

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

PETITIONER:

Employer Account No. - 3088229
P & S DEPENDABLE DRYWALL,INC
ATTN:RICHARD N. PELT,SR
12008 N OREGON AVENUE
TAMPA FL 33612-4017

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-64410L**

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 May 16, 2012, 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 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:

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals**

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

PETITIONER:

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**PROTEST OF LIABILITY
DOCKET NO. 2012-64410L**

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 May 16, 2012

After due notice to the parties, a telephone hearing was held on July 13, 2012. The Petitioner, represented by the Petitioner’s president, appeared and testified. The Joined Party appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, 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.

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.

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 a corporation, formed in 2007, that is engaged in business as a drywall contractor for commercial projects. The Petitioner performs work directly for owners or under contract with general contractors. The Petitioner’s president, his wife and son are active in the operation of the

business. Those individuals are leased by the Petitioner through an employee leasing company, and their wages are reported to the Department of Revenue by the leasing company.

2. The Petitioner utilizes workers it classifies as independent contractors to install metal framing and to hang drywall. The Petitioner utilizes experienced workers and does not provide training. The workers usually contact the Petitioner when they are looking for work. The Petitioner does not enter into written agreements with the workers.
3. The workers provide their own tools and equipment. The Petitioner provides scaffolding, if needed. The general contractor provides a lift, if needed. For most jobs, the general contractor furnishes the materials needed for the work. If the Petitioner contracts directly with an owner, the Petitioner furnishes the materials. The workers provide their own transportation to the job sites.
4. The jobs vary in duration from several days to several weeks or months. The workers do not have set hours and can work at any time the job site is available. The Petitioner monitors the progress of the work. At times, the Petitioner's president works at the site along with the workers, marking ground lines and installing doors. At other times, the Petitioner's president visits the job sites to check the progress.
5. The workers are usually paid a price per running foot for installing the metal framing and a price per board for hanging drywall. The price agreed upon depends upon the difficulty of the work. Occasionally, the workers are paid by the hour. The hourly rate is dependent upon the worker's level of experience. The Petitioner does not provide worker's compensation insurance or fringe benefits, such as vacation pay, holiday pay, or bonuses to the workers.
6. The workers are free to subcontract the work and to work for others, including competitors of the Petitioner.
7. The workers are responsible for correcting their own errors without additional compensation.
8. The Petitioner often hires Oscar Castillo to install metal framing and hang drywall. Oscar Castillo performs the work with a team, consisting of his brothers, nephews, and other relatives. Oscar Castillo provides a written statement to the Petitioner for the work that shows the amount of work performed by each team member. The Petitioner pays Oscar Castillo by check. Oscar Castillo pays the other team members.
9. The Joined Party is Oscar Castillo's brother. The Joined Party began working as a member of Oscar Castillo's team in March 2011. The Joined Party was not experienced in installing metal framing or hanging drywall. The Joined Party learned how to do the work by watching his brothers.
10. After working for approximately two months, the Joined Party became dissatisfied with deductions from his pay made by Oscar Castillo. Oscar Castillo deducted a portion of a fee he paid to a check cashing service from the Joined Party's pay. The Joined Party asked the Petitioner if he could be paid directly by the Petitioner. The Petitioner agreed and told the Joined Party he would be paid under the same terms as his brother was paid. At the request of the Petitioner, the Joined Party completed a form W-9. The Joined Party was paid directly by the Petitioner from May 7, 2011, through September 25, 2011.
11. The Joined Party continued to perform his work in the same manner as he had performed the work with his brother, Oscar Castillo. The Joined Party did not work independently of Oscar Castillo or

the other team members. The Joined Party did not submit an invoice to the Petitioner. The Petitioner paid the Joined Party based upon the amount of work reported by Oscar Castillo. The Joined Party worked under the same terms and conditions as the other workers the Petitioner considered independent contractors.

12. During the time the Joined Party performed services for the Petitioner, the Petitioner was a subcontractor on a job at MacDill Air Force Base. After the subcontractor filed for bankruptcy, the Petitioner continued to perform work for the general contractor's surety company. The surety company required that the Petitioner bill for the work on an hourly basis. The Petitioner, in turn, paid Oscar Castillo and the Joined Party on hourly basis. The general contractor required all workers and visitors to sign in and sign out when arriving and leaving the job site. The Petitioner used the number of hours reflected on the sign in sheets to determine the amounts due Oscar Castillo, the Joined Party, and the other team members.
13. The Petitioner did not withhold taxes from the Joined Party's pay. The Petitioner reported the Joined Party's 2011 earnings on a form 1099-MISC as non-employee compensation.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner by the Joined Party and others as drywall construction workers, 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.
15. 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).
16. 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).
17. 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.
18. 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.
19. 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.
20. 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.
21. The Petitioner does not enter into written agreements with individuals the Petitioner considers independent contractors. The record reflects that the agreement for direct payment by the Petitioner to the Joined Party was made for the Joined Party’s convenience. The Petitioner advised the Joined Party that he would be paid in the same manner as the Petitioner paid Oscar Castillo; however, no specific terms were discussed. The Joined Party performed his services under the same terms and conditions as the other workers the Petitioner considers independent contractors. In the absence of an express agreement as to the working relationship, the actual practice of the parties should be examined. Keith v. News Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).
22. The Petitioner did not provide any training to the Joined Party. The Petitioner did not tell the Joined Party how to perform the work. The Joined Party gained experience by working with his brothers and other family members.
23. The workers, including the Joined Party, were free to accept or decline work and to perform services for competitors of the Petitioner. The Joined Party and the other workers were not required to work set hours.
24. The Joined Party and the other workers used their own tools and equipment, with the exception of scaffolding and a lift, and provided their own transportation to and from the job sites.
25. The Petitioner did not supervise the work. The workers were responsible to correcting defective work without additional compensation.
26. The workers were paid primarily on a piecework basis, rather than by time, and the amounts were negotiated. The workers were paid by time only when the Petitioner’s contract with its client required payment on an hourly basis.

27. 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.
28. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983). It was not shown that the Petitioner exercised sufficient control over the Joined Party or the other workers to establish an employer-employee relationship. Thus, it is concluded that the services performed for the Petitioner by the Joined Party and others as drywall construction workers do not constitute insured work.
29. The record shows the Petitioner's president and two other individuals performing service for the Petitioner are leased by the Petitioner under a contract with an employee leasing company. Accordingly, pursuant to Section 443.1215(1), Florida Statutes, the Petitioner does not meet liability requirements for Florida reemployment assistance contributions.

Recommendation: It is recommended that the determination dated May 16, 2012, be REVERSED.

Respectfully submitted on August 20, 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 20, 2012**

Copies mailed to:

Petitioner
Respondent
Joined Party

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