

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

PETITIONER:

Employer Account No. - 2402150
BROWARD MANUAL REHAB INC
ATTN ANGELA DELGADO CPA
665 SE 10TH STREET
DEERFIELD BEACH FL 33441-5634

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-6276L**

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 October 26, 2012, is MODIFIED to reflect a retroactive date of liability effective April 4, 2011. It is further ORDERED that the determination is AFFIRMED as modified.

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, 2013**.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

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, 2013.

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:

BROWARD MANUAL REHAB INC
ATTN ANGELA DELGADO CPA
665 SE 10TH STREET
DEERFIELD BEACH FL 33441-5634

TATYANA CHEKMARIEVA
5600 NW 59TH ST APT 4
TAMARAC FL 33319

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

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:

Employer Account No. - 2402150
BROWARD MANUAL REHAB INC
ATTN ANGELA DELGADO CPA
665 SE 10TH STREET
DEERFIELD BEACH FL 33441-5634

RESPONDENT:

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

PROTEST OF LIABILITY

DOCKET NO. 2013-6276L

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 26, 2012.

After due notice to the parties, a telephone hearing was held on July 11, 2013. The Petitioner, represented by its president, appeared and testified. 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 not received.

Issue:

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.

Findings of Fact:

1. The Petitioner is a Florida profit corporation which operates a physical therapy and rehabilitation business. The Petitioner's president is a licensed physical therapist.
2. After the Petitioner's president, or other licensed physical therapist, performs the therapy services for the Petitioner's patients it is necessary to have an assistant clean the treatment room and restock the supplies to prepare the treatment room for the next patient.
3. In early April 2011 the Petitioner was attempting to hire an assistant to clean and restock the treatment rooms. The Joined Party applied for the position and was interviewed by the Petitioner.

The Petitioner told the Joined Party the duties of the job, that the rate of pay was \$9 per hour, and that the Petitioner had two shifts available, Monday through Friday from 8 AM until 4 PM or from 11 AM until 6:30 PM. The position was offered to the Joined Party. The Joined Party accepted the offer and chose the 8 AM until 4 PM shift. The Joined Party began performing services for the Petitioner on or about April 4, 2011. The parties did not enter into any written agreement or contract.

4. The Petitioner trained the Joined Party how to clean and restock the treatment rooms on the Joined Party's first day of work. The job of cleaning and restocking the treatment rooms does not require any skill or special knowledge and it only took one or two hours to train the Joined Party concerning how the work was to be performed.
5. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work.
6. The Petitioner has a dress code which the Joined Party was required to adhere to. The Petitioner has uniform Polo shirts bearing the Petitioner's name and logo which were either provided to the Joined Party or were available for the Joined Party to purchase. The Joined Party was not required to wear the Petitioner's Polo shirt as long as the Joined Party complied with the Petitioner's dress code.
7. During the interview the Joined Party told the Petitioner that she was employed elsewhere as a home health aide. The Petitioner had no objection to the Joined Party working elsewhere, including in a hospital or nursing home, however, the Petitioner would not have allowed the Joined Party to work for a competitor of the Petitioner.
8. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her.
9. The Joined Party was supervised by the Petitioner's president and by the other physical therapist. The Joined Party's work performance was satisfactory and no warnings were issued to her concerning work performance. However, there were occasions when the treatment room was not cleaned to the Petitioner's satisfaction and on those occasions the Joined Party was instructed to reclean or restock the treatment room. The Joined Party was warned by the Petitioner concerning reporting for work late.
10. The Joined Party was required to complete a timesheet showing the time worked. The Joined Party was allowed to take a one hour break for lunch and was required to sign out for the lunch break. There was no specified time for the lunch break, however, office policy was that the workers with the most seniority had first choice in break times and the workers with less seniority had to take their break at a different time.
11. Although the Joined Party's beginning rate of pay was \$9 per hour, the Petitioner increased the Joined Party's pay rate on several occasions based on the Joined Party's job performance and based on the Petitioner's profitability. The Joined Party's final rate of pay was \$10.02 per hour.
12. The Petitioner paid the Joined Party on a bi-weekly basis. No taxes were withheld from the pay. The Petitioner did not provide any fringe benefits such as paid vacations or paid holidays. At the end of 2011 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
13. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. During the latter part of September 2012 the Joined Party abruptly left the job without explanation during the workday and never returned to work.

14. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance program benefits, effective September 23, 2012. 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 assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
15. On October 26, 2012, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to October 4, 2011. The Petitioner filed a timely protest on November 15, 2012.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner by the Joined Party constitute employment subject to the Florida Reemployment Assistance Program 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.
17. 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).
18. 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 Department is limited to applying only Florida common law in determining the nature of an employment relationship.
19. 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.
20. 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.

21. 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.
22. 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 can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
23. The Parties did not enter into any written agreement or contract and no testimony was provided concerning any verbal agreement that the Joined Party would perform services as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
24. The Petitioner operates a business which provides physical therapy and rehabilitation to the Petitioner's patients. The Joined Party was engaged by the Petitioner to clean and restock the treatment rooms so that the Petitioner could provide treatment to the next patient. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business. The work was performed at the Petitioner's business location during the Petitioner's regular business hours. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work and it was not shown that the Joined Party was at risk of suffering a financial loss from performing services.
25. The work performed by the Joined Party did not require any skill or special knowledge. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)
26. The Petitioner paid the Joined Party based on time worked rather than based on production or by the job. The Petitioner determined the hours of work, the rate of pay, and the method of pay. The Petitioner controlled the financial aspects of the relationship.
27. The Joined Party performed services for the Petitioner from April 2011 until September 2012, a period of approximately one and one-half years. Either party could terminate the relationship at any time without incurring liability for breach of contract. 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."
28. The Petitioner controlled what work was performed, where the work was performed, when the work was performed, by whom the work was performed, and how the work was performed. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court

explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

29. The evidence presented in this case reveals that the services performed for the Petitioner by the Joined Party constitute insured employment.
30. The Joined Party began performing services for the Petitioner on April 4, 2011; however, the determination of the Department of Revenue is only retroactive to October 4, 2011. The correct retroactive date of liability is the Joined Party's first date of employment, April 4, 2011.

Recommendation: It is recommended that the determination dated October 26, 2012, be MODIFIED to reflect a retroactive date of liability effective April 4, 2011. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 12, 2013.



R. O. SMITH, 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 12, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

TATYANA CHEKMARIEVA
5600 NW 59TH ST APT 4
TAMARAC FL 33319

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

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