

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

PETITIONER:

Employer Account No. - 3111391
FISIOTHERAPIA HOLLYWOOD INC
ATTN VINCENZA AUCIELLO
115 SOUTH 17TH AVENUE
HOLLYWOOD FL 33020-6801

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-126967L**

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 portion of the determination dated October 19, 2012, holding that services performed by the Joined Party and other individuals as massage therapists constitute insured employment is REVERSED. It is further ORDERED that the portion of the determination holding the Petitioner liable for the payment of reemployment assistance contributions effective February 17, 2011, based on corporate officer activity 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, 2013.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

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 June, 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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LISE BOURDON
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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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RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
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**PROTEST OF LIABILITY
DOCKET NO. 2012-126967L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
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 19, 2012.

After due notice to the parties, a telephone hearing was held on February 7, 2013. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 submitted by the Joined Party on February 19, 2013.

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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a corporation, formed February 17, 2011, that provides scheduling services and therapists for a medical practice. The Petitioner's president hires and coordinates the scheduling of therapists to provide services for patients of Fisioterapia Hollywood Medical Services, Inc., a corporation in which the Petitioner's president is also an officer. The Petitioner's president has been active in the business since February 17, 2011. The Petitioner and the medical practice share an office location.
2. The Joined Party provided services for the Petitioner as a massage therapist between March 4, 2011, and September 30, 2011. The Joined Party has been a licensed massage therapist for more than ten years. The Joined Party operates her own business providing massage therapy to clients in their homes. The Petitioner's president was aware that the Joined Party provided massage therapy, having been referred to her in 2008. The Petitioner's president contacted the Joined Party to inquire whether the Joined Party would be interested in providing massage therapy for patients at the Petitioner's business location.
3. The Joined Party provided massage therapy for a patient on two occasions in March 2011. The Petitioner paid the Joined Party the amount of \$55 for each therapy session. On April 5, 2011, the parties entered into an *Independent Contractor Agreement*. The agreement identifies the Joined Party as "Contractor" and states that the Contractor is "an independent agent." The agreement provides that the Joined Party will provide services as a massage therapist "at the rate of \$50 per service rendered." The rate of compensation was negotiated. The agreement provides for a term of one year and allows the Joined Party to terminate the agreement with one month's written notice.
4. The Joined Party performed her services at the Petitioner's business location. The Petitioner provided a table and sheets for the Joined Party's convenience. The Joined Party could have used her own portable massage table. The Joined Party provided her own oils and lotions.
5. The Petitioner did not provide training to the Joined Party. The Petitioner did not supervise or direct the work performed by the Joined Party. The Petitioner was concerned with whether the patients were satisfied with the Joined Party's services and whether the patients were improving. If a patient was not comfortable with the Joined Party's services, the Petitioner scheduled the patient with another therapist. The Petitioner gave the Joined Party the patient's chart so that the Joined Party could determine the appropriate massage therapy for the patient's condition. At the conclusion of a session, the Joined Party completed and signed therapy notes documenting the therapy performed, the patient's range of motion, the muscles worked, and the patient's progress. The Joined Party was asked to clean up after a session and to deposit the used linens in a basket. The Joined Party was asked to wear scrubs.
6. The Joined Party did not have a set schedule and was not required to be available on particular days or at particular times. The Petitioner's president contacted the Joined Party, usually a week in advance, to arrange appointments for patients. Sometimes the Joined Party scheduled the next appointment for the patient at the conclusion of a session.
7. The Joined Party was not restricted from performing similar work for a competitor of the Petitioner.
8. At the Petitioner's request, the Joined Party provided proof of professional liability insurance coverage for her services as a massage therapist. The Petitioner asked the Joined Party to register with the Agency for Health Care Administration and to complete a background screening; however, the Joined Party did not do so.
9. The Joined Party was paid by the session. The Petitioner did not withhold taxes from amounts paid to the Joined Party. The Petitioner reported the Joined Party's earnings on a form 1099-MISC. The Joined Party did not receive fringe benefits, such as sick pay, vacation pay, or holiday pay.

10. The Petitioner utilizes the services of another licensed massage therapist. The other massage therapist works under the same terms and conditions as the Joined Party, except that the other massage therapist chooses to use her own massage table.
11. The Joined Party filed a claim for reemployment assistance benefits effective June 3, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
12. On October 19, 2012, a Field Auditor II with the Department of Revenue issued a determination holding that the services performed for the Petitioner by the Joined Party and other individuals as massage therapists constitute insured employment retroactive to February 17, 2011. The determination further holds the Petitioner to be a liable employer effective February 17, 2011. Among other things, the determination states "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter." The determination was mailed to the Petitioner on October 23, 2012.
13. The Petitioner filed a protest on November 9, 2012.

Conclusions of Law:

14. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.--The Department and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
15. Rule 73B-10.035(5)(a)1., Florida Administrative Code, provides:

Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
16. The record shows the mailing date of the determination was October 23, 2012. The Petitioner's protest was filed on November 9, 2012. As the protest was filed within 20 days of the mailing date of the determination, the protest is timely.
17. 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)(2)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.
18. 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).
19. 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).

20. 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.
21. 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.
22. 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.
23. 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.
24. The written agreement between the parties evidences the intent to enter into an independent contractor relationship. In Keith v. News & Sun Sentinel Co., 667 So. 2d 167 (Fla. 1995), the Florida Supreme Court held that in determining the status of a working relationship, the agreement of the parties should be honored, unless other provisions of the agreement, or the actual practice of the parties demonstrates that the agreement is not a valid indicator of the status of the working relationship.
25. The Joined Party is a skilled professional who is engaged in a distinct profession or occupation. 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).
26. Employees and independent contractors are both subject to some control by the person or entity hiring them. 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."

27. It was not shown in this case that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship. The Petitioner did not determine when the work was performed or how the work was performed. The Joined Party did not have set hours for work. Patient appointments were arranged around the Joined Party's personal schedule. The Joined Party determined how the work was performed. The Petitioner did not supervise the Joined Party's work. The Petitioner was concerned with the results of the Joined Party's work, rather than the means by which the work was accomplished.
28. The Petitioner did not withhold taxes from payments made to the Joined Party. The Petitioner did not provide any fringe benefits to the Joined Party. The Petitioner reported the Joined Party's earnings as non-employee compensation.
29. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as massage therapists do not constitute insured work.
30. Section 443.1216(1)(a), Florida Statutes, provides in part:
 - (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.
 2. An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee.
31. The Petitioner is a corporation, and the Petitioner's president performs service for the corporation. Accordingly, the Petitioner's president is a statutory employee.
32. Section 443.1215, 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 president has been active in the business since February 17, 2011. Thus, the Petitioner had at least one employee in twenty different calendar weeks during 2011. The Petitioner meets the liability requirements for Florida reemployment assistance contributions effective February 17, 2011.
34. The Joined Party submitted Proposed Findings of Fact and Conclusions of Law. The Joined Party's Proposed Findings of Fact and Conclusions of Law were considered by the Special Deputy. Those Proposed Findings of Fact and Conclusions of Law that are supported by the record were incorporated in the recommended order. Those Proposed Findings of Fact and Conclusions of Law that are not supported by the record were respectfully rejected.

Recommendation: It is recommended that the determination dated October 19, 2012, be MODIFIED. It is recommended that the portion of the determination holding that services performed by the Joined Party and other individuals as massage therapists constitute insured employment be REVERSED. It is recommended that the portion of the determination holding the Petitioner liable for the payment of reemployment assistance contributions effective February 17, 2011, based upon corporate officer activity, be AFFIRMED.

Respectfully submitted on April 22, 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
April 25, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

LISE BOURDON
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HOLLYWOOD FL 33022

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