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

PETITIONER:
Employer Account No. - 2978593
PRIORITY ONE CLEARING SERVICES INC
1208 S MYRTLE AVE
CLEARWATER FL 33756-3425

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

PROTEST OF LIABILITY
DOCKET NO. 2011-149448L

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 19, 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 **April, 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 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 April, 2012.

Shanedra 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:

PRIORITY ONE CLEARING SERVICES
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1208 S MYRTLE AVE
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MICHELLE NICKERSON
38 RIDGECROFT LANE
SAFETY HARBOR FL 34695

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

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2978593
PRIORITY ONE CLEARING SERVICES INC
ATTEN: DAWN DAUGHERTY CEO
1208 SOUTH MYRTLE AVENUE
CLEARWATER FL 33756-3425

PROTEST OF LIABILITY
DOCKET NO. 2011-149448L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Interim 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 19, 2011.

After due notice to the parties, a telephone hearing was held on January 5, 2012. The Petitioner, represented by the Petitioner's president/CEO, appeared and testified. The Petitioner's accountant testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party did not appear.

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 as data entry/customer service constitute insured employment, and if so, the effective date of liability, pursuant to Sections 443.036(19), 443.036(21), and 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a Florida corporation formed in 2006 for the purpose of operating a magazine subscription data processing service.

2. The Joined Party performed clerical services, including answering telephones, filing, and entering data, for the Petitioner while one of the Petitioner's permanent employees, a customer service

representative, was on vacation. The Joined Party worked from August 23, 2010, through September 3, 2010, and again from September 27, 2010, until September 30, 2010.

3. The Joined Party obtained the work through a friend of the Petitioner's president and CEO. The Joined Party was unemployed at the time and looking to rejoin the workforce. The Joined Party was told the work would be temporary and that she would be a "contracted, 1099 worker." The Petitioner told the Joined Party the specific dates on which her services were needed. There was no written agreement between the Petitioner and the Joined Party.

4. The Joined Party received on-the-job training from the Petitioner's director of operations. The Petitioner established priorities for the tasks to be completed by the Joined Party, with answering the telephones being the first priority. The Joined Party was told how to use the telephone system, what to say when she answered the telephone, how and where to file, how to take a customer's name, how to access information in the Petitioner's system, and how to respond to customer inquiries. The Joined Party was provided with a telephone script in the event she forgot what to say. The Joined Party was also told how to maintain a spreadsheet reflecting actions taken on a customer's account. The Joined Party was paid during the training period.

5. All of the Joined Party's services were performed at the Petitioner's business location. The Petitioner provided the work space, equipment, software, and supplies needed for the work. The Joined Party did not have any expenses in connection with the work.

6. The Petitioner's regular business hours were from 9:00 a.m. until 5:00 p.m., Monday through Friday. The Joined Party was expected to perform her work during the Petitioner's regular business hours. The Joined Party could have done the filing at any time, although she did not perform any work outside the Petitioner's regular business hours. The Petitioner allowed the Joined Party some flexibility in her working hours so that she could attend job interviews or take care of other personal matters. The Joined Party reported to the Petitioner's director of operations when she arrived in the morning. The Petitioner's director of operations kept track of the hours worked by the Joined Party. The Joined Party notified the Petitioner's director of operations if she needed to take time off during the work day.

7. Initially, the Joined Party's work was reviewed to ensure it was being done correctly. Thereafter, the Petitioner would point out any call handling or data entry mistakes made by the Joined Party that were overheard or discovered by the Petitioner's director of operations. The Joined Party was not required to make any corrections to her work without compensation.

8. The Petitioner paid the Joined Party at a rate of $9.00 per hour on a bi-weekly basis. The Joined Party did not invoice for her services. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide the Joined Party with any fringe benefits, such as health insurance, vacation pay, or sick pay. The Joined Party completed a Form W-9, and the Petitioner reported the Joined Party's earnings on a Form 1099-MISC.

9. The Joined Party could not hire someone else to perform the work for her without the Petitioner's approval. Either party could terminate the relationship at any time without penalty.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

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

17. The record reflects the Petitioner exercised significant control over the details of the work. The Petitioner assigned specific tasks to the Joined Party, prioritized the work to be performed, and provided detailed instructions as to how the Joined Party was to perform the work. The Joined Party reported to a supervisor who kept track of the hours worked by the Joined Party and monitored the Joined Party’s performance. The Joined Party was required to perform her primary

task, answering the telephones, during the Petitioner's regular office hours. The Petitioner supplied the work space, equipment and supplies. The Joined Party was not free to hire others to perform the work for her. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker's status is the employing unit's right of control over the manner in which the work is performed. The Court, quoting Farmer's and Merchant's Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: "[I]f 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 he is subject to the control of the person being served as to the means to be used, he is not an independent contractor."

18. It was not shown that the Joined Party was engaged in a distinct occupation or business. The record demonstrates instead that the Joined Party was actively seeking employment. The Joined Party had no expenses in connection with the performance of the work. Everything that was needed for the Joined Party to perform the work was provided by the Petitioner.

19. The Petitioner controlled the financial aspects of the relationship. The Joined Party did not invoice for her services. The Joined Party was paid hourly and not by the job. These factors are more indicative of an employer-employee relationship. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

20. The Petitioner's business is a magazine subscription clearing house. Although somewhat limited in scope, the Joined Party performed the same duties as the Petitioner's permanent employee, a customer service representative. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business.

21. Either party could terminate the relationship at any time without incurring liability. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court, quoting 1Larson, Workmens'Compensation Law, Section 44.35, stated: "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."

22. It is concluded that the services performed for the Petitioner by the Joined Party as a customer service representative constitute insured employment.

Recommendation: It is recommended that the determination dated September 19, 2011, be AFFIRMED.

Respectfully submitted on February 6, 2012.

SUSAN WILLIAMS, Special Deputy
Office of Appeals