

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

PETITIONER:

Employer Account No. - 2609510

ALL JEWELERS DROP & SHOP INC
ATTN ALEC LATORELLA
6541 ARANCIO DRIVE WEST
JACKSONVILLE FL 32244-6815

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-97524L**

ORDER

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as jewelry and watch repair workers 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 an unemployment compensation claim in October 2010. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department (the Agency for Workforce Innovation and its successor, the Department of Economic Opportunity) 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 and other jewelry and watch repair workers worked for the Petitioner as employees or independent contractors. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any other workers that performed services under the same terms and conditions as 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 unemployment compensation taxes on the wages

it paid to the Joined Party and any other jewelry and watch repair workers. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party and other jewelry and watch repair workers were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages it paid to the Joined Party and any workers who performed services under the same terms and conditions as 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 September 1, 2011. The Petitioner, represented by its Owner, appeared and testified. A worker testified as a witness on behalf of 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 17, 2012.

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

1. The Petitioner is a subchapter S corporation, incorporated in December 2004 for the purpose of running a jewelry and watch repair service. The Petitioner's place of business was located in a mall.
2. The Joined Party performed services in Jewelry and watch repair for the Petitioner from January 1, 2011, through April 3, 2011.
3. The Joined Party observed the Petitioner at work and asked to learn the profession. The Petitioner and Joined Party worked together for several weeks before the Joined Party was put to work.
4. The Petitioner's shop is located in a shopping mall and is required to operate during hours set by the mall.
5. The Petitioner informed the Joined Party that the Joined Party would be working as an independent contractor at the time of hire.
6. The Joined Party signed a contract at the time of hire. The contract indicated that the Joined Party would be an independent contractor. The contract did not allow the Joined Party to work for a competitor without the permission of the Petitioner. The contract included a two year non-compete clause which covered a fifty mile radius. The contract allowed the Joined Party to do side-work with the permission of the Petitioner.
7. The Joined Party and the Petitioner worked out what days of the week the Joined Party was available for work. The Joined Party was required to inform the Petitioner if he would not be able to make a scheduled shift.
8. The Joined Party would report to the place of business on days he was scheduled to work. The Joined Party would open the shop, set up the register, and await customers. The Joined Party

generally worked alone. At the end of the day, the Joined Party would count out the register, sweep, and clean the store.

9. The Petitioner provided supervision and guidance early in the relationship.
10. The Petitioner provided a list of base prices for various services. The Joined Party would set a price for each customer. The Joined Party would keep a percentage of money charged. The base price represented the minimum cost of materials for the job. The Joined Party provided an invoice to the Petitioner listing services performed and prices charged.
11. The Petitioner would inspect repairs prior to their return to the customer. The Petitioner would re-do repairs that did not meet his standards. The Joined Party would be charged for any work done by the Petitioner.
12. The Petitioner provided the tools and materials needed to perform the work. The Joined Party was required to pay for any tools damaged by the Joined Party.
13. Either party could end the relationship at anytime and without liability.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated July 12, 2011, be affirmed. The Petitioner's exceptions were received by mail postmarked January 25, 2012. 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 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. The Petitioner's exceptions are also addressed below.

Upon review of the record, it was determined that the second paragraph above the *Issue* must be modified because it does not accurately reflect the number of witnesses that testified at the hearing. The record reflects that a single worker testified on behalf of the Petitioner. The second paragraph above the *Issue* is amended to say:

After due notice to the parties, a telephone hearing was held on September 1, 2011. The Petitioner's owner appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A Tax Specialist II appeared and testified on behalf of the Respondent.

In its exceptions, the Petitioner takes exception to the Special Deputy's Findings of Fact and Conclusions of Law. The Petitioner also proposes alternative findings of fact, alternative conclusions of law, and findings of fact in accord with the Special Deputy's findings of fact. Section 120.57(1)(l), Florida Statutes, does not allow the modification or rejection of the Special Deputy's Findings of Fact or Conclusions of Law unless the Department first determines that the findings of fact are not supported by the competent substantial evidence in the record or 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. A review of the record also reveals that the Special Deputy's Conclusions of Law 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 and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as modified herein. The Petitioner's 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 fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of

the Special Deputy as amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

Therefore, it is ORDERED that the determination dated July 12, 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 **April, 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 April, 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:

ALL JEWELERS DROP & SHOP INC
ATTN ALEC LATORELLA
6541 ARANCIO DRIVE WEST
JACKSONVILLE FL 32244-6815

CURTIS L BURNHAM
9126 EAGLE NEST DR
NAVARRE FL 32566

ALL JEWELERS DROP & SHOP INC
ATTN ALEC LATORELLA
300 MARY ESTHER BLVD
SUITE 46
MARY ESTHER FL 32569

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

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

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. - 2609510
ALL JEWELERS DROP & SHOP INC
ATTN ALEC LATORELLA
6541 ARANCIO DRIVE WEST
JACKSONVILLE FL 32244-6815



**PROTEST OF LIABILITY
DOCKET NO. 2011-97524L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
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 12, 2011.

After due notice to the parties, a telephone hearing was held on September 1, 2011. The Petitioner’s owner appeared and testified at the hearing. The Petitioner called two workers as witnesses. The Joined Party appeared and testified in his own behalf. A tax specialist II appeared and testified on behalf of the Respondent.

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

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in December 2004 for the purpose of running a jewelry and watch repair service. The Petitioner’s place of business was located in a mall.
2. The Joined Party performed services in Jewelry and watch repair for the Petitioner from January 1, 2011, through April 3, 2011.

3. The Joined Party observed the Petitioner at work and asked to learn the profession. The Petitioner and Joined Party worked together for several weeks before the Joined Party was put to work.
4. The Petitioner's shop is located in a shopping mall and is required to operate during hours set by the mall.
5. The Petitioner informed the Joined Party that the Joined Party would be working as an independent contractor at the time of hire.
6. The Joined Party signed a contract at the time of hire. The contract indicated that the Joined Party would be an independent contractor. The contract did not allow the Joined Party to work for a competitor without the permission of the Petitioner. The contract included a two year non-compete clause which covered a fifty mile radius. The contract allowed the Joined Party to do side-work with the permission of the Petitioner.
7. The Joined Party and the Petitioner worked out what days of the week the Joined Party was available for work. The Joined Party was required to inform the Petitioner if he would not be able to make a scheduled shift.
8. The Joined Party would report to the place of business on days he was scheduled to work. The Joined Party would open the shop, set up the register, and await customers. The Joined Party generally worked alone. At the end of the day, the Joined Party would count out the register, sweep, and clean the store.
9. The Petitioner provided supervision and guidance early in the relationship.
10. The Petitioner provided a list of base prices for various services. The Joined Party would set a price for each customer. The Joined Party would keep a percentage of money charged. The base price represented the minimum cost of materials for the job. The Joined Party provided an invoice to the Petitioner listing services performed and prices charged.
11. The Petitioner would inspect repairs prior to their return to the customer. The Petitioner would re-do repairs that did not meet his standards. The Joined Party would be charged for any work done by the Petitioner.
12. The Petitioner provided the tools and materials needed to perform the work. The Joined Party was required to pay for any tools damaged by the Joined Party.
13. Either party could end the relationship at anytime and without liability.

Conclusions of Law:

14. 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.
15. 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).

16. 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).
17. 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.
18. 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.
19. 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. 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.
20. The evidence presented in this case reveals that the Petitioner exercised control over the Joined Party’s ability to work. The contract between the parties at the time of hire prohibited the Joined Party from working for a competitor or doing side work without the permission of the Petitioner. The contract also contained a non-compete clause with a two year duration and covering a fifty mile radius. An independent contractor is defined by being a separate entity from the employing unit and being in business for himself. Restrictions on an individual’s ability to operate his own business are not consistent with an independent contractor relationship. The Petitioner indicated that the contract was not generally enforced, however, the Petitioner had the right to enforce the contract at any time.
21. The Joined Party was restricted to working within the Petitioner’s hours of operation. The Joined Party was responsible for opening the store, setting up the register and awaiting customers. The

Joined Party was expected to close and clean the store at the end of the day. Such activities demonstrate that the Joined Party is, in effect, managing the Petitioner's business on the days the Joined Party provided services. This tends to indicate an employer-employee relationship.

22. The Petitioner provided the workplace, materials, and all of the tools necessary to perform the work. The Petitioner expected the Joined Party to pay for any tools damaged and for any work that had to be re-done. Barring damage to the tools, the Joined Party had no expenses in conjunction with the work.
23. The Petitioner had the right to examine work before it was turned in to the customers. Any work not meeting the Petitioner's approval would be re-done by the Petitioner at the Joined Party's expense. An independent contractor relationship allows for an examination of the final product. In this case, the Petitioner must make certain that the work performed by the Joined Party meets the standards of the Petitioner. This indicates that the Joined Party represents the Petitioner to the public.
24. The work performed by the Joined Party in jewelry and watch repair was an integral part of the normal course of business for the Petitioner's jewelry and watch repair business. The Joined Party saw to the day to day course of running the business on those days the Joined Party performed services.
25. A preponderance of the evidence presented at this hearing demonstrates that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated July 12, 2011, be AFFIRMED.

Respectfully submitted on January 17, 2012.



KRIS LONKANI, Special Deputy
Office of Appeals