

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

PETITIONER:

Employer Account No. - 2221053
V & V OWEN CORPORATION
8248 NORTH WEST 14TH COURT
CORAL SPRINGS FL 33071

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-119236L**

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 July 27, 2011, 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 **June, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation 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.

Shanendra 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 June, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

V & V OWEN CORPORATION
8248 NORTH WEST 14TH COURT
CORAL SPRINGS FL 33071

CRANDELL & ASSOCIATES INC
ATTN: MAUREEN THOMAS
120 EAST OAKLAND PARK BLVD SUITE
106
FT LAUDERDALE FL 33334

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: JOYCE FLAKES
3111 N UNIVERSITY DRIVE
STE 501
CORAL SPRINGS FL 33065

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2221053
V & V OWEN CORPORATION
8248 NORTH WEST 14TH COURT
CORAL SPRINGS FL 33071

**PROTEST OF LIABILITY
DOCKET NO. 2011-119236L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation 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 27, 2011.

After due notice to the parties, a telephone hearing was held on April 23, 2012. The Petitioner, represented by its accountant, appeared and testified. The Petitioner's president testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Auditor III testified as a witness.

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 constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which operates a moving business as a subcontractor to major van lines. The major van lines provide the trailers and the Petitioner provides the trucks and the labor. The Petitioner owns and operates three trucks which are used to pull the trailers.
2. The Petitioner's president is active in the operation of the business and he drives one of the three trucks. The Petitioner hires drivers to drive the other trucks and hires laborers to load and unload the goods that are being moved. The Petitioner's president is an acknowledged employee of the Petitioner, however, the Petitioner classifies some of the other drivers and laborers as casual

laborers and classifies some of the drivers and laborers as independent contractors. The Petitioner's president is the Petitioner's only acknowledged employee.

3. When the Petitioner hires a worker the Petitioner's president determines if the worker is a driver or a laborer. The Petitioner offers an hourly rate of pay and the worker may choose to accept or decline the offer of work. If the worker accepts the offer of work the major van lines perform background checks on the applicant.
4. The Petitioner requires the workers to sign a written agreement. The agreement is a document which the Petitioner's president obtained from an unknown source prior to the formation of the Petitioner's business. The Petitioner uses the generic agreement for the primary purpose of obtaining the workers' social security numbers and addresses. The agreement refers to the worker as "contractor" and to the Petitioner as "owner." Although the agreements are not dated the agreement states that "This contract shall commence on this date and terminate at OWNER'S discretion." The agreement provides that the contractor is free to bring in any partners, substitutes or sub-contractors who will do all or part of contractor's work without any control or supervision of the owner and that the owner's permission is not required. The agreement provides that the contractor is free to choose where to perform the work and may do so at the contractor's home, office, or other location of the contractor's choosing. The agreement states that the contractor will offer services to the general public and will at all times maintain a separate and distinct identity and place of business separate and apart from that of the owner. The agreement provides that the contractor shall set the contractor's own working hours, pace, and procedures without consulting with the owner or being directed by the owner. The agreement provides that the owner shall not supervise nor interfere with the contractor and shall not terminate the agreement prematurely as long as the contractor performs the work satisfactorily.
5. Contrary to the wording of the agreement the workers are required to personally perform the work. The workers may not hire others to perform any portion of the work for them. The Petitioner, through its contracts with the major van lines, determines when the work is performed and where the work is performed. The drivers, including the Petitioner's president, are considered to be lead workers. Although the work does not require any training, skill, or special knowledge, the drivers may offer some direction to the laborers.
6. The major van lines provide liability insurance in the amount of \$1,000,000 to cover the Petitioner's trucks and any damage caused to the goods by the Petitioner or the Petitioner's workers. The major van lines provide workers' compensation insurance to cover the workers. The major van lines provide the workers with uniforms which bear the name of the van line. Both the van lines and the Petitioner provide equipment, tools, and supplies for the workers to use. The workers may choose to provide their own hand tools. The Petitioner provides the trucks and is responsible for the cost of licenses, fuel, maintenance and repairs. The workers do not have any investment in the business and do not have any expenses in connection with the work which they perform for the Petitioner.
7. All of the workers, whether classified by the Petitioner as casual labor or as independent contractor, are required to complete weekly time cards showing the beginning and ending times worked each day. The workers indicate on the timecards whether or not they took a lunch break. The Petitioner pays the workers weekly based on the number of hours reported on the time cards. The Petitioner does not withhold any payroll taxes from the pay of any of the workers and does not provide any fringe benefits. At the end of the year the Petitioner issues a *Form 1099-MISC* to some of the workers to report the earnings paid by the Petitioner to those workers.
8. The Florida Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law. The audit was conducted at the office of the Petitioner's accountant. The

Petitioner's president completed two *Independent Contractor Analysis* questionnaires which were examined by the Tax Auditor. The Petitioner's general ledger listed 44 workers of whom a *Form 1099-MISC* was issued to 12 workers. The Petitioner did not report the earnings of the other 32 workers to the Internal Revenue Service on *Form W-2 Wage and Tax Statement*.

9. The Tax Auditor concluded that all of the Petitioner's workers, whether classified by the Petitioner as casual labor or as independent contractor, were the Petitioner's employees. The Department of Revenue notified the Petitioner of the audit results by *Notice of Proposed Assessment* dated July 27, 2011. The Petitioner's accountant filed a timely protest by letter dated August 11, 2011.

Conclusions of Law:

10. The issue in this case, whether services performed for the Petitioner 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.
11. 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).
12. 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.
13. 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.
14. 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.

15. 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.
16. 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.
17. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented “while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.”
18. It has been shown by the Petitioner's testimony and evidence that the written agreements signed by the workers are not valid indicators of the working relationship. The agreements are not relevant to the services performed by the workers and were used by the Petitioner for the primary purpose of obtaining the workers' social security numbers. Therefore, the relationship must be examined using the Restatement test.
19. It has been shown that the Petitioner is in business to move goods under a subcontract agreement with major van lines. The Petitioner's drivers and laborers perform those moves for the Petitioner using equipment provided by the van lines and by the Petitioner. The services provided are not separate and distinct from the Petitioner's business but are an integral and necessary part of the Petitioner's business. The Petitioner owns the trucks and is responsible for the expenses of operating the trucks and paying the workers. The evidence reveals that the Petitioner has a substantial investment in the business but that the workers do not have any investment or operating expenses. It was not shown that the workers were at risk of suffering a financial loss from performing services for the Petitioner.
20. The Petitioner's testimony reveals that the work performed by the workers does not require any training, skill, or special knowledge. 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)
21. The Petitioner determined the method and rate of pay. The Petitioner paid the workers based on time worked rather than by the job or based on production, a fact that points to an employer-employee relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation 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 taxes from the pay does not, standing alone, establish an independent contractor relationship.

22. The evidence reveals that the Petitioner had the right to terminate a worker at any time without incurring liability for breach of contract. 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."
23. The Petitioner determined what work was performed, when it was performed, and by whom it was performed. The Petitioner provided only minimal direction, however, it is not necessary for an employer to actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to direct and control the worker. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984) 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.
24. The Petitioner classified some of the workers as casual laborers rather than independent contractors. At the hearing the Petitioner was not able to explain the difference in the classifications. The Petitioner explained that a Form 1099-MISC was not issued for each worker because the Petitioner did not always obtain an address for each worker.
25. Section 443.036(11), Florida Statutes, provides that casual labor means labor which is not performed in the course of the employer's trade or business, that is occasional, incidental, or irregular, and does not exceed 200 person-hours in total duration. Section 443.1216(13)(s), Florida Statutes provides, that casual labor not in the course of the employer's trade or business is exempt from coverage under the law. However, Rule 73B-10.022(4), Florida Administrative Code, provides that, in accordance with the Code of Federal Regulations, services performed for a corporation do not fall within the casual labor exemption provided in Section 443.1216(13)(s).F.S.
26. It is concluded that the services performed for the Petitioner during 2009 by individuals classified by the Petitioner as independent contractors and as casual labor constitute insured employment subject to the unemployment compensation law.

Recommendation: It is recommended that the determination dated July 27, 2011, be AFFIRMED.

Respectfully submitted on April 27, 2012.



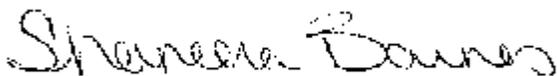
R. O. SMITH, Special Deputy
Office of Appeals

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 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 ken z 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:
April 27, 2012

Copies mailed to:

Petitioner
Respondent

CRANDELL & ASSOCIATES INC
ATTN: MAUREEN THOMAS
120 EAST OAKLAND BLVD SUITE 106
FT LAUDERDALE FL 33334

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399