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

PETITIONER:
Employer Account No. - 3025197
GOLD COAST INDUSTRIES INC
ATTN: MARY CORACI
10042 NW 50TH STREET
SUNRISE FL 33351-8019

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

PROTEST OF LIABILITY
DOCKET NO. 2012-80879L

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 15, 2012, is AFFIRMED.

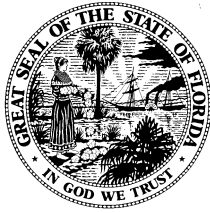
JUDICIAL REVIEW

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 January, 2013.



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.

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 January, 2013.

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:

GOLD COAST INDUSTRIES INC
ATTN: MARY CORACI
10042 NW 50TH STREET
SUNRISE FL 33351-8019

FRANCISCO RODRIGUEZ
1810 W 79TH STREET
HIALEAH FL 33014

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 3025197
GOLD COAST INDUSTRIES INC
ATTN: MARY CORACI
10042 NW 50TH STREET
SUNRISE FL 33351-8019

PROTEST OF LIABILITY
DOCKET NO. 2012-80879L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
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 June 15, 2012.

After due notice to the parties, a telephone hearing was held on November 19, 2012. The Petitioner, represented by the Petitioner's vice 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 received from the Petitioner.

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 sells and installs fencing. Both the Petitioner's president and vice president are active in the business. The president oversees the fence installation and the vice president works in the office answering the telephone and setting appointments. The Petitioner has established liability for payment of reemployment assistance tax.

2. The Joined Party is an individual who has a history of employment as a permit runner. The Joined Party had been employed by several different companies including a company owned by the Joined Party's father. The Joined Party became unemployed when his father's company went out of business. The Joined Party used Craigslist to seek other employment. The Joined Party posted his availability to work as a permit runner and in response he was contacted by the Petitioner.
3. The Joined Party was interviewed by the Petitioner's vice president who informed the Joined Party that the Petitioner was very busy at the time and that the job of permit runner would be, at least initially, forty hours per week. The vice president informed the Joined Party that the rate of pay was $10 per hour and that the Petitioner would reimburse the Joined Party for the use of the Joined Party's car at the rate of fifty cents per mile. The Petitioner informed the Joined Party that the Joined Party would be responsible for paying his own taxes at the end of the year.
4. The Joined Party accepted the offer of work and began work for the Petitioner during the latter part of April 2011. The parties did not enter into any written agreement or contract.
5. Since the Joined Party had previous experience as a permit runner the Petitioner did not provide any training concerning how to pull permits. Pulling permits is not complicated work and does not require training, however, each government office which issues permits has their own procedures and it is helpful to be aware of the various procedures.
6. The Petitioner provided the Joined Party with work space in the Petitioner's office and the use of a computer. The company provided the Joined Party with a company email address and business cards. The business cards contained the Petitioner's name, slogan, and office telephone number as well as the Joined Party's name and cell phone number.
7. Most of the Joined Party's work time was spent outside the Petitioner's office picking up the permits from government offices and dropping the permits off at the locations of the Petitioner's customers. On days when there were no permits to be picked up the Joined Party worked in the Petitioner's office.
8. The Petitioner grew dissatisfied with the Joined Party's ability to expedite the permits and believed that it would be beneficial if the Joined Party had someone help him complete the paperwork. The Petitioner hired another individual to work in the Petitioner's office to assist the Joined Party with the paperwork. The Petitioner paid that individual to assist the Joined Party. The Petitioner classified the office assistant as an independent contractor. The Joined Party never hired or paid anyone to perform the work for him or to assist him with the work.
9. During the time that the Joined Party worked for the Petitioner he did not offer his services as a permit runner to the general public and did not work for any other company. The Petitioner's president told the Joined Party that he was not allowed to pull permits for any other company while working for the Petitioner. The Joined Party did not have an occupational license or business license and did not have business liability insurance.
10. Although the Joined Party occasionally worked forty hours per week for the Petitioner he usually worked between twenty to thirty hours per week. If the Joined Party was not able to work he was required to call in to notify the Petitioner. The Joined Party was required to complete a weekly time sheet and expense report. On the time sheet and expense report the Joined Party was required to show the start time for each day. He was required to show the time he left to work outside the office, what time he arrived at and left each destination, the mileage for each leg of his travels, and his ending time for the day. The Petitioner paid the Joined Party on a regularly established pay day, Monday of each week. No taxes were withheld from the pay.

11. In addition to the reimbursement for mileage at fifty cents per mile the Petitioner reimbursed the Joined Party for parking and tolls. There were times when the Petitioner disagreed with the expense report submitted by the Joined Party and refused to reimburse the Joined Party for a portion of the expenses. The Joined Party believed that he did not have any recourse but to accept the altered payment because he believed that if he complained he would be terminated.
12. The Joined Party was not entitled to fringe benefits such as paid holidays or paid vacations.
13. Following the end of 2011 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC in the amount of $13,329.26 as nonemployee compensation.
14. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the relationship on March 23, 2012.

Conclusions of Law:

15. The issue in this case, whether services performed for the Petitioner by the Joined Party as a permit runner constitute employment subject to the Florida Reemployment Assistance Program 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.
16. 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).
17. 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.
18. 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.
19. 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.

20. 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.

21. 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.

22. There was no written agreement between the Petitioner and the Joined Party. The verbal agreement was what the parties accepted following the initial interview. The evidence reveals that the parties agreed that the Joined Party would run permits for the Petitioner, that the Petitioner would pay the Joined Party $10 per hour, that the Petitioner would reimburse the Joined Party for expenses, and that the Petitioner would not withhold payroll taxes from the pay. 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."

23. The Petitioner's business is to sell and install fences. Once the Petitioner sells a fence the Petitioner must obtain a permit before the Petitioner can install the fence. The Petitioner hired the Joined Party specifically to pick up the permits from the government offices and to deliver the permits. The work performed by the Joined Party is part of the installation process and is an integral and necessary part of the Petitioner's business. The Petitioner provided the office space and computer for the Joined Party to use. The Joined Party was responsible for providing his own transportation, however, the Petitioner reimbursed the Joined Party for the expense of transportation.

24. The work performed by the Joined Party was not complicated and did not require training. It was not shown that any skill or special knowledge was required to perform the work. Although the humblest labor can be independently contracted and the most highly trained artisan can be an employee, see Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), 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 Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

25. The Petitioner paid the Joined Party by time worked, which is typical of an employment relationship, rather than by production or by the job. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program 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 from the pay does not, standing alone, establish an independent contractor relationship.

26. The Joined Party performed services exclusively for the Petitioner for a period of approximately one year. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the Joined Party. 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 overall weight of the evidence in this case reveals that the Petitioner had the right to control the Joined Party as to the means and manner in which the work was performed. The Petitioner prohibited the Joined Party from performing services for others and the Joined Party relied solely on the Petitioner for the Joined Party's income. The Petitioner controlled the financial aspects of the relationship. Thus, it is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

28. The special deputy was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Most significantly, the Petitioner testified that the Petitioner contacted the Joined Party as a result of an ad on Craigslist placed by the Joined Party seeking customers for the Joined Party. The Joined Party testified that it was not an ad placed on Craigslist to obtain customers but instead it was an attempt to obtain employment, similar to his prior employment, as a permit runner. Factors considered in resolving evidentiary conflicts include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

29. The Petitioner submitted proposed findings of fact and conclusions of law which includes documentary evidence that was not presented at the hearing. Rule 73B-10.035(10)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing has been closed. Thus, the additional evidence presented by the Petitioner is rejected and has not been considered in this recommended order.

Recommendation: It is recommended that the determination dated June 15, 2012, be AFFIRMED.

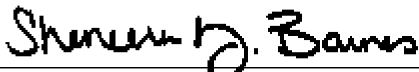
Respectfully submitted on December 7, 2012.

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:
December 7, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

FRANCISCO RODRIGUEZ
1810 W 79TH STREET
HIALEAH FL 33014

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417