DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2656682
ADVANCE REHAB AND HOME HEALTH
2316 W 23RD STREET STE C
PANAMA CITY FL 32405-2345

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

PROTEST OF LIABILITY
DOCKET NO. 2011-69494L

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 April 7, 2011, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2011**.

TOM CLENDENNING
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

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

PETITIONER:
Employer Account No. - 2656682
ADVANCE REHAB AND HOME HEALTH
ATTN: MOHAMED HUSSEIN
2316 W 23RD STREET STE C
PANAMA CITY FL 32405-2345

PROTEST OF LIABILITY
DOCKET NO. 2011-69494L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated April 7, 2011.

After due notice to the parties, a telephone hearing was held on August 3, 2011. The Petitioner's co-owner, an occupational therapist, a book keeper, and an office manager appeared and testified at the hearing. A tax specialist II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

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.

Findings of Fact:

1. The Petitioner is a limited liability company formed in July 2005, for the purpose of running an outpatient rehabilitation facility. The Petitioner files taxes as a partnership.

2. The Joined Party provided services as a massage therapist for the Petitioner from July 12, 2009, through February 3, 2011. The Petitioner retained two additional massage therapists since the company's formation.

3. The Joined Party had clients prior to seeking work with the Petitioner. The Joined Party retained those clients.

4. The Joined Party was expected to provide hours of availability. Patients were scheduled around the available hours.

5. The Joined Party had a massage therapy license.

6. The Joined Party was allowed to work for competitors.

7. The Joined Party was expected to keep track of patients and hours worked. The Joined Party requested and was paid at a rate of $25 per hour. The Joined Party was paid every two weeks.

8. The Petitioner made massage tables, sheets, and lotions available to the Joined Party. The Joined Party generally brought her own table and sheets to perform the work.

9. The Joined Party would determine the appropriate treatment for each patient. The Joined Party could refuse to see a patient.

10. The Joined Party was not required to provide any reports to the Petitioner except for a listing of hours worked and patients seen. The Petitioner did not supervise or direct the Joined Party.

11. The patient would determine whether to be seen in home or at the Petitioner's place of business.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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. 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.

18. The evidence presented in this case reveals that the Petitioner did not exercise control over how or when the work was performed. The Joined Party set her own hours and used her own professional discretion in determining how the work was to be performed. The work was performed at either the Petitioner's place of business or at the home of the client. The Joined Party was not supervised and was not required to keep the Petitioner informed as to the status of the work.

19. The Joined Party is a licensed massage therapist and has had her own clients prior to working for the Petitioner. The Joined Party maintained her prior clients and was free to perform work for a competitor of the Petitioner.

20. The work performed by the Joined Party as a massage therapist was a part of the day to day course of business for the Petitioner's outpatient rehabilitation business. The service performed by the Joined Party was a regular service offered by the Petitioner as a part of the totality of services performed by the Petitioner for clients.

21. The evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated April 7, 2011, be REVERSED.

Respectfully submitted on November 14, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals