

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

PETITIONER:

Employer Account No. - 2627356
MEDALLION HOMES GULF COAST LC
ATTN: CHARLIE TOKARZ, VP
2212 58TH AVE EAST
BRADENTON FL 34203-5062

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-119235L**

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 August 11, 2011, 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 **April, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation 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 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 April, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation 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
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
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**PROTEST OF LIABILITY
DOCKET NO. 2011-119235L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Interim Executive Director,
Unemployment Compensation 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 August 11, 2011.

After due notice to the parties, a telephone hearing was held on December 15, 2011. The Petitioner, represented by the Petitioner's vice president, appeared. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist, 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 and other individuals as drafter(s) 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.

Findings of Fact:

1. The Petitioner is a limited liability company engaged in the business of semi-custom home building. The Petitioner utilizes the services of an independent engineer to sign and seal construction drawings for permitting.

2. The Joined Party has 25 years of drafting experience. The Joined Party provided drafting services for the Petitioner from August 31, 2010, until March 25, 2011. The Joined Party was hired on a temporary basis to update the Petitioner's master plans. At that time, the Petitioner employed one drafter; however, the Petitioner did not want to overburden that employee with the additional work. The Petitioner anticipated the duration of the Joined Party's services would be 4-6 weeks. The Joined Party accepted the work because he was unemployed at the time and hoped the opportunity would lead to a permanent job.
3. There was no written agreement between the parties. The Petitioner told the Joined Party the work would be temporary and that he would be paid \$575 per week.
4. The Petitioner has a relationship with Cargor Partners 3 that allows the Petitioner to build homes on lots owned by Cargor Partners 3. Some of the expense of the Joined Party's services was allocated by the Petitioner to Cargor Partners 3. The Joined Party did not work or communicate with anyone identified as an employee or representative of Cargor Partners 3.
5. The Joined Party was paid \$575 per week. Prior to receipt of his weekly payment, the Joined Party was required to sign and date a pre-printed invoice that was prepared by the Petitioner. On each invoice, two-thirds of the payment was allocated to the Petitioner and one-third to Cargor Partners 3. No payroll taxes were withheld from the Joined Party's pay. The Petitioner did not provide any fringe benefits to the Joined Party, such as health insurance, sick pay or vacation pay. The Petitioner paid the Joined Party a Christmas bonus of \$100. The Joined Party's 2010 earnings were reported on a Form 1099-MISC.
6. The Petitioner provided the work space, computer, AutoCAD software, printer, and all other equipment and supplies needed to perform the work. The Joined Party had no expenses in connection with the work.
7. The Joined Party performed all of his services at the Petitioner's location. Although the Joined Party may have been able to perform a minor portion of his work from home or another location, the majority of the work had to be done using the Petitioner's network and AutoCAD program. The Petitioner's office was open from 6:00 a.m. until 6:00 p.m., Monday through Friday. The office was occasionally open on Saturday. The Joined Party worked from 8:00 a.m. to 5:00 p.m., the same hours worked by most of the Petitioner's employees.
8. The Joined Party was skilled in the use of the AutoCAD program. The Joined Party was trained on the location, format, and organization of the Petitioner's master plans, and the particular requirements of the Petitioner's engineer. The Joined Party was required to perform his work in accordance with the requirements of the Petitioner's engineer and instructions provided in the form of "red-line" drawings. If the Petitioner's engineer was not satisfied with the Joined Party's work product, the Joined Party was required to correct his work. He was not expected to correct his work without compensation.
9. For the first two months, the Joined Party's efforts were focused primarily on updating the master plan sets. Thereafter, the Joined Party was instructed to work on customer plans. The Petitioner provided the Joined Party with customer requested changes to the master plan that the Joined Party incorporated into a set of customized construction drawings.
10. The Petitioner determined the scope and sequence of the Joined Party's work. The Joined Party's work was reviewed by the Petitioner and the Petitioner's engineer. The Joined Party was supervised by an employee of the Petitioner who was responsible for pre-production processes.

The Joined Party met with the supervisor several times each week to review the progress of the work.

11. The Joined Party did not have his own business. He did not advertise his services to the general public. During the time the Joined Party performed services for the Petitioner, the Joined Party devoted 40 hours per week to the work. The Petitioner did not restrict the Joined Party from working for a competitor.
12. The Petitioner terminated the relationship with the Joined Party when the Petitioner decided to hire another full time drafter. The Petitioner did not hire the Joined Party for the full time position because the Petitioner did not think the Joined Party was the right person for the job.

Conclusions of Law:

13. 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.
14. 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).
15. 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).
16. 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.
17. 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.

18. 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.
19. 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.
20. The record reflects the Petitioner exercised sufficient control over the details of the work to establish an employer-employee relationship. The Petitioner assigned specific tasks to the Joined Party, and prioritized the work to be performed. The Joined Party was required to perform the work in a manner that was dictated by the Petitioner or the Petitioner’s engineer. The Joined Party’s work was supervised. The Petitioner supplied the work space, equipment and supplies needed to perform the work. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker’s status is the employing unit’s right of control over the manner in which the work is performed. The Court, quoting Farmer’s and Merchant’s Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: “[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor.”
21. It was not shown that the Joined Party was engaged in a distinct occupation or business. The record demonstrates instead that the Joined Party was unemployed for some 18 months and was seeking full time employment. The Joined Party had no expenses in connection with the performance of the work. Everything that was needed for the Joined Party to perform the work was provided by the Petitioner.
22. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate and method of pay. The Joined Party was required to sign and date an invoice that was prepared by the Petitioner. The Joined Party was paid by time and not by the job. These factors are 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.
23. The Petitioner’s business is semi-custom home building. At the time the Joined Party performed his services for the Petitioner, the Petitioner employed another drafter. The Joined Party performed the same duties as the Petitioner’s permanent employee. The work performed by the Joined Party was an integral and necessary part of the Petitioner’s business.
24. Although the Joined Party was originally engaged for a specific period of time, the relationship became one of an indefinite duration that either party could terminate at any time without incurring liability. This factor is indicative of an employer-employee relationship. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court, quoting 1Larson, Workmens’ Compensation Law, Section 44.35, stated: “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.”
25. It is concluded that the services performed for the Petitioner by the Joined Party as a drafter constitute insured employment.

Recommendation: It is recommended that the determination dated August 11, 2011, be AFFIRMED.

Respectfully submitted on February 28, 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 ken z 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:

February 28, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party:

CHARLES MATJOURANIS
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