

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

PETITIONER:

Employer Account No. - 3115440
PONDS EDGE ASSISTED FACILITY INC
ATTN MICHAELANGELO AA DANO ADM
7952 PONDS EDGE LN
ZEPHYRHILLS FL 33540-1972

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-6278L**

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 November 8, 2012, holding that the Joined Party performed services in insured employment is AFFIRMED. It is further ORDERED that the portion of the determination holding the Petitioner liable for payment of reemployment assistance tax retroactive to October 1, 2011, is MODIFIED to reflect a retroactive liability date of January 1, 2008.

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 **August, 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 August, 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:

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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

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RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-6278L**

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 November 8, 2012.

After due notice to the parties, a telephone hearing was held on June 3, 2013. The Petitioner, represented by its Administrator, appeared and testified. The Petitioner's Alternate Administrator appeared and testified. 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.

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.

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.

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner, Pond's Edge Assisted Living Facility, Inc. is a Florida profit corporation which was formed on June 21, 2006, and which is licensed to provide care for up to nine residents. The Petitioner's president and secretary is Michaelangelo Angelito A. Dano. Effective January 1, 2007, the Petitioner began operating an assisted living facility to provide care for elderly residents. The Petitioner's president/secretary has performed services for the Petitioner each week since inception of the business as Administrator of the business. The Petitioner's president/secretary receives a salary as compensation for the services which he performs for the Petitioner.
2. In 2011 the Joined Party attended school to obtain certification as a nurse assistant. While attending school the Joined Party applied for employment with the Petitioner. The Joined Party was required to complete an employment application and was interviewed by the Petitioner. During the interview the Joined Party was informed that since she was still in school her work schedule would be Thursday, Friday, and Saturday from 7 AM until 7 PM and that her rate of pay would be minimum wage, \$7.31 per hour. The Joined Party was informed that she would be responsible for her own taxes and that the Petitioner would not provide any fringe benefits.
3. The Joined Party accepted the Petitioner's offer of work on September 27, 2011, and was required to sign a *Contract Agreement*. The *Contract Agreement* states that the Joined Party understands that she is engaged as an independent contractor to perform services for the Petitioner as a caregiver, that she is solely responsible for payment of income and self-employment taxes, and that no taxes will be withheld from her pay. The Agreement states that the Joined Party agrees to have her time sheet signed by the Administrator each day and that the Petitioner will pay the Joined Party \$7.31 per hour on the fifteenth and thirtieth of each month. The Agreement states that the Joined Party is expected to perform services for the Petitioner including, assisting residents, cooking, cleaning/housekeeping, laundry, and any other duties specified by the Petitioner.
4. The Joined Party did not have any investment in a business, did not have a business license or occupational license, did not have business liability insurance, and did not offer caregiver services to the general public.
5. The Joined Party's first three days of work were for training during which time the Joined Party was required to shadow another worker. An Alternate Administrator told the Joined Party what to do and how to do it. The Petitioner paid the Joined Party for the training time. After the first three days of training the Petitioner provided periodic training for the Joined Party.
6. The Petitioner provided everything that was needed to perform the work including a washing machine, clothes dryer, stove, cleaning equipment, and supplies. The Petitioner provided the Joined Party with an identification badge. The Joined Party did not have to provide anything in order to perform the work and did not have any expenses in connection with the work.
7. The Joined Party was required to clock in and out each day and was allowed to take two fifteen minute breaks and one thirty minute meal break during each twelve hour shift. The Joined Party was required to clock out for the thirty minute meal break.
8. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her. If the Joined Party was not able to work as scheduled she was required to notify the Petitioner. On one occasion the Joined Party had car trouble and notified the Petitioner that she would be late to work. The Petitioner issued a written warning to the Joined Party as a result of that incident of tardiness.
9. The Joined Party was required to work her assigned shift and could not come and go as she pleased. On some occasions the Joined Party completed her assigned duties before the end of her shift. If the Petitioner's resident count was low at the time the Petitioner would send the Joined Party home without allowing her to complete the assigned shift.

10. At the time of hire the Joined Party was still in school and had not yet taken the examination for Certified Nurse Assistant. The Petitioner told the Joined Party that if she passed the Certified Nurse Assistant examination the Petitioner would increase the Joined Party's hourly rate of pay. While working for the Petitioner the Joined Party passed the examination for Certified Nurse Assistant. The Joined Party requested the pay increase, however, the Petitioner denied the request stating that the Joined Party could not receive a pay increase unless the Petitioner obtained additional residents.
11. The Joined Party worked under the supervision of an Alternate Administrator. If the Administrator or an Alternate Administrator was not on duty the Joined Party worked under the supervision of a Certified Nurse Assistant with more experience than the Joined Party.
12. No taxes were withheld from the Joined Party's pay. The Petitioner did not provide any fringe benefits for the Joined Party. The Petitioner also did not provide any fringe benefits for the Petitioner's only acknowledged employee, the Administrator.
13. 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.
14. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party last performed services for the Petitioner on February 17, 2012.
15. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective September 11, 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.
16. The Department of Revenue investigation revealed that the Petitioner had never registered with the Department of Revenue for payment of unemployment compensation taxes on its workers, including the Petitioner's corporate officers. During the course of the investigation the Petitioner provided incorrect information to the Department of Revenue, stating that a caregiver first performed services for the Petitioner on September 28, 2011.
17. On November 8, 2012, the Department of Revenue issued a determination holding that the Joined Party was an employee of the Petitioner retroactive to October 1, 2011, that officers of corporations are statutory employees, and that the Petitioner was liable for payment of unemployment compensation tax effective October 1, 2011. The Petitioner filed a timely protest by mail postmarked November 27, 2012.

Conclusions of Law:

18. 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.
19. 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).
20. 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.

21. 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.
22. 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.
23. 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.
24. 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.
25. The Petitioner required the Joined Party to sign a *Contract Agreement* which states that the Joined Party is an independent contractor. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). 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.”

26. The Petitioner's business is the operation of an assisted living facility at which the Petitioner provides care for elderly residents. The Joined Party was engaged by the Petitioner as a caregiver to provide care for the Petitioner's residents. 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 business. The Joined Party did not have an investment in a business, did not have a business license, did not have business liability insurance, did not provide services to anyone other than the Petitioner, and did not have any expenses in connection with the work. The Petitioner provided the place of work and all equipment, tools, and supplies that were needed to perform the work. The Joined Party was not at risk of suffering a financial loss from services performed.
27. The Joined Party's assigned duties included providing care for the Petitioner's residents including cooking, housecleaning, doing laundry, and providing personal care. It was not shown that any skill or special knowledge was needed to perform the work. 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)
28. The Petitioner determined the Joined Party's work schedule and required the Joined Party to clock in and out. The Joined Party was not free to come and go as she pleased and was even required to clock out for her thirty minute meal break. The Petitioner determined the rate of pay, minimum wage. The Joined Party was paid by time worked rather than based on production or by the job. The fact that the Petitioner chose not to withhold taxes from the pay does not, standing alone, establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program 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.
29. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party was engaged to perform services for an indefinite period of time. 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."
30. The evidence presented in this case reveals that the Petitioner determined what work was to be performed, where it was performed, when it was performed, by whom it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship by determining the Joined Party's hours of work and the hourly rate of pay. 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.
31. It is concluded that the services performed for the Petitioner by the Joined Party constitute employment.
32. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of

whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

- 33. The Petitioner's president/secretary of the corporation has been active as Administrator of the business since inception of the business, February 1, 2007.
- 34. 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 the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
- 35. The evidence reveals that the Petitioner has had at least one employee during twenty different weeks of each year since January 1, 2007. Thus, the Petitioner has established liability for payment of unemployment tax effective January 1, 2007.
- 36. 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.
- 37. Although the Petitioner's officer performed services retroactive to 2007, the Petitioner is only required to retain records for a period of five years following the calendar year in which the services are performed. 2007 is outside the statute of limitations. The Petitioner is required to retain records for remuneration of services for 2008 until the end of the 2013 calendar year. Thus, the statute of limitations allows retroactive liability to January 1, 2008.

Recommendation: It is recommended that the portion of the determination dated November 8, 2012, holding that the Joined Party performed services in insured employment be AFFIRMED. It is recommended that the portion of the determination holding the Petitioner liable for payment of unemployment compensation tax retroactive to October 1, 2011, be MODIFIED to reflect a retroactive liability date of January 1, 2008.

Respectfully submitted on June 24, 2013.

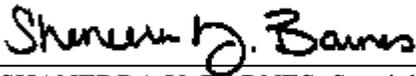


R. O. SMITH, Special Deputy
Office of Appeals

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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
June 24, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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