

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

PETITIONER:

Employer Account No. - 2496341

PULMONARY PRACTICE OF ORLANDO PA
ATTN LEE M PEREZ
717 EAST MICHIGAN ST
ORLANDO FL 32806-4645

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-119940L**

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 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 a reemployment assistance claim in August 2012. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) that she 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 worked for the Petitioner as an employee or independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for reemployment assistance benefits, and the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party were in insured employment.

The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because she 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 December 19, 2012. The Petitioner, represented by its attorney, appeared and testified. The Joined Party did not appear for the hearing. The Respondent, represented by a Tax Specialist II, appeared and testified. The Special Deputy issued a recommended order on January 17, 2013.

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

1. The Petitioner operates a medical practice.
2. The Petitioner engaged the Joined Party to clean the Petitioner's medical office.
3. The Petitioner reported compensation paid to the Joined Party for each of the calendar years 2009, 2010, and 2011 on a form 1099-MISC.
4. The Joined Party filed a claim for reemployment assistance benefits effective August 26, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed and an investigation was conducted by the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
5. The Department of Revenue issued a determination dated October 5, 2012, holding that the Joined Party was an employee of the Petitioner retroactive to October 1, 2007. The Petitioner filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated October 5, 2012, be affirmed. The Petitioner's exceptions were received by mail postmarked January 30, 2013. 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 Petitioner's exceptions are addressed below. Also, 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 takes exception to the Special Deputy's Findings of Fact and Conclusions of Law. The Petitioner also proposes alternative findings of fact and conclusions of law. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines 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 Findings of Fact are supported by competent substantial evidence in the record and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Department may not modify or the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. The Petitioner's exceptions to the Special Deputy's Findings of Fact and Conclusions of Law are respectfully rejected.

The Petitioner also takes exception to the Special Deputy's classification of the testimony of its attorney, its sole witness, as hearsay evidence. Section 120.269(2)(g), Florida Statutes, provides:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Section 120.57(1), Florida Statutes, provides:

ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Rule 73B-10.035(15)(c), Florida Administrative Code, provides:

(c) Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F. S.

A review of the record reveals that the Special Deputy held that the Petitioner's testimony was hearsay in Conclusion of Law #17. As the Special Deputy found in Conclusion of Law #13, the record reflects that the Petitioner's attorney's knowledge of the working relationship between the Petitioner and the Joined Party was based solely on what he was told by the Petitioner's president, office manager, and Certified Public Accountant. Due to the attorney's lack of firsthand knowledge of the working relationship, the Petitioner's testimony was properly classified as hearsay evidence. The classification of the evidence was also proper because the Petitioner's testimony was not presented or substantiated as a hearsay exception. Pursuant to the cited sections of the statute and rule, the Special Deputy properly rejected hearsay information that was not established by other competent evidence. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law, including Conclusions of Law #13 and 17, represent a reasonable application of the law to the facts. The Petitioner's exceptions are respectfully rejected.

Additionally, the Petitioner takes exception to the Respondent's failure to object to the Petitioner's testimony. As mentioned above, rule 73B-10.035(15)(c), Florida Administrative Code, allows the admission of hearsay evidence, "whether received in evidence over objection or not," to "supplement or explain other evidence" and does not permit hearsay evidence alone to support a finding of fact unless it falls under a hearsay exception. A review of the record demonstrates that the Petitioner's sole witness only provided hearsay testimony during the hearing and the Respondent did not object to the Petitioner's testimony. Rule 73B-10.035(15)(c), Florida Administrative Code, explicitly allows for the rejection of hearsay evidence in the absence of any objections. Thus, it was proper for the Special Deputy to reject the

Petitioner's hearsay testimony despite the lack of an objection from the Respondent. The Petitioner's exception to the Respondent's failure to object is respectfully rejected.

The Petitioner further alleges that the Special Deputy did not consider the statements of its letter dated November 29, 2012. Contrary to the Petitioner's allegations, the record shows that the Petitioner did not request the admission of the letter. Also, the Petitioner acknowledges in its own exceptions that the letter is a written version of its attorney's testimony. As previously stated, section 120.260(2)(g), Florida Statutes, provides for the exclusion of "irrelevant, immaterial, or unduly repetitious evidence." The Petitioner has not demonstrated that the Special Deputy's failure to admit the document was an exclusion of evidence prohibited under section 120.260(2)(g), Florida Statutes, or that the Special Deputy failed to conduct the hearing in compliance with the essential requirements of law as required under section 120.57(1)(l), Florida Statutes. Thus, the Petitioner's exceptions regarding the letter dated November 29, 2012, are respectfully rejected.

In its remaining exceptions, the Petitioner requests the consideration of additional evidence. Rule 73B-10.035, Florida Administrative Code, provides that additional evidence will not be accepted after the close of a hearing. The Department cannot accept the Petitioner's additional evidence because the Petitioner did not provide the evidence until after the close of the hearing. Accordingly, the Petitioner's request is respectfully denied.

A review of the record reveals that the Findings of Fact contained in the Recommended Order 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 are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the Petitioner's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated October 5, 2012, 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 **February, 2013**.



Altemese Smith,
Bureau Chief,
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 February, 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:

PULMONARY PRACTICE OF ORLANDO
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717 EAST MICHIGAN ST
ORLANDO FL 32806-4645

MARTHA SAAVEDRA
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TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

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PETITIONER:

Employer Account No. - 2496341
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**PROTEST OF LIABILITY
DOCKET NO. 2012-119940L**

RESPONDENT:

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

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 October 5, 2012.

After due notice to the parties, a telephone hearing was held on December 19, 2012. The Petitioner, represented by the Petitioner's attorney, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party did not appear.

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 dated January 11, 2013, were received from the Petitioner on January 14, 2013. The Petitioner's Proposed Findings of Fact and Conclusions of Law were not timely submitted and were not considered.

Issue:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner operates a medical practice.
2. The Petitioner engaged the Joined Party to clean the Petitioner's medical office.
3. The Petitioner reported compensation paid to the Joined Party for each of the calendar years 2009, 2010, and 2011 on a form 1099-MISC.

4. The Joined Party filed a claim for reemployment assistance benefits effective August 26, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed and an investigation was conducted by the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
5. The Department of Revenue issued a determination dated October 5, 2012, holding that the Joined Party was an employee of the Petitioner retroactive to October 1, 2007. The Petitioner filed a timely protest.

Conclusions of Law:

6. The issue in this case, whether services performed for the Petitioner 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.
7. 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).
8. 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).
9. 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.
10. 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.

11. 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.
12. 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.
13. The Petitioner’s representative and sole witness was the Petitioner’s attorney. The Petitioner’s attorney maintains a law practice separate from the Petitioner’s medical practice and was retained by the Petitioner solely in connection with the protest of the determination. Although the attorney testified that the Joined Party was engaged as an independent contractor, the attorney was not present at the time the Petitioner and the Joined Party entered into the agreement for hire, had never spoken with the Joined Party, and had no firsthand knowledge of the work relationship. The attorney’s testimony concerning the work relationship was based upon what he was told by the Petitioner’s president, office manager, and Certified Public Accountant.
14. Section 90.801(1)(c), Florida Statutes, defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony.
15. Rule 73B-10.035(15)(c) states, “Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.”
16. 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 is in error.
17. The testimony of the Petitioner’s attorney is hearsay and, as such, is legally insufficient to show that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated October 5, 2012, be AFFIRMED.

Respectfully submitted on January 17, 2013.

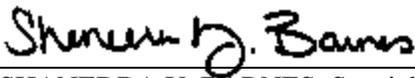


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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:
January 17, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

MARTHA SAAVEDRA
10541 CHERRY OAK CIRCLE
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