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

PETITIONER:
Employer Account No. - 2415520
ADVANCED SENIOR SOLUTIONS INC
ADVANCED CARE ADVISORS INC
PO BOX 501
PALM HARBOR FL 34682-0501

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

PROTEST OF LIABILITY
DOCKET NO. 2011-134907L

O R D E R

This matter comes before me for final Department 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 September 9, 2011, is AFFIRMED.

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 **June, 2012**.

Altemese Smith,
Assistant Director,
Unemployment Compensation 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.

Shanedra Y. Barnes
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 June, 2012.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

ADVANCED SENIOR SOLUTIONS INC
ADVANCED CARE ADVISORS INC
PO BOX 501
PALM HARBOR FL 34682-0501

JOYCE RYBERG
8212 101ST COURT
SEMINOLE FL 33777

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

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

MCFARLAND GOULD LYONSSULLIVAN
AND HOGAN PA
311 SOUTH MISSOURI AVENUE
CLEARWATER FL 33756

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

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Unemployment Compensation Appeals
MSC 347 CALDWELL BUILDING
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PROTEST OF LIABILITY
DOCKET NO. 2011-134907L

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 September 9, 2011.

After due notice to the parties, a telephone hearing was held on May 2, 2012. The Petitioner was represented by its attorney. The Petitioner's President/CEO testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. A friend of the Joined Party testified as a witness for the Joined Party.

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. Rule 73B-10.035(10)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing has been closed. In lieu of Proposed Findings of Fact and Conclusions of Law the Joined Party submitted an affidavit and a copy of a letter to the Unemployment Appeals Commission. Both documents are additional evidence not previously submitted and are rejected.

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.

Findings of Fact:

1. The Petitioner is a corporation which was formed in 2002 to operate a business as a geriatric care manager providing homemaker/companions to the elderly in their homes.

2. The Joined Party is an individual who has always worked as an employee. During the Joined Party's last employment she worked in outside sales for a medical imaging business. In 2010 the Joined Party was seeking employment and was informed by a marketing representative that the Petitioner was seeking an individual to work in the Petitioner's office. The Joined Party contacted the Petitioner and agreed to meet with the Petitioner's president over lunch. During the luncheon meeting the Petitioner's President informed the Joined Party that the position was for an administrative assistant to the President. The Joined Party was told that she would work in the Petitioner's office from 9:30 AM until 3:30 PM on Monday through Friday, that the rate of pay was $11.00 per hour, and that she would be paid on a biweekly basis. The job duties would be answering the telephone, relaying messages to the President, scheduling the homemaker/companions, and scheduling appointments for the Petitioner. The Joined Party would occasionally be required to visit the clients' homes to do quality assurance surveys. In order to do the quality assurance visits the Petitioner would provide a checklist which the Joined Party would complete in order for the Petitioner to determine if the homemaker/companion was performing the work as required and to determine if the client was satisfied with the homemaker/companion. The Joined Party was told that she would be required to obtain the President's permission to leave the office, and that she would be required to roll the telephones over to her cell phone during her absence from the office. She was also informed the telephones would occasionally roll over to her cell phone during evenings and weekends. The Joined Party expressed an interest in the position.

3. The Joined Party heard nothing from the Petitioner until several weeks later when the Petitioner requested that the Joined Party come to the Petitioner's office for further discussion. After several additional interviews the Petitioner offered the position to the Joined Party and informed the Joined Party that she would be responsible for paying her own taxes. The Petitioner informed the Joined Party that the earnings would be reported on a Form 1099, a term that the Joined Party was not familiar with because the Joined Party had always worked in employment. The Petitioner provided the Joined Party with a multitude of papers to sign including an *Independent Contractor Agreement* for the position of administrative assistant. The Joined Party signed the Agreement on July 26, 2010, without reading the Agreement. The Joined Party began performing services for the Petitioner on July 27, 2010.

4. The *Independent Contractor Agreement* provides that the Joined Party shall provide services to the Petitioner pursuant to the express authorization of the Petitioner in accordance with the Joined Party's job description and with the Petitioner's policies, practices, and procedures, and upon request of the supervisor. The Agreement provides the Petitioner with the right to change the policies and procedures from time to time at the Petitioner's discretion. The Agreement provides the Petitioner with the right to supervise, control, coordinate, and evaluate the provision of all services performed by the Joined Party. The Agreement requires the Joined Party to complete and turn in a time record at the end of each work week. The Agreement is for a one year period of time without automatic renewal, however, the Agreement provides that a standard probationary period of ninety days will be enforced at which time the contract can be terminated with or without cause. Either party may terminate the Agreement at any time with fifteen days written notice for breach of a material term. The Agreement provides that the Petitioner will not withhold any taxes from the pay and that, upon request and if necessary, the Petitioner will provide the Joined Party with a Form 1099.

5. The Petitioner provided the Joined Party with an office, a desk, telephone, computer, copy machine, fax machine, and all supplies that were needed to perform the work. Although the duties were not complex and did not require formal training, the Petitioner trained the Joined Party concerning, among other things, how to answer the telephone, how to use the Petitioner's computer system, how to schedule the homemaker/companions, how to work on and mail the monthly newsletter, how to compute the payroll for the homemaker/companions, how to make charts, how to mail birthday cards to the Petitioner's clients, requirements of the HIPPA law, and how to use the fax machine. The Petitioner provided a method of connecting to the Petitioner's computer from the Joined Party's personal computer at the Joined Party's home. The Petitioner provided the Joined Party with an identification badge bearing the name of the Petitioner's company and the Joined Party's name which the Joined Party was required to wear when visiting clients' homes. The Petitioner also provided the Joined Party with business cards bearing the Petitioner's name, address, telephone number, the Joined Party's name, and the Joined Party's position title of Administrative Assistant/Case Coordinator.
6. The Joined Party did not have any investment in a business, did not have a business license or occupational license, did not have business liability insurance, and did not advertise services to the general public. The Joined Party did not provide services to anyone other than the Petitioner. The Joined Party felt that it would be a conflict of interest to perform services for a competitor. The Joined Party was required to personally perform the work. She was prohibited from hiring others to perform the work for her.
7. The Joined Party worked under the supervision of the Petitioner's president. The President directed the Joined Party concerning the sequence that work was to be performed. The President was usually very complimentary of the Joined Party's performance, however, there were a few occasions when the President expressed anger concerning the Joined Party's performance.
8. The Joined Party was required to meet with the Petitioner's president at the end of each workday to update the President on what she had done during the day and what she had not done. In addition, the Petitioner had regularly scheduled staff meetings which the Joined Party was required to attend to take notes. After the meetings the Joined Party was required to type the notes and to provide the typed notes to the staff members.
9. The Joined Party was required to notify the Petitioner's president whenever the Joined Party went in or out of the office. Whenever the Joined Party left the office to do a quality assurance visit she was required to roll the office telephone over to her cell phone.
10. The Joined Party completed the timesheet as required listing the beginning and ending times of work for each day. The timesheet contained columns for listing the time out and in for lunch or other reasons, however, since the Joined Party was required to obtain permission to leave the office she usually brought her lunch and ate at her desk while working.
11. On a few occasions the Petitioner told the Joined Party to fill in for a homemaker/companion. The work performed by the homemaker/companions does not require any license or certification and does not require any skill or special knowledge. The Joined Party complied.
12. Whenever the Joined Party worked at a client's home doing quality assurance visits or providing services as a homemaker/companion, the Petitioner paid the Joined Party forty cents per mile for transportation. After hours telephone calls were sometimes transferred to the Joined Party's cell phone during evenings and weekends. The Joined Party occasionally used her home computer when she received the after hours calls. The Petitioner reimbursed the Joined Party $10 per pay period for business use of the Joined Party's cell phone and computer.
13. If the Joined Party needed to leave work to attend to personal business, such as a doctor's appointment, she was required to obtain permission from the Petitioner. On one occasion the

Joined Party requested a change in her work hours to 10 AM until 4 PM. The Petitioner's president refused the Joined Party's request.

14. The Petitioner paid the Joined Party on a biweekly basis based on the number of hours the Joined Party reported on the timesheet. The Petitioner did not withhold any taxes from the pay. In 2011 the Petitioner gave the Joined Party a bonus for good work performance. The Joined Party did not receive any other fringe benefits such as paid holidays, paid sick days, paid vacations, or health insurance. If the Joined Party missed time from work for a holiday or other reason, the Petitioner allowed the Joined Party to make up the missed time by working extra hours. If the Joined Party made an error the Petitioner paid the Joined Party for the additional time that was needed to redo the work. At the end of 2010 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

15. In 2011 the Petitioner decided not to renew the Joined Party's Agreement. The Petitioner notified the Joined Party in writing on July 11, 2011, that July 11, 2011, was the Joined Party's last day of work, constituting what the Petitioner intended as fifteen days notice of the cancellation of the Agreement.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.

17. 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).

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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). 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."

24. The Petitioner's business is to provide homemaker/companions to the elderly in their homes. It was the Joined Party's responsibility to perform services as an assistant to the Petitioner's President. The Joined Party was responsible for taking telephone calls from the Petitioner's clients, scheduling the homemaker/companions, and other clerical duties. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business. The Petitioner provided everything that was needed to perform the work and reimbursed the Joined Party for expenses. The Joined Party did not have an investment in a business, did not have a business or occupational license, did not have liability insurance, did not advertise or offer services to the general public, and did not perform services for others. The Joined Party did not have any unreimbursed expenses in connection with the work and was not at risk of suffering a financial loss from performing services.

25. The Petitioner controlled the hours and days of work. The Petitioner paid the Joined Party by the hour at a rate of pay determined by the Petitioner. The Joined Party was required to complete a daily timesheet and was paid by time worked rather than by the job or based on production. Payment by time worked points to an employment relationship. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

26. The work performed by the Joined Party did not require formal training and did not require any skill or special knowledge. In spite of the simplicity of the work the Petitioner trained the Joined Party concerning how the work was to be performed. Training is a method of control because it specifies how the work is to be performed. 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)

27. The Joined Party was supervised by the Petitioner's President. The President determined what was to be done, how it was to be done, and the sequence the work was to be performed. The Joined Party was required to meet with the President at the end of each day to report what she had done during the day and what she had not done.

28. The Joined Party was hired with the understanding that she had to satisfactorily complete an initial ninety day probationary period during which time the Petitioner could terminate the Agreement at any time, with or without cause. A probationary period is typical of an employer-employee relationship. 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."

29. The Petitioner controlled when the work was performed, where the work was performed, and how the work was performed. The Petitioner controlled the financial aspects of the relationship by providing everything that was needed to perform the work. 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.

30. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated September 9, 2011, be AFFIRMED.

Respectfully submitted on May 21, 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:
May 21, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

JOYCE RYBERG
8212 101ST COURT
SEMINOLE FL 33777

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
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