

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

PETITIONER:

Employer Account No. - 2836085
CARDIOFLEX THERAPY INC
2600 SW 130TH TERRACE
DAVIE FL 33330-1230

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-42818L**

ORDER

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 April 10, 2013, 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, 2013.**



Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
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.

Shanendra 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, 2013.

Shanendra 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:

CARDIOFLEX THERAPY INC
2600 SW 130TH TERRACE
DAVIE FL 33330-1230

JENNIFER GRASSIA
4205 VINEYARD CIRCLE
WESTON FL 33332-2152

CARDIOFLEX THERAPY INC
ATTN TERRY ABRAMS MPT CSCS
10620 GRIFFIN ROAD SUITE 102
COOPER CITY FL 33328-3213

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

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

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Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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RESPONDENT:

State of Florida

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c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated April 10, 2013.

After due notice to the parties, a telephone hearing was held on July 17, 2013. The Petitioner appeared, represented by its President. The Joined Party did not appear. The Respondent appeared, represented by a Tax Specialist II.

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 was created in 2005. The president of the Petitioner is the only officer and only owner of the corporation. That has been the case throughout the existence of the Petitioner. The Petitioner provides physical therapy services, and some occupational therapy. The Petitioner opened a clinic in February 2012. Services are provided to patients in the patients' homes and at the clinic.

2. The Joined Party became associated with the Petitioner on September 1, 2012. The Joined Party was hired to work as a marketing person. The president told the Joined Party that she would be an independent contractor. The Joined Party agreed. There was no written agreement between the parties.
3. The Joined Party worked in the clinic and in the field, visiting doctors' offices. The Joined Party worked Monday through Friday, starting at the clinic at 8 a.m., the time when the clinic opened for business. The claimant worked on four days of the week to 1 p.m., and on one day of the week the Joined Party would leave at noon. The short day differed from week to week. The Joined Party would notify the president a day or two in advance which of the days that week would be her short day.
4. The Petitioner supplied marketing materials about the clinic. When the Joined Party worked in the clinic, she would use the Petitioner's office equipment and supplies to make telephone calls, send emails, or send faxes. When the Joined Party worked in the field, she would use her own vehicle to travel to the chosen medical offices. The Petitioner paid the Joined Party a flat rate car allowance for each day she used her vehicle to travel to a medical office. The rate started at \$10 per day and eventually rose to \$20 per day. The rate applied without regard to mileage. The Joined Party was entitled to the allowance if she visited several offices at different locations; or if she just made one trip, for example to a medical office building where she could visit several offices in the building.
5. The Petitioner supplied the Joined Party with the names of doctors to visit, from a database that the president had compiled when he was performing his own marketing. The Joined Party was paid a \$50 bonus or commission if her efforts generated a referral.
6. In December 2012 the president announced that the Joined Party and some other workers were going to be employees, instead of independent contractors. The change occurred as of January 1, 2013. At that time, the Petitioner began income tax withholding, and began deducting Social Security and Medicare taxes. Pay rate, hours of work, and the manner of working remained the same; so the only obvious difference was in the net pay issued to the Joined Party on the biweekly pay day.
7. The association between the Joined Party and the Petitioner came to an end on or about February 28, 2013. The Joined Party simply stopped providing services to the Petitioner.

Conclusions of Law:

8. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).

9. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
 - h) whether or not the work is 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.
10. In Keith v. News and Sun-Sentinel Co., 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:
- Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.
11. The evidence shows that the Joined Party provided her services to the Petitioner during the Petitioner's business hours, often on the Petitioner's premises, using the Petitioner's tools and supplies. The Joined Party was primarily paid by the hour, though she did get some supplemental income from the car allowance and the bonus or commission. These facts tend to show that the Joined Party was an employee of the Petitioner, not an independent contractor.
12. The president of the Petitioner and the Joined Party expressly agreed that the Joined Party was an independent contractor, but since the Joined Party performed her work in the same way when she was called an employee, the name given to the relationship makes no difference. See, Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972) (express designation of worker as independent contractor insufficient to establish that status; worker was an employee). Where, as in this case, the same work is done in the same way whether the worker is designated an independent contractor or an employee, then the designation of status loses its force as evidence of what the status of the worker is.
13. Section 73B-10.035, Florida Administrative Code, provides:
- (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.

14. The Petitioner has not met the burden of proof on it of establishing that the Joined Party was an independent contractor rather than an employee prior to January 1, 2013.

Recommendation: It is recommended that the Determination dated April 10, 2013, finding that the Joined Party was an employee for the entire period of the work for the employing unit, be AFFIRMED.

Respectfully submitted on August 13, 2013.



J JACKSON HOUSER, 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 envío 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
August 13, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

JENNIFER GRASSIA
4205 VINEYARD CIRCLE
WESTON FL 33332-2152

CARDIOFLEX THERAPY INC
ATTEN TERRY ABRAMS MPT CSCS
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