DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2289385

BLUE SKY AIRPORT LIMO SERVICES LLC
137 SEABOARD AVE UNIT A
VENICE FL 34285

PROTEST OF LIABILITY
DOCKET NO. 2011-126271L

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

O R D E R

This matter comes before me for final Department Order.

An issue before me is whether the Petitioner filed a timely protest pursuant to sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code. Another issue before me is whether services performed for the Petitioner by the Joined Party James Ryder constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party James Ryder filed a reemployment assistance claim in June 2011. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for reemployment assistance benefits, and the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe reemployment assistance taxes on the wages it paid to the

Joined Party. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party James Ryder will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on May 9, 2012, and this case was consolidated with Docket Number 2012-17125L. The Petitioner was represented by its attorney. The Petitioner's bookkeeper, general manager and two former owners testified as witnesses on behalf of the Petitioner. The Respondent, represented by a Tax Specialist II, appeared and testified. Joined Parties James Ryder and Michael Osborne both appeared and testified. The Special Deputy issued recommended orders for both Docket Number 2011-126271L and Docket Number 2012-17125L on June 5, 2012.

The Special Deputy's Findings of Fact recite as follows:

1. Joined Party Michael Osborne worked for an airport limousine service in Venice, Florida as a driver beginning in 1996. In June 2000 the Petitioner, Blue Sky Airport Limo Service, L.L.C., was formed for the purpose of purchasing the airport limousine company in July 2000. The Petitioner's owners were Jeffery Knuckles, John Dowd and Thomas Parks. Jeffery Knuckles and John Dowd were absentee owners who were not involved in the operation of the business. The managing member of the limited liability company was Thomas Parks. Upon purchase of the business the Petitioner retained Michael Osborne as a driver and classified him as an independent contractor. There was no written agreement or contract between Michael Osborne and the Petitioner. At one point Michael Osborne questioned the manager, Thomas Parks, why the Petitioner had classified him as an independent contractor. Thomas Parks replied that there was a fine line between employees and independent contractors, but did not offer any further explanation as to why the Petitioner had classified Michael Osborne as an independent contractor.
2. In March 2003 the Petitioner hired Joined Party James Ryder as a driver. The Petitioner never told James Ryder that he was hired as an independent contractor. There was no written agreement or contract between James Ryder and the Petitioner.
3. The Petitioner requires newly hired drivers to complete training by riding with an existing driver for one or two days. James Ryder rode with another driver for one day. When Michael Osborne was hired by the Petitioner's predecessor in 1996 he was required to complete training in the same manner. He was not required to complete additional training when the Petitioner purchased the business. During the time that Michael Osborne and James Ryder worked for the Petitioner there were occasions when newly hired drivers were assigned to ride with James Ryder or Michael Osborne for training purposes.

4. The drivers are assigned to different work shifts by the Petitioner and are classified by the Petitioner as either full time drivers or part time drivers. Both Michael Osborne and James Ryder were assigned to work the early morning shift and were classified as full time drivers. The hours of the early morning shift are generally as early as 3 AM until approximately noon. The Petitioner's business operates seven days per week. Prior to 2010 Michael Osborne was scheduled to be off on Friday each week. In 2010 the Petitioner informed Michael Osborne that he was not allowed to work six days a week and that he was required to be off two days each week.

5. Jeffery Knuckles and John Dowd bought out Thomas Parks in 2007. After that date the company was operated by several different managers. Jeffrey Knuckles and John Dowd believed that the company was being poorly managed and that theft was occurring. Beginning in approximately 2010 or 2011 Jeffrey Knuckles, who lives in Colorado, began making frequent trips to the business location to oversee the business operation. On August 26, 2011, the limited liability company, including the business, was sold to Amine Abdul-aal. Since August 26, 2011, the business has been managed by his daughter, Zeina Abdul-aal.

6. The Petitioner has had ten to twenty drivers at any one time in the past. Currently, the Petitioner has nine drivers. The Petitioner provides the vehicles which are driven by the drivers. The Petitioner pays for the gas, maintenance, repairs, licenses, permits, and insurance for the vehicles. The Petitioner provides cell phones for the drivers, which are to be used for company business. The Petitioner provides business cards bearing the Petitioner's name and telephone number. The business cards do not contain the driver's name or the driver's contact information. The Petitioner provides everything that is needed for the drivers to perform the work with the exception of airport licenses for the Tampa and Sarasota airports which have been required by those airports during the last few years. Each driver is required to obtain those licenses from the airports. The licenses authorize the driver to operate the Petitioner's vehicle on airport property but do not authorize the driver to operate vehicles for other transportation companies. A driver is required to return the license to the airport if the driver is terminated from the Petitioner. The initial fee for the Tampa airport is $100 with an annual renewal fee of $75. The Sarasota airport charges an annual fee of $35. The Petitioner pays the fee for the drivers for the Ft. Myers airport. Any other expenses which the drivers may have are reimbursed by the Petitioner.

7. Prior to approximately 2006 the Petitioner required the drivers to wear company uniforms bearing the Petitioner's name. One uniform was provided by the Petitioner at the time of hire and the drivers had the option of purchasing additional uniforms. The Petitioner paid one-half of the cost for additional uniforms. In approximately 2006 the Petitioner discontinued requiring company uniforms and established a dress code for the drivers. The drivers are not allowed to wear sandals or tee-shirts but are allowed to wear shorts with pockets and a collared shirt.

8. The drivers are paid a percentage of the fares which are charged to the Petitioner's clients. The Petitioner determines the amount of all fares and generally requires the clients to prepay the fares. The Petitioner determines the percentage of the fare which is paid to the drivers. When Michael Osborne began working for the Petitioner in July 2000 the Petitioner paid him 21% of the fares. In 2005 the Petitioner unilaterally changed the drivers' percentage to 18%.

9. The drivers do not bill the Petitioner for their services and they are not required to punch a timecard or complete a timesheet. The Petitioner pays the drivers weekly based on 18% of the revenue generated by each driver. No taxes are withheld from the pay and no fringe benefits are provided, with the exception of occasional Christmas bonuses. At the end of each year the Petitioner reports the earnings of each driver on Form 1099-MISC as nonemployee compensation. Occasionally, the customer does not prepay and the driver is notified by the Petitioner that the driver is required to collect the cash from the customer. Also occasionally, an individual will approach a driver at the airport and request to be transported. The Petitioner has provided the drivers with a list of the fares from one location to another. The driver tells the potential passenger the amount of the fare and, if the fare is acceptable to the customer, the driver must contact the Petitioner to notify the Petitioner and to request permission to transport the passenger before transporting the customer. The driver is required to turn in all fares collected by the driver.

10. The drivers are allowed to receive gratuities from passengers and some of those gratuities are collected by the Petitioner at the time that the client prepays the fare. Initially, the drivers were allowed to keep any cash gratuities which were paid to them by customers and they were not required to report the receipt of those gratuities to the Petitioner. The Petitioner changed that policy at some point in time and requires the drivers to turn in all cash gratuities which the drivers receive. The Petitioner then returns the cash gratuities to the driver along with the prepaid gratuities.

11. On one occasion the Petitioner asked Joined Party James Ryder if he would be willing to wash and detail two vehicles that were in poor shape and asked James Ryder how much pay he would be willing to accept for the work. James Ryder stated an amount which was acceptable to the Petitioner. He completed the work and was paid accordingly.

12. The Petitioner provides the full time drivers with a manifest containing the assignments or runs assigned to the driver for the following day. A driver may refuse an assignment but the driver must have a good reason for refusing. It was common knowledge among the drivers that if a driver refused assignments too often the driver would be disciplined or discharged. Both Michael Osborne and James Ryder had been told by other drivers that assignments had been withheld from them for several days because they had refused to take an assignment. On one or two occasions Michael Osborne attempted to refuse an assignment and was told by the Petitioner that he had to take the assignment or else he would not have a job.

13. The drivers are required to request time off in advance and must obtain permission. If a driver is ill and not able to work an assignment, the driver must notify the Petitioner so that the Petitioner can schedule a substitute. The driver is not allowed to hire others to perform the work for him. It is difficult for the early morning drivers to notify the Petitioner because the Petitioner's office is not open that early. As a result Michael Osborne usually worked even though he was ill. On a few occasions Michael Osborne contacted one of the Petitioner's other drivers to take the assignment. On those occasions the substitute driver was paid by the Petitioner, not by Michael Osborne.

14. The drivers are not allowed to have family members or other riders, with the exception of the paid passengers, in the Petitioner's vehicle. In the past the Petitioner would occasionally allow the full time early morning drivers to take a vehicle home with them so that they could leave directly from their home to pick up an early morning passenger rather than going to the Petitioner's location, picking up the vehicle, and then picking up the passenger. Several years ago the Petitioner changed that policy. The drivers are not allowed to take a vehicle home.

15. The Petitioner has a drivers' lounge at the Petitioner's business location. The lounge has a desk and a computer which the drivers may use to print maps and obtain driving directions. For a period of time the drivers were allowed to wash the vehicles at the business location. At some point in time the city notified the Petitioner that the vehicles could not be washed at the business location because of drainage problems. After that date the Petitioner authorized the drivers to take the vehicles to gas stations which also operate commercial car washes. The drivers pay for the commercial car washes with gas credit cards provided to the drivers by the Petitioner.

16. At some point in time the Petitioner instituted a policy that the drivers were not allowed to idle the vehicles with the air conditioning on while waiting to pick up a passenger, even in extreme heat.

17. The Petitioner has had occasional drivers' meetings in the past. Attendance at the meetings is not mandatory. At one of the meetings the Petitioner accused the drivers of stealing gas.

18. The drivers are required to report by the cell phone provided by the Petitioner when they pick up the customer and when they deliver the customer to the destination. For a period of time a previous manager did not want to be bothered with the drivers calling in to report the status of the assignments and told the drivers to not bother calling in.

19. On or about March 31, 2008, the Petitioner presented James Ryder with an *Independent Contractor Checklist Pursuant to 440.02(15)(d)* for his signature. James Ryder signed the document.

20. In 2011 Jeffery Knuckles decided that the Petitioner needed a drivers' handbook for insurance purposes. His fiancé was employed as a human resource employee with an unrelated company. His fiancé transcribed the employee handbook used by her employer for use by the Petitioner. The drivers' handbook was distributed to the drivers and the drivers were required to sign an *Agreement Acknowledgment.* Among other things the Acknowledgment states "I understand and agree that it is my responsibility to read the Driver Handbook within the next 48 hours and any subsequent additions, revisions, and/or addendum(s) and to abide by the rules, policies, and standards set forth in the Driver Handbook." The Acknowledgment continues "I further acknowledge and agree that my employment with Blue Sky is at-will and that I am an independent contract driver which means that it is not for a specified period of time, and can be terminated at any time for any reason, with or without cause or notice, provided no violations of federal or state law have been violated by Blue Sky or me. I understand that I may terminate my employment at any time, with or without reason or advance notice. IN SIGNING THIS AGREEMENT, I UNDERSTAND THAT FAILURE TO ABIDE BY THE TERMS AND CONDITIONS OF THE DRIVER HANDBOOK COULD RESULT IN TERMINATION."

21. Michael Osborne did not want to sign the *Agreement Acknowledgment.* The Petitioner told Michael Osborne that if he did not sign the Acknowledgment that he would not have a job. Michael Osborne signed the document on June 6, 2011.

22. After the Petitioner was sold on August 26, 2011, the new owner made some changes. The Petitioner installed GPS in the vehicles so that the Petitioner would know where the vehicles were at all times.

23. Michael Osborne and James Ryder both believed that they were not allowed to drive for a competitor or for themselves. Although they believed that they could not work for a competitor the Petitioner never told them whether they could or could not work for a competitor. They both believed that working for a competitor would constitute a conflict of interest. They heard through the grapevine that other drivers had worked for other companies and that those drivers did not want the Petitioner to know of their outside activities.

24. Neither Michael Osborne or James Ryder had any investment in a business, had a business license or occupational license, had business liability insurance, advertised their services, or performed work for others. Michael Osborne believed that he was an independent contractor only because the Petitioner told him that he was an independent contractor. James Ryder always believed that he was the Petitioner's employee but understood that payroll taxes were not withheld from his pay and that he was responsible for paying the taxes.

25. James Ryder worked as a driver for the Petitioner until May 15, 2011, when he was notified by the Petitioner that he was terminated. The Petitioner stated that the termination was due to lack of work. James Ryder filed a claim for unemployment compensation benefits effective June 5, 2011. When he did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if James Ryder performed services for the Petitioner as an employee or as an independent contractor.

26. On August 4, 2011, the Department of Revenue created a determination, which is indicated to have been mailed to the Petitioner's correct address of record, holding that James Ryder was the Petitioner's employee retroactive to January 1, 2010. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written protest to this determination within twenty (20) days from the date of this letter."

27. The Petitioner's bookkeeper brings the mail in from the mailbox each day and opens the mail. If the bookkeeper had received the determination she would have placed it on the desk of Jeffery Knuckles. Jeffrey Knuckles was in Colorado at the time and he returned to Florida on August 21, 2011. He opened the mail on his desk, however, the determination was not in the mail on his desk. He returned to Colorado on August 29, 2011. On or before August 27, 2011, the Department of Revenue mailed a *Notice of Final Assessment* to the Petitioner which was timely received by the Petitioner. The Notice advises, among other things, that if the Petitioner fails to file a written protest within twenty days of August 27, 2011, specifying the objections to the assessment, the assessment will be final. The Petitioner filed a written protest by mail dated September 14, 2011, stating the Petitioner "takes issue with the fact that any assessment is being made as the individual concerned is an independent contractor and has never been an employee." On October 14, 2011, an *Order to Show Cause* was mailed to the Petitioner by the Department of Economic Opportunity directing the Petitioner to show cause within fifteen days why the Director should not dismiss the petition for lack of jurisdiction. The Petitioner timely replied on October 26, 2011.

28. Michael Osborne was terminated by the Petitioner on October 11, 2011. The Petitioner told Michael Osborne that he was terminated because he had accepted payment from the Petitioner for a run which he had not made and because he had allowed the Petitioner's vehicle to idle for an excessive amount of time. Michael Osborne filed a claim for unemployment compensation benefits effective October 16, 2011. When Michael Osborne did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if Michael Osborne performed services for the Petitioner as an employee or as an independent contractor.

29. On November 22, 2011, the Department of Revenue issued a determination holding that Michael Osborne and other individuals performing services for the Petitioner as drivers are the Petitioner's employees retroactive to October 1, 2006. The Petitioner filed a timely protest by letter dated December 9, 2011.

Based on these Findings of Fact, the Special Deputy recommended that the Petitioner's protest be accepted as timely filed. The Special Deputy also recommended that the determination dated August 4, 2011, be modified to reflect a retroactive date of October 1, 2006, and that the determination be affirmed as modified.

By orders dated June 20, 2012, and June 27, 2012, the Special Deputy granted an extension of the time for filing exceptions until July 20, 2012. The Petitioner's exceptions were received by mail postmarked July 19, 2012. No other submissions were received from any party.

With respect to the recommended order, section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts. The Petitioner's exceptions are also addressed below.

Upon review of the record, it was determined that a portion of Finding of Fact #14 must be modified because it does not accurately reflect testimony provided during the hearing. The record reflects that the Joined Party James Ryder testified that he usually worked even though he was ill. As a result, Finding of Fact #14 is amended to say:

> The drivers are required to request time off in advance and must obtain permission. If a driver is ill and not able to work an assignment, the driver must notify the Petitioner so that the Petitioner can schedule a substitute. The driver is not allowed to hire others to perform the work for him. It is difficult for the early morning drivers to notify the Petitioner because the Petitioner's office is not open that early. On a few occasions, Michael Osborne contacted one of the Petitioner's other drivers to take the assignment. On those occasions, the substitute driver was paid by the Petitioner, not by Michael Osborne.

In its exceptions, the Petitioner contends that both recommended orders are inconsistent with Florida law, the Special Deputy ignored key pieces of the Petitioner's evidence, the Special Deputy improperly excluded Petitioner's relevant admissible evidence, and the Special Deputy relied on inadmissible hearsay. The Petitioner's exceptions and proposed findings of fact and conclusions of law propose alternative findings of fact and conclusions of law or findings of fact and conclusions of law in accord with the Special Deputy's Findings of Fact and Conclusions of Law. The Petitioner specifically takes exception to Findings of Fact #1-4, 6-7, and 10-25. The Petitioner also takes exception to Conclusions of Law #41, 39, and 52 from Docket Number 2011-126271L and Conclusions of Law #38, 42, and 49 from Docket Number 2012-17125L. The Department has reviewed the Petitioner's contentions.

The Department has determined that the Petitioner's contentions lack support. Section 120.57(1)(l), Florida Statutes, provides that the Special Deputy is the trier of fact in an administrative hearing, and does not allow the modification or rejection of the Special Deputy's Findings of Fact or Conclusions of Law unless the Department first determines that the findings of fact are not supported by the competent substantial evidence in the record, the conclusions of law do not reflect a reasonable application of the law to the facts, or that the proceedings on which the findings were based did not comply with essential requirements of law. Section 120.57(1)(c), Florida Statutes, also provides that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." A review of the record demonstrates that the Special Deputy resolved conflicts in evidence in favor of the Joined Parties. A review of the record also reveals that the Special Deputy's amended Findings of Fact, including Findings of Fact #1-4, 6-7, and 10-25, are supported by competent substantial evidence in the record.

A review of the record further reveals that the Special Deputy's Conclusions of Law, Conclusions of Law #41, 39, and 52 from Docket Number 2011-126271L and Conclusions of Law #38, 42, and 49 from Docket Number 2012-17125L, are supported by competent substantial evidence in the record and reflect a reasonable application of the law to the facts. The Petitioner has not demonstrated that the Special Deputy relied on inadmissible hearsay. As a result, the Department may not further modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as modified herein. The Petitioner's exceptions are respectfully rejected.

In both its exceptions and proposed findings of fact and conclusions of law, the Petitioner relies on several court cases to support its conclusion that the Joined Parties performed their services as independent contractors. The court cases cited by the Petitioner are distinguishable from the case at hand because the Special Deputy ultimately found that the Petitioner had the right to control the Joined Parties' services consistent with an employer/employee relationship. This outcome is similar to *Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966), a case the Petitioner cited that held that an employment relationship existed between a worker and the business. The Special Deputy's conclusion that an employment relationship existed between the parties is supported by competent substantial evidence in the record and reflects a reasonable application of the law to the facts. As previously stated, section 120.57(1)(l), Florida Statutes, does not allow additional modification of the Special Deputy's Findings of Fact and Conclusions of Law. Based on all of the considerations listed above, all of the Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the amended Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order as amended herein. The Special Deputy's amended Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

Therefore, it is ORDERED that the Petitioner's appeal is accepted as timely. It is further ORDERED that the determination dated August 4, 2011, is MODIFIED to reflect a retroactive date of October 1, 2006. It is further ORDERED that the determination is AFFIRMED as modified.

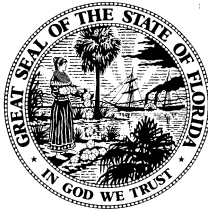
JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this *Order* and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _______ day of **August, 2012**.



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

DEPUTY CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _______ day of August, 2012.

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

BLUE SKY AIRPORT LIMO SERVICES
LLC
137 SEABOARD AVE UNIT A
VENICE FL 34285

JAMES RYDER
649 TAMIAMI TRAIL SOUTH APT 102
VENICE FL 34285

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

SHUMAKER LOOP & KENDRICK LLP
ATTN: JENNIFER B COMPTON
240 SOUTH PINEAPPLE AVENUE
SARASOTA FL 34236

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 347 CALDWELL BUILDING
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PROTEST OF LIABILITY
DOCKET NO. 2011-126271L

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 4, 2011.

After due notice to the parties, a telephone hearing was held on May 9, 2012. The Petitioner was represented by its attorney. The Petitioner's bookkeeper, the Petitioner's General Manager, and two former owners, Jeffery Knuckles and John Dowd, testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. Joined Party James Ryder appeared and testified. This case was consolidated with 2012-17125L. Joined Party Michael Osborne appeared and testified.

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 timely received from the Petitioner.

Issue:

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

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. Joined Party Michael Osborne worked for an airport limousine service in Venice, Florida as a driver beginning in 1996. In June 2000 the Petitioner, Blue Sky Airport Limo Service, L.L.C., was formed for the purpose of purchasing the airport limousine company in July 2000. The Petitioner's owners were Jeffery Knuckles, John Dowd and Thomas Parks. Jeffery Knuckles and John Dowd were absentee owners who were not involved in the operation of the business. The managing member of the limited liability company was Thomas Parks. Upon purchase of the business the Petitioner retained Michael Osborne as a driver and classified him as an independent contractor. There was no written agreement or contract between Michael Osborne and the Petitioner. At one point Michael Osborne questioned the manager, Thomas Parks, why the Petitioner had classified him as an independent contractor. Thomas Parks replied that there was a fine line between employees and independent contractors, but did not offer any further explanation as to why the Petitioner had classified Michael Osborne as an independent contractor.
2. In March 2003 the Petitioner hired Joined Party James Ryder as a driver. The Petitioner never told James Ryder that he was hired as an independent contractor. There was no written agreement or contract between James Ryder and the Petitioner.
3. The Petitioner requires newly hired drivers to complete training by riding with an existing driver for one or two days. James Ryder rode with another driver for one day. When Michael Osborne was hired by the Petitioner's predecessor in 1996 he was required to complete training in the same manner. He was not required to complete additional training when the Petitioner purchased the business. During the time that Michael Osborne and James Ryder worked for the Petitioner there were occasions when newly hired drivers were assigned to ride with James Ryder or Michael Osborne for training purposes.
4. The drivers are assigned to different work shifts by the Petitioner and are classified by the Petitioner as either full time drivers or part time drivers. Both Michael Osborne and James Ryder were assigned to work the early morning shift and were classified as full time drivers. The hours of the early morning shift are generally as early as 3 AM until approximately noon. The Petitioner's business operates seven days per week. Prior to 2010 Michael Osborne was scheduled to be off on Friday each week. In 2010 the Petitioner informed Michael Osborne that he was not allowed to work six days a week and that he was required to be off two days each week.
5. Jeffery Knuckles and John Dowd bought out Thomas Parks in 2007. After that date the company was operated by several different managers. Jeffrey Knuckles and John Dowd believed that the company was being poorly managed and that theft was occurring. Beginning in approximately 2010 or 2011 Jeffrey Knuckles, who lives in Colorado, began making frequent trips to the business location to oversee the business operation. On August 26, 2011, the limited liability company, including the business, was sold to Amine Abdul-aal. Since August 26, 2011, the business has been managed by his daughter, Zeina Abdul-aal.
6. The Petitioner has had ten to twenty drivers at any one time in the past. Currently, the Petitioner has nine drivers. The Petitioner provides the vehicles which are driven by the drivers. The Petitioner pays for the gas, maintenance, repairs, licenses, permits, and insurance for the vehicles. The Petitioner provides cell phones for the drivers, which are to be used for company business. The Petitioner provides business cards bearing the Petitioner's name and telephone number. The business cards do not contain the driver's name or the driver's contact information. The Petitioner provides everything that is needed for the drivers to perform the work with the exception of airport

licenses for the Tampa and Sarasota airports which have been required by those airports during the last few years. Each driver is required to obtain those licenses from the airports. The licenses authorize the driver to operate the Petitioner's vehicle on airport property but do not authorize the driver to operate vehicles for other transportation companies. A driver is required to return the license to the airport if the driver is terminated from the Petitioner. The initial fee for the Tampa airport is $100 with an annual renewal fee of $75. The Sarasota airport charges an annual fee of $35. The Petitioner pays the fee for the drivers for the Ft. Myers airport. Any other expenses which the drivers may have are reimbursed by the Petitioner.

7. Prior to approximately 2006 the Petitioner required the drivers to wear company uniforms bearing the Petitioner's name. One uniform was provided by the Petitioner at the time of hire and the drivers had the option of purchasing additional uniforms. The Petitioner paid one-half of the cost for additional uniforms. In approximately 2006 the Petitioner discontinued requiring company uniforms and established a dress code for the drivers. The drivers are not allowed to wear sandals or tee-shirts but are allowed to wear shorts with pockets and a collared shirt.

8. The drivers are paid a percentage of the fares which are charged to the Petitioner's clients. The Petitioner determines the amount of all fares and generally requires the clients to prepay the fares. The Petitioner determines the percentage of the fare which is paid to the drivers. When Michael Osborne began working for the Petitioner in July 2000 the Petitioner paid him 21% of the fares. In 2005 the Petitioner unilaterally changed the drivers' percentage to 18%.

9. The drivers do not bill the Petitioner for their services and they are not required to punch a timecard or complete a timesheet. The Petitioner pays the drivers weekly based on 18% of the revenue generated by each driver. No taxes are withheld from the pay and no fringe benefits are provided, with the exception of occasional Christmas bonuses. At the end of each year the Petitioner reports the earnings of each driver on Form 1099-MISC as nonemployee compensation.

10. Occasionally, the customer does not prepay and the driver is notified by the Petitioner that the driver is required to collect the cash from the customer. Also occasionally, an individual will approach a driver at the airport and request to be transported. The Petitioner has provided the drivers with a list of the fares from one location to another. The driver tells the potential passenger the amount of the fare and, if the fare is acceptable to the customer, the driver must contact the Petitioner to notify the Petitioner and to request permission to transport the passenger before transporting the customer. The driver is required to turn in all fares collected by the driver.

11. The drivers are allowed to receive gratuities from passengers and some of those gratuities are collected by the Petitioner at the time that the client prepays the fare. Initially, the drivers were allowed to keep any cash gratuities which were paid to them by customers and they were not required to report the receipt of those gratuities to the Petitioner. The Petitioner changed that policy at some point in time and requires the drivers to turn in all cash gratuities which the drivers receive. The Petitioner then returns the cash gratuities to the driver along with the prepaid gratuities.

12. On one occasion the Petitioner asked Joined Party James Ryder if he would be willing to wash and detail two vehicles that were in poor shape and asked James Ryder how much pay he would be willing to accept for the work. James Ryder stated an amount which was acceptable to the Petitioner. He completed the work and was paid accordingly.

13. The Petitioner provides the full time drivers with a manifest containing the assignments or runs assigned to the driver for the following day. A driver may refuse an assignment but the driver must have a good reason for refusing. It was common knowledge among the drivers that if a driver refused assignments too often the driver would be disciplined or discharged. Both Michael Osborne and James Ryder had been told by other drivers that assignments had been withheld from

them for several days because they had refused to take an assignment. On one or two occasions Michael Osborne attempted to refuse an assignment and was told by the Petitioner that he had to take the assignment or else he would not have a job.

14. The drivers are required to request time off in advance and must obtain permission. If a driver is ill and not able to work an assignment, the driver must notify the Petitioner so that the Petitioner can schedule a substitute. The driver is not allowed to hire others to perform the work for him. It is difficult for the early morning drivers to notify the Petitioner because the Petitioner's office is not open that early. As a result Michael Osborne usually worked even though he was ill. On a few occasions Michael Osborne contacted one of the Petitioner's other drivers to take the assignment. On those occasions the substitute driver was paid by the Petitioner, not by Michael Osborne.

15. The drivers are not allowed to have family members or other riders, with the exception of the paid passengers, in the Petitioner's vehicle. In the past the Petitioner would occasionally allow the full time early morning drivers to take a vehicle home with them so that they could leave directly from their home to pick up an early morning passenger rather than going to the Petitioner's location, picking up the vehicle, and then picking up the passenger. Several years ago the Petitioner changed that policy. The drivers are not allowed to take a vehicle home.

16. The Petitioner has a drivers' lounge at the Petitioner's business location. The lounge has a desk and a computer which the drivers may use to print maps and obtain driving directions. For a period of time the drivers were allowed to wash the vehicles at the business location. At some point in time the city notified the Petitioner that the vehicles could not be washed at the business location because of drainage problems. After that date the Petitioner authorized the drivers to take the vehicles to gas stations which also operate commercial car washes. The drivers pay for the commercial car washes with gas credit cards provided to the drivers by the Petitioner.

17. At some point in time the Petitioner instituted a policy that the drivers were not allowed to idle the vehicles with the air conditioning on while waiting to pick up a passenger, even in extreme heat.

18. The Petitioner has had occasional drivers' meetings in the past. Attendance at the meetings is not mandatory. At one of the meetings the Petitioner accused the drivers of stealing gas.

19. The drivers are required to report by the cell phone provided by the Petitioner when they pick up the customer and when they deliver the customer to the destination. For a period of time a previous manager did not want to be bothered with the drivers calling in to report the status of the assignments and told the drivers to not bother calling in.

20. On or about March 31, 2008, the Petitioner presented James Ryder with an *Independent Contractor Checklist Pursuant to 440.02(15)(d)* for his signature. James Ryder signed the document.

21. In 2011 Jeffery Knuckles decided that the Petitioner needed a drivers' handbook for insurance purposes. His fiancé was employed as a human resource employee with an unrelated company. His fiancé transcribed the employee handbook used by her employer for use by the Petitioner. The drivers' handbook was distributed to the drivers and the drivers were required to sign an *Agreement Acknowledgment.* Among other things the Acknowledgment states "I understand and agree that it is my responsibility to read the Driver Handbook within the next 48 hours and any subsequent additions, revisions, and/or addendum(s) and to abide by the rules, policies, and standards set forth in the Driver Handbook." The Acknowledgment continues "I further acknowledge and agree that my employment with Blue Sky is at-will and that I am an independent contract driver which means that it is not for a specified period of time, and can be terminated at any time for any reason, with or without cause or notice, provided no violations of federal or state law have been violated by Blue Sky or me. I understand that I may terminate my employment at

any time, with or without reason or advance notice. IN SIGNING THIS AGREEMENT, I UNDERSTAND THAT FAILURE TO ABIDE BY THE TERMS AND CONDITIONS OF THE DRIVER HANDBOOK COULD RESULT IN TERMINATION."

22. Michael Osborne did not want to sign the *Agreement Acknowledgment.* The Petitioner told Michael Osborne that if he did not sign the Acknowledgment that he would not have a job. Michael Osborne signed the document on June 6, 2011.

23. After the Petitioner was sold on August 26, 2011, the new owner made some changes. The Petitioner installed GPS in the vehicles so that the Petitioner would know where the vehicles were at all times.

24. Michael Osborne and James Ryder both believed that they were not allowed to drive for a competitor or for themselves. Although they believed that they could not work for a competitor the Petitioner never told them whether they could or could not work for a competitor. They both believed that working for a competitor would constitute a conflict of interest. They heard through the grapevine that other drivers had worked for other companies and that those drivers did not want the Petitioner to know of their outside activities.

25. Neither Michael Osborne or James Ryder had any investment in a business, had a business license or occupational license, had business liability insurance, advertised their services, or performed work for others. Michael Osborne believed that he was an independent contractor only because the Petitioner told him that he was an independent contractor. James Ryder always believed that he was the Petitioner's employee but understood that payroll taxes were not withheld from his pay and that he was responsible for paying the taxes.

26. James Ryder worked as a driver for the Petitioner until May 15, 2011, when he was notified by the Petitioner that he was terminated. The Petitioner stated that the termination was due to lack of work. James Ryder filed a claim for unemployment compensation benefits effective June 5, 2011. When he did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if James Ryder performed services for the Petitioner as an employee or as an independent contractor.

27. On August 4, 2011, the Department of Revenue created a determination, which is indicated to have been mailed to the Petitioner's correct address of record, holding that James Ryder was the Petitioner's employee retroactive to January 1, 2010. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written protest to this determination within twenty (20) days from the date of this letter."

28. The Petitioner's bookkeeper brings the mail in from the mailbox each day and opens the mail. If the bookkeeper had received the determination she would have placed it on the desk of Jeffery Knuckles. Jeffrey Knuckles was in Colorado at the time and he returned to Florida on August 21, 2011. He opened the mail on his desk, however, the determination was not in the mail on his desk. He returned to Colorado on August 29, 2011. On or before August 27, 2011, the Department of Revenue mailed a *Notice of Final Assessment* to the Petitioner which was timely received by the Petitioner. The Notice advises, among other things, that if the Petitioner fails to file a written protest within twenty days of August 27, 2011, specifying the objections to the assessment, the assessment will be final. The Petitioner filed a written protest by mail dated September 14, 2011, stating the Petitioner "takes issue with the fact that any assessment is being made as the individual concerned is an independent contractor and has never been an employee." On October 14, 2011, an *Order to Show Cause* was mailed to the Petitioner by the Department of Economic Opportunity directing the Petitioner to show cause within fifteen days why the Director

should not dismiss the petition for lack of jurisdiction. The Petitioner timely replied on October 26, 2011.

29. Michael Osborne was terminated by the Petitioner on October 11, 2011. The Petitioner told Michael Osborne that he was terminated because he had accepted payment from the Petitioner for a run which he had not made and because he had allowed the Petitioner's vehicle to idle for an excessive amount of time. Michael Osborne filed a claim for unemployment compensation benefits effective October 16, 2011. When Michael Osborne did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if Michael Osborne performed services for the Petitioner as an employee or as an independent contractor.

30. On November 22, 2011, the Department of Revenue issued a determination holding that Michael Osborne and other individuals performing services for the Petitioner as drivers are the Petitioner's employees retroactive to October 1, 2006. The Petitioner filed a timely protest by letter dated December 9, 2011.

Conclusions of Law:

31. Section 443.141(2)(c), Florida Statutes, provides:
    (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

32. Rule 73B-10.035(5)(a)1., Florida Administrative Code, provides:
    Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

33. The determination dated August 4, 2011, contains no certification of mailing. No competent evidence was presented to show that the determination was actually mailed to the Petitioner and the presumption that the determination was mailed on August 4, 2011, is a rebuttable presumption. The Petitioner's testimony establishes that the determination was not received by the Petitioner. Thus, the Petitioner's protest is accepted as timely filed.

34. 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.

35. 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).

36. 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). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer

to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.

37. 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.

38. 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.

39. 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.

40. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

41. The evidence in this case reveals that there was no written agreement or contract between the parties. James Ryder was required to sign an *Independent Contractor Checklist Pursuant to 440.02(15)(d),* approximately five years after he began performing services for the Petitioner. Chapter 440, Florida Statutes, is known as the "Workers' Compensation Law" and is not the appropriate statute for determining whether the Petitioner is liable for payment of unemployment compensation tax. James Ryder was not told at the time of hire that he was engaged as an independent contractor. James Ryder always believed that he was the Petitioner's employee but recognized that the Petitioner required him to be responsible for paying his own taxes.

42. Michael Osborne was required to sign an *Agreement Acknowledgment,* under threat of termination, to acknowledge receipt of the driver handbook. The *Agreement Acknowledgement* refers to Michael Osborne's "employment" with the Petitioner and conversely refers to Michael Osborne as an "independent contract driver." No evidence was presented concerning any verbal agreement between the parties.

43. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties." In Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983) the court held that a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

44. The Petitioner is in the business of providing transportation for the Petitioner's clients to and from various airports. The drivers are engaged by the Petitioner to drive the Petitioner's vehicles to provide the transportation services which the Petitioner has contracted to perform. The work performed by the drivers is not separate and distinct from the Petitioner's business but is an integral and necessary part of the Petitioner's business.

45. The Petitioner has a substantial investment in the business. The Petitioner owns the vehicles and is responsible for all costs of operating the vehicles including gas, maintenance, repairs, licenses, and insurance. The Petitioner reimburses the drivers for any costs which the drivers may have with the exception of airport licenses which the Tampa and Sarasota airports require the drivers to purchase. Those licenses can only be used by the drivers to operate vehicles for the Petitioner and must be surrendered upon termination. At a maximum cost of $135 per year the licenses do not represent a significant investment in a business and do not constitute operating expenses which may put the drivers at risk of financial loss from performing services for the Petitioner.

46. The Petitioner requires newly hired drivers to ride with an experienced driver for a day or two as a means of training the new drivers. Driving a vehicle does not require any special skill or knowledge and is not the type of activity that requires training for a licensed driver. 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)

47. The drivers are paid a commission based on the fares of completed assignments. The drivers are not paid by time worked but rather they are paid based on the work which they complete. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The Petitioner determines the amount of the fares, determines the amount of the commission percentage, and determines which drivers are assigned to make the runs. The Petitioner controls the financial aspects of the relationship. The fact that the Petitioner chooses not to withhold payroll taxes or provide fringe benefits does not, standing alone, create an independent contractor relationship.

48. Michael Osborne performed services as a driver exclusively for the Petitioner for a period of approximately eleven years. James Ryder performed services exclusively for the Petitioner as a driver for approximately eight years. The Petitioner has the right to terminate the drivers at any time, for any reason, with or without cause or notice. These facts reveal the existence of an at-will relationship of relative permanence, typical of an employer-employee relationship. The Petitioner

terminated both Michael Osborne and James Ryder. 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."

49. Although the drivers drive the Petitioner's vehicles without direct supervision, the Petitioner exercises control over the drivers. Years ago, the Petitioner required the drivers to wear uniforms which were provided by the Petitioner. After the Petitioner discontinued the uniforms policy, the Petitioner developed a dress code which the drivers are required to follow. The drivers have to have a good reason for refusing work assignments. Michael Osborne was threatened with termination if he did not accept a work assignment. The drivers are required to abide by any rules, policies, and standards established by the Petitioner, and abide by any rules, policies, or standards which the Petitioner may establish at any time in the future. Among other things, the drivers are not allowed to idle the Petitioner's vehicles while parked, even if the intent is to keep the vehicle cool on a very hot day. The drivers are not allowed to have family members or other unauthorized riders in the vehicle. The drivers must obtain the Petitioner's permission before transporting any passenger. The drivers must obtain the Petitioner's permission before taking any time off from work.

50. The Petitioner controls what work is to be performed because the Petitioner determines which drivers are offered which work assignments. The work assignments are for a specified date at a specified time. Thus, the Petitioner controls when the work is performed. The Petitioner controls the percentage paid to the drivers and controls whether or not assignments are provided to the drivers. By providing the vehicles and paying for the operating expenses, the Petitioner has extended the exercise of control to the means used to perform the work. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

51. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.

52. The Petitioner's witnesses provided testimony in an attempt to show that work performed by airport limousine drivers is usually performed by independent contractors rather than under the direction of an employer. All of that testimony is hearsay because the testimony is based on what other individuals told the witnesses rather than based on the personal knowledge of the witnesses. No competent evidence was presented which shows that, in the local area, the work of airport limousine drivers is usually performed by independent contractors.

53. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to

the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

54. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error. The preponderence of the competent evidence reveals that the services performed by James Ryder, Michael Osborne, and other individuals as drivers constitute insured employment. Thus, it has not been shown that the determinations were in error.

55. Rule 60BB-2.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered.

56. The determination addressing the status of Michael Osborne and all other individuals performing services for the Petitioner as drivers was issued on November 22, 2011. The determination held that the effective date of the liability was October 1, 2006, a date within the five year period. James Ryder was part of that class of worker. James Ryder began working for the Petitioner in March 2003, prior to October 1, 2006. Since the determination addressing the status of James Ryder was not received by the Petitioner and has not become final, the retroactive date must be consistent with the determination addressing the effective date for the entire class of worker, October 1, 2006.

57. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law. Most of the proposed findings are merely recitation of testimony rather than findings of fact based on the evidence. The Petitioner's proposed findings 24, 26, 28, 29, 30, 31, 33, 34, 43, 44, 57, 58, 59, 60, 62, 73, 75, 76, 82, and 88 are not supported by the weight of the competent, credible evidence and are rejected. Proposed finding 32 contains a possible typographical error and can not be addressed as written because the substance of the proposal can not be ascertained. Proposed finding 42 is the Petitioner's conclusion rather than a fact supported by the evidence and is rejected.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated August 4, 2011, be MODIFIED to reflect a retroactive date of October 1, 2006. As modified it is recommended that the determination be AFFIRMED.

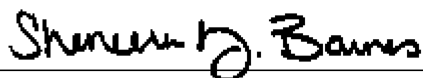
Respectfully submitted on June 5, 2012.

R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envió por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
June 5, 2012

Copies mailed to:
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