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

PETITIONER:
Employer Account No. - 2848597
AUTO SYSTEMS MANAGEMENT INC
150 CORONADO ROAD
DEBARY FL 32713

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

PROTEST OF LIABILITY
DOCKET NO. 2011-97529L

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 March 16, 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.

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
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 March 16, 2011.

After due notice to the parties, a telephone hearing was held on November 28, 2011. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Petitioner's president testified as a witness. 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 was formed in January 2008 to operate an automobile repair business which specializes in the repair or replacement of transmissions. The business is owned and operated by the Petitioner's president.

2. In early 2009 the Joined Party worked as a center manager for a transmission repair business located in another city. That business classified the Joined Party as an independent contractor.

3. On January 31, 2009, the Petitioner solicited the Joined Party for the position of center manager of the Petitioner's business and provided the Joined Party with a written *Offer-Incentive Plan.* The *Offer-Incentive Plan* set forth, among other things, the job description, the method of computing the compensation, the rate of compensation, and the hours of work. The *Offer-Incentive Plan* did not specify whether the offer of work was for an employment position or for an independent contractor position. Although it was not contained in the *Offer-Incentive Plan*, the Petitioner offered an incentive bonus to the Joined Party as an inducement to accept the offer of work. The Joined Party accepted the offer and began work in March 2009.

4. As center manager the Joined Party worked at the Petitioner's business location. The Petitioner provided everything that was needed to perform the work including a computer, a telephone, and supplies. The Joined Party did not have any expenses in connection with work. On a few occasions the Joined Party used his own car or a customer's car for company business. On those occasions the Petitioner reimbursed the Joined Party for the fuel expense.

5. The Joined Party's work schedule was Monday through Friday from 7:30 AM until 5:30 PM and every other Saturday from 8 AM until 12 PM. The Petitioner's president was present while the Joined Party worked each weekday. The Petitioner's president worked the alternating Saturdays.

6. The Joined Party's duties consisted of assisting the president with sales and marketing and assisting the president with the day-to-day operations of the business. The Joined Party oversaw the work performed by the mechanics to make sure that they were performing the work in a proper and timely manner. The Joined Party did not have the authority hire or fire employees, however, he did participate in the hiring process and also notified employees that they were discharged when instructed to do so by the president. After hours telephone calls were normally forwarded to the president's telephone. The Joined Party was not required to be on-call after regular work hours.

7. The Petitioner provided the Joined Party with uniform shirts, pants, business cards, and a cell phone. The shirts had the business name but did not bear the Joined Party's name. The Joined Party was responsible for laundering the uniform shirts. The pants were through a uniform service which also laundered the pants. The business cards contained the Petitioner's business name and telephone number and listed the Joined Party as Center Manager.

8. The Joined Party was not required to complete a timesheet and he did not submit a bill or invoice to the Petitioner to be paid. The Joined Party was paid a guaranteed base salary of $750 per week plus commission if the commission based on the total sales of the business for the week exceeded $750. No payroll taxes were withheld from the pay. The Petitioner paid the Joined Party on a weekly basis with the payday occurring on Friday. At the end of the year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

9. The Petitioner provided the Joined Party with a one week paid vacation during the first year. During the second year the Joined Party was to be provided with two weeks and during subsequent years the Petitioner was to provide the Joined Party with three weeks paid vacation. The vacation pay was the $750 base pay plus commission based on the total sales of the business during the week of the vacation. The Petitioner provided the Joined Party with paid holidays and paid sick days. The Petitioner paid Christmas bonuses to the Joined Party. The Petitioner did not provide paid health insurance or other fringe benefits to the Joined Party.

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. The Joined Party was not allowed to work for a competitor.

11. On April 23, 2009, the Petitioner presented the Joined Party with a document entitled *Independent Contractor Affidavit*. The Affidavit states the definition of independent contractor as set forth in Chapter 440, Florida Statutes, also known as the Workers' Compensation Law. The Joined Party was required to sign the Affidavit attesting that he had read the definition, that he meets the qualifications of an independent contractor, and that he waives workers' compensation coverage.

12. The Petitioner's president was the Joined Party's immediate supervisor. The president observed the Joined Party while the Joined Party worked. On "hundreds" of occasions the president told the Joined Party what to do and how to do it. The Joined Party was not allowed to refuse to wait on a customer. The Joined Party did not have the authority to determine how much to charge a customer. The Petitioner's president determined the amounts to be charged to the customers.

13. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. In November 2010 the Petitioner terminated the relationship with the Joined Party. At the time of termination the Petitioner paid the Joined Party for the second week of vacation that the Joined Party had not taken during 2010. The Petitioner subsequently replaced the Joined Party with a center manager whom the Petitioner has classified as an employee.

14. During the time that the Joined Party performed services for the Petitioner, the Joined Party did not have any investment in a business and did not have expenses in connection with the work. The Joined Party did not have a business license or occupational license, did not have business liability insurance, did not advertise his services, and did not perform services for others. The Joined Party did not have a separate business with his own work facility, equipment, tools, and materials. The Joined Party did not have a federal employer identification number and did not have a business bank account. The Petitioner paid the Joined Party directly rather than making the paycheck payable to a business. The Joined Party was not at risk of suffering a financial loss in connection with the work or services.

15. The Joined Party filed a claim for unemployment compensation benefits effective December 5, 2010. When the Joined Party did not receive credit for his earnings with the Petitioner 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.

16. On March 4, 2011, the Department of Revenue issued a determination holding that the Joined Party performing services as a center manager was the Petitioner's employee retroactive to March 3, 2009. The determination further advised the Petitioner that the Joined Party's wages had been added to the unemployment tax returns for all four quarters of 2009 and 2010. The Department of Revenue reissued the determination on March 16, 2011, as an affirmation of the March 4, 2011, determination. The Petitioner's Certified Public Accountant filed a timely protest by letter dated March 31, 2011.

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 Agency 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 written agreements in this case consist of the *Offer-Incentive Plan* and the *Independent Contractor Affidavit.* The *Offer-Incentive Plan* is a letter offering the position of center manager to the Joined Party and it does not specify whether the offer is an offer of employment or whether it is an offer of self employment. The *Independent Contractor Affidavit* pertains only to workers' compensation insurance and was not signed until approximately a month after the Joined Party began work. The Joined Party signed the Affidavit attesting that he met the qualifications of an independent contractor even though, according to the definition contained in the Affidavit, he did not. A statement in an agreement that the existing relationship is that of independent contractor is

not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), that while the obvious purpose to be accomplished by an agreement is to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.

25. 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."

26. The Petitioner operates an automotive repair business. The Petitioner engaged the Joined Party to assist the Petitioner's president in the day-to-day operation of the business as the center manager. The Petitioner provided the place of work and everything that was needed to complete the work. The work performed by the Joined Party was an integral and necessary part of the business rather than separate and distinct from the Petitioner's business. The Joined Party did not have an investment in a business, did not have expenses connected with the work, and was not at risk of suffering a financial loss from services performed.

27. The Petitioner paid the Joined Party a guaranteed salary plus a commission. The commission was not based on the Joined Party's performance or production but was based on the total production of the Petitioner's business. The Joined Party had a set work schedule which was determined by the Petitioner. Thus, the Joined Party was paid by time worked rather than based on production or by the job. 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 fact that the Petitioner chose not to withhold payroll taxes, standing alone, does not establish an independent contractor relationship.

28. The Petitioner provided paid vacations, paid holidays, paid sick days, and bonuses. These payments are fringe benefits that are generally reserved for employees. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

29. The Joined Party performed services for the Petitioner for a period in excess of one and one-half years and either party could have terminated the relationship at any time. Generally, a benefit that is increased based on years of service, such as the increased weeks of vacation, is intended to encourage a long term or permanent relationship. These facts reveal the existence of an at-will relationship of relative permanence. 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."

30. The Petitioner determined what work was performed, where it was performed, when it was performed, and how it was performed. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the

control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

31. The evidence presented in this case reveals that the services performed for the Petitioner by the Joined Party as center manager constitute insured employment.

Recommendation: It is recommended that the determination dated March 16, 2011, be AFFIRMED.

Respectfully submitted on January 30, 2012.

R. O. SMITH, Special Deputy
Office of Appeals