

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

PETITIONER:

Employer Account No. - 2627413
MARK RICHARDS INC
ATTN DR MARK RICHARDS
1907 NORTH ANDREWS AVENUE
WILTON MANORS FL 33311-3914

**PROTEST OF LIABILITY
DOCKET NO. 2013-48054L**

RESPONDENT:

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

O R D E R

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 April 10, 2013, is REVERSED.

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 1 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 Tribunal la pou 1 prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou 1 prepare apati de kopi anrejistremant 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.

Shanedra 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.

Shanedra 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

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Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING
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DOCKET NO. 2013-48054L

RESPONDENT:

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

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 April 10, 2013.

After due notice to the parties, a telephone hearing was held on June 25, 2013. The Petitioner appeared and was represented by a Certified Public Accountant. The Petitioner's president and the Certified Public Accountant testified as witnesses for the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party declined to participate in the hearing.

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 received from the Petitioner on July 29, 2013.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as massage therapists 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 is a corporation that has operated a business, Fort Lauderdale Pain & Injury Center, since 2005. The Petitioner offers chiropractic, physiotherapy, and massage therapy services to patients. The Petitioner's president provides the chiropractic and physiotherapy services. The Petitioner utilizes licensed massage therapists to provide the massage therapy services. The Petitioner classifies the massage therapists as independent contractors. All of the massage therapists perform their services for the Petitioner under the same terms and conditions.

2. The Joined Party provided services for the Petitioner as a massage therapist between August 25, 2005, and November 16, 2012. The Joined Party was a licensed massage therapist at all times when providing massage therapy services for the Petitioner. The Joined Party had his own business providing massage therapy to clients at various locations.
3. The Petitioner's president obtained the Joined Party's resume from a colleague. The Petitioner's president contacted the Joined Party to schedule an interview. The parties agreed that the Joined Party would provide massage therapy for the Petitioner's patients at the Petitioner's office on an as-needed basis and that the Joined Party could use the Petitioner's office to provide massage therapy for the Joined Party's clients. The parties agreed that the relationship would be an independent contractor relationship. The parties did not enter into a written agreement.
4. 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 Joined Party examined each of the Petitioner's patients referred to him by the Petitioner to determine whether the patient could be helped by massage therapy. The Joined Party determined the appropriate massage technique, the duration of the therapy session, and the number of therapy sessions required for each patient receiving massage therapy. At the conclusion of a session, the Joined Party completed SOAP notes documenting the patient's symptoms, the Joined Party's findings upon examination, the muscles worked, and the therapy performed. The Joined Party and the Petitioner's president consulted on a regular basis concerning the progress of patients.
5. The Joined Party performed some services for the Petitioner at the Petitioner's business location. The Joined Party occasionally performed some massage therapy services at the homes of the Petitioner's patients. The Petitioner provided the Joined Party with a small office workspace where the Joined Party could use his telephone to arrange appointments with his clients or with the Petitioner's patients. The Joined Party utilized his personal portable table, lotions, oils, and a small hand-held device in performing his services. The Joined Party also utilized the Petitioner's examination tables. The Petitioner provided disposable covers for the tables. The Joined Party was not required to wear a uniform or dress in a particular manner. The Joined Party had his own business cards. The Petitioner did not provide business cards for the Joined Party. The Joined Party provided his own professional liability insurance.
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 and the Joined Party coordinated the dates and times the Joined Party was to provide massage services, whether for the Petitioner's patients or the Joined Party's clients. The Petitioner provided the Joined Party with a key to the center. The Joined Party could perform his services during hours when the center was otherwise closed. The Joined Party was not required to accept a patient offered by the Petitioner. The Joined Party, on occasion, declined to work on a particular patient.
7. The Joined Party was not prohibited from subcontracting the work or hiring someone to assist him with the performance of his services.
8. The Petitioner handled the billing and collection of massage therapy fees charged to its patients and the clients of the Joined Party for whom services were performed at the Petitioner's facility. The Joined Party determined the amounts charged his clients. For massage therapy services provided to the Joined Party's clients at the Petitioner's facility, the Joined Party received sixty percent of the fee and the Petitioner retained forty percent of the fee for the use of the facility. For massage therapy services provided to the Petitioner's patients, the Joined Party was paid an hourly rate of \$15 - \$21. 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 bonuses, sick pay, vacation pay, holiday pay, or other fringe benefits.

9. The Joined Party filed a claim for reemployment assistance benefits effective March 17, 2013. When the Joined Party did not receive credit for his 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.
10. On April 10, 2013, the Department of Revenue issued a determination holding that the services performed for the Petitioner by the Joined Party and other individuals as licensed massage therapists constitute insured employment retroactive to January 1, 2008. The Petitioner filed a timely protest.

Conclusions of Law:

11. 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.
12. 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).
13. 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).
14. 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.
15. 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.
16. 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.
17. 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.
18. The parties did not enter into a written agreement. The verbal agreement between the parties evidences a desire 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.
19. The Joined Party is a licensed 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).
20. 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.”
21. 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 or how the work was performed. In some instances, the Petitioner did not determine where the work was performed. The Joined Party determined whether to work on his own clients at the Petitioner’s facility or another location. The preferences of the Petitioner’s patients sometimes determined whether the Joined Party worked on those patients at the Petitioner’s office or in the patients’ homes. The Joined Party did not have set hours for work. Appointment times for the Petitioner’s patients and the Joined Party’s clients were scheduled by mutual agreement between the Joined Party and the Petitioner’s president. The Joined Party determined how the work was performed. The Joined Party could use his own portable table or the Petitioner’s examination tables. The Joined Party used his own lotions, oils, and tools. The Petitioner did not supervise or direct the Joined Party’s work.

22. The Joined Party was not restricted from performing similar services for others, including competitors of the Petitioner. The Joined Party had his own business providing massage therapy for clients.
23. 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.
24. 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.
25. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law. The Petitioner'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 April 10, 2013, be REVERSED.

Respectfully submitted on August 2, 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

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
August 2, 2013

Copies mailed to:

Petitioner
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Joined Party

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