DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. – 0570631
TRADITIONAL WATERCRAFT INC
ATTN: DAWN KITTELL
1979 WILD ACRES RD
LARGO FL 33771-3815

PROTEST OF LIABILITY
DOCKET NO. 0024 2694 37-02

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

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 September 11, 2014, 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 19th day of **May, 2015**.

Magnus Hines,
RA Appeals Manager,
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.

Shanedra Y. Barnes
DEPUTY CLERK

5.19.15
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 19th day of May, 2015.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
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Reemployment Assistance Appeals
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
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 September 11, 2014.

After due notice to the parties, a telephone hearing was held on February 5, 2015. The Petitioner, represented by the Vice President of Finance and Administration, appeared and testified. The Fiberglass Supervisor testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as fiber glass laminators constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner, Traditional Watercraft, Inc., is a corporation which operates a fiberglass boat manufacturing company. Prior to 2008 the Petitioner had approximately 220 employees. Due to the poor economy the Petitioner experienced a ninety percent drop in sales resulting in an extensive layoff of employees. Some of the employees, including the Fiberglass Supervisor, were retained and reclassified as "contingent labor." It was the Petitioner's belief that a contingent worker is an individual who performs services for an employer but who is not technically an employee. When economic conditions improved the Petitioner again classified the workers, including the Fiberglass Supervisor, as employees.

2. In 2013 the Petitioner's business was improving but the Petitioner was reluctant to hire new employees because sales were sporadic and the Petitioner did not want to have to terminate employees if continuing work was not available. The Petitioner placed a help wanted advertisement in the newspaper for fiberglass workers. The Joined Party responded to the help wanted advertisement and completed an employment application. The Fiberglass Supervisor reviewed the application and interviewed the Joined Party. From the application and the interview the Fiberglass Supervisor determined that the Joined Party had prior experience working with fiberglass. The Joined Party was hired to work on an as needed basis beginning on May 7, 2013. The parties did not enter into any written agreement or contract.
3. Although the Joined Party had some fiberglass experience it was necessary for the Fiberglass Supervisor to train the Joined Party how to perform the work because the Petitioner uses methods that are different from other boat manufacturers. Also, the Joined Party had never done gel coating and needed to be trained in order to perform gel coating.
4. The Petitioner provided the place of work and all tools, equipment, and supplies that were needed to complete the work. The Joined Party owned a very nice cordless drill which he chose to use instead of the drills provided by the Petitioner but he was not required to use his own tools. The Joined Party did not have any known expenses in connection with the work.
5. A fiberglass laminator is not required to have any type of certification to perform the work. The work does not require any special skill or knowledge. The Joined Party was supervised by the Fiberglass Supervisor.
6. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.
7. The Petitioner determined when the Joined Party was needed to work and instructions were given to the Joined Party concerning when to work, how to perform the work, and the sequence in which the work was to be performed. If the Joined Party had refused to follow the Petitioner's instructions the Fiberglass Supervisor would have discharged the Joined Party.
8. The Joined Party was required to punch a time clock. The Petitioner paid the Joined Party each week based on the number of hours worked during the week. The Joined Party was not allowed to work off the clock and he was paid for any time needed to correct errors or defective work. No taxes were withheld from the pay and no fringe benefits were provided. At the end of 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation in the amount of $12,031.07.
9. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract.
10. During the time that the Joined Party performed services for the Petitioner there were approximately seven other workers who were classified by the Petitioner as contingent workers and who worked under the same terms and conditions as the Joined Party. In January 2014 the Petitioner received sufficient boat orders to provide full time work for the production workers for a period of approximately six months. At that time the Petitioner reclassified the Joined Party from being a contingent, temporary, or intermittent worker to a permanent, full time, employee. As a full time employee the Petitioner did not provide any guarantee that permanent full time work would be available. As an employee the Petitioner withheld payroll taxes from the pay. All other terms and conditions remained the same as when the Joined Party was classified as a contingent worker.
11. In August 2014 the Petitioner did not have continuing work available for the Joined Party and he was laid off due to lack of work. On August 14, 2014, the Joined Party filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for his earnings with the Petitioner an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

12. On September 11, 2014, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as fiberglass laminators are the Petitioner's employees retroactive to May 7, 2013. The Petitioner filed a timely protest by mail postmarked September 12, 2014.

Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as fiberglass laminators 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.

14. 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).

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. No evidence was presented concerning the agreement between the parties. 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."

21. The Petitioner's business is the manufacture of fiberglass boats. The work performed for the Petitioner by the Joined Party was fiberglass lamination. 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 business. The Petitioner provided the place of work and all tools, equipment, and supplies that were needed to complete the work. It was not shown that the Joined Party had any investment in a business, had any expenses in connection with the work, or was at risk of suffering a financial loss from performing services for the Petitioner.

22. It was not shown that fiberglass lamination is a highly skilled occupation or that the job requires any special knowledge. Although the Joined Party had prior experience it was necessary for the Petitioner to teach the Joined Party how to perform the work. 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)

23. The Petitioner determined the hours of work based on the Petitioner's needs. The Petitioner determined the method of pay as well as the rate of pay. The Joined Party was paid by time worked rather than by the job or based on production. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. 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.

24. The Joined Party performed services as a "contingent worker" from May 2013 until January 31, 2014, a period of nine months. During that time either party was free to terminate the relationship without incurring liability for breach of contract. 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."

25. The Petitioner determined what work was to be performed, where it was to be performed, when it was to be performed, by whom it was performed, and how it was performed. The Petitioner provided everything that was needed to perform the work and controlled the financial aspects of the relationship. 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 authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

26. The Petitioner argues that the Joined Party was not an employee of the Petitioner between May 7, 2013, and January 31, 2014, because the Petitioner hired the Joined Party to be a temporary worker, an intermittant worker, an as-needed worker, a contract worker, or a contingent worker. The Florida Reemployment Assistance Program Law does not discriminate between temporary/permanent workers or part-time/full-time workers.

27. Section 443.036(11), Florida Statutes defines "casual labor" as labor that is occasional, incidental, or irregular, not exceeding 200 person-hours in total duration. As used in this subsection, the term "duration" means the period of time from the commencement to the completion of the particular job or project. Services performed by an employee for his or her employer during a period of 1 calendar month or any 2 consecutive calendar months, however, are deemed to be casual labor only if the service is performed on 10 or fewer calendar days, regardless of whether those days are consecutive. If any of the services performed by an individual on a particular labor project are not casual labor, each of the services performed by the individual on that job or project may not be deemed casual labor. Services must constitute casual labor and may not be performed in the course of the employer's trade or business for those services to be exempt under this section. (emphasis supplied)

28. Section 443.1216(13)(s), Florida Statutes provides that casual labor not in the course of the employer's business is exempt from coverage under the Florida Reemployment Assistance Program Law.

29. Rule 73B-10.022(4), Florida Administrative Code, provides that in accordance with 26 Code of Federal Regulations 31.3306(c)(3)-1, services performed for a corporation do not come within the casual labor exceptions provided in Section 443.1216(13)(s), Florida Statutes.

30. The Petitioner is a corporation. Thus, any labor performed for the Petitioner that is occasional, intermittent, or irregular, is not exempt from coverage under the Florida Reemployment Assistance Program Law.

31. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as fiberglass laminators constitute insured employment.

Recommendation: It is recommended that the determination dated September 11, 2014, be AFFIRMED.

Respectfully submitted on March 27, 2015.

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

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
March 27, 2015

Copies mailed to:
Petitioner
Respondent
Joined Party

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