

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

PETITIONER:

Employer Account No. - 3080723
A & A PROFESSIONAL THERAPY INC
ATTN: ANNIA HANS
6595 NW 36TH STREET SUITE 108
VIRGINIA GARDENS FL 33166-6969

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-108946L**

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 19, 2012, is MODIFIED to reflect a retroactive date of liability of October 1, 2011. As MODIFIED, the determination 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 January, 2013.



Altemese Smith,
Assistant Director,
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.

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 January, 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:

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Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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RESPONDENT:

State of Florida
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**PROTEST OF LIABILITY
DOCKET NO. 2012-108946L**

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 September 19, 2012.

After due notice to the parties, a telephone hearing was held on November 14, 2012. The Petitioner, represented by the Petitioner's Vice President, appeared and testified. Jorge Alleguez testified as a witness for the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist, 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. Proposed Findings of Fact and Conclusions of Law were not received.

Issues:

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.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation that was formed on May 9, 2011. The Petitioner provides in-home therapy services for patients. The Petitioner began providing therapy services in October 2011, when the Petitioner obtained a license. The Petitioner provides the services under contracts with home health agencies. The Petitioner's vice president has performed services for the Petitioner since the inception of the corporation.

2. The Joined Party performed services for the Petitioner as a case manager from November 2011 until August 2012. The Joined Party's responsibilities were to receive and process patient information from agencies, forward paperwork to therapists, receive reports from therapists, submit the therapists' reports to agencies, and follow-up with the therapists to ensure that the services requested were being provided. The Petitioner determined the assignment of a patient to a therapist.
3. The Joined Party obtained the work through a friend of the Petitioner's vice president. The Joined Party was told what hours she would be expected to work and that she would be compensated at a rate of \$225 per week. The Joined Party was told she would receive a 1099 at the end of the year, so that she could pay her own taxes. The parties did not enter into a written agreement.
4. The Joined Party did not have experience as a case manager. The Joined Party received on the job training from another of the Petitioner's case managers. The Joined Party was paid during the training period.
5. The Joined Party's services were performed at the Petitioner's business office. The Petitioner furnished a computer and telephone for the Joined Party's use in performing the work.
6. The Joined Party worked from 9:00 a.m. to 5:00 p.m., Monday through Friday. The Joined Party had a set time for lunch and other short breaks. The Joined Party was not required to keep a timesheet or otherwise record her hours.
7. The Joined Party did not bill for her services. The Joined Party was paid on a bi-weekly basis, initially at a rate of \$225 per week. The Petitioner later raised the Joined Party's pay to \$250 and, ultimately, \$275 per week. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party received holiday pay. The Joined Party did not receive sick pay or vacation pay. The Joined Party is a Notary Public. If the Joined Party was asked by the Petitioner to notarize a document, the Joined Party was paid \$10 per document. The Petitioner reported the Joined Party's earnings on a form 1099-MISC. The Petitioner paid the Joined Party the sum of \$1,250 in the fourth quarter 2011.
8. The Joined Party was supervised by the Petitioner's vice president.
9. The Joined Party was not restricted from performing services for a competitor of the Petitioner.
10. Either party could terminate the relationship at any time without a penalty or liability for breach of contract.
11. The Joined Party did not have her own business or occupational license. The Joined Party believed she was an employee of the Petitioner.
12. Jorge Alleguez has performed services for the Petitioner as a case manager since October 2011. Jorge Alleguez performs services for the Petitioner under a written agreement. Jorge Alleguez performs all of his services as a case manager at the Petitioner's office, using the Petitioner's equipment. The Petitioner's vice president provided training to Jorge Alleguez. Jorge Alleguez has set hours for work, and is compensated on a salaried basis. Jorge Alleguez does not have his own business or occupational license and does not advertise his services to the general public.

Conclusions of Law:

13. 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.

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).
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 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 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."

21. The Petitioner's business is providing therapy services for patients. The Joined Party performed services on a full-time basis as a case manager. 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. The Joined Party did not have her own business. The Joined Party did not have any expense or financial risk associated with the work performed for the Petitioner.
22. 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 Farmer's and Merchant's Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: "[I]f 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 he is subject to the control of the person being served as to the means to be used, he is not an independent contractor." In this case the Petitioner exercised significant control over the details of the work. The Petitioner determined what work was performed, where the work was performed, when the work was performed and, through the training and direction, how the work was performed.
23. The Petitioner provided all of the equipment and supplies needed for the work.
24. The Petitioner determined the rate and method of payment. The Joined Party was paid by time rather than by the job. The Joined Party received holiday pay, a benefit normally reserved for employees. The fact that taxes were not withheld from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.
25. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party performed services for the Petitioner for approximately eight months. 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."
26. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984) the Court determined that the Department has the authority to make its determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. In this case, the Department of Revenue made its determination applicable to all persons performing services as case workers.
27. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
28. It was not shown that the other case manager(s) performs services under terms and conditions that differ from the terms and conditions under which the Joined Party performed her services.
29. It is concluded that the services performed for the Petitioner by the Joined Party and others as case managers constitute insured employment.
30. Section 443.036(20)(c), Florida Statutes, provides:

(c) A person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or limited liability company during all of each week of his or her tenure in office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

31. Section 443.1216(1)(a)1., Florida Statutes, provides:

(1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

1. An officer of a corporation.

32. Section 443.1215(1)(a), Florida Statutes, provides:

(1) Each of the following employing units is an employer subject to this chapter:

(a) An employing unit that:

1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or

2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

33. The Petitioner’s vice president, a statutory employee, has performed services for the Petitioner since the inception of the incorporation, May 9, 2011. Those services are sufficient to establish liability effective October 1, 2011, based on the fact that the Petitioner employed at least one individual in employment during twenty different calendar weeks during a calendar year.

Recommendation: It is recommended that the determination dated September 19, 2012, be MODIFIED to reflect a retroactive date of liability of October 1, 2011. As MODIFIED, it is recommended that the determination be AFFIRMED.

Respectfully submitted on December 13, 2012.

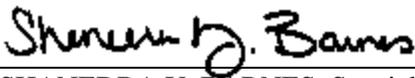


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
December 12, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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