

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

**PETITIONER:**

Employer Account No. - 1147862  
HEMISPHERE TITLE COMPANY  
14160 PALMETTO FRONTAGE RD STE 12  
MIAMI FL 33016

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-119951L**

**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 15, 2011, is MODIFIED to reflect additional gross wages in the amount of \$47,323.75 rather than additional gross wages of \$99,192.73. 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 *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:

HEMISPHERE TITLE COMPANY  
14160 PALMETTO FRONTAGE RD STE 12  
MIAMI FL 33016

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

DEPARTMENT OF REVENUE  
ATTN: VANDA RAGANS - CCOC #1 4624  
5050 WEST TENNESSEE STREET  
TALLAHASSEE FL 32399

MIAMI TAX OFFICE  
ATTN: DOUGLAS CAMPBELL  
8175 NW 12TH STREET SUITE 425  
MIAMI FL 33126-1831

TURNER & ASSOCIATES LLP  
ATTN: STEPHEN C ENRIQUEZ CPA  
15291 NORTHWEST 60TH AVE SUITE 100  
MIAMI LAKES FL 33014

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143

**PETITIONER:**

Employer Account No. - 1147862  
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**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-119951L**

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Deputy Director,  
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 15, 2011.

After due notice to the parties, a telephone hearing was held on January 31, 2012. The Petitioner, represented by the Petitioner's Certified Public Accountant, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor III.

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 constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, 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 60BB-2.025, Florida Administrative Code.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

**Findings of Fact:**

1. The Petitioner is a subchapter S corporation which operates a title company. The Petitioner was selected by the Department of Revenue for an audit of the Petitioner's books and records for 2009 to ensure compliance with the Unemployment Compensation Law.
2. The audit was performed at the office of the Petitioner's Certified Public Accountant on February 7, 2011.
3. The audit revealed that the Petitioner has one corporate officer who is active in the business, Patricia Gonzalez. During 2009 the Petitioner reported wages of \$6,500 for Patricia Gonzalez and paid unemployment compensation tax on that amount. The tax auditor adjusted the amount of wages for Patricia Gonzalez by adding the ordinary business income attributed to the corporate officer on Schedule K-1 of the Petitioner's Form 1120S, *U.S. Income Tax Return for an S Corporation*, in the amount of \$35,399. The Petitioner does not contest the additional wages for Patricia Gonzalez.
4. The audit revealed that the Petitioner paid Christmas bonuses to three employees, in the total amount of \$1,590, which were not reported as wages for the three employees. The tax auditor added the bonuses to the total wages received by the three employees. The Petitioner does not contest the reclassification of the bonuses as wages.
5. The Petitioner issued nine 1099 forms in 2009. The tax auditor examined the forms but did not ask the Petitioner's Certified Public Accountant about the individuals to whom the 1099s were issued. The total of the nine 1099 forms is \$62,203.73 and the tax auditor reclassified all of those payments as wages.
6. One of the 1099 forms was issued to Jorge L. Fors, Esq. in the amount of \$7,231.15. Jorge L. Fors is an attorney who performed legal services for the Petitioner during 2009 as Jorge L. Fors, P.A. Jorge L. Fors, P.A. maintains a law office that is located at an address that is separate from the Petitioner's business location. Jorge L. Fors, P.A. submitted an invoice to the Petitioner for payment of services rendered.
7. One of the 1099 forms was issued to Ana L. Mirabal in the amount of \$4,150. Ana L. Mirabal is an individual who cleaned the Petitioner's offices after regular business hours. Ana Mirabel billed the Petitioner at the beginning of each month for the cleaning services which she performed.
8. On occasion the Petitioner performs services as the closing agent on real estate transactions. As the closing agent the Petitioner disburses the commissions earned by Realtors. At the end of 2009 the Petitioner issued 1099 forms to those Realtors. A *Form 1099-MISC* was issued to Keith Penny in the amount of \$9,202, Leslie Espinosa in the amount of \$3,783.20, Stella Penagos in the amount of \$3,656, and Xenia Rojas in the amount of \$11,367.50, all of which were for commissions disbursed during closing. The tax auditor reclassified each of those payments as wages.
9. The Petitioner issued a *Form 1099-MISC* in the amount of \$10,334.75 to Irenes Morales who performed services for the Petitioner as a part time worker. The tax auditor reclassified the payments made to Irenes Morales as wages. The Petitioner acknowledges that Irenes Morales was improperly classified as an independent contractor and does not contest the reclassification to employee by the tax auditor.
10. The Department of Revenue issued a *Notice of Proposed Assessment* on August 15, 2011, showing additional gross wages in the amount of \$99,192.73. The Petitioner's Certified Public Accountant filed a timely protest by letter dated August 17, 2011.
11. Pursuant to the Petitioner's protest a telephone hearing was scheduled to be held on December 19, 2011. The *Notice of Hearing Before Special Deputy* instructed the parties to provide the name and

telephone number of the person to be contacted for the hearing. The Petitioner's Certified Public Accountant complied with that instruction. On December 19, 2011, the special deputy unsuccessfully attempted to contact the Certified Public Accountant at the telephone number provided. The Certified Public Accountant was prevented from participating in the hearing due to illness. On December 20, 2011, the Certified Public Accountant requested that the appeal be reopened.

### Conclusions of Law:

12. Rule 60BB-2.035, Florida Administrative Code, provides:
  - (18) 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.
13. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.
14. The Petitioner did not participate in the December 19, 2011, hearing due to illness. The Petitioner exercised due diligence in promptly requesting that the protest be reopened. Thus, good cause has been established.
15. The Petitioner does not contest the tax auditor's finding that additional wages were paid to the active corporate officer, Patricia Gonzalez, in the amount of \$35,399. The Petitioner does not contest the reclassification of bonuses paid to three employees totaling \$1,590 as wages. The Petitioner does not contest the reclassification of the wages in the amount of \$10,334.75 paid to the part time employee, Irenes Morales. Thus, the Petitioner does not contest the reclassification of payments in the total amount of \$47,323.75 as wages.
16. The Petitioner does contest the reclassification of the payments made to the Petitioner's attorney and does contest the reclassification of the commissions disbursed to Realtors when the Petitioner provided services as closing agent.
17. The issue of 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.
18. 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).
19. 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 Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

20. 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.
21. 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.
22. 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.
23. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
24. Although the *Form 1099-MISC* was issued by the Petitioner to its attorney in the name of Jorge L. Fors, Esq., the correct legal entity is Jorge L. Fors, P.A., as shown on an invoice entered into evidence. Jorge Fors operates a law practice that is separate and distinct from the Petitioner's business. Thus, it is concluded that the services performed for the Petitioner by Jorge Fors do not constitute employment.
25. The evidence reveals that the Realtors did not perform any services for the Petitioner. As closing agent the Petitioner merely disbursed the commissions that were actually paid by the parties to the real estate transactions. The disbursement of commissions by the Petitioner does not constitute the payment of wages.



26. The total of the payments made to the Realtors and to the Petitioner's attorney, which were incorrectly reclassified as wages by the tax auditor, is \$51,868.98.

**Recommendation:** It is recommended that the determination dated August 15, 2011, be MODIFIED to reflect additional gross wages in the amount of \$47,323.75 rather than additional gross wages of \$99,192.73. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on February 2, 2012.



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R. O. SMITH, Special Deputy  
Office of Appeals