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

**PETITIONER:**
Employer Account No. - 0398029
DEWHURST ASSOCIATES
939 CLINT MOORE RD
BOCA RATON FL 33487-2802

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2012-18826L**

**O R D E R**

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 December 22, 2011, is MODIFIED to reflect a retroactive date of October 13, 2009. 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 **June, 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.

Shanedra 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 June, 2012.**

Shanedra Y. 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 347 CALDWELL BUILDING
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**RESPONDENT:**
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

# RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant 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 December 22, 2011

After due notice to the parties, a telephone hearing was held on March 20, 2012. The Petitioner, represented by its Executive Vice President, 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 as field superintendent constitute insured employment, and if so, the effective date of liability, pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner is a corporation formed in 1971 for the purpose of operating a commercial general contracting business. The Petitioner is a certified general contractor in Florida. The Petitioner hires subcontractors to perform construction work. The Petitioner utilizes project managers and field superintendents to oversee the work of the subcontractors. The Petitioner considers some of its field superintendents to be employees and some of its field superintendents to be independent contractors. The superintendents classified as independent contractors are hired for a specific

project and are not restricted from working for other contractors. The superintendents classified as employees may work on more than one project at a time, depending upon the size of the project, and are not allowed to work for other contractors.

2. The Joined Party was employed by the Petitioner as a field superintendent from July 2007, until early 2009. As an employee, the Joined Party was paid at a rate of $25 per hour and received fringe benefits, such as health insurance, sick pay, vacation pay, and a 401K retirement plan. The Joined Party was laid off due to a lack of work.

3. In October 2009, the Petitioner contacted the Joined Party and offered him work as a field superintendent on one of the Petitioner's projects. The Joined Party was told that he would be hired as a subcontractor, and not as an employee. At the time of the offer, the claimant was unemployed. On October 9, 2009, the Joined Party met with the Petitioner's vice president/director of construction. The Joined Party was presented with a letter agreement dated October 8, 2009, which he signed.

4. The agreement provides that the Joined Party is being hired as an independent contractor. The stated term of the agreement is eight weeks. The agreement provides that the Joined Party will be paid a salary of $1,200 per week, consisting of a base salary of $1,000, FICA of $77, COBRA of $70, and a car allowance of $53. The agreement states that overtime will be paid at a rate of $40 per hour, up to eight hours per week. The agreement provides that the Petitioner will supply the Joined Party with a cellular telephone, laptop/notebook, and company shirts. The agreement provides that the Joined Party will be considered for a permanent position as a full-time employee in the event the Petitioner's business needs warrant an additional full-time position.

5. The Joined Party performed services as a field superintendent under the October 8, 2009, letter agreement from October 13, 2009, until the conclusion of the project, a period of approximately three months.

6. In October 2010, the Petitioner again contacted the Joined Party and offered him work as a field superintendent on another of the Petitioner's projects. The parties entered into a letter agreement dated October 22, 2010, the terms of which are identical to the prior letter agreement, except that the duration of the 2010 agreement is eighteen (18) weeks.

7. The Joined Party worked as a field superintendent under the 2010 agreement from November 2010, until the completion of the project in 2011. After completion of that project, the Joined Party performed field superintendent services for the Petitioner on a project located in Tampa, Florida. The parties did not enter into another written agreement. The Joined Party continued to work under the same terms and conditions, except that the Petitioner also provided the Joined Party with a hotel room and a weekly stipend of $250, because the project was located a considerable distance from the Joined Party's residence. The Joined Party performed services on the Tampa project for five or six months.

8. Approximately one and one-half months after the completion of the Tampa project, the Petitioner hired the Joined Party for another project near the Joined Party's residence. As of the date of the hearing, the Joined Party continues to perform services for the Petitioner on that project.

9. The Joined Party's duties under the various written and verbal agreements were the same as his duties as an employee. The Joined Party was responsible for overseeing the operations of the subcontractors to ensure that the work progressed in accordance with the project schedule, that the quality of the work met the project specifications, and that applicable safety regulations were

followed. The Joined Party did not require any training. He was familiar with industry standards for field superintendents and with the expectations of the Petitioner, based upon his previous employment with the Petitioner.

10. The Joined Party's services were performed at the project sites. On occasion, the Joined Party visited the Petitioner's office for a meeting or to pick-up paperwork. The Joined Party was expected to be at the job site whenever construction work was being performed. The working hours were established at the outset of a project by agreement between the Petitioner and the Petitioner's client.

11. The Petitioner furnished a laptop, software program, cellular telephone, company shirts, and hard hat for the Joined Party's use in performing the work. Additionally, the Petitioner provided the Joined Party with business cards identifying the Joined Party as a superintendent and a company credit card for use in purchasing incidental materials for the job site.

12. The Joined Party reported to a project manager. The Joined Party completed a daily report of job site activities that he submitted electronically to the project manager on a daily basis. If a question arose on the job site that the Joined Party could not answer, or if the Joined Party had an issue with a subcontractor that he could not resolve, the Joined Party referred the matter to the project manager. The project manager made periodic visits to the job site. If the project manager thought some aspect of the work needed to be redone or replaced, he would tell the Joined Party how he wanted it done.

13. The Petitioner paid the Joined Party on a weekly basis, at a rate of $30 per hour for regular hours and $40 per hour for overtime hours. The Joined Party was required to obtain authorization from the project manager to work overtime. The Joined Party completed an electronic timesheet and submitted it to the Petitioner on a weekly basis.

14. The Petitioner did not withhold taxes from the Joined Party's pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC. The claimant did not receive fringe benefits such as sick pay, vacation pay, or holiday pay.

15. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him.

16. The Joined Party did not have his own business, occupational license, contractor's license, workers' compensation insurance, or business liability insurance. The Joined Party did not advertise his services to the general public. The Joined Party was not restricted from performing services for others; however, the Petitioner expected that the Joined Party would only perform services for others outside of the hours the Joined Party was required to devote to the Petitioner's projects. During the time the Joined Party performed services for the Petitioner, the Joined Party did not perform similar services for others.

17. Either party had the right to terminate the relationship at any time without penalty or liability.

18. The Joined Party filed a claim for unemployment compensation benefits effective October 30, 2011. When the Joined Party did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.

19. On December 22, 2011, the Department of Revenue issued a determination holding that the services performed by the Joined Party as a field superintendent constitute insured employment retroactive to November 15, 2010. The Petitioner filed a timely protest.

**Conclusions of Law:**

20. 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.

21. 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).

22. 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).

23. 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.

24. 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.

25. 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.

26. 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.

27. The written agreements between the parties state that the Joined Party is an independent contractor. A statement in an agreement that the existing relationship is that of an independent contractor is not dispositive of the issue. Lee v. American Family Assurance Company, 431 So.2d 249 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So. 2d 131 (Fla. 1972), a case involving an independent contractor agreement that specified the worker was not to be considered an employee, 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."

28. The work performed by the Joined Party required a high degree of knowledge and skill. Courts have noted the particular difficulty in determining the extent of control over the activities of a professional person or highly skilled worker. See Florida Gulf Coast Symphony, Inc. v. Department of Labor and Employment Security, 386 So.2d 259 (Fla. 2d DCA 1980); Kay v. General Cable Corp., 144 F.2d 653 (3d Cir. 1944); Carnes v. Industrial Commission, 73 Ariz. 264, 240 P.2d 536 (1952). The engaging party's control "must necessarily be more tenuous and general than the control over nonprofessional employees." James v. Commissioner, 25 T.C. 1296, 1301 (1956).

29. In this case, the Petitioner exercised sufficient control over the Joined Party's work to support a finding that the Joined Party was an employee of the Petitioner. The Petitioner determined the rate and method of payment. The Petitioner determined where and when the work was to be performed. The work had to be performed at the Petitioner's job sites and, on occasion, at the Petitioner's office. The Petitioner, in conjunction with the Petitioner's client, determined the working hours. The Joined Party was required to be on site while construction activities were in progress. The Joined Party performed his duties in the same manner as he had performed them as an employee of the Petitioner. The Joined Party reported to and took direction from the Petitioner's project manager. The Joined Party was required to personally perform the work.

30. The Petitioner furnished all of the instrumentalities needed to perform the work. The Joined Party used his own vehicle to travel to the job sites; however, the Joined Party's pay included an allowance for the use of his vehicle.

31. The Joined Party was paid by time, and not by the job. This factor is 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.

32. The Joined Party did not have his own business, occupational license, contractor's license, or business liability insurance. He did not advertise his services to the general public. The Joined Party had no financial risk or expenses in connection with the performance of his services for the Petitioner.

33. The Petitioner operates a general contracting business. As a field superintendent, the Joined Party supervised the Petitioner's subcontractors. The duties performed by the Joined Party under the written and verbal agreements were the same duties that he performed as an employee. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business. As the court stated in Hilldrup Transfer & Storage of New Smyrna Beach, Inc. v. Department of Labor and Employment Security, 447 So.2d 414 (Fla. 5th DCA 1984), "if the work performed in

the relationship under consideration is a part of the principle's business, this factor indicates an employment status, even if the work requires a high level of skill to perform it."

34. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

35. The determination in this case holds the Petitioner liable for payment of unemployment compensation taxes retroactive to November 15, 2010. However, the record shows the Joined Party has worked for the Petitioner since October 13, 2009. Therefore, the correct retroactive date is October 13, 2009.

**Recommendation:** It is recommended that the determination dated December 22, 2011 be MODIFIED to reflect a retroactive date of October 13, 2009. As MODIFIED, the determination is AFFIRMED.

Respectfully submitted on May 21, 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 envió 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:**
**May 21, 2012**

Copies mailed to:
Petitioner
Respondent
Joined Party

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