

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250**

PETITIONER:

Employer Account No. - 3159101
THOMAS J. CONWAY
C/O HEATHER GAYLE
2819 NEEDLES CT
GREEN COVE SPRINGS FL 32043-5214

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0019 3454 36-01**

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 May 31, 2013, is REVERSED.

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 4th day of April, 2014.



Magnus Hines

Magnus Hines,
RA Appeals Manager,
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

4.7.14

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 7th day of April, 2014.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
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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**

PETITIONER:

Employer Account No. - 3159101
THOMAS J CONWAY
C/O HEATHER GAYLE
2819 NEEDLES COURT
GREEN COVE SPRINGS FL 32043-5214

**PROTEST OF LIABILITY
DOCKET NO. 0019 3454 36-01**

RESPONDENT:

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

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 May 31, 2013.

After due notice to the parties, a telephone hearing was held on October 28, 2013. The Petitioner, represented by the Petitioner's daughter, appeared and testified. The Respondent, represented by a Department of Revenue Senior 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 working as caregivers constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

ISSUE: Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

Findings of Fact:

1. Thomas Conway is an individual who suffered a disabling stroke in 1997. In 2002 Thomas Conway moved in with his daughter, M. H. Gayle, so that his daughter could provide care for him. M. H. Gayle is employed full time but is able to perform some work from home. A home health care company was engaged to provide care for Thomas Conway while M. H. Gayle was away from home. Medicare paid for the services provided by the home health care company. The

service provided by the home health care company was going to end in 2009 and M. H. Gayle began searching for someone who could provide home health care for Thomas Conway.

2. The Joined Party is an individual with twenty years of medical experience while employed by the United States National Guard. In 2009 the Joined Party was attempting to start a business in which she would provide home health services for clients. The Joined Party was referred to M. H. Gayle as an individual who could provide home care for Thomas Conway.
3. M. H. Gayle met with the Joined Party to discuss the prospect of the Joined Party providing services as a caregiver for Thomas Conway. M. H. Gayle explained that she was looking for someone who would be with her bedridden father while she was working away from home, to prepare lunch for her father, and do some laundry and housecleaning. Initially, M. H. Gayle and the Joined Party agreed that the Joined Party would perform services on a part time trial basis and they agreed upon an hourly rate of pay that was acceptable to both parties. They agreed on a part time work schedule that would meet the needs of Thomas Conway. The Joined Party began performing services on or about June 9, 2009. No payroll taxes were withheld from the pay and at the end of 2009 the money paid to the Joined Party was not reported by M. H. Gayle or Thomas Conway on Form 1099-MISC or on Form W-2.
4. The type of work performed by the Joined Party for Thomas Conway did not require any training. M. H. Gayle merely showed the Joined Party everything that she did for her father. Everything that was needed to perform the work, such as cooking utensils, food, and supplies were provided.
5. While performing part time care giving services for Thomas Conway in 2009 the Joined Party attempted to find other clients for whom she could provide care giving services. The Joined Party's attempts were not successful because the Joined Party and the other potential clients could not reach an agreement on the hourly rate of pay. Beginning on or about January 1, 2010, the Joined Party agreed to provide care for Thomas Conway on a full time basis, Monday through Friday, from 8 AM until 3:30 PM. The work schedule was based on the needs of Thomas Conway and the fact that M. H. Gayle could work from home for two hours each afternoon and provide care for her father during those hours.
6. In 2010 the Joined Party spoke to the Joined Party's accountant concerning how to handle the tax situation regarding the income from the relationship. The Joined Party told M. H. Gayle that the accountant said that a Form 1099-MISC needed to be completed at the end of the each year listing the amount of the payments made to the Joined Party during the year. The accountant provided a blank Form 1099 for M. H. Gayle to complete. M. H. Gayle took the blank form to her tax preparer, H & R Block, to be completed. H & R Block showed M. H. Gayle how to complete the form so that she could do it herself in future years.
7. M. H. Gayle was pleased with the work performed by the Joined Party and wanted to keep the Joined Party happy. To keep the Joined Party happy M. H. Gayle offered to pay the Joined Party a one week paid vacation and to pay the Joined Party for some holidays each year. The Joined Party accepted that offer and requested additional paid time off in case of illness. M. H. Gayle granted the request. No other benefits, such as health or life insurance, retirement benefits, workers' compensation coverage, or bonuses were provided.
8. The Joined Party did not complete a timesheet and did not submit a bill or invoice for payment. M. H. Gayle was aware of the hours worked by the Joined Party and paid the Joined Party accordingly.
9. A Power of Attorney was granted to M. H. Gayle so that M. H. Gayle could handle the financial affairs of Thomas Conway. Thomas Conway received benefits from the Veterans Administration which were generally used to pay the Joined Party. If there were insufficient funds to pay the Joined Party from the account of Thomas Conway, M. H. Gayle paid the Joined Party from the personal account of M. H. Gayle.

10. At the end of each year a Form 1099-MISC was issued to the Joined Party listing the amount of money paid to the Joined Party from the account of Thomas Conway and a separate Form 1099-MISC was issued to the Joined Party listing the amount of money that was paid by M. H. Gayle. The compensation was identified on the forms as "nonemployee compensation."
11. The Joined Party never complained about being classified as an independent contractor rather than an employee and never requested that taxes be withheld from the pay. The Joined Party's accountant prepared paperwork so that the Joined Party could pay estimated income taxes to the Internal Revenue Service on a monthly basis.
12. On or about March 19, 2013, M. H. Gayle noticed that her father had some sores on his back and told the Joined Party that she had some questions she wanted to ask the Joined Party about the sores. The Joined Party misunderstood and felt that she was being blamed for the sores or that she was being criticized for her work performance. The Joined Party terminated the relationship when she told M. H. Gayle that she believed that it was time for her to move on.

Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner 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.
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). 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.
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 can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
 20. Neither M. H. Gayle nor Thomas Conway operate a business. Thus, the work performed by the Joined Party did not constitute a regular part of the Petitioner's business. Thomas Conway is a bedridden patient who lives in his daughter's home. The fact that the work was performed at the location of Thomas Conway does not establish control on the part of the Petitioner. The work schedule was mandated by the needs of Thomas Conway and by the work schedule of M. H. Gayle. Since the work schedule was not arbitrary there is no showing of control. No tools or equipment were needed to perform the work.
 21. 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).
 22. There was no written agreement or contract between the parties. The agreement between the parties was a simple verbal agreement. From the testimony presented at the hearing it is apparent that it was the intent of the parties to establish a nonemployee relationship. In documentary evidence submitted by the Joined Party the Joined Party refers to Thomas Conway as her "client" rather than as her "employer." The Joined Party sought professional guidance from her accountant concerning how the Joined Party and the Petitioner should handle the payment of compensation to the Joined Party as a nonemployee. The Joined Party even provided the Petitioner with a blank Form 1099-MISC so that the Petitioner could properly report the nonemployee compensation.
 23. M. H. Gayle was not present when the Joined Party provided the majority of care for Thomas Conway. M. H. Gayle did not provide any training other than M. H. Gayle showed the Joined Party how she personally provided care for her father. It was not shown that M. H. Gayle or Thomas Conway controlled how the work was performed. That fact is further demonstrated by the Joined Party's refusal to answer questions concerning the sores on the back of Thomas Conway. As an employee the Joined Party would have been obligated to answer those questions. As an independent contractor the Joined Party had the right to "move on" without answering the questions.
 24. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards

results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

25. It is concluded that the services performed by the Joined Party for the Petitioner do not constitute insured employment.

Recommendation: It is recommended that the determination dated May 31, 2013, be REVERSED.

Respectfully submitted on February 3, 2014.



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 kenx 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 enlipe lan dosye a e endike ke yo te voye kopi yo.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
February 3, 2014

Copies mailed to:

Petitioner

Respondent

Joined Party

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