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

PETITIONER:
Employer Account No. - 2732098
DAYTONS CLASSIC AUTO REPAIR INC
EUROPEAN MOTOR CLINIC
4725 BRANDYWINE DR
BOCA RATON FL 33487-2177

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

PROTEST OF LIABILITY
DOCKET NO. 2011-92494L

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 June 8, 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 **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.

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

By U.S. Mail:

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DOR BLOCKED CLAIMS UNIT
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
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PROTEST OF LIABILITY
DOCKET NO. 2011-92494L

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 June 8, 2011.

After due notice to the parties, a telephone hearing was held on April 4, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 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 operated an automobile repair business from approximately November 2006 until January 28, 2011.

2. In the latter part of 2009 or early 2010 the Joined Party was working as an automobile mechanic at a business located next door to the Petitioner's business. That business was closing and the Petitioner hired the Joined Party to work as a mechanic in the Petitioner's business on or about February 10, 2010. The Joined Party believed that he was hired to be the Petitioner's employee, however, he was aware that the Petitioner intended to pay the Joined Party as a contractor.

3. There was no written agreement or contract between the Petitioner and the Joined Party.

4. The Petitioner's shop hours are from 8 AM until 5 PM and the Joined Party was required to work the shop hours.

5. The Petitioner provided the place of work, the equipment such as lifts and compressors, and supplies. The Petitioner also provided a helper who was an employee of the Petitioner. The Joined Party provided his own hand tools which the Joined Party left in the Petitioner's shop from day to day.

6. The Joined Party wore a uniform shirt each day bearing the Petitioner's business name.

7. Generally, the Joined Party did not have any direct contact with customers. When a customer came into the shop to have a vehicle repaired the Petitioner's president provided a repair estimate to the customer. Sometimes, the president would ask the Joined Party to diagnose the repair problem. On those occasions the Joined Party would comply and would tell the president what needed to be done, the parts that were needed, and how long the Joined Party believed that it would take to complete the repair. The president did not rely on the Joined Party's estimate of how long it would take to complete the job. Instead, the president used a labor guide which provided an estimate of the repair time for each repair job. Sometimes, the president would give a labor estimate to the customer that was for less time than specified by the Joined Party or by the labor guide. The president would estimate less time for the repair if the customer was a friend or if the president did not believe that the customer would be willing to pay the full cost of the labor.

8. The Petitioner generally charged the customer $90 per hour for the labor. The Petitioner purchased all of the parts that were used by the Joined Party to complete the repairs and the Petitioner marked the parts up when charging the customer. The Joined Party did not share in the income from the mark-up. The Joined Party's only income from the work was $30 per hour for the amount of labor charged by the Petitioner.

9. The Petitioner determined the sequence that the jobs were assigned to the Joined Party. The Joined Party was not allowed to start any repair job until he was authorized to do so by the Petitioner. Generally, the jobs were assigned to the Joined Party in the order that the customers came into the Petitioner's shop.

10. The Joined Party was required to personally perform the work. The Joined Party was not allowed to hire others to perform the work for him.

11. During the time that the Joined Party performed services for the Petitioner he did not perform services for others. He did not have a business license or occupational license.

12. The Joined Party was required to work the Petitioner's shop hours and he was not permitted to come and go as he pleased. The Joined Party was allowed to take a lunch break during down time or during a slow time of the day. When the Joined Party believed that there was an opportunity to take a lunch break he would ask the Petitioner for permission to take the lunch break.

13. The Joined Party is a professional mechanic and the Petitioner's president did not stand over him while the Joined Party was performing the work. However, the president would occasionally observe the Joined Party while the Joined Party was working and would offer suggestions concerning how the president believed the work should be performed.

14. The Joined Party was not required to complete a timesheet or bill the Petitioner for the work which he performed. The Joined Party kept track of the work which he had completed and the number of flat rate labor hours which he believed he had earned. On most occasions the Joined Party never saw the customer invoices which were prepared by the Petitioner. The Petitioner paid the Joined Party at the end of each week based on the number of labor hours charged to the customers on the invoices. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as paid vacations or paid holidays.

15. The Joined Party frequently disagreed with the weekly pay as computed by the Petitioner. As a result of heated arguments over the pay the Joined Party threatened to quit working for the Petitioner almost every week. Eventually, the Joined Party left the job due to a dispute over the pay on or about May 30, 2010.

16. At the end of 2010 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

Conclusions of Law:

17. 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.

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. The Petitioner operated an automobile repair shop and engaged the Joined Party to perform the actual repairs which the Petitioner offered to perform for the Petitioner's customers. 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 business. The Joined Party did not have a separate business license and performed services only for the Petitioner's customers. The Petitioner provided the place of work, the equipment, and supplies. The Joined Party only provided his own hand tools.

25. The Joined Party is a professional mechanic who did not require training or direct supervision. However, the Petitioner controlled what work was performed, where it was performed, and when it was performed. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

26. The relationship between the Petitioner and the Joined Party lasted only a few months, however, the evidence reveals that the Joined Party was engaged for a continuous period of time rather than just for one repair job. The Joined Party left his personal tools in the Petitioner's shop from day to day throughout the period of the relationship. Either party could terminate the relationship at any time. Eventually, the Joined Party left due to frequent disagreements over the pay. 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."

27. The Petitioner paid the Joined Party by work completed rather than by actual time worked. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The Petitioner generally charged customers $90 per hour and paid the Joined Party one-third of the labor charge. The amount of labor charged to the customers, the hourly labor charge, and the percentage paid to the Joined Party were all controlled by the Petitioner. The fact that the Petitioner chose not to withhold payroll taxes from the pay, standing alone, does not establish an independent contractor relationship.

28. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error. The Petitioner has failed to satisfy the necessary burden of proof in this case. The evidence reveals that the Petitioner exercised significant control over the Joined Party including what work was performed, where it was performed, and when it was performed. The evidence reveals that the Petitioner had the right to control how the Joined Party performed the work and reveals that the Petitioner controlled the financial aspects of the relationship. Thus, it is concluded that the services performed for the Petitioner by the Joined Party as a mechanic constitute insured employment.

Recommendation: It is recommended that the determination dated June 8, 2011, be AFFIRMED.

Respectfully submitted on April 6, 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:
April 6, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

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