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

PETITIONER:
Employer Account No. - 3047104
KIRSPLASH LLC
171 SW BRANDY WAY
LAKE CITY FL 32024-4551

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

PROTEST OF LIABILITY
DOCKET NO. 2011-150617L

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 29, 2011, is MODIFIED to reflect a retroactive date of January 1, 2007. 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 **May, 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 May, 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:

KIRSPLASH LLC
171 SW BRANDY WAY
LAKE CITY FL 32024-4551

LOUIS A BEAMES
472 SE LITTLE JOHN PLACE
HIGH SPRINGS FL 32643

DIANA JOHNSON ESQ
18 NORTHWEST 33RD COURT
GAINESVILLE FL 32607

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

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MSC 344 CALDWELL BUILDING
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RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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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 29, 2011.

After due notice to the parties, a telephone hearing was held on January 19, 2012. The Petitioner was represented by its attorney. The Petitioner's single member manager, a former pool technician, and the mother of the former pool technician testified as witnesses for the Petitioner. The Joined Party appeared and testified. A former pool technician testified as a witness for the Joined Party. The Respondent, represented by a Tax Specialist II, 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/or Conclusions of Law were received from the Petitioner and Joined Party.

Issues:
Whether services performed for the Petitioner by the Joined Party and other individuals as pool technicians 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a single member Florida limited liability company, organized in 2006, for the purpose of operating a pool construction, repair, and cleaning business. The Petitioner files with the Internal Revenue Service as a sole proprietorship. In February 2011, the Petitioner opened a retail store for the sale of swimming pool supplies. Until the opening of the retail location, the business operated out of the home of the Petitioner's single member manager.

2. The Petitioner utilizes pool technicians to clean pools for its customers. The Petitioner considers the pool technicians to be independent contractors. The Petitioner does not enter into written agreements with its pool technicians. The pool technicians perform their services under the same arrangement with the Petitioner. The Joined Party performed services for the Petitioner as a pool technician from June 2006 until August 1, 2011.

3. The Joined Party had no prior pool cleaning experience. The Joined Party responded to an advertisement by the Petitioner for a pool cleaner because he thought the work sounded interesting and he wanted to learn how to do it. The Petitioner agreed to hire the Joined Party and to pay him $320 per week, plus $75 per week for gasoline. Thereafter, the Petitioner increased the Joined Party's pay to $340 per week, plus $120 for gasoline, and finally to $400 per week, plus $120 for gasoline. The Petitioner told the Joined Party he could not clean pools for others. The Joined Party was trained by one of the Petitioner's pool technicians. For one week, the Joined Party rode along with the other pool technician to the locations of the Petitioner's customers. The other pool technician taught the Joined Party how to do everything that was needed to service the pools, including the use of the various chemicals needed to maintain proper water quality. The Joined Party was paid during the training.

4. After the completion of the training period, the Joined Party took over the other pool technician's route. All customer accounts are obtained and assigned by the Petitioner. The Petitioner assigns new accounts based on the general geographic area and number of pools being serviced by a technician. Pool technicians can decline an account. At the time the Joined Party began servicing his route, the customer accounts were serviced on a particular schedule. If the Joined Party wanted to change a scheduled service stop, he would obtain the approval of the Petitioner. The Joined Party was told not to service pools before 9:00 a.m. or after 6:00 p.m. Over the course of the relationship, the number of pool service stops per week varied from 32 to 52. For the first two years the Joined Party performed services for the Petitioner, the Joined Party was required to take pictures before and after cleaning each pool. The Petitioner provided the camera and required the Joined Party to submit the camera on a weekly basis so that the Petitioner could download the pictures to a computer. The Joined Party was told the purpose of taking the pictures, which bore a date and time stamp, was to show the pool was serviced on the date and time shown.

5. The Petitioner, through its single member manager, supplies the service trucks and the equipment needed to perform the work. The Petitioner's manager insures and maintains the vehicles. The Petitioner furnishes all of the chemicals needed to service the pools. The Petitioner supplies the pool technicians with cellular telephones.

6. The Joined Party was told to wear khaki pants and a collared shirt. For commercial pools, pool technicians are required to complete a Florida Department of Health monthly swimming pool report for each cleaning. The pool technicians are required to keep a record of the account name, date of service, service performed, and chemicals used for each pool serviced and to submit the record to the Petitioner on a monthly basis. The Petitioner also has the pool technicians complete a pre-printed service receipt to be left at the customer location. If the pool technicians have a problem maintaining the water quality of a pool, they take a water sample to the Petitioner for testing, and the Petitioner tells them which chemicals to use to solve the problem.

7. All of the material communication about an account occurs between the Petitioner and the customer. If the Petitioner receives a complaint from a customer, the Petitioner decides whether to speak to the pool technician about the complaint. If the Petitioner addresses the complaint with the technician and the

complaint is not resolved, the Petitioner reassigns the account to another pool technician. Pool technicians are expected to correct defective work without additional compensation.

8. The Petitioner paid the Joined Party on a weekly basis. The Petitioner did not withhold payroll taxes from the Joined Party's pay. The Joined Party did not receive any fringe benefits such as health insurance, sick pay, or vacation pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC. The Petitioner's manager prepared the Joined Party's federal income tax returns. The Petitioner's manager listed the Joined Party's income on a Form 1040 as business income and attached a Schedule C showing the income as gross receipts or sales and the vehicle mileage as a business expense. The Joined Party did not understand the forms; however, he signed and submitted them because he relied on the manager.

9. The Joined Party did not have his own business, occupational license, or business liability insurance. The Joined Party did not perform pool cleaning services for any other pool service company and did not have his own customers. The only expense the Joined Party had in connection with the work for the Petitioner was the cost of fuel for the truck. The Petitioner provided the Joined Party with a weekly allowance for gasoline.

10. Either party had the right to terminate the relationship at any time without liability. The Petitioner discontinued the relationship with the Joined Party.

11. The Joined Party last worked for the Petitioner on August 1, 2011. The Joined Party filed a claim for unemployment compensation benefits effective August 21, 2011. When the Joined Party did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.

12. On September 29, 2011, the Department of Revenue issued a determination holding that the services performed by the Joined Party and other individuals as pool technicians constitute insured employment retroactive to January 1, 2010. The Petitioner filed a timely protest.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

18. 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.

19. 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.

20. The Petitioner's business is the construction, repair, and cleaning of pools. The Petitioner's pool technicians perform the cleaning of the pools for the Petitioner's customers. The work performed for the Petitioner by the pool technicians is not separate and distinct from the Petitioner's business, but is an integral and necessary part of the Petitioner's business.

21. It was not shown that the work performed by the pool technicians requires any special skill or knowledge. 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 Security, 386 So.2d 259 (Fla. 2d DCA 1980). The Joined Party and other pool technicians had no pool cleaning experience before working for the Petitioner. The pool technicians received on-the-job training from one of the Petitioner's experienced pool technicians prior to beginning their routes. At times, the pool technicians relied upon the expertise of the Petitioner to correct problems with water quality.

22. The Petitioner supplied the vehicles, equipment, and supplies needed for the work. The fact that the vehicles and equipment are personally owned by the Petitioner's single member manager is immaterial, especially in light of the fact that the single member limited liability company files with the Internal Revenue Service as a sole proprietorship. The pool technicians do not use their own vehicles, equipment or supplies. It was not shown that the pool technicians have any significant expenses in connection with the work or are at risk of suffering a financial loss from performing their services.

23. The Petitioner determined what work was performed and where the work was performed. Through the training provided, the Petitioner determined how the work was performed. By setting the hours in which the service could be performed and in assigning particular accounts to the pool technicians, the Petitioner significantly controlled when the work was performed. In Adams v. Department of Labor and 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 or interference with the work that is significant in distinguishing between an independent contractor and a servant.

24. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate and method of payment. The Joined Party was paid a flat weekly amount plus a flat weekly allowance for gasoline. The Joined Party was paid by time rather than by the job. The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

25. The Joined Party performed services for the Petitioner for over five years. Either party had the right to terminate the relationship at any time without incurring a penalty or liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the relationship with the Joined Party. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court 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."

26. In Adams v. Department of Labor and Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court determined the Department had the authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. It is concluded that the services performed for the Petitioner by the Joined Party and others as pool technicians constitute insured work.

27. The determination in this case holds the Petitioner liable for payment of unemployment compensation taxes retroactive to January 1, 2010. However, the record shows the Joined Party and other pool technicians have worked for the Petitioner since June 2006.

28. Section 443.1215, Florida Statutes, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
    (a) An employing unit that:
    1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
    2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

29. The Joined Party has performed services for the Petitioner since June 2006. Those services are sufficient to establish liability based on the fact that the Petitioner employed at least one individual in employment during twenty calendar weeks during a calendar year.

30. Rule 73B-10.032(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.

31. Although the Petitioner may have established liability for unemployment compensation taxes in 2006, the Petitioner's retroactive liability is limited to a period of five years after services were performed. Therefore, the retroactive date of liability is January 1, 2007.

32. The Petitioner provided Proposed Findings of Fact and Conclusions of Law on January 26, 2012. The Joined Party provided Proposed Findings of Fact and Conclusions of Law on January 28, 2012. The proposed findings were considered, and where those findings are supported by the record, they are

incorporated into this recommended order. Where the findings do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated September 29, 2011 be MODIFIED to reflect a retroactive date of January 1, 2007. As modified, it is recommended that the determination be AFFIRMED.

Respectfully submitted on March 30, 2012.

SUSAN WILLIAMS, 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:
March 30, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

DIANA JOHNSON ESQ
18 NORTHWEST 33RD COURT
GAINESVILLE FL 32607

LOUIS A BEAMES
472 SE LITTLE JOHN PLACE
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