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

PETITIONER:
Employer Account No. - 2735084
SOUTHEAST HEALTH AND REHABILITATION CENTER INC
ATTEN KEITH MCCOY
318 S STATE ROAD 7
MARGATE FL 33068-5703

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

PROTEST OF LIABILITY
DOCKET NO. 2011-149445L

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 October 11, 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 **July, 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.

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 July, 2012.

Shanedra Y. Barnes
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:

SOUTHEAST HEALTH AND
REHABILITATION
CENTER INC
ATTN KEITH MCCOY
318 S STATE ROAD 7
MARGATE FL 33068-5703

MAXINE DAVIE
2690 SOMERSET DRIVE APT 111
LAUDERDALE LAKES FL 33311

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

MAITLAND TAX
ATTN GORDON HERGET SUITE 160
2301 MAITLAND CENTER PARKWAY
MAITLAND FL 32751-4192

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2735084
SOUTHEAST HEALTH AND REHABILITATION CENTER INC
ATTEN KEITH MCCOY
318 S STATE ROAD 7
MARGATE FL 33068-5703

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

PROTEST OF LIABILITY
DOCKET NO. 2011-149445L

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 October 11, 2011.

After due notice to the parties, a telephone hearing was held on June 5, 2012. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party 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 not received.

Issue:

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

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 73B-10.035(18).

Findings of Fact:

1. The Petitioner is a corporation which operated a medical office that provided chiropractic and massage services until the business closed in March 2012. The Petitioner's president is not a licensed health professional. The Petitioner's president oversaw the daily operation of the

business, however, he was not qualified to direct the services provided by the Chiropractor, who was classified by the Petitioner as the Petitioner's employee, or to direct the services provided to the Petitioner by other health care providers including the physical therapist and the massage therapists.

2. The Joined Party is a licensed massage therapist. In approximately 2000 the Petitioner engaged the Joined Party to provide massage therapy services to the Petitioner. At the time of hire the Petitioner told the Joined Party the days and hours of work and the hourly rate of pay. The Petitioner informed the Joined Party that the Petitioner does not withhold payroll taxes from the pay. The Joined Party worked for the Petitioner under those terms and conditions until approximately 2004 when the relationship ended. In approximately 2006 the Petitioner rehired the Joined Party under the same terms and conditions. There were no written agreements or contracts between the parties.

3. The Petitioner told the Joined Party that she was required to work Monday, Wednesday, and Friday from 9 AM until 12:30 PM and from 3 PM until 7 PM. If the Joined Party needed to take time off from work she was required to give the Petitioner advance notice so that the Petitioner could arrange for another massage therapist to perform the work.

4. All of the Joined Party's work was performed in the Petitioner's office, on the Petitioner's patients, during the Petitioner's regular business hours. The Petitioner provided the massage room, treatment table, therapy equipment, and all supplies that were needed to perform the work. In 2000 the Petitioner provided the Joined Party with three uniforms. Thereafter, the Joined Party purchased her own uniforms. At one point in time the Joined Party requested business cards. The Petitioner provided the business cards which listed the Petitioner's name as well as the Joined Party's name. The Joined Party did not have any expenses in connection with the work.

5. At the time of hire the Joined Party was not familiar with the Petitioner's equipment and training was provided concerning how to use the equipment. The Chiropractor observed the Joined Party while she performed massages and provided direction on occasion. The Joined Party also was required to assist the physical therapist. When the Joined Party assisted the physical therapist, the physical therapist told her what to do and how to do it. The Joined Party's immediate supervisor was considered to be the Office Manager.

6. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her.

7. The Joined Party was required to complete and turn in a weekly time sheet. The Petitioner paid the Joined Party based on the hours reported by the Joined Party. The Petitioner determined the hourly rate of pay. On several occasions the Joined Party requested an increase in the hourly rate of pay. On most of those occasions the Joined Party's requests were denied.

8. The Petitioner paid the Joined Party on a weekly basis. No taxes were withheld from the pay and the Petitioner did not provide any fringe benefits such as medical insurance, retirement benefits, paid holidays, or paid vacations. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

9. The Joined Party did not have any investment in a business, did not have an occupational or business license, did not advertise or offer services to the general public, and did not have business liability insurance or malpractice insurance. The Joined Party did not perform services for other medical offices and did not operate her own business. The Joined Party worked exclusively for the Petitioner except when she performed massages for family or friends. The Joined Party always believed that she was the Petitioner's employee.

10. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the relationship on or about August 24, 2011.

11. The Joined Party filed an initial claim for unemployment compensation benefits effective August 21, 2011. When the Joined Party did not receive credit for her earnings a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor. By determination dated October 11, 2011, the Department of Revenue determined that the Joined Party and other individuals performing services for the Petitioner as massage therapists were the Petitioner's employees retroactive to March 1, 2008. The Petitioner filed a timely protest by mail postmarked October 31, 2011.

12. Pursuant to the Petitioner's appeal a telephone hearing was scheduled to be held on January 23, 2012. The special deputy contacted the Petitioner's office but was informed that neither the president nor the Office Manager were in. A *Recommended Order of Dismissal* was mailed to the Petitioner on January 24, 2012, recommending that the Petitioner's protest be dismissed because the Petitioner failed to prosecute the appeal. The Petitioner requested that the protest be reopened by letter dated February 6, 2012. The Petitioner was not able to participate in the January 23, 2012, hearing due to a family medical emergency.

Conclusions of Law:

13. Rule 73B-10.035, Florida Administrative Code, provides:
    (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

14. Rule 73B-10.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.

15. The Petitioner's president was prevented from participating in the January 23, 2012, hearing due to a medical problem involving a family member. The reason for the Petitioner's absence from the hearing was unanticipated and beyond the Petitioner's control. The Petitioner made a timely request for reopening. Thus, good cause has been established.

16. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as massage therapists 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. 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."

24. The Petitioner's business was to provide chiropractic and massage services to the Petitioner's patients. The Joined Party provided the massage services to the Petitioner's patients, in the

Petitioner's office, during the Petitioner's regular business hours. The Petitioner provided the place of work and all equipment and supplies that were needed to complete the work. The Joined Party did not have any investment in a business and did not have any expenses in connection with the work. The services provided by the Joined Party were not separate and distinct from the Petitioner's business but were a necessary and integral part of the Petitioner's business.

25. The Petitioner's president argues that, since he is not a licensed health care provider, the Petitioner did not have the right to direct how the work was to be performed. Contrary to that argument the evidence reveals that the chiropractor was classified by the Petitioner as the Petitioner's employee. The Petitioner delegated the responsibility of directing and controlling the manner in which the Joined Party performed her work to the chiropractor and to the physical therapist. In James v. Commissioner, 25 T.C. 1296, 1301 (1956), the court stated in holding that a doctor was an employee of a hospital "The methods by which professional men work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of an employer over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over the non-professional employees."

26. The Petitioner determined the Joined Party's days and hours of work. The Petitioner controlled both the method of pay, by time worked rather than by the job or based on production, and the rate of pay. The Petitioner controlled the financial aspects of the relationship. The fact that the Petitioner chose not to withhold payroll taxes from the pay or to provide fringe benefits normally associated with employment relationships does not, standing alone, establish an independent contractor relationship.

27. The Joined Party initially performed services for the Petitioner for a period of approximately four years. Following a separation of approximately two years the Joined Party was rehired under similar terms and conditions. The Joined Party last performed services for the Petitioner for a period of approximately five years until the Petitioner terminated the relationship in August 2011. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence, 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."

28. The Petitioner controlled what work was performed, when it was performed, where it was performed, and how it was performed. 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.

29. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as massage therapists constitute insured employment.

Recommendation: It is recommended that the determination dated October 11, 2011, be AFFIRMED.

Respectfully submitted on June 8, 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 8, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

MAXINE DAVIE
2690 SOMERSET DRIVE APT 111
LAUDERDALE LAKES FL 33311

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

MAITLAND TAX
ATTN GORDON HERGET SUITE 160
2301 MAITLAND CENTER PARKWAY
MAITLAND FL 32751-4192