

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

**PETITIONER:**

Employer Account No. - 0238937  
SAND KEY ASSOCIATES LIMITED PRTSHP  
1160 GULF BLVD  
CLEARWATER FL 33767-2703

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-128358L**

**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 September 9, 2011, 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 **April, 2012**.



\_\_\_\_\_  
Altemese Smith,  
Assistant Director,  
Unemployment Compensation 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 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 April, 2012.

*Shanendra Barnes*

\_\_\_\_\_  
SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
Unemployment Compensation Appeals  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143

By U.S. Mail:

SAND KEY ASSOCIATES LIMITED  
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BETSY KESLER  
2275 EDYTH DRIVE  
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DEPARTMENT OF REVENUE  
ATTN: VANDA RAGANS - CCOC #1 4624  
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TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT  
ATTENTION MYRA TAYLOR  
P O BOX 6417  
TALLAHASSEE FL 32314-6417

JOHNSON POPE BOKER RUPPEL & BURN  
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CLEARWATER FL 33756

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING  
107 EAST MADISON STREET  
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**PETITIONER:**

Employer Account No. - 0238937  
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**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-128358L**

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Deputy Director,  
Interim Executive Director,  
Unemployment Compensation 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 September 9, 2011.

After due notice to the parties, a telephone hearing was held on January 18, 2012. The Petitioner was represented by its attorney. The Petitioner's Controller and the Petitioner's Fitness Center Manager testified as witnesses. The Petitioner's Human Resources Director appeared as a witness but did not testify. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 received from the Petitioner.

**Issue:**

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.

**Findings of Fact:**

1. The Petitioner is a resort hotel which operates a fitness center on the premises. Among other things the fitness center offers massage therapy and esthetician services for guests of the hotel. The Petitioner has classified the massage therapists and estheticians as independent contractors. The massage therapists are responsible for obtaining their own licenses and/or certifications.
2. The Joined Party began performing services in the Petitioner's fitness center as a licensed massage therapist and esthetician in June 2000. In addition to the Joined Party the Petitioner used the services of two other massage therapists.
3. The Joined Party was prohibited from performing adjunct services or offering adjunct products without the Petitioner's permission. The Petitioner did not prohibit the Joined Party from performing services as a massage therapist for herself or for others, however, those services could not be performed from the Petitioner's premises.
4. The massage therapists are required to answer/report to the Fitness Center Manager, the Director of Administration, and/or the Human Resources Manager.
5. The Petitioner maintains three massage therapy rooms located on the ninth floor of the Petitioner's hotel. The three massage therapy rooms are provided without charge for the exclusive use of the three massage therapists solely to provide massage services. The massage therapists are allowed to administer massage services in other locations throughout the Petitioner's property including, but not limited to, poolside, guest's rooms, and the beach. The Petitioner provides all equipment and tools needed to perform the massages. The Petitioner provides the linens and is responsible for laundering the linens. The massage therapists provide their own oils. The Petitioner requires the massage therapists to have their own liability insurance. The Petitioner requires the massage therapists to clean all products and tools each day. Major cleaning, such as floors, carpets, walls, etc., is provided by the Petitioner and is scheduled by the Fitness Center Manager.
6. The Petitioner provides the massage therapists with business cards. The massage therapists are prohibited from using their own business cards or advertising materials. The massage therapists are prohibited from giving a personal business card or other advertising material to any client, member, or guest of the Petitioner's resort.
7. The Petitioner provides the massage therapists with a uniform shirt, bearing the Petitioner's name, which the massage therapists are required to wear. The Petitioner also provides the massage therapists with a name tag, bearing the massage therapist's name, which the massage therapists are required to wear at all times on the upper left side of the uniform shirt. The Petitioner requires the massage therapists to wear capris, slacks, or business shorts which are knee length. All pants, and shorts must be light tan or khaki in color and must be clean, pressed, and must fit properly. The massage therapists are prohibited from wearing cargo pants or parachute pants.
8. The Petitioner has a list of massage services which the Petitioner has determined that the massage therapists are allowed to perform and the cost for each of those services. The massage therapists do not book their own appointments. When a guest contacts the Petitioner to schedule a massage, the Petitioner informs the guest of the price of the service. If the guest requests a service that is not on the list, such as a back massage, the Petitioner informs the guest that that service is not available. However, the Petitioner may inform the guest that the Petitioner will schedule the guest for a full body massage and that the therapist will be instructed to concentrate on the guest's back. If the Petitioner agrees to provide a service that is not on the list, the Petitioner determines the price of that service.

9. The Petitioner pays the massage therapists a commission, the amount of which is determined by the Petitioner. The massage therapists can not negotiate the commission percentage. The Joined Party received a 50% commission for massage services and a 65% commission for esthetician services. No payroll taxes are withheld from the pay and the massage therapists do not receive fringe benefits such as paid holidays, paid vacations, paid sick days, bonuses, insurance, or retirement benefits. At the end of each year the Petitioner reports the earnings of each massage therapist on Form 1099-MISC as nonemployee compensation.
10. Each of the massage therapists is entitled to a free meal from the restaurant at the Petitioner's resort during each scheduled six hour work shift. The massage therapists are required to order from the associates' menu and are required to pay a \$1.00 gratuity to the hostess or server. Each of the Petitioner's employees who have completed a ninety day probationary period are eligible to participate in a room discount program which provides discounted rooms at over 500 properties worldwide for up to twenty-five nights per year. The Petitioner also allowed the Joined Party to participate in the room discount program.
11. The massage therapists are prohibited from parking in the resort's parking lot other than in parking spots designated by management at the rear of the property. The massage therapists are required to enter and exit the resort through the designated associate entrance at the rear of the resort. The massage therapists are prohibited from unauthorized use of, or visits to, other departments of the resort, other than for the authorized shift meal break.
12. Generally, the Petitioner classifies the massage therapists as either full time or part time/on-call. Whether the massage therapist is classified as full time or as part time, the massage therapist is required to be available to work seven days a week from 10 AM until 6 PM and must be available to work the full extent of each shift. All massage therapists are required to be available to work on holidays.
13. After the Petitioner schedules a guest to receive a massage service, the Petitioner notifies the massage therapist. All massage therapists are required to provide the Petitioner with a valid telephone number so that the Petitioner can notify the massage therapists of the appointments. The massage therapists are responsible for monitoring their telephones for calls and messages and are required to return all calls to the Petitioner within twenty minutes. If a return call is not received by the Petitioner within twenty minutes, the Petitioner assigns the appointment to another massage therapist. The massage therapists are free to decline any appointment, however, if a massage therapist declines too many appointments, the Petitioner may terminate the massage therapist.
14. The massage therapists are required to call in to the manager on duty to report any absence or illness at least three hours prior to the first scheduled appointment. The massage therapists are not allowed to hire others to perform the work for them, however, if a massage therapist arranges for another of the Petitioner's massage therapists to work for him or her, the Petitioner pays the other massage therapist for the work performed rather than the original massage therapist.
15. The massage therapists are required to report to the Petitioner's fitness center fifteen minutes prior to the scheduled appointment so that the massage therapist is relaxed and fully prepared to greet the guest. The massage therapists are required to keep the massage rooms stocked with clean linens and required to keep the massage tables prepped and ready for incoming appointments. The Petitioner may discharge a massage therapist for excessive tardiness or absenteeism.
16. The Petitioner has notified the massage therapists of standards for greeting clients. The massage therapists are advised to greet the guest in a warm, welcoming, and friendly manner by stating "My name is ...I will be your massage therapist." The massage therapists are to shake hands with the guest, use eye contact, and to break the ice by asking questions such as "How are you today?", and "When was your last massage?" The massage therapists escort the guest to the treatment

room, open the locker room door for the guest, and make sure that the treatment door is open. The massage therapist is to confirm the treatment by asking a question such as "We have you scheduled for a 55 minute Swedish massage, is that correct?" The massage therapist is then required to explain what the service includes. The massage therapist is required to ask the guest to remove all jewelry and place the jewelry in the pocket of the robe. The massage therapist is required to inform the guest that the massage therapist will leave the room while the guest undresses and lies down on the table.

17. After a minute the massage therapist is required to knock on the door and ask if the guest is ready. After the massage therapist re-enters the room the massage therapist is to ask if the guest is comfortable, to ask about the room temperature, and to ask about the music. The massage therapist is to wash his or her hands before beginning the treatment. The Petitioner has established draping techniques which the massage therapists are required to follow. The massage therapists are prohibited from giving the guest the option of being draped or undraped. If the guest asks to be undraped, the massage therapist must deny the request and advise the guest that being undraped is not an option. During the massage the therapist is required to always ask about hand pressure. After the massage is concluded the massage therapist is required to advise the guest that the guest is required to sign the paperwork on the counter before leaving the room and that the guest is to bring the robe to the front desk. The massage therapist is required to ask the guest how the guest feels, to remind the guest to drink plenty of water, and to thank the guest for the visit.
18. The massage therapists are required to complete a log sheet showing the names of the guests and the services provided. If a guest presents a voucher for payment the massage therapist must make sure that the guest has signed the voucher. The massage therapist is required to turn in the log sheets, vouchers, and gift certificates to the Fitness Center Manager by Monday morning so that the massage therapists can be paid on the regularly scheduled payday, Friday. The Fitness Center Manager verifies that the paperwork submitted by the massage therapists is correct before payment is made.
19. The Petitioner encourages the massage therapists to participate in any or all programs pertaining to advertisement and promotion of the Petitioner's resort and to do their best to promote spa amenities available in the resort. The Petitioner cautions the massage therapists that not participating in any program of advertisement and promotion may result in the massage therapist earning less compensation than massage therapists that do participate.
20. On August 2, 2010, the Petitioner required the Joined Party and other massage therapists to sign an *Independent Contractor Agreement*. Since the Joined Party also performed services as an esthetician she was required to sign a second identical *Independent Contractor Agreement* for the esthetician services. The Agreements were for a one year period of time terminating on August 2, 2011, with a thirty day written notice of termination of contract due to dissatisfaction of either party.
21. Among other things the Agreement provides that the parties acknowledge that the Joined Party is an independent contractor and not an employee or agent of the Petitioner for any purpose. The Agreement also provides that the Petitioner retains the right to establish standards and the right to direct correction of any deviation from expected standards.
22. On November 16, 2010, the Petitioner notified the Joined Party that the Petitioner had terminated the Agreement with the Joined Party effective December 15, 2010. The Joined Party last performed services for the Petitioner on November 18, 2010.
23. The Joined Party filed an initial claim for unemployment compensation benefits effective December 5, 2010. 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 issued to the Department of Revenue to determine if the Joined Party performed



services as an employee or as an independent contractor. On March 17, 2011, the Tax Auditor issued a determination holding that the Joined Party, performing services for the Petitioner as a massage therapist was the Petitioner's employee retroactive to January 1, 2009. The determination further advised the Petitioner that the Joined Party's earnings had been added to the Petitioner's employer's quarterly reports and that a bill will be forthcoming. 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 days from the date of this letter." The Petitioner did not file a written protest.

24. On September 9, 2011, the Department of Revenue issued a second determination regarding whether the Joined Party performed services for the Petitioner as an employee or as an independent contractor. The Tax Auditor extended that determination to include all other persons performing services for the Petitioner as massage therapists retroactive to January 1, 2009. The determination states "This is an affirmation of a prior determination dated March 17, 2011." 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 days from the date of this letter." The Petitioner filed a timely written protest by letter dated September 26, 2011.

### Conclusions of Law:

25. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation 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.
26. 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).
27. 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 Agency is limited to applying only Florida common law in determining the nature of an employment relationship.
28. 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.
29. 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.
30. 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.
31. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
32. In this case no competent evidence was presented concerning any verbal or written agreement between the Petitioner and the massage therapists other than the *Independent Contractor Agreement* signed by the Joined Party and the Petitioner's Fitness Center Manager on August 2, 2010. None of the Petitioner's witnesses were involved in the hiring of the Joined Party in June 2000 and any testimony concerning the intent of the parties is hearsay. In regard to the August 2, 2010, written Agreement, it has previously been held that a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1<sup>st</sup> DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."
33. The Petitioner operates a resort hotel which contains a fitness center that offers services to hotel guests, including massage therapy. Therefore, massage therapy is a part of the Petitioner's regular business activity. The Petitioner determines what services the massage therapists are allowed to perform for the Petitioner's hotel guests and determines the amounts that the Petitioner charges the guests for those services. The services performed for the Petitioner by the massage therapists are an integral and necessary part of the regular business of Petitioner's fitness center rather than a separate and distinct activity.
34. The Petitioner provides the place of work, equipment, tools, and some supplies such as linens, without charge to the massage therapists. The Petitioner is responsible for the cleaning and maintenance of the massage room and the laundering of the linens. The massage therapists provide the oils that are used to perform the massages. The massage therapists are required by the August 2, 2010, Agreement to provide liability insurance. The expenses incurred by the massage therapists do not constitute a significant investment in a business.

35. The Joined Party is a licensed massage therapist and was responsible for obtaining any license or certification required to perform work as a massage therapist and esthetician. Thus, some degree of skill is involved in the work performed by massage therapists. In James v. Commissioner, 25 T.C. 1296, 1301 (1956), the court stated in holding that a doctor was an employee of a hospital "The methods by which professional men work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of an employer over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over the non-professional employees." In Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1<sup>st</sup> DCA 1958) the court stated that the humblest labor can be independently contracted and the most highly trained artisan can be an employee.
36. The massage therapists are paid based on production rather than by time worked. However, the Petitioner determines the amounts of the customer charges and the percentage that is paid to the massage therapists. The Petitioner controls what services may be performed by the massage therapists and controls the number of appointments assigned to each massage therapist. These facts reveal that the Petitioner maintains significant control over the financial aspects of the relationship. In addition, the Petitioner provides certain fringe benefits to the massage therapists, including a free meal for each six hour work shift. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation 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. In addition to the free meals the Petitioner provided the Joined Party with eligibility to participate in a program that offered reduced room rates at associated hotels located worldwide. This is a benefit that is not available to the general public, and according to the Petitioner's documents, is available to employees who have completed their 90 day probationary periods. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
37. The Joined Party worked for the Petitioner from June 2000 until November 18, 2010, a period of over nine years. The August 2, 2010, Agreement specifies that the Agreement is in effect for a period of one year and that the Agreement can be terminated at the end of the one year period with a thirty day written notice of termination due to dissatisfaction of either party. The Petitioner chose to terminate the Agreement prior to the end of the one year term for undisclosed reasons. 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 1 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."
38. The facts present in this case reveal that the Petitioner controls what work is to be performed, when it is performed, and where it is performed. In addition, the Petitioner controls how the work is performed to a significant degree. Although the Petitioner does not directly supervise the performance of the massages, among other things the Petitioner instructs the massage therapists in writing on how to greet the guests, what to say to the guests, and how to drape the guests. The Petitioner controls the massage therapists concerning their appearance, and restricts the massage therapists concerning where to park, which hotel entrance to use, where they may go within the hotel, and what they may do in the hotel.
39. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an

employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004). It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5<sup>th</sup> DCA 1984)

40. 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.
41. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as massage therapists and/or estheticians constitute insured employment.

**Recommendation:** It is recommended that the determination dated September 9, 2011, be AFFIRMED.

Respectfully submitted on February 10, 2012.



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R. O. SMITH, Special Deputy  
Office of Appeals