

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

PETITIONER:

Employer Account No. - 3067070
REID CHIROPRACTIC GROUP LLC
ATTN CAROLYN C REID, DC
1540 MONUMENT RD SUITE 1
JACKSONVILLE FL 32225-8311

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-42816L**

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 March 19, 2013, 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 August, 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 August, 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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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
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**PROTEST OF LIABILITY
DOCKET NO. 2013-42816L**

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 March 19, 2013

After due notice to the parties, a telephone hearing was held on June 26, 2013.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed findings of fact or conclusions of law were not received.

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 is a chiropractic clinic that began operation as a limited liability company in 2010. The managing member and sole member of the LLC is Dr. Carolyn Cleland-Reid, the primary physician for the clinic. The Joined Party performed services as a massage therapist with the Petitioner from May 25, 2012 to January 10, 2013. The Joined Party became associated with the clinic when the Petitioner needed a temporary replacement for a massage therapist who was taking maternity leave. The massage therapist was one of the four employees at the clinic, including the managing member. Since the Joined Party was going to be with the Petitioner for a limited time, and for the limited purpose of substituting for an employee who could not work, the managing member believed that the Joined Party would be an independent contractor, rather than an employee.

2. The Joined Party was referred to the Petitioner by the school from which he had just completed massage therapy training. The Joined Party obtained a massage therapy license from the state of Florida shortly after completing the school work. When the managing member of the Petitioner spoke to the Joined Party about working for the clinic, the managing member advised that the Joined Party would be working as an independent contractor for approximately six to eight weeks while the regular massage therapist was on maternity leave. The Joined Party agreed to this.
3. The Joined Party received some on-the-job training in the Petitioner's procedures from the employee he was going to be substituting for. The training consisted mostly of the Joined Party watching what the massage therapist did, and discussing the primary physician's preferences about massage techniques that should be used.
4. The Joined Party was scheduled to work when there were patients that needed massage services. The Joined Party sometimes appeared at the workplace at times he was not scheduled to be there. The Joined Party was paid by the hour for services that he provided. He recorded his time on time cards, the same kind that employees recorded their time on. The Joined Party worked on the Petitioner's premises, providing services to the Petitioner's patients, using tools and supplies provided by the Petitioner. The Joined Party did not carry liability insurance separate from the Petitioner.
5. In order to present a uniform look to the public, all workers, whether designated as employees or contractors, were required to wear black attire. The Joined Party provided his own black clothing. In late 2012, the Petitioner obtained shirts printed with the Petitioner's name, and after that all workers who were in contact with the public wore the shirts, along with an identification badge showing the worker's name. The Joined Party wore the same attire as other workers throughout the association. The Petitioner provided the shirts with the name of the clinic. When the Joined Party was no longer working with the Petitioner, the Petitioner retained the shirt, but not the badge.
6. The Joined Party could have worked elsewhere as a massage therapist when he was not working on the Petitioner's premises, but he did not do so. In the Petitioner's locality some massage therapists work in their own businesses, and some work as employees. The Joined Party did not think of himself as self-employed. The Petitioner occasionally referred to the Joined Party's status as "contracted employee."
7. The Joined Party stayed with the Petitioner longer than the time period agreed to in the beginning. The Joined Party agreed to do that in order to ease the return to work of the regular massage therapist, and because another employee had unexpectedly left.
8. The Joined Party would provide services to patients of the Petitioner as scheduled. When the Joined Party was finished with the massage, he would fill out notes on a standard assessment form provided by the Petitioner. The making of such notes is a standard practice for massage therapists, whether they are employees or independent contractors.
9. During the time that the Joined Party was associated with the Petitioner, the Joined Party received information from the Petitioner about electronic medical records requirements, to make sure that he complied with Federal law relating to privacy of medical records under HIPPA.
10. The Joined Party was paid at the same time as the employees. The pay was not reduced by any deductions for income tax withholding, or for Social Security or Medicare taxes. The claimant was issued a 1099 MISC for 2012.

Conclusions of Law:

11. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).
12. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
 - (h) whether or not the work is 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.
13. In Keith v. News and Sun-Sentinel Co., 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:

Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.
14. The evidence reflects that the Joined Party was hired to replace an employee, and he was treated as an employee when he was on the Petitioner's premises. Being treated as an employee implies that the Joined Party was an employee. Temporary, or part-time, or irregular employment is still employment. The Joined Party wore the same clothing as employees, and he wore a name badge identifying him as part of the business operation of the Petitioner. The Joined Party was trained by an employee of the Petitioner. Training implies an assertion of control over methods and techniques. The Joined Party used the tools and supplies of the Petitioner, rather than his own. The Joined Party provided services to the Petitioner's patients, on the Petitioner's premises, as scheduled by the Petitioner, rather than providing services to his own patients, as referred by the

Petitioner. These facts show that the Petitioner exercised control over the work of the Joined Party in a way that makes the Joined Party an employee, rather than an independent contractor.

15. The evidence does show that the parties expressly designated the Joined Party as an independent contractor. Moreover, the Joined Party could have provided massage therapy services to other persons, independent of any obligations he had to the Petitioner. There was some basis, in other words, for a person to believe that the Joined Party might be an independent contractor. However, the force of these facts is diminished by other facts. The managing member of the Petitioner stated that she believed that the Joined Party was an independent contractor because he was being hired as a temporary replacement. The Joined Party testified that he did not believe himself to be self-employed. The evidence shows that when the parties agreed that the Joined Party should have the status of “independent contractor” they were agreeing to something other than the actual legal status of independent contractor. The express use of the term, “independent contractor” is not controlling. See, for example, Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972) (truck driver designated in written agreement as independent contractor held to be an employee).
16. The Petitioner has the burden of establishing that the determination was in error. Section 73B-10.035, Florida Administrative Code. The Petitioner has not carried this burden. The evidence shows that the Joined Party was providing services to the Petitioner as a temporary employee, and not as an independent contractor.
17. **Recommendation:** It is recommended that the determination dated March 19, 2013, finding that the massage therapy services provided by the Joined Party to the Petitioner were services in employment, be AFFIRMED.

Respectfully submitted on July 16, 2013.

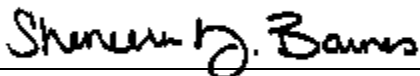


J JACKSON HOUSER, Special Deputy
Office of Appeals

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:
July 16, 2013**

Copies mailed to:

Petitioner
Respondent
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