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

PETITIONER:
Employer Account No. - 2799308

EAGLE MARSH LUXURY LIMOUSINE LLC
ATTN: VERONIQUE HOWLEY
3869 NW ROYAL OAK DR
JENSEN BEACH FL 34957-3408

PROTEST OF LIABILITY
DOCKET NO. 2012-88207L

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

O R D E R

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed a reemployment assistance claim in April 2012. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for reemployment assistance benefits, and the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay

reemployment assistance taxes on wages it paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on November 1, 2012. The Petitioner appeared and was represented by legal counsel. The Petitioner's owner testified as a witness for the Petitioner. The Joined Party appeared and testified on his own behalf. The Respondent, represented by a Tax Specialist II, appeared and testified. The Special Deputy issued a recommended order on January 14, 2013.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner operates a transportation service. The Petitioner primarily transports passengers between various airports and a Club Med location. The Petitioner also provides a stretch limousine service. The Petitioner utilizes drivers whom the Petitioner classifies as independent contractors to transport the passengers. The Petitioner has approximately 15 individuals that provide driving services.
2. The Joined Party began performing services for the Petitioner as a driver in late 2010, and continued to perform those services until April 27, 2012. The Joined Party took one month off in early 2012 for hernia surgery.
3. The Joined Party responded to an advertisement placed by the Petitioner on Craigslist seeking drivers possessing a commercial driver's license. The Joined Party met with the Petitioner's member/owner who showed the Joined Party where the Petitioner kept its vehicles and the keys for the vehicles, described the work to be done, told the Joined Party what each trip paid, and told the Joined Party that he needed to have a cellular telephone so the Petitioner could contact him. The parties did not enter into a written agreement. The parties did not discuss whether they were entering into an employer-employee relationship or an independent contractor relationship. The Joined Party assumed he was not an employee because he was not paid hourly, did not receive benefits, used the Petitioner's vehicles, and did not have any expenses associated with the use of the vehicles.
4. The Joined Party had prior experience as a driver for another airport shuttle service. The Joined Party possessed a commercial driver's license and permits required for drivers of vehicles for hire from Palm Beach County and the city of Orlando. The Petitioner did not provide any training to the Joined Party. The Petitioner told the Joined Party to be courteous, to be on time, and to wear a necktie.
5. The Petitioner's customers contacted the Petitioner for transportation services. The Petitioner determined the fare at the time the service was requested. The Joined Party was not permitted to alter the fare set by the Petitioner. In most cases, the Joined Party did not have a contact number for the customer. If the Joined Party was running late or encountered some problem, the Joined Party contacted the Petitioner so that the Petitioner could communicate with the customer. The Joined Party was not permitted to solicit and transport passengers in the Petitioner's vehicles for his own benefit. If the Joined Party was at the airport or another

location and was approached by someone for a ride, he contacted the Petitioner for permission to transport the passenger and charged the rate set by the Petitioner.

6. The Petitioner assigned all of the trips to the drivers. Usually, the Petitioner emailed the drivers in the evening with a trip list for the following day. The Petitioner provided the drivers with the date and time for the pick-up, the customer's name, the pick-up location, the drop-off location, and the vehicle to be used. The drivers were expected to respond as soon as possible. The Joined Party's practice was to immediately acknowledge receipt of the email. The Joined Party was required to keep his cellular telephone on 24 hours per day, seven days per week so that the Petitioner could contact him for unscheduled trips. The Joined Party told the Petitioner when he wanted a day off from driving. If the Petitioner was going to be busy on that particular day, the Petitioner told the Joined Party to pick another day. The Petitioner sometimes called the Joined Party for a job on his day off, and the Joined Party would work. The Joined Party only refused a job assignment one time. The Joined Party was contacted by the Petitioner to make an airport run after he had already worked approximately 15 hours, and the Joined Party refused the job. The Joined Party experienced a substantial reduction in assignments for the following week. The Joined Party did not believe he was free to refuse work without penalty.

7. The Joined Party used the Petitioner's vehicles to perform the work. The Petitioner paid all of the costs associated with the use of the vehicles, including fuel, maintenance, insurance and tolls. The Joined Party was a covered driver under the Petitioner's insurance policy. The Joined Party was not required to pay a deductible or repair expenses in the event of an accident in the Petitioner's vehicle. The Joined Party had a minor accident with one of the Petitioner's vehicles. The Joined Party voluntarily paid for repairs because he was afraid, if he did not, the Petitioner would not give him further work. The Joined Party was required to wash and vacuum the vehicle before his first pick-up of the day. The Joined Party took the vehicles to a car wash and was reimbursed by the Petitioner for the cost. The Joined Party was required to return the vehicle to the Petitioner's business location at the end of each day unless he had an early morning pick-up in the same vehicle the next day. In that circumstance, the Joined Party was permitted to keep the car overnight and could drive the vehicle for personal use. The Joined Party used his personal cellular telephone in connection with the work.

8. The Petitioner determined the per trip rate paid to the Joined Party. If the Joined Party had to wait for more than an hour at an airport with a customer, such as a minor, the Petitioner paid the Joined Party at a rate of $15 per hour for waiting time. If an arriving flight was delayed more than an hour or two, the Petitioner sometimes paid the Joined Party additional compensation. If the Joined Party went to a pick-up location and the customer was not there, the Petitioner paid the Joined Party for the trip.

9. The Petitioner paid the Joined Party on a bi-weekly basis. The Joined Party maintained daily driving reports and submitted them to the Petitioner prior to the pay date. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party did not receive bonuses, sick pay, vacation pay, holiday pay, or other fringe benefits. The Petitioner reported the Joined Party's earnings on a form 1099-MISC. The Joined Party could and did receive tips from passengers. The Joined Party was not required to report his tips to the Petitioner.

10. The Joined Party could not subcontract the work or hire others to perform his services for the Petitioner. The Joined Party could give an assigned job to another of the Petitioner's drivers.

11. The Joined Party was not restricted from working for a competitor of the Petitioner. During the first week the Joined Party performed driving services for the Petitioner, he also performed driving services for another airport shuttle service. After that week the Joined Party did not perform driving services for anyone other than the Petitioner.

12. The Joined Party did not have his own business, business cards, occupational license, or business liability insurance and did not advertise his services as a driver to the general public.

13. Either party could terminate the relationship at any time without penalty or liability for breach of contract. After the Joined Party was late picking up a passenger from an airport, the Petitioner notified the Joined Party that the Petitioner would only use the Joined Party as a driver in emergency situations. The Joined Party did not receive further work from the Petitioner.

14. The Joined Party filed a claim for unemployment compensation benefits effective May 8, 2012. When the Joined Party did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.

15. On June 15, 2012, the Department of Revenue issued a determination holding that the services performed for the Petitioner by the Joined Party as a driver constitute insured employment retroactive to January 1, 2011. On July 2, 2012, the Petitioner submitted a protest of the determination along with a completed *Independent Contractor Analysis* and other information pertaining to the work relationship with the Joined Party. On July 25, 2012, the Department of Revenue issued an affirmation of the prior determination. The Petitioner filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated July 25, 2012, be affirmed. The Special Deputy granted an extension of time for the filing of exceptions until February 18, 2013, at the Petitioner's request. The Petitioner's exceptions were received by mail postmarked February 12, 2013. No other submissions were received from any party.

With respect to the recommended order, section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Also, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

Upon review of the record, it was determined that Finding of Fact #14 must be modified because it lists the date of the *Wage Transcript and Determination* instead of the effective date of the Joined Party's claim. The record reflects that the Joined Party's claim was effective April 29, 2012. As a result, Finding of Fact #14 is amended to say:

> The Joined Party filed a claim for reemployment assistance (formerly known as unemployment compensation) benefits effective April 29, 2012. When the Joined Party did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.

In *Sections I-III* of its exceptions, the Petitioner proposes alternative findings of fact and conclusions of law and specifically takes exception to Conclusions of Law #23-27. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's amended Findings of Fact are supported by competent substantial evidence in the record and the Special Deputy's Conclusions of Law, including Conclusions of Law #23-27, reflect a reasonable application of the law to the facts. As a result, the Department may not further modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts findings of fact and conclusions of law as amended herein. The Petitioner's

exceptions to the Special Deputy's amended findings of fact and conclusions of law are respectfully rejected.

The Petitioner also cites several court cases in support of its contention that an independent contractor relationship existed between the Petitioner and the Joined Party. The cases are distinguishable from the case at hand. The courts in these cases held that independent contractor relationships existed due to a lack of control over the details of the work. *Hilldrup Transfer & Storage of New Smyrna Beach, Inc. v. State, Dept. of Labor & Employment Sec., Div. of Employment*, 447 So. 2d 414, 417 (Fla. 5th DCA 1984); *Messer v. Dep't of Labor & Employment Sec.*, 500 So. 2d 1372, 1373 (Fla. 5th DCA 1987); *Peterson v. Highland Crate Co-op.*, 23 So. 2d 716, 717 (Fla. 1945); *A Nu Transfer, Inc. v. Dep't of Labor & Employment Sec. Div. of Employment Sec.*, 427 So. 2d 305, 306 (Fla. 3d DCA 1983); *Roark v. Peters*, 242 So. 2d 199, 201 (Fla. 1st DCA 1970). The record reflects that the Special Deputy concluded that the Petitioner exerted control over the details of the Joined Party's work consistent with an employer/employee relationship. As previously stated, the Special Deputy's amended Findings of Fact are supported by competent substantial evidence in the record, the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts, and the Department is not permitted to further modify or reject the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes. The Department accepts the Special Deputy's amended Findings of Fact and Conclusions of Law. The Petitioner's remaining exceptions are respectfully rejected.

A review of the record reveals that the amended Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order as amended herein. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the Petitioner's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in this order.

Therefore, it is ORDERED that the determination dated July 25, 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 **April, 2013**.

Altemese Smith,
Bureau Chief,
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 April, 2013.

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:

EAGLE MARSH LUXURY LIMOUSINE L
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3869 NW ROYAL OAK DR
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DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
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TALLAHASSEE FL 32314-6417

JASON CLARK
PO BOX 17486
WEST PALM BEACH FL 33416

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

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PROTEST OF LIABILITY
DOCKET NO. 2012-88207L

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 July 25, 2012.

After due notice to the parties, a telephone hearing was held on November 1, 2012. The Petitioner appeared and was represented by legal counsel. The Petitioner's member/owner testified as a witness for the Petitioner. 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. The Petitioner filed a request for an extension of time for the submission of Proposed Findings of Fact and Conclusions of Law. The Special Deputy granted the request and extended the deadline for proposals to November 30, 2012. Proposed Findings of Fact and Conclusions of Law were submitted by the Petitioner on November 30, 2012.

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 operates a transportation service. The Petitioner primarily transports passengers between various airports and a Club Med location. The Petitioner also provides a stretch limousine service. The Petitioner utilizes drivers whom the Petitioner classifies as independent contractors to transport the passengers. The Petitioner has approximately 15 individuals that provide driving services.

2. The Joined Party began performing services for the Petitioner as a driver in late 2010, and continued to perform those services until April 27, 2012. The Joined Party took one month off in early 2012 for hernia surgery.

3. The Joined Party responded to an advertisement placed by the Petitioner on Craigslist seeking drivers possessing a commercial driver's license. The Joined Party met with the Petitioner's member/owner who showed the Joined Party where the Petitioner kept its vehicles and the keys for the vehicles, described the work to be done, told the Joined Party what each trip paid, and told the Joined Party that he needed to have a cellular telephone so the Petitioner could contact him. The parties did not enter into a written agreement. The parties did not discuss whether they were entering into an employer-employee relationship or an independent contractor relationship. The Joined Party assumed he was not an employee because he was not paid hourly, did not receive benefits, used the Petitioner's vehicles, and did not have any expenses associated with the use of the vehicles.

4. The Joined Party had prior experience as a driver for another airport shuttle service. The Joined Party possessed a commercial driver's license and permits required for drivers of vehicles for hire from Palm Beach County and the city of Orlando. The Petitioner did not provide any training to the Joined Party. The Petitioner told the Joined Party to be courteous, to be on time, and to wear a necktie.

5. The Petitioner's customers contacted the Petitioner for transportation services. The Petitioner determined the fare at the time the service was requested. The Joined Party was not permitted to alter the fare set by the Petitioner. In most cases, the Joined Party did not have a contact number for the customer. If the Joined Party was running late or encountered some problem, the Joined Party contacted the Petitioner so that the Petitioner could communicate with the customer. The Joined Party was not permitted to solicit and transport passengers in the Petitioner's vehicles for his own benefit. If the Joined Party was at the airport or another location and was approached by someone for a ride, he contacted the Petitioner for permission to transport the passenger and charged the rate set by the Petitioner.

6. The Petitioner assigned all of the trips to the drivers. Usually, the Petitioner emailed the drivers in the evening with a trip list for the following day. The Petitioner provided the drivers with the date and time for the pick-up, the customer's name, the pick-up location, the drop-off location, and the vehicle to be used. The drivers were expected to respond as soon as possible. The Joined Party's practice was to immediately acknowledge receipt of the email. The Joined Party was required to keep his cellular telephone on 24 hours per day, seven days per week so that the Petitioner could contact him for unscheduled trips. The Joined Party told the Petitioner when he wanted a day off from driving. If the Petitioner was going to be busy on that particular day, the Petitioner told the Joined Party to pick another day. The Petitioner sometimes called the Joined Party for a job on his day off, and the Joined Party would work. The Joined Party only refused a job assignment one time. The Joined Party was contacted by the Petitioner to make an airport run after he had already worked approximately 15 hours, and the Joined Party refused the job. The Joined Party experienced a substantial reduction in assignments for the following week. The Joined Party did not believe he was free to refuse work without penalty.

7. The Joined Party used the Petitioner's vehicles to perform the work. The Petitioner paid all of the costs associated with the use of the vehicles, including fuel, maintenance, insurance and tolls. The Joined Party was a covered driver under the Petitioner's insurance policy. The Joined Party was not required to pay a deductible or repair expenses in the event of an accident in the Petitioner's vehicle. The Joined Party had a minor accident with one of the Petitioner's vehicles. The Joined Party voluntarily paid for repairs because he was afraid, if he did not, the Petitioner would not give him further work. The Joined Party was required to wash and vacuum the vehicle before his first pick-up of the day. The Joined Party took the vehicles to a car wash and was reimbursed by the Petitioner for the cost. The Joined Party was required to return the vehicle to the Petitioner's

business location at the end of each day unless he had an early morning pick-up in the same vehicle the next day. In that circumstance, the Joined Party was permitted to keep the car overnight and could drive the vehicle for personal use. The Joined Party used his personal cellular telephone in connection with the work.

8. The Petitioner determined the per trip rate paid to the Joined Party. If the Joined Party had to wait for more than an hour at an airport with a customer, such as a minor, the Petitioner paid the Joined Party at a rate of $15 per hour for waiting time. If an arriving flight was delayed more than an hour or two, the Petitioner sometimes paid the Joined Party additional compensation. If the Joined Party went to a pick-up location and the customer was not there, the Petitioner paid the Joined Party for the trip.
9. The Petitioner paid the Joined Party on a bi-weekly basis. The Joined Party maintained daily driving reports and submitted them to the Petitioner prior to the pay date. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party did not receive bonuses, sick pay, vacation pay, holiday pay, or other fringe benefits. The Petitioner reported the Joined Party's earnings on a form 1099-MISC. The Joined Party could and did receive tips from passengers. The Joined Party was not required to report his tips to the Petitioner.
10. The Joined Party could not subcontract the work or hire others to perform his services for the Petitioner. The Joined Party could give an assigned job to another of the Petitioner's drivers.
11. The Joined Party was not restricted from working for a competitor of the Petitioner. During the first week the Joined Party performed driving services for the Petitioner, he also performed driving services for another airport shuttle service. After that week the Joined Party did not perform driving services for anyone other than the Petitioner.
12. The Joined Party did not have his own business, business cards, occupational license, or business liability insurance and did not advertise his services as a driver to the general public.
13. Either party could terminate the relationship at any time without penalty or liability for breach of contract. After the Joined Party was late picking up a passenger from an airport, the Petitioner notified the Joined Party that the Petitioner would only use the Joined Party as a driver in emergency situations. The Joined Party did not receive further work from the Petitioner.
14. The Joined Party filed a claim for unemployment compensation benefits effective May 8, 2012. When the Joined Party did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
15. On June 15, 2012, the Department of Revenue issued a determination holding that the services performed for the Petitioner by the Joined Party as a driver constitute insured employment retroactive to January 1, 2011. On July 2, 2012, the Petitioner submitted a protest of the determination along with a completed *Independent Contractor Analysis* and other information pertaining to the work relationship with the Joined Party. On July 25, 2012, the Department of Revenue issued an affirmation of the prior determination. The Petitioner filed a timely protest.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.

17. 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).

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. The evidence presented in this case does not reveal the existence of an agreement, verbal or written, specifying whether the Joined Party would perform services as an employee or as an independent contractor. 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 cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties." The Joined Party's belief that his status was one of a contractor, as indicated in his testimony at the hearing and in his response to the Department of Revenue's *Independent Contractor Analysis* form, was based not upon an express agreement with the Petitioner or upon an intent to enter into an independent contractor relationship with the Petitioner, but upon a conclusion drawn from the manner in which the Petitioner chose to pay and report the Joined Party's earnings.

24. The Petitioner operates a transportation service. The Joined Party performed services as a driver. The Joined Party transported the Petitioner's customers in the Petitioner's vehicles. 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 Petitioner's business.

25. The Joined Party did not have his own business. The Joined Party did not advertise his services as a driver to the general public. The Joined Party did not have a significant financial investment in the work performed for the Petitioner. The Petitioner obtained the customers, furnished the vehicles, and paid all of the costs associated with the use of the vehicles. The Joined Party possessed a commercial driver's license and airport permits prior to performing any services for the Petitioner. It was not shown that the Joined Party incurred any additional expense due to the use of his personal cellular telephone in connection with the work performed for the Petitioner.

26. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker's status is the employing unit's right of control over the manner in which the work is performed. The Court, quoting from La Grande v. B & L Services, Inc., 432 So.2d 1364 (Fla. 1st DCA 1983), stated that the distinction between an employee and an independent contractor centered around "the degree of control which the putative employer exercises over the person, the decisive question being who has the right to direct what shall be done and how and when it shall be done;…whether the person is subject to or whether he is free from control with regard to the details of the engagement." In this case the Petitioner determined what work was performed, when the work was performed, and where the work was performed. The Petitioner determined which passengers the Joined Party was to transport and, thereby, when and where the work was performed. Although the Petitioner contended the Joined Party was free to accept or decline work at any time, the record reveals the Joined Party could not refuse an assignment without fear of reprisal. The Petitioner determined which vehicle the Joined Party was to use. The Petitioner determined the fare charged to the customer. The Joined Party could not subcontract the work.

27. The Petitioner determined the rate and method of payment. The Petitioner paid the Joined Party on a bi-weekly basis. Whether the Joined Party was paid per trip or by the hour for waiting time, the Petitioner determined the amount of the Joined Party's pay. The fact that the Petitioner chose not to withhold taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

28. Either party had the right to terminate the relationship at any time without incurring a penalty or liability for breach of contract. The Joined Party performed services for the Petitioner for approximately sixteen months. With the exception of the first week of service, the Joined Party performed driving services exclusively for the Petitioner. 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."

29. It is concluded that the services performed for the Petitioner by the Joined Party as a driver constitute insured employment.

30. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law. The Petitioner's Proposed Findings of Fact and Conclusions of Law were considered by the Special Deputy. Those Proposed Findings of Fact and Conclusions of Law that are supported by the record were incorporated in the recommended order. Those Proposed Findings of Fact and Conclusions of Law that are not relevant, are not supported by the record, or are mischaracterizations of the evidence were respectfully rejected.

Recommendation: It is recommended that the determination dated July 25, 2012, be AFFIRMED.

Respectfully submitted on January 14, 2013.

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:
January 14, 2013

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