

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

PETITIONER:

Employer Account No. - 2894263
EXTERIA BUILDING PRODUCTS LLC
ATTN: RUTH JOSEPH, HR GENERALIST
1111 NW 165TH STREET
MIAMI FL 33162

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-60774L**

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 27, 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 **October, 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 October, 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:

EXTERIA BUILDING PRODUCTS LLC
ATTN: RUTH JOSEPH, HR GENERALIST
1111 NW 165TH STREET
MIAMI FL 33162

RICHARD DAVIS
8201 NW 85TH AVENUE
TAMARAC FL 33321

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

DEPARTMENT OF REVENUE
TALLAHASSEE CENTRAL SERVICE
CENTER
ATTN: MYRA TAYLOR
P O 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
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**PROTEST OF LIABILITY
DOCKET NO. 2012-60774L**

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 March 27, 2012.

After due notice to the parties, a telephone hearing was held on August 2, 2012. The Petitioner, represented by the Petitioner’s HR Generalist, appeared and testified. The Petitioner’s Financial Controller testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. 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.

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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 73B-10.035(18).

Findings of Fact:

1. The Petitioner is a limited liability company that is engaged in the manufacture and sale of exterior siding materials.

2. The Joined Party has a background in the siding business. The Joined Party was a licensed general contractor in New York and had his own business there until 2006. Since 2006, the Joined Party has not operated his own business or held any type of construction license.
3. The Joined Party's former brother-in-law is employed by the Petitioner. In December 2010, the Joined Party's former brother-in-law asked the Joined Party to provide some carpentry work for the Petitioner at a trade show in Orlando, Florida. The Joined Party was told he would be paid \$130 per day or \$650 per week. The Joined Party agreed and worked for one week. The Joined Party completed a form W-9 on December 22, 2010.
4. In April 2011, the Joined Party's former brother-in-law contacted the Joined Party about performing work at the Petitioner's front office and showroom. The Joined Party was hired to perform carpentry work and various other tasks assigned by the Petitioner. At the time of hire there was no defined scope of work. The Joined Party did not provide any proposals or estimates to the Petitioner. The Joined Party was looking for full-time, permanent employment. The Petitioner told the Joined Party that the Petitioner's budget did not allow for the addition of a permanent employee at that time. The Joined Party hoped that he would eventually be hired as a full-time employee. The Joined Party performed services for the Petitioner on an as-needed basis from mid-April, 2011, through October 20, 2011.
5. The Petitioner told the Joined Party what work the Petitioner wanted the Joined Party to perform. The Joined Party was told to relocate cubicles, furniture, and customer samples, and to build walls, shelves, cabinets, and sample walls. The Petitioner provided simple sketches and verbal instructions to the Joined Party for the work to be performed. The Petitioner did not tell the Joined Party how the work was to be accomplished. The Petitioner's work was directed by an employee of the Petitioner. The Petitioner told the Joined Party when to stop performing work and when to restart work.
6. The Joined Party was paid at a rate of \$650 per week until October 2011, at which time the weekly rate was increased to \$700. Initially, the Joined Party accompanied an employee of the Petitioner to a building supply store to pick up materials needed for the work. The other individual paid for the materials with a company check. When that individual's truck became inoperable, or if the individual was unavailable, the Joined Party used his personal vehicle on a few occasions to pick-up materials. The Joined Party was reimbursed for mileage associated with trips from the Petitioner's place of business to the building supply store and for any materials purchased by the Joined Party. The Petitioner prepared weekly invoices for the Joined Party's signature. The Joined Party completed weekly or monthly expense reports for the mileage and materials.
7. The Joined Party was required to work eight hours per day, Monday through Friday. The Petitioner initially told the Joined Party his hours would be 8:00 a.m. to 4:00 p.m. The Joined Party asked to work instead from 6:00 a.m. to 2:00 p.m., to avoid heavy commuting traffic, and his request was approved.
8. The Petitioner provided most of the tools needed for the work. The Joined Party used his personal hammer, tape measure, and chop saw.
9. The Joined Party was not responsible for correcting defective work without additional compensation.
10. The Joined Party was not restricted from performing similar services for others, including competitors of the Petitioner.
11. The Petitioner did not withhold taxes from the Joined Party's pay. The Petitioner reported the Joined Party's compensation on a form 1099-MISC for 2011. The Joined Party did not receive bonuses or fringe benefits such as sick pay, vacation pay, or holiday pay.
12. The Joined Party did not have his own business, occupational license, liability insurance, or workers' compensation insurance.

13. Either party could terminate the relationship at any time without penalty or liability.
14. The Joined Party filed a claim for unemployment compensation benefits effective January 23, 2012. When the Joined Party did not receive credit for his earnings with the Petitioner, an *Interstate Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Florida Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
15. On March 27, 2012, the Department of Revenue issued a determination holding that the general construction services performed by the Joined Party constitute insured employment retroactive to April 5, 2011. The Petitioner filed a timely protest.
16. Pursuant to the Petitioner's protest, a telephone hearing was scheduled for July 11, 2012. The Petitioner did not appear for the hearing, and, as a result, a Recommended Order of Dismissal was issued. The Petitioner did not receive the hearing notice. The special deputy attempted to contact the Petitioner by telephone at the time of the scheduled hearing and left voicemail messages for the Petitioner. When the Petitioner's HR Generalist heard the voicemail messages on July 11, 2012, she called the telephone number left by the special deputy. The Petitioner filed a written request for rehearing on July 11, 2012.

Conclusions of Law:

17. Rule 73B-10.035(18), Florida Administrative Code, provides:
Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.
18. The Petitioner failed to attend the July 11, 2012, hearing because the Petitioner did not receive notice of the hearing and was not aware of the hearing. The Petitioner made a timely request for reopening. Thus, good cause has been established and the Recommended Order of Dismissal is rescinded.
19. 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.
20. 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).
21. 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).
22. 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.

23. 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.
24. 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.
25. 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.
26. The parties did not enter into a written agreement. The witnesses for the Petitioner did not have first-hand knowledge of the terms of hire. The Joined Party’s testimony established that he was seeking employment and that it was not his intent to perform services as a contractor. The Joined Party was told at the time of hire that the Petitioner did not have sufficient funds in its budget to hire a permanent employee. The evidence presented did not establish a meeting of the minds as to the nature of the work relationship. In the absence of an express agreement, the actual practice of the parties should be analyzed under the factors set forth in the Restatement. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).
27. The evidence presented in this case reveals that the Joined Party performed services for the Petitioner as a skilled carpenter. In Florida Gulf Coast Symphony, Inc. v. Department of Labor and Employment Security, 386 So.2d 259 (Fla. 2nd DCA 1980) the court discussed the factors to be considered when determining the extent of control over the work performed by skilled individuals. The court, citing Carnes v. Industrial Commission, 73 Ariz. 264, 240 P.2d 536 (1952), concluded, “if the alleged employer has the right to direct the time and the place in which the services are to be rendered, the person to or for whom the services are to be rendered and the degree and amount of said services, then the relationship is that of employer/employee, despite the fact that the employer does not closely direct the details of the performance.” In this case the Petitioner determined what work was to be performed, where the work was to be performed, and when the work was to be performed. The Petitioner determined the rate and method of payment.
28. The Joined Party was not engaged in a distinct occupation or business. The Joined Party did not have an occupational license or business liability insurance. The Joined Party had no financial risk or expenses in connection with the performance of his services for the Petitioner.

29. The Joined Party provided his own hand tools and a chop saw. The Petitioner provided all other tools, equipment, and materials needed to perform the work. The Petitioner paid for the Joined Party's travel to and from the job site to the building supply store.
30. The Joined Party was paid by time and not by the job. This factor is more indicative of an employer-employee relationship. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
31. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated March 27, 2012, be AFFIRMED.

Respectfully submitted on August 22, 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 22, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

RICHARD DAVIS
8201 NW 85TH AVENUE
TAMARAC FL 33321

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

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ATTN: RUTH JOSEPH, HR GENERALIST
1111 NW 165TH STREET
MIAMI FL 33169-5819

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