager.

Throughout his employment, Claimant supervised from three to ten or twelve employees, and at any one time he was responsible for five or six. He assigned work and the order of the jobs and told employees what materials to use, which he ordered through local vendors. He also performed various labor-intensive jobs, such as plumbing, electrical work and carpentry, but on average only about 25% of his work was labor-intensive.

He reviewed employment applications for maintenance positions, interviewed candidates, and hired or recommended applicants. Claimant introduced new employees to the workplace, showed them procedures and policies, and helped them with paperwork. He had authority to approve pay rates within a pre-set wage range (between minimum wage and $13 per hour), but had to seek Maddalone's authority if the range was exceeded. He also had the authority to approve overtime hours. He counseled, disciplined and had the authority to terminate employees.

In mid 2006, Nick Laverne was hired as director of maintenance, a position above Claimant. Laverne was the liaison between M & A and the property owners and tenants. He met with inspectors, was responsible for code enforcement, computed and paid bills, and estimated jobs with Claimant. He also worked with Claimant in deciding whether someone should be terminated.

Claimant was not paid overtime, because Maddalone believed he was an exempt employee based on a 2006 Department of Labor investigation finding that while other employees were due overtime wages, Claimant was not.

Claimant's Testimony

Maddalone was president of both M & A and Maddalone Construction, which were administered from the same location. All M & A employees worked for both companies.

Claimant worked for M & A from 2003-2008. He was not hired as a supervisor, and during his interview he was told that he would be responsible for renovating apartments, keeping them up to code, and doing "plumbing, electrical, heating, painting, carpentry, sheetrock" and "anything that could possibly be done inside or outside of the building." He noticed the position in a newspaper which advertized it as a construction or maintenance position, which fit his employment background.

He was not told that he was a salaried employee, and was not paid an annual salary. He was paid an hourly rate, which initially was $12 or $13 an hour. He almost always worked more than 40 hours a week, and he was paid an hourly rate for 40 hours and "incentive pay" for hours worked beyond 40. The rate for the hours beyond 40 hours was the same rate as the rate for the first 40 hours. If he worked less than 40 hours he was not paid a fixed weekly salary, but was paid only for the hours that he worked. Before

Maddalone Construction was established, he was paid by single check regardless of the hours worked. After that M & A paid him for his 40 hours, but Maddalone Construction paid his "incentive pay."

Claimant knows that he did not sign the "Employee Agreement" when he was hired because he was not hired as a maintenance supervisor, which is the position listed on the agreement. Also, he was not hired at $14 an hour which is the pay rate on the agreement. While the agreement states that he was to receive a weekly salary, it also states that his pay was $14 an hour.

Initially, he recorded his work hours on a time sheet, but sometime later Maddalone installed a punch clock. Claimant recorded his work hours on the clock until Maddalone told him to no longer use it, but continued to track his hours on a time card.

Sometime after beginning his employment he was made a supervisor. In that position he reported to Petitioners' office for one-half hour in the morning where he sorted through work orders and put them into piles so that the workers would know their assignments. After the morning meetings, he spent the remainder of his work day in the field, maintaining and repairing properties. In addition to the jobs mentioned in his employment interview, he did "roofing, siding, windows, doors . . . cabinets, floors, kitchen and baths, yard work, snowplowing, clean[ed] up grounds, clean[ed] up trash, [and] fram[ed] buildings," and "90 percent" of the time he was the only person on call for emergency service. His work was "99.95" percent labor intensive.

In the evening, he returned to the office where for one-half hour he reviewed the work orders to determine if the work assignments were completed. If any were not completed, he and Maddalone would prioritize the work for the following day. After Maddalone hired Nick Laverne, which was a few years prior to Claimant ending his employment, he and Laverne prioritized the work, though Maddalone ultimately determined the order of work to be completed.

Claimant supervised between two and eight employees, but those supervisory responsibilities ceased once Laverne was hired. Laverne supervised all maintenance employees, including Claimant. Laverne was responsible for code enforcement, dealing with building owners, attending office meetings, ordering materials and billing for completed jobs. Laverne seldom performed any labor-intensive tasks.

Claimant had some involvement in hiring employees. He interviewed applicants and then discussed each applicant with Maddalone. He gave his opinions about the applicants' qualifications, but Maddalone made the ultimate hiring decisions. Claimant never determined employees' pay rates and he had no role in promotions as there were no promotional opportunities within M & A.

Claimant evaluated employees, which he described as "inspect[ing] the jobs to ensure that they were completed." He issued 17 disciplinary counseling memos during 2005 and 2006 for "attendance, insubordination, not completing tasks, [and] assignments . . . ."

He handled employee grievances and complaints, but generally employees brought their concerns directly to Maddalone. He reported employees who were not performing adequately to Maddalone, who determined whether they should be fired. While Claimant fired employees, he never fired anyone without Maddalone's authorization.

He had some role in determining the type of materials, supplies, equipment and machinery used by M & A, but he only ordered relatively inexpensive items such as caulk or garbage bags. Maddalone told him what and where to buy more expensive items. The flow and distribution of materials was generally controlled by the tenants of the properties that M & A maintained.

STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101).

The Board is required to presume than an order of the Commissioner is valid. Labor Law § 103 (1) provides, in relevant part:

> "Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Under Board Rule 65.30 "the burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, it is Petitioners' burden to prove that the Orders under review are not valid or reasonable based on the claims raised in its petition, and amended petition. Those claims include whether Claimant is entitled to overtime pay and whether the Petitioners failed to keep and/or furnish accurate payroll records.

FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing testimony, arguments and documentary evidence, makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39).

I. The Petition was properly amended at hearing to include the issue of whether Claimant was exempt from overtime.

The Commissioner argued, at hearing, that the petition does not claim that the Orders were invalid or unreasonable, nor does it assert that Claimant was an exempt employee. Therefore, argues the Commissioner, the Board should only decide whether she is estopped

from now classifying Claimant as a nonexempt employee when, in a previous Commissioner audit Claimant was found to be exempt. The Hearing Officer accepted Petitioners' application to amend its petition to include the asserted omissions and the Commissioner now reargues its motion to limit the scope of the Board's review.

Labor Law § 101 (2), in relevant part states:

> The petition shall be filed with the board in accordance with such rules as the board shall prescribe, and shall state the rule, regulation, or order proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections to the . . . order not raised in such appeal shall be deemed waived.

Petitioners filed their petition, *pro se,* and stated:

> I am writing to request a hearing on the finding of this audit enclosed. I feel as though there is one employee that is not deserving of the outcome for the reason as follows:
>
> In an audit in April 2006, [Claimant], Maintenance Manager was considered as exempt employee by the auditor. Now, during the audit of records in May 2008 he is not considered Exempt, therefore the auditor awarded him moneys back dated prior to the 1st audit. . . . Our feeling is that your Auditor made a mistake on your last audit[1], regarding this employee, and because of your mistake I am being forced to pay this employee."

Generally, pleadings must be liberally construed and defects ignored in the absence of prejudice to a party (*Estate of Unterweiser v Town of Hempstead,* 235 AD2d 453 [2d Dept. 1997]). Though inartfully drawn, the petition sufficiently challenges the Orders by requesting "a hearing on the finding of this audit. . . ." We find that while the petition is unclear, Petitioners sufficiently amended the petition to notify the Commissioner that it challenges the Orders and Claimant's nonexempt designation. Any prejudice to the Commissioner is outweighed by the due process interests of the Petitioners, and we note that the Hearing Officer provided sufficient time for the Commissioner to respond to the more specific allegations.

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[1] The Commissioner asserts that the wording of the petition shows that petitioners believe that the Commissioner made a mistake in classifying Claimant as exempt in the 2006 audit, and that now he should be classified as nonexempt. As the Claimant's responsibilities did not change between that audit and the one leading to the current Orders, the Commissioner contends that petitioners agree that Claimant is a nonexempt employee. By his testimony, Maddalone sufficiently clarified that they do not believe that Claimant was ever a nonexempt employee.

II. The Commissioner's prior investigation and finding does not prevent her from reclassifying Claimant as a nonexempt employee.

Petitioners argue that they relied upon a 2006 Labor Department investigation finding that Claimant was an exempt employee, and that as a result of that finding they treated him as exempt to their detriment. They contend that the "Department of Labor should be estopped from arriving at different conclusions with respect to the same employee when the same information was available to the Department during both investigations."

In response, the Commissioner relies on *Parkview Associates v City of New York*, 71 NY2d 274 (1988), in which the Court of Appeals held that an erroneously issued Department of Buildings' permit did not estop the same department from issuing a stop-work permit when it corrected its error, even though there was substantially harsh results to the permit holder ("[e]stoppel is not available against a local government unit for ratifying an administrative error."(*Parkview, at* 282). See, *New York State Medical Transporters Association v Perales*, 77 NY2d 126 [1990]; *Fowler v New York State Board of Law Examiners*, 298 AD2d 682 [3rd Dept 2002]; and, *Carney v Newburgh Park Motors*, 84 AD2d 599 [3rd Dept 1981]) as examples of the application of *Parkview* to government entities other than municipal agencies.

Petitioners argue that in *Parkview* a "municipal entity . . . relied upon incorrect information when taking a municipal action" and "[w]hen the incorrect information . . . was exposed, the municipal entity was not estopped from correcting its error." Petitioners contend that here two investigators had the same information and arrived at different conclusions, which they say sufficiently distinguishes this case from *Parkview*.

We disagree. The Commissioner is entitled, if not obligated, to correct errors made in previous audits, and under *Parkview* she cannot be estopped from doing so. Further, we do not find that two investigators reached different conclusions distinguishing. In *Parkview*, the New York City Department of Buildings approved a new building application for the construction of a 31 story building. The approval was granted in reliance on a zoning map which was mislabeled. When the error was realized, a stop-work order was issued and a portion of the building was limited to 19 stories instead of the originally approved 31. Whether two investigators reached different conclusions, or as in *Parkview,* the same department reached different conclusions, is irrelevant. The Commissioner cannot be required to ratify previous errors nor can she be precluded from discharging her statutory duty to determine employee eligibility for benefits under the Labor Law.

III. Petitioners Have Failed to Establish that Claimant Was an Executive Employee Excluded from the Benefit of Overtime Pay.

New York law requires employers to pay employees at an overtime rate of one-and-a-half times their hourly rate of pay for all hours worked beyond 40 hours per week (New York Labor Law §§ 650 *et seq.*; 12 NYCRR 141-1.4). Only employees who work in a "bona fide executive capacity" are excluded from overtime protection by the executive

exemption under the minimum wage order for the building service industry (Labor Law § 651 [5] [c]; 12 NYCRR 141-3.1; *see* 12 NYCRR 141-1.4 for the building service overtime rate requirement). [2]

The executive exemption criteria for the building service industry are detailed in 12 NYCRR 141-3.2 (c) (1) (i) as follows:

> (i) "Executive. Work in a *bona fide executive . . . capacity* means work by an individual:
>
> *(a)* whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof; and
>
> *(b)* who customarily and regularly directs the work of two or more other employees therein; and
>
> *(c)* who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and recommendations as to the hiring or firing and as to the advancement and promotion or any change of status of other employees will be given particular weight;
>
> *(d)* who customarily and regularly exercises discretionary powers; and . . .
>
> *(e)* who is paid for services a salary of not less than:
>
> 1. $386.25 per week on and after March 31, 2000 . . .
> 2. $450.00 per week on and after January 1, 2005 . . .
> 3. $505.25 per week on and after January 1, 2006 . . . ."

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[2] Although not mentioned by Petitioners, we note that the Wage Order mistakenly cites to 12 NYCRR 142 (the Miscellaneous Industry Wage Order) instead of 12 NYCRR 141 (the Building Service Industry Wage Order). Although there is a difference in the language describing the executive exemption, we find that the mistake did not prejudice Petitioners since Petitioners refer to the Building Service Industry standard in its brief and the difference between the Orders does not affect the findings herein. In addition, Petitioners submitted a copy of the text of 12 NYCRR 141-3.2 as its Exhibit 3. The Miscellaneous Industry Order incorporates the exemptions of the Fair Labor Standards Act (FLSA) (12 NYCRR 142-2.2) while the Building Service Industry Order enumerates the factors as quoted below. We find that Claimant was not an exempt employee based on the fact that his primary duty was not management and the fact that he was not paid on a salary basis. Both factors mirror the standards of the FLSA and we utilize federal law in interpreting the standards. *See Ansoumana v Gristede's Operating Corp.*, 255 FSupp2d 184 (SDNY 2003) (where New York law and federal law embody the same standards, federal law may be used in interpreting New York law).

Petitioners bear the burden of proving that Claimant clearly and plainly fits within the exemption. (*Scott Wetzel Services, Inc. v New York State Bd of Industrial Appeals et al.*, 252 AD2nd 212, 214 [3rd Dept1998]; *Arnold v Ben Kanowsky, Inc.*, 361 US 388, 392, 394 n 11). The exemptions are narrowly construed against the employers seeking to assert them. (*Scott Wetzel* at 214). As stated previously, where New York law and the Fair Labor Standards Act (FLSA) embody the same standards, federal law may be used in interpreting New York law (*see Ansoumana v Gristede's Operating Corp.*, 255 FSupp2d at 189).

As the criteria for executive status are listed in the conjunctive, Petitioners must show that the Claimant met all five of them. (*Matter of the Petition of Hand Held Films, Inc.*, Docket No. PR 06-092 [May 20, 2009]). "The FLSA establishes a presumption of nonexempt status, which the employer must overcome by proving each element of a claimed exemption" (*Astor v United States*, 79 Fed Cl. 303 [US Ct Cl, 2007]; *Martin v Michigan Power Co.*, 381 F 3d 574 [6th Cir 2004]). Whether an employee fits the exempt criteria "is a highly fact-intensive inquiry that must be made on a case-by-case basis in light of the totality of the circumstances" (*Johnson v Big Lots Stores, Inc.* 561 F.Supp. 2d 567, 575 [ED La 2008]), and Claimant's job title(s) is insufficient to establish whether he is exempt (29 CFR 541.2).

a. Claimant's primary duty was not management.

Petitioners must show that Claimant's primary duty was "the management . . . ."of Petitioners' business or a recognized subdivision or department (12 NYCRR 141-3.2 [c][1][i][a]). The U.S. Department of Labor's regulations define "primary duty" as the "main, major, or most important duty that the employee performs" (29 CFR 541.700 [a]). When judging whether an employee meets this definition, the following factors are to be considered:

> the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. *Id*
>
> The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion" (29 CFR 541.700 [b]).

We find that Claimant's primary duty was that of construction and maintenance work and that Petitioners have failed to show that his primary duty was management of Petitioner's business.

Although Claimant had the title of maintenance supervisor, he worked almost exclusively in the field, performing maintenance work on Petitioners' managed properties along with other maintenance workers. These responsibilities included plumbing, electrical, heating, painting, carpentry, framing, sheetrocking, roofing, siding, windows, doors, cabinets, floors, kitchen, baths, yard work, snowplowing, and cleaning up. Claimant was the only person on call for almost all emergency service, and while on call he performed labor tasks, such as fixing frozen pipes and solving heat problems.

While Claimant performed some of the management responsibilities delineated in state and federal regulations, he credibly testified that his primary responsibility was maintaining Petitioners' buildings and that he spent comparatively little time performing management tasks. In addition, his supervisory responsibilities were greatly reduced once Laverne was hired.

b. An exempt employee customarily and regularly directs the work of two or more employees.

Claimant assigned and checked the work of two or more employees. He was responsible for prioritizing and assigning work in the morning and in the evening, determining whether the work was completed. However, Claimant did not exclusively determine the priority of work as Maddalone had to confirm all work assignments, and after Laverne was hired, Claimant, Laverne, and Maddalone scheduled work assignments. Further, after Laverne was hired, employees that had reported to Claimant then reported to Laverne and not to Claimant.

c. Claimant's recommendations concerning the hiring, firing and disciplining of employees was given weight.

Claimant was involved in the hiring, firing and disciplining of employees, at least in the period prior to the time Laverne was hired. While he was not authorized to hire, fire, or discipline employees on his own, his recommendations to Maddalone was generally followed.

d. Claimant's was not paid on a salary basis.

An employee is considered to be paid on a salary basis "if the employee regularly receives each pay period . . . a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed" (29 CFR 541.602 a). With some exceptions, an exempt employee must receive full salary for any week that the employee worked, regardless of the number of hours or days worked. (*id.*) As Claimant's weekly wages of

$560 to $620 were at least those required for exempt status, we turn to the question of whether he was paid a weekly salary or an hourly rate.

Maddalone testified that Claimant was told when hired that he would "be receiving a weekly salary," though he could not recall the substance of the conversation. Claimant, however, testified that he was paid an hourly wage and that if he worked more than 40 hours in a week he was paid "incentive pay" for all hours over 40 hours, at the same hourly rate he received for his first 40 hours. Claimant also testified that he was paid only for the hours he worked if he worked less than 40 hours. This practice of wage payment is inconsistent with payment on a salary basis.

Petitioners also rely on a document titled "Employment Agreement," which is signed by the Claimant, for their position that Claimant was paid a weekly salary. That agreement lists a $560 weekly salary, but also lists a $14 hourly pay rate. The agreement is ambiguous, undated, and does not prove whether Claimant's wages were salary or hourly based. The $560 weekly salary listed on the agreement divided by its $14 hourly wage rate equals 40 hours, which was the hours that he regularly worked before receiving "incentive pay."

Claimant's "incentive pay" was not related to productivity or Petitioners' profits, but rather was simply payment for more than 40 work hours. While payment for hours worked beyond 40 hours may not be dispositive of whether an employee meets the salary test, it, like deductions, is relevant. Overpayments reflect a paycheck that is determined by the number of hours worked per week, and is inconsistent with executive pay. "The . . . exemption exists precisely because executive . . . employees 'are given discretion in managing their time and their activities and . . . are not answerable merely for the number of hours worked or number of tasks accomplished.' This discretion makes premium overtime unnecessary" (*Torres v Gristede's Operating Corp.*, 628 F Supp2d 447, 459 [SDNY 2008], quoting *Kinney v District of Columbia, 301 US App DC* 279, 994 F2d 6, 11 [DC Cir 1993]).

The burden of proving each element of the exemption rests with the Petitioners. The Petitioners have failed to prove that Claimant's primary duty was management and have failed to prove that Claimant was paid on a salary basis. While Claimant meets some of the criteria for exempt status, the Petitioners have failed to show that Claimant met all the criteria enumerated in 12 NYCRR 141-3.21 (c)(1)(i)(a-e). Therefore, we find that Claimant is not an exempt executive and is due overtime wages for the time worked over 40 hours in each week.

JOINT EMPLOYER

Claimant first worked exclusively for M & A. In his last years of employment, Maddalone Construction, Inc. was formed, and he worked occasionally for that business. Before Maddalone Construction, Inc., Claimant was paid entirely by M & A. After Maddalone Construction, Inc., Claimant was paid for his first 40 hours by M & A, and any hours over 40 were paid by Maddalone Construction, Inc.

Multiple employers may jointly employ someone for the purpose of the Fair Labor Standards Act (*Matter of Lovinger, Lovinger and Edge Solutions*, PR 08-059 [March 24, 2010]. All joint employers are individually responsible for compliance with the FLSA (29 CFR 791.2[a]). If "employment by one employer is not completely disassociated from employment by the other employer (s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the [Fair Labor Standards] Act" (29 CFR 791.2[a]).

We find that M & A and Maddalone Construction, Inc. are joint employers. Chris Maddalone was president of both companies. The companies operated from the same address. Employees worked for both companies simultaneously. Claimant was paid by Maddalone Construction, Inc. for hours over 40 hours a week, notwithstanding whether such hours were for work done for Maddalone Construction, Inc. or M & A. The companies were sufficiently associated to be defined as joint employers.

PENALTY ORDER

Petitioners argue that:

> "[E]ven if this Board were to conclude that Petitioners were not entitled to rely upon a prior investigation by the Department, . . . the civil penalty assessed against Petitioners [should] be dismissed as Petitioners reasonably relied upon the prior representations of the Department when concluding that Claimant was not entitled to overtime."

Once the Commissioner issues a compliance order that includes a demand that the employer pay the total amount found to be due and owing (Labor Law § 218 [1]), she is authorized to assess a civil penalty based on the amount owing. Labor Law § 218 (1) continues:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the commissioner of an additional sum as civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment in an amount less than the total wages . . . found by the commissioner to be due, plus the appropriate civil penalty . . . In assessing the amount of the penalty, the commissioners shall give due consideration 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, in the case of

wages, benefits or supplements violations the failure to comply with recordkeeping or other non-wage requirements."

The Commissioner assessed a 25% penalty in the Wage Order. Investigator Smith testified that a 100% civil penalty was the usual penalty in cases with prior violations, such as with Petitioners, but that he recommended to his supervisor, Elizabeth Ares, the 25% penalty because Petitioners "provided the records, they were cooperative, the size of the business was very small, and they had good faith, meaning that they were considering making a payment to the Department of Labor." Ares testified that she recommended the 25% penalty based on Smith's opinion that Petitioner's conduct was not willful. She also concluded, based on discussions with Maddalone, that the Claimant's underpayment was neither willful nor deliberate. Ares also testified and Maddalone intended to "come into compliance and continue to remain in compliance."

Claimant's underpayment was due substantially, if not entirely, to Petitioners' reliance on the previous audit which found Claimant to be an exempt employee. While the Commissioner, as found herein, cannot be estopped from correcting a prior determination, her 25% penalty order can be revoked.

Therefore, we revoke the 25% civil penalty assessed in the Wage Order for failure of the Commissioner to substantiate "due consideration" of the statutory criteria required by Labor Law § 218, and modify the final Order accordingly.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is modified to revoke the civil penalty but otherwise affirmed; and

2. The petition for review, as amended, be and the same hereby is denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
February 7, 2011.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is modified to revoke the civil penalty but otherwise affirmed; and

2. The petition for review, as amended, be and the same hereby is denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
February 7, 2011.