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

PETITIONER:
Employer Account No. - 1079827
FANOURIOS I FERDERIGOS MD PA
2626 TAMPA RD STE 103
PALM HARBOR FL 34684-3110

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

PROTEST OF LIABILITY
DOCKET NO. 2012-60204L

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 28, 2012, 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 **September, 2012**.

Altemese Smith,
Assistant Director,
Reemployment Assistance 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 Y. 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 September, 2012.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance 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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MSC 347 CALDWELL BUILDING
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PROTEST OF LIABILITY
DOCKET NO. 2012-60204L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Reemployment Assistance 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 28, 2012

After due notice to the parties, a telephone hearing was held on July 5, 2012. The Petitioner, represented by a Certified Public Accountant, appeared and testified. The Joined Party appeared and testified. A former employee of the Petitioner testified as a witness on behalf of the Joined Party. A Department of Revenue Tax Specialist II appeared and testified on behalf of the Respondent.

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 corporation engaged in the practice of orthopedic surgery. In addition to surgical services, the Petitioner provides massage therapy and physical therapy for its patients.

2. The Joined Party has been a licensed massage therapist since 2006. The Joined Party performed massage therapy and physical therapy services for the Petitioner from January 2011, until February 18, 2012.

3. The Joined Party obtained the work with the Petitioner by responding to a classified advertisement for a massage therapist posted by the Petitioner. At the interview, the Joined Party explained to the Petitioner that she was looking for employment with a guaranteed number of hours. The parties agreed that the Joined Party would be paid at a rate of $25 per hour and that she would work from 10:00 a.m. until 6:00 p.m., Tuesdays and Thursdays, and a half-day every other Saturday. The parties did not enter into a written agreement.

4. The Joined Party did not require training in order to perform massage therapy. The Joined Party had no prior experience performing physical therapy. During her first week of work, for which she was paid, the Joined Party did not provide services to any patients. Rather, she observed the services performed by the Petitioner's former massage therapist and took notes. Additionally, whenever a patient required physical therapy, the Petitioner demonstrated to the patient and the Joined Party the physical exercises the Petitioner wanted the patient to do in order to achieve certain goals.

5. The Joined Party's services were performed at the Petitioner's office. The Petitioner provided the Joined Party with a key to the office, because no other individuals worked on Saturdays. The Petitioner purchased a massage table and furnished all of the other equipment and supplies needed for the work.

6. The Joined Party was required to clock in and out on the days she worked. The Joined Party was required to stay at the Petitioner's office for her entire shift, whether or not there were patients to treat. Patients were scheduled for sessions with the Joined Party by the Petitioner, the Petitioner's staff, and the Joined Party. In addition to Tuesdays, Thursdays, and every other Saturday, the Joined Party worked on Fridays if needed.

7. The Petitioner determined the type, duration, and goals of the therapy for each patient. The Petitioner billed the patients for the therapy. For each patient visit, the Joined Party was required to note the nature of the patient's complaint, the therapy performed, the results or findings, and the therapy to be performed at the patient's next appointment. The Joined Party reported to the Petitioner on the status of the patients on a regular basis.

8. The Joined Party was paid on a bi-weekly basis. The Joined Party did not receive fringe benefits such as sick pay, vacation pay, or health insurance. The Petitioner paid the Joined Party a $150 Christmas bonus. The Petitioner did not withhold taxes from the Joined Party's pay. When the Joined Party received her first paycheck, she asked why no taxes had been deducted from her pay. The Petitioner told the Joined Party she did not qualify to be an employee. When the Joined Party protested, the Petitioner told the Joined Party that the Petitioner would take care of the taxes at the end of the year. The Petitioner reported the Joined Party's 2011 earnings on a form 1099-MISC.

9. The Joined Party did not have her own business, occupational license, or liability insurance. The Petitioner told the Joined Party that her services were covered under the Petitioner's liability insurance. The Joined Party did not perform similar services for others during the time the Joined Party worked for the Petitioner.

10. The Petitioner terminated the relationship because the Joined Party did not clock out upon leaving the office prior to the end of a scheduled shift.

11. The Joined Party filed an initial claim for unemployment compensation benefits effective February 19, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed and an investigation was referred to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor. On March 28, 2012, the Department of Revenue issued a determination holding that the Joined Party and others, performing services for the Petitioner as massage therapists, were the Petitioner's employees retroactive to January 1, 2011.

Conclusions of Law:

12. The issue in this case, whether services performed for the Petitioner by the Joined Party and others as massage therapists 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). 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.

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.

18. 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.

19. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

20. The Petitioner's representative and sole witness was a Certified Public Accountant. Although the Certified Public Accountant testified that it was his understanding that the Joined Party was engaged as an independent contractor, the Certified Public Accountant was not present at the time the Petitioner and the Joined Party entered into the agreement for hire, nor did he have firsthand knowledge of the work relationship.

21. Section 90.801(1)(c), Florida Statutes, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay.

22. Rule 73B-10.035(15)(c) states, "Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S."

23. The testimony of the Certified Public Accountant is hearsay and, as such, legally insufficient to rebut the competent testimony of the Joined Party.

24. It was shown that the Petitioner determined what work was performed, where the work was performed, when the work was performed, and, with regard to the physical therapy services, how the work was performed. The Petitioner provided everything that was needed to perform the work. In Adams v. Department of Labor and Employment 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, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that 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.

25. 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.

26. The competent evidence presented in this case does not show that the determination of the Department of Revenue was in error. Thus, it is concluded that the services performed for the Petitioner by the Joined Party and others working as massage therapists constitute insured employment.

Recommendation: It is recommended that the determination dated March 28, 2012 be AFFIRMED.

Respectfully submitted on July 31, 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

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
July 31, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

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