

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

PETITIONER:

Employer Account No. - 2371978
LENMART INTERNATIONAL INC
ATTN LENNESTT MARTINEZ VP
12190 NW 98TH AVE STE 6
HIALEAH FL 33018-2932

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-23705L**

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 December 28, 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 **September, 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 September, 2013.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
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OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
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By U.S. Mail:

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Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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DOCKET NO. 2013-23705L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

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

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated December 28, 2012.

After due notice to the parties, a telephone hearing was held on July 16, 2013. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party was represented by his attorney. 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.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as assistants 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, Lenmart International Inc., is a corporation which operates a trucking business and which is involved in selling and leasing trucks and heavy equipment.
2. In approximately February 2011 the Petitioner contacted the Joined Party through the Joined Party's cousin and offered work to the Joined Party. The Petitioner told the Joined Party that the hours of work were Monday through Friday from 8 AM until 5 PM and from 8 AM until midday on Saturday. The Petitioner told the Joined Party that his primary responsibility would be to keep

the place clean and that the Petitioner would pay the Joined Party \$400 per week. The Joined Party accepted the offer and began work on or about February 2, 2011.

3. The Petitioner's business location consists of several acres of land. Most of the property is paved but there are grassy areas with palm trees. The Joined Party was responsible for sweeping the paved areas, picking up the palm fronds and putting them in the trash, spraying grass with an herbicide, cutting grass with a machete, assisting the mechanics by getting tools for them, and getting coffee from a neighboring cafeteria for the Petitioner's employees and customers. The Petitioner provided the brooms, machete, herbicide and everything else that was required to perform the work.
4. The Petitioner leases trucks which are used to haul sugar cane. During the sugar cane season the Joined Party was responsible for going to the sugar cane fields to change the oil in the trucks and to change tires on the trucks. The Petitioner provided the Joined Party with transportation to the fields and provided all equipment and supplies that were needed to perform the work. Whether the Joined Party performed the assigned work at the Petitioner's location or at the sugar cane fields, the Joined Party did not have any expenses in connection with the work.
5. The Joined Party was supervised by the Petitioner's president and by the Petitioner's vice president. They instructed the Joined Party what to do, how to do it, and the sequence in which the work was to be done. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.
6. The Petitioner's property is inside a fence. The Petitioner did not provide the Joined Party with a key to the property and the Joined Party was restricted to working only during the Petitioner's business hours.
7. The Joined Party did not bill the Petitioner for the services which he performed and he was not required to complete a timesheet. If the Joined Party was not able to work as scheduled he was required to notify the Petitioner. If the Joined Party was absent he was not paid for the absence. Since the Petitioner's president supervised the Joined Party the president was aware of the time worked by the Joined Party and paid the Joined Party accordingly.
8. The Petitioner paid the Joined Party weekly from the bank account of Lenmart International Inc., however, on occasion the Petitioner paid the Joined Party in cash. On one or more occasions the Petitioner gave the Joined Party pay advances and recovered the advances by withholding the advances from the Joined Party's pay.
9. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as paid holidays, paid vacations, or health insurance. On one occasion the Petitioner gave the Joined Party a cash bonus. At the end of 2011 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
10. During the time that the Joined Party performed services for the Petitioner the Joined Party did not have any investment in a business, did not have a business license or occupational license, did not have business liability insurance, and did not offer services to the general public.
11. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. In approximately August 2011 the Joined Party was laid off due to lack of work by the Petitioner. The Petitioner recalled the Joined Party to work in approximately October 2011. The Joined Party continued working for the Petitioner until August 17, 2012.
12. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective September 2, 2012. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

13. On December 28, 2012, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as assistants are the Petitioner's employees retroactive to February 2, 2011. The Petitioner filed a timely protest by mail postmarked January 15, 2013.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals working as assistants 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.
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). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.
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.

20. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
21. There was no written contract or agreement between the Joined Party and the Petitioner. The only evidence concerning the verbal agreement is the testimony of the Petitioner's president and the Joined Party that the Joined Party was told the duties of the job, the hours of work, and the rate of pay at the time of the job offer. 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 can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
22. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party did not have any investment in a business and did not have any expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from performing services.
23. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him. The Petitioner assigned the work to the Joined Party and controlled who performed the work.
24. The work performed by the Joined Party was simple labor and did not require any skill or special knowledge to perform. 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. 2^d DCA 1980)
25. The Petitioner paid the Joined Party by time worked rather than based on production or by the job. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.
26. The Joined Party performed services for the Petitioner from February 2011 until August 2012 on a full time basis with the exception of a three month period of time when the Joined Party was laid off due to lack of work. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. 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 L 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."
27. The Petitioner controlled what work was performed, where it was performed, when it was performed, by whom it was performed, and how it was performed. The Petitioner determined both the method of pay and the rate of pay. The Petitioner controlled the financial aspects of the relationship. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the

person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

28. It is concluded that the services performed for the Petitioner by the Joined Party and other similarly situated workers constitute insured employment.

Recommendation: It is recommended that the determination dated December 28, 2012, be AFFIRMED.

Respectfully submitted on August 19, 2013.



R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd 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:
August 19, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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