AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2631291
RENIASSANCE HOME HEALTH CARE INC
12900 SW 128TH ST STE 105
MIAMI FL 33186

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2010-120174L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated August 12, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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PROTEST OF LIABILITY
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RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 12, 2010.

After due notice to the parties, a telephone hearing was held on April 20, 2011. The Petitioner was represented by its attorney. The Petitioner's Administrator, Director of Nurses, and a Certified Nurse Assistant testified as witnesses.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which operates a home health care agency. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law.
2. The Tax Auditor examined the Form 1099-MISCs that were issued by the Petitioner to Certified Nurse Assistants, Home Health Aides, Licensed Practical Nurses, and Registered Nurses. The Petitioner classified all of those workers as independent contractors.

3. When the Certified Nurse Assistants, Home Health Aides, Licensed Practical Nurses, and Registered Nurses apply for work with the Petitioner, the workers are required to complete a comprehension test to ensure that they have the necessary skills to perform the work. The Petitioner does not provide any training for the workers. The workers and the Petitioner enter into written agreements or contracts which provide that the worker is an independent contractor.
4. A care plan is established for each patient. Work assignments are offered to the workers; however, the workers are free to refuse any assignment offered. The workers are paid by the visit and the amount of pay for each visit varies and is negotiable.
5. The care plans established by doctors set forth the frequency of the visits and the type of care required. The Petitioner does not set the work schedules for the workers. The workers set their own schedules and hours of work in conjunction with the patients' desires and needs.
6. The Petitioner is governed by the Agency for Healthcare Administration, Medicare regulations, and by the State of Florida. The Petitioner does not exert any control over the workers other than the control required by the governmental authorities.
7. The Petitioner does not provide any equipment or supplies to the workers. The workers are required to purchase their own equipment and supplies. The workers provide their own transportation and the Petitioner does not reimburse the workers for any expenses. The workers are required to obtain continuing education at their own expense.
8. The Petitioner does not supervise the workers. Medicare regulations require that the Petitioner must check on each worker providing skilled nursing care every fourteen days and every sixty days for other workers. The Petitioner does not observe the workers while the workers are performing services. The Petitioner talks to the patients to ensure that services have been provided to the patients' satisfaction in compliance with the established care plans. If a patient is satisfied with the care provided by the worker, the supervisory visit is ended.
9. The workers are free to work for other home health care agencies. Maria Marchante, who performs services for the Petitioner as a Certified Nurse Assistant, regularly performs services for two other home health care agencies. The Petitioner is aware that many other workers perform services for other home health care agencies.
10. The workers are not required to wear uniforms or any form of identification with the Petitioner. Most of the workers wear scrubs which are purchased by the workers.
11. The workers submit invoices to the Petitioner for the work performed and are required to submit the case notes. When the Petitioner receives the invoices and case notes the workers are paid at fifteen day intervals. No taxes are withheld from the pay and no fringe benefits such as paid vacations, paid holidays, or health insurance are provided by the Petitioner. The Petitioner reports the earnings of each worker on Form 1099-MISC as nonemployee compensation.
12. Each written agreement or contract sets forth the term of the agreement. The terms vary from worker to worker depending on the agreement. The agreements and contracts may be terminated upon thirty days' written notice or may be terminated immediately upon breach of the agreement or upon mutual written consent of both parties.
13. The Tax Auditor concluded that the Petitioner was not in compliance with the Florida Unemployment Compensation Law due to misclassified workers. On or before August 12, 2010, the Department of Revenue issued a *Notice of Proposed Assessment* setting forth the additional tax that was due as a result of the misclassification of workers. The Petitioner filed a timely protest by mail postmarked August 12, 2010.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

15. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

16. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

17. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

18. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:
        (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
        (b) whether or not the one employed is engaged in a distinct occupation or business;
        (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
        (d) the skill required in the particular occupation;
        (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
        (f) the length of time for which the person is employed;
        (g) the method of payment, whether by the time or by the job;
        (h) whether or not the work is a part of the regular business of the employer;
        (i) whether or not the parties believe they are creating the relation of master and servant;
        (j) whether the principal is or is not in business.

19. Comments in the Restatement explain that the word “servant” does not exclusively connote manual labor, and the word “employee” has largely replaced “servant” in statutes dealing with various aspects of the working relationship between two parties.

20. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.

21. The evidence presented in this case reveals that all of the workers perform services under written agreements or contracts that specify that the worker is an independent contractor. The Florida

Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

22. The evidence reveals that the workers are certified or licensed to perform the duties of Certified Nurse Assistant, Home Health Aide, Licensed Practical Nurse, or Registered Nurse. The Petitioner does not provide any training and the workers use their own skills and knowledge to perform the work. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

23. The Petitioner does not provide any equipment or supplies which are needed to perform the work. The workers provide their own equipment and supplies and are not reimbursed for any working expenses.

24. The agreements and contracts set forth the term of each agreement or contract. The agreements and contracts may be terminated only if certain conditions are satisfied. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract." In this case the workers do have the legal right to complete the projects which they have contracted to perform.

25. The workers are paid per visit. The workers are paid a negotiated rate based on the work performed rather than based on time worked. No taxes are withheld from the pay and the workers do not receive fringe benefits that are customarily associated with employment relationships.

26. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

27. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

28. The Petitioner did exercise some control over the workers, however, all of that control was the result of governmental authorities. Regulation imposed by governmental authorities does not evidence control by the employer for the purpose of determining if the worker is an employee or an

independent contractor. NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, 922 (11th Cir. 1983); Global Home Care, Inc. v. D.O.L. & E.S., 521 So. 2d 220 (Fla. 2d DCA 1988).

29. Based on the evidence presented in this case it is concluded that the services perfomed by the workers classified by the Petitioner as independent contractors and which were reclassified by the Department of Revenue during the audit as employees do not constitute insured employment.

Recommendation: It is recommended that the determination dated August 12, 2010, be REVERSED.

Respectfully submitted on April 22, 2011.

R. O. SMITH, Special Deputy
Office of Appeals