STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
PATRICK MADDEN AND MADDEN CONSTRUCTION CO., INC.,	
Petitioners,	
	DOCKET NO. PR 09-281
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, and an Order Under Articles 6 and 19 of the Labor Law, both dated August 12, 2009,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Jack N. Posner, Esq., for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

Patrick Madden, and Patricia Mantel, for petitioners.

Michael Dawson, and Howard Gumpel, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on October 8, 2009. An answer was filed on November 18, 2009. Upon notice to the parties, a hearing was held on September 14, 15, and October 17, 2011, in Old Westbury, New York before Anne P. Stevason, Esq., Chairperson of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing statements.

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or respondent) issued an Order to comply with Article 6 of the Labor Law (Wage Order) against petitioners Patrick J. Madden and Madden Construction Co, Inc. (Madden or petitioner) on August 12, 2009. The Order directs payment to the Commissioner for wages due and owing to Michael Dawson (Dawson or claimant) in the amount of $88,846.20 with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $19,122.62, and assesses a civil penalty in the amount of $88,846.20 for a total amount due on the Wage Order of $196,815.02.

A second Order under Articles 6 and 19 of the Labor Law (Penalty Order) was also issued against Madden in the amount of $1,000: $500 penalty for failing to keep and/or furnish true and accurate payroll records for each employee; and $500 penalty for failing to pay commissioned salespersons in accordance with agreed terms of employment and no less than once a month.

The main allegations of the petition are that claimant acted as an independent contractor and not an employee; and that no commissions were currently owed to claimant because either the sale was pending or claimant had been paid in full.

In its answer, the Commissioner alleges that Dawson was petitioner's employee and that commissions were still due and owing.

I. SUMMARY OF EVIDENCE

Undisputed Evidence

Madden Construction is a small home remodeling firm which builds extensions and renovations. The business constituted a partnership between Madden and Howard Gumpel until approximately April 2007. After Gumbel left there was litigation between the former partners.

Claimant Dawson worked for Madden Construction from approximately December 2005 until May 2008 as a salesman. Madden also worked as a salesman for the company. While working for Madden, Dawson also had a full time job driving a truck for a construction materials supplier.

Madden provided Dawson with leads on sales and then Dawson would make appointments with homeowners and meet with them to give them an estimate on the cost of the work that they wanted on their home and eventually to have them sign a contract. He would then get a deposit for the job, which he would convey to Madden. Dawson set up his own appointments, was free to refuse a lead, though the office manager could not recall if Dawson ever refused a lead, and set his own hours of work and usually worked on his own. Dawson's responsibilities after a sale would be to help the customer make selections with regard to windows, tiles, siding, etc. This work was usually completed prior to the start of construction.

Dawson would draw up an estimate on the home project using Madden's software, which contained pricing information and had labor costs built in. At first Dawson used a computer in Madden's office to draw up the estimates and later Madden installed the software on Dawson's laptop computer.

Dawson was compensated for his work in commissions on the sales. The commissions were paid in two installments, the front-end commissions would be paid after the contract was signed and a 10% deposit received. The front-end commission was 3% of the contract price. The back-end commission was to be paid when the job was completed and varied depending on the profitability of the job. Each year Madden would give Dawson a 1099 tax form and Dawson would file his income taxes as an independent contractor, deducting for business expenses and taking depreciation for his car and computer, etc.

Dawson provided a letter to Madden entitled Sub Contractor Agreement. The form and wording of the letter was obtained by Madden from a former salesman and Dawson was informed by Madden's office manager that he needed to sign the letter prior to Madden issuing any payments to Dawson. The letter reads as follows:

> "This document is to acknowledge the relationship between Madden construction Company and myself. It is understood I will provide consulting services to your company on a semi-regular basis. It is understood I work alone, keep no regular weekly, daily or hourly schedule with your firm nor do I report for assignments or managerial advice. I maintain my own office and supplies and use my own phone number to generate income from other sources. In short I am not under Madden Construction Company's direct supervision.
>
> "I understand and agree that consulting fee shall be paid in two increments, and be based on two levels of performance. The time frame need to determine the second level of performance can be as long as six months more, which will delay second payments until that time.
>
> "As a 1099 sub-contractor, I will keep track of all my earnings and bear sole responsibility for any and all tax liabilities on monies earned from Madden Construction Company."

There was no other writing and/or contract which further explained the commission agreement or defined what was encompassed by performance.

Petitioner's Evidence

Madden testified that all of the salesmen that worked for the company were independent contractors. Dawson had prior experience selling home improvements and needed no training from Madden on what to do. Madden did not review the estimates that

Dawson gave customers and Dawson was able to bind the company to a contract and needed no approval from Madden prior to signing with a customer. Madden exercised no control or supervision over any of Dawson's work. Dawson had to submit an invoice in order to be paid. In a lawsuit by another salesman who did the same work as Dawson, the jury found that the other salesman was an independent contractor and not an employee.

Dawson did all of his work out of the office, either at home or at a customer's house. Dawson had to pay his own expenses and paid for any flyers or business cards that he had.

When Dawson was hired, Madden explained the commission structure to him: 3% commission on the contract price would be paid at the front end when the customer signed the contract and provided a 10% deposit. The back-end commission would be paid after the job was completed and was dependent upon the profitability of the job and the salesman's performance. If the job provided for a 1.45 mark up after all the expenses were deducted from the price paid, the salesman would get a 6% commission on the gross profit. If the mark-up was less than 1.45, the salesman would keep the front-end commission but would receive no back-end. A mark-up was necessary since the cost of each job did not include Madden's overhead, insurance, office rent, gas, phones, advertising, etc.

Madden produced all of the contracts on the sales in question as well as the final accounting on each sale's incoming and outgoing funds, and copies of the commission checks written to Dawson. Madden testified that Dawson is not owed any commission on the jobs for which Dawson is claiming a back-end commission for the following reasons:

Customer	**Front-end Commission + Advance of Back End**	**Reason for no Back-end Commission**
Arbucci	$1,665	Mark-up was 1.33≤ 1.45
Fontaine	$7,572 + $3,500	Mark-up was 1.28≤ 1.45
Klusman	$3,990	Mark-up was 1.13≤ 1.45
Connelly	$1,890	Mark-up was 1.24≤ 1.45
DeVito	$6,474 + $6,500	Mark-up was 1.35≤ 1.45
Jenkins	$3,990 + $2,000	Mark-up was 1.32≤ 1.45
Torres	$2,460	Mark-up was 1.30≤ 1.45
Angelini	$3,960 + $3,500	Overpaid back-end in advances
Maloney	$6,090 + $3,000	Mark-up was 1.28≤ 1.45
McShane	$2,910	Mark-up after subtracting sales by others was 1.26≤ 1.45
Palumbo	$2,700	Mark-up after subtracting sales by others was 1.39≤ 1.45
Dusharme	$1,999.50	Mark-up after subtracting sales by others was 1.14≤ 1.45
Robison & Seay	$2,550	Mark-up was 1.16≤ 1.45
Serravalli	No Front-end Commission	Sold by Madden not Dawson
Ge	$3,000	Job not finished

Madden subtracted the sales on the change orders made by other salesmen or Madden from the total amount incoming, however, he did not subtract the corresponding costs of those orders.

Madden testified that Dawson still owed him for all of the advances on the back-end commissions where the back-end commission was not due. In addition, Madden stated that when Dawson started, Madden gave him the Reid job which Madden had already estimated so that Dawson would start off with some money, with the understanding that when Dawson sold a similar job there would be an offset. Since the Fontaine job was for a similar price, Dawson was not supposed to get a commission on that job. Dawson's failure to issue correct estimates or to take certain things into account when providing estimates was the reason that the contracts were not as profitable as they should be. There were problems with the Ge contract due to the fact that a variance was required and Dawson was not around to answer questions and told the office manager not to call him any more after he left Madden. The Ge contract is still not complete.

Petitioner also produced a letter Madden had written to DOL explaining that he and Dawson had many conversations about the back-end commissions between November 2007 and April 2008 and had agreed that "when the last of the jobs that Mr. Dawson had sold were finished being built, that we would sit down together and go over his sales so we could determine his back end commissions."

Respondent's Evidence

Claimant Dawson testified that when he began working for Madden, he went on a few sales calls with him. Madden also showed him how to draw a plan for an extension. Dawson had a job selling siding and roofing before working for Madden but never sold home improvements of the type sold by Madden. Dawson did not have a business, insurance, or sell for anyone other than Madden. Madden's office manager ordered business cards for Dawson pursuant to instructions from Madden, which gave Madden Construction's name, address and fax number and listed Dawson as a consultant. The contract signed by the customer was written on a template provided by Madden. Prior to signing a contract with a customer that bound Madden, Dawson would present the contract and the estimate to Madden for approval. All correspondence that Dawson wrote on a project was on Madden Construction letterhead. Dawson met three customers at the Madden offices.

When Dawson was hired he was told that he would be a subcontractor but he was not given a choice. The letter subcontract agreement, although signed by him, was prepared by Madden. Dawson completed his tax returns based on the fact that Madden gave him a 1099 form. Initially, Dawson did all of his estimates in the Madden office where he had a desk and a computer. When he had his own computer, and Madden installed the software, he worked some at home. Dawson had a key to the office and attended sales meetings at the office every few weeks. Dawson also did some website work for Madden.

Madden provided Dawson with the estimating software program that he had developed which contained most of the estimated costs for different projects which included

labor and a 1.65 mark up in price. All Dawson had to do was measure what needed to be added and the type of construction and the program would provide a drop-down menu which provided all of the specifications for the job and their cost. Dawson had no discretion in completing an estimate. He was required to use the Madden software. When he was hired he was told that he would receive a back-end commission that would be based on profitability but because the software program was so good, he could rely on receiving between 4 and 4.8% of the sales price on the back end in addition to the 3% at the front end. Dawson received a 7% commission on his previous job with a home improvement company.

Dawson testified that he never had an agreement with Madden that he would offset the commission received from the Reid job against a future job. In fact, Madden had only sold part of the Reid job and Dawson greatly increased the project. Dawson also testified that he procured the Scaravelli project and produced a signed contract and a letter from Scaravelli stating that he bought the project through Dawson and not Madden.

Dawson stopped receiving the back end commissions after Gumbel left and there was a lawsuit going on between the partners. On the Reid job, which occurred prior to Gumbel leaving, the sales price was $224,500 and Dawson received $6,735 or 3% of the price, on the front end, and then received $9,064 for the back end commission or approximately 4% of the price, for a total commission of 7%. On the Parant job, which also occurred prior to Gumbel's departure, the price was $92,700, Dawson received a front end commission of 3%, or $2,781, and then received a back end of $4,171, or 4.49%, for a total commission of $6,952 or a total commission of approximately 7.49% of the price. Dawson testified that he was never told that there might not be a back-end commission.

Gumbel, Madden's partner until 2007, testified that Dawson was often in the office and had a desk there. The commission structure was that the salesman was to get 3% up front after the 10% down payment and then get 12% of the gross profit. The total commission usually came to about 10% of the contract price. Salesmen would get the back end of the commission even if they were not working for Madden when the job was completed. Either he or Madden would review Dawson's estimates and contracts before they were signed.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The Labor Law provides that "any person ...may petition the board for a review of the validity or reasonableness of any ... order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 §[1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board's Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person

asserting it"]; State Administrative Procedure Act § 306 [1]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

It is therefore petitioners' burden to prove the allegations in the petition by a preponderance of evidence.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant was Petitioners' Employee and not an Independent Contractor

Under Article 6 of the Labor Law, "employer" is defined as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190 [3]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is identical, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*see e.g. Ansoumana v Gristede's Operating Corp.*, 226 F Supp 2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by the Labor Law or an independent contractor without wage and hour protections, "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care, Inc.*, 840 F 2d 1054, 1059 [2d Cir 1988]). The factors to be considered in assessing such economic reality include (1) the degree of control exercised by the petitioners over the claimant, (2) the claimant's opportunity for profit or loss, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the petitioners' business (*id.* at 1058-1059). No one factor is dispositive (*id.* at 1059).

Factor 1: The degree of control exercised by the employer over the worker

Claimant was free to accept or reject any lead provided by petitioner. However, Dawson was required to use Madden's estimating software which removed most discretion from Dawson as far as estimating or pricing the jobs. In addition, the templates for the contract signed and the specifications sheet were provided by Madden. Madden supplied Dawson with business cards which contained Madden's information on it. We find that Madden also had to approve the estimate and contract prior to Dawson signing the contract. It is not credible to believe that Madden would bind itself to significant construction contracts, which it felt it could not renege on, without first reviewing them. Thus, Petitioner had pervasive control over claimant's work.

Factor 2: The worker's opportunity for profit or loss

Claimant's main, if not sole, investment in his work was his time and services. His opportunity for profit depended upon his sales and he had no financial stake in his work. There was no risk of loss of money since there was no investment other than time. There did not appear to be much in the way of expenses for claimant as well. There is no evidence that claimant was operating his own business. He only sold petitioner's construction services.

Factor 3: The degree of skill and independent initiative required to perform the work

Although Dawson had sold for a home improvement company before, he had only sold siding and roofing. Madden did some training of Dawson on how to operate the estimating software and how to sketch an extension but as Madden testified the software contained drop down menus giving the different components of the job. This removed much of the discretion from Dawson on how to charge a job.

Factor 4: The permanence or duration of the working relationship

Dawson worked for Madden on a part-time basis for approximately 3 years. During this time, Madden did no sales work for any other business.

Factor 5: The extent to which the work is an integral part of the employer's business

Petitioner performs home improvement construction. Dawson sells this service as does petitioner himself. If there were no sales petitioner would have no business, therefore, sales are an integral part of the business. This is highlighted by the fact that Madden also performs sales work.

We find that based on the totality of the circumstances the claimant was dependent on the petitioner's business for "the opportunity to render service" (*see Brock v Superior Care*, 840 F2d at 1059). Accordingly, an employment relationship existed between the petitioner and the claimant and the petitioner is liable for any unpaid wages under Article 6 of the Labor Law.

2. Commissions are due to Claimant.

Claimant was "paid on a commission basis and a commission is considered a wage under section 190 (l) of the Labor Law." (*Pachter v. Bernard Hodes Group, Inc.*, 10 NY3d 609, 617-18 [2008]). Regarding the employer's obligation to pay commission wages, specifically, Labor Law § 191-c (1) provides, in pertinent part:

> "When a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after

> they become due in the case of earned commissions not due when the contract is terminated . . . ."

Labor Law § 191-a further provides:

> "For purposes of this article the term:
>
> (a) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of wholesale orders or sales.
>
> (b) "Earned commission" means a commission due for services or merchandise which is due according to the terms of an applicable contract or, when there is no applicable contractual provision, a commission due for merchandise which has actually been delivered to, accepted by, and paid for by the customer, notwithstanding that the sales representative's services may have terminated."

Labor Law §191(c) provides, as of October 16, 2007:

> "The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request. . . . The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment."

Commissions are, therefore, determined based on the agreement of the parties. In this case, the parties have testified differently concerning the terms of the agreement with regard to the back-end commission. The letter, signed by Dawson, and prepared by Madden, is not specific enough to determine the issue. Pursuant to Labor Law § 191 (c), since the employer cannot provide a written contract provision, there is a presumption that the terms presented by Dawson are the agreed terms. Therefore, for all sales after October 16, 2007, we use the terms provided by Dawson and at least 4% is due on all sales projects that have been completed.

For the sales prior to October 2007, we find that the evidence of how the previous sales commissions were determined in the projects of Reid and Parant, when back end commissions were paid, support the testimony of Dawson that he was guaranteed at least 7% total commission for each job. The mark-up requirement appears to be an after-thought by Madden, never conveyed to Dawson, as illustrated by the contracts which contained change orders and Madden subtracted the income from the change orders in order to determine the mark up but did not subtract the cost of the orders.

Therefore, the Board finds that Dawson earned 7% on each sale. The following sums are due to Dawson based on what he has already been paid on each job. His commission for the Ge project is not yet due but will be due when the project is completed. That amount is $8,620.

Date of sale	Customer	Amount of Sale	%	Total Commission	Amount Paid	Amount due
5/06	Arbucci	$ 55,500	7	$ 3,885	$ 1,665	$ 2,200
5/06	Fontaine	$252,400	7	$ 17,668	$ 11,072	$ 6,596
6/07	Klusman	$133,000	7	$ 9,310	$ 3,990	$ 5,320
6/07	Connolly	$ 63,000	7	$ 4,410	$ 1,890	$ 2,520
9/07	DeVito	$215,800	7	$ 15,106	$ 12,974	$ 4,722
10/07	Jenkins	$133,000	7	$ 9,310	$ 5,990	$ 3,320
10/07	Torres	$ 82,000	7	$ 5,740	$ 2,460	$ 3,280
12/07	Angelini	$132,000	7	$ 9,240	$ 7,460	$ 1,780
1/08	Maloney	$203,000	7	$ 14,210	$ 9,090	$ 5,120
2/08	McShane	$ 97,000	7	$ 6,790	$ 2,910	$ 3,880
2/08	Palumbo	$ 90,000	7	$ 6,300	$ 2,700	$ 3,600
4/08	Dusharme	$ 66,650	7	$ 4,665.50	$ 1,999.50	$ 2,666
4/08	Robison	$ 85,000	7	$ 5,950	$ 2,550	$ 3,400
5/08	Serravalli	$ 35,375	7	$ 2,476.25	$ 1,061.25	$ 1,415
5/08	Ge	$166,000	7	$ 11,620	$ 3,000	
					TOTAL DUE	**$49,819.00**

Civil Penalty

The Wage Order assesses a 100% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 100% civil penalty were proper and reasonable in all respects. However, the penalty aspect of the Wage Order should be adjusted to reflect the modification in the amount of wages due.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law §14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order of the Commissioner is hereby affirmed, as modified; and

2. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Steyason, Chairperson

J. Christopher Meagher, Member

Sean Grunet, 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
October 17, 2012.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order of the Commissioner is hereby affirmed, as modified; and

2. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
October 17, 2012.