

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

PETITIONER:

Employer Account No. - 3080869
BAUC ELECTRIC INC
ATTN: RAJKO BAUC, PRESIDENT
3327 OCIO STREET
HOLIDAY FL 34690-2344

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-59740L**

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the portion of the determination dated April 23, 2012, holding that the services performed for the Petitioner by the Joined Party constitute insured employment is REVERSED. It is further ORDERED that the portion of the determination holding the Petitioner liable for the payment of reemployment assistance contributions retroactive to April 1, 2007, based on corporate office activity is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 2012.**



Altemese Smith,
Assistant Director,
Reemployment Assistance 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 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, 2012.

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:

BAUC ELECTRIC INC
ATTN: RAJKO BAUC, PRESIDENT
3327 OCIO STREET
HOLIDAY FL 34690-2344

JASON ALBERT
11240 RAINBOW WOODS LOOP
SPRING HILL FL 34609

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals**

MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

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**PROTEST OF LIABILITY
DOCKET NO. 2012-59740L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated April 23, 2012.

After due notice to the parties, a telephone hearing was held on July 3, 2012. The Petitioner, represented by the Petitioner's president, appeared and testified. An accountant testified as a witness for the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party did not appear.

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.

Issues:

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.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is an “S” corporation that was formed on August 8, 2005, and since that time has been engaged in the business of residential electrical contracting.
2. The Petitioner’s president is the sole officer of the corporation and has been active in the business since its inception. The wages of the Petitioner’s president were reported to the Department of Revenue by a leasing company through the fourth quarter 2006.
3. The Joined Party performed services for the Petitioner as an electrician’s helper at various times from October 2010, until February 2012. The Joined Party was a friend of the Petitioner’s president. If the Petitioner needed help on a job and if the Joined Party was available, the Joined party would perform services for the Petitioner. At times the Joined Party worked with the Petitioner’s president at the jobsite. At other times the Joined Party went to a job site alone to install light bulbs and cover plates and to pick-up pieces of wire. The Joined Party was not required to accept a job in order for the Petitioner to continue giving the Joined Party work. The Joined Party did not perform any work for the Petitioner from May 4, 2011, until October 20, 2011.
4. The Joined Party did not have set hours for work. If the Joined Party accompanied the Petitioner’s president to the job site to act as a helper, the Joined Party was free to leave the job site at any time. If the Joined Party was given specific work to do, the Joined Party could leave the job site when the work was complete. When the Joined Party worked alone at job sites, the Petitioner informed the Joined Party of the date by which the work needed to be completed.
5. The Petitioner did not provide any training or otherwise instruct the Joined Party as to how to perform the work. The Petitioner’s president checked the work performed by the Joined Party. The Joined Party was required to correct defective work without additional compensation.
6. The Joined Party used his personal hand tools to perform the work.
7. The Joined Party could subcontract the work and was free to perform similar work for others.
8. The Joined Party was paid on a weekly basis for completed jobs. The Joined Party did not invoice for his work. The Petitioner determined the amount of pay based upon the size of the job and the amount of the work performed by the Joined Party. The Petitioner did not withhold taxes from the Joined Party’s pay. The Joined Party did not receive fringe benefits such as sick pay, vacation pay, or holiday pay. The Petitioner reported the Joined Party’s earnings on a form 1099-MISC.
9. The Joined Party filed a claim for reemployment assistance (formerly unemployment compensation) benefits effective March 11, 2012. 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 23, 2012, the Department of Revenue issued a determination holding that the services performed by the Joined Party constitute insured employment retroactive to October 1, 2010. Additionally, the determination held the Petitioner liable for the payment of reemployment assistance contributions retroactive to April 1, 2007, based upon 20 weeks of corporate officer activity.

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 record reflects the lack of an express agreement between the parties as to the working relationship. In the absence of an express agreement, the actual practice of the parties should be examined. Keith v. News Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).
19. The Joined Party was informed by the Petitioner of opportunities to perform work. The Joined Party could accept or decline the work. The Joined Party was free to perform work for others.
20. The Petitioner did not provide any training to the Joined Party. The Petitioner did not instruct the Joined Party as to how to perform the work. The Joined Party used his own hand tools. The Joined Party was required to correct mistakes without additional compensation.
21. The Joined Party was not required to work set hours. The Petitioner required only that the work be completed by a particular date.
22. The Petitioner did not withhold taxes from the Joined Party’s pay. The Petitioner did not provide any fringe benefits to the Joined Party. The Petitioner reported the Joined Party’s earnings as non-employee compensation. Although the Petitioner determined the amount of pay, the Joined Party was paid by the job rather than by time.
23. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship.
24. Section 443.1216(1)(a), Florida Statutes, provides in part:
 - (1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
 1. An officer of a corporation.
 2. An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee.
25. The Petitioner is a corporation. The Petitioner’s president performs services for the corporation. As such, the Petitioner’s president is a statutory employee.
26. Section 443.1215, Florida Statutes, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

27. Rule 73B-10.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered.
28. The Petitioner's president has been active in the business since 2005. Through the fourth quarter 2006, the wages of the Petitioner's employer were reported by a leasing company. Accordingly, the Petitioner meets the liability requirements for Florida reemployment assistance contributions effective April 1, 2007.

Recommendation: It is recommended that the determination dated April 23, 2012 be MODIFIED. It is recommended that the portion of the determination holding that the services performed for the Petitioner by the Joined Party constitute insured employment be REVERSED. It is further recommended that the portion of the determination holding the Petitioner liable for the payment of reemployment assistance contributions retroactive to April 1, 2007, based upon corporate officer activity, be AFFIRMED.

Respectfully submitted on August 14, 2012.



SUSAN WILLIAMS, Special Deputy
Office of Appeals

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

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

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
August 14, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

JASON ALBERT
11240 RAINBOW WOODS LOOP
SPRING HILL FL 34609

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
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