

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

PETITIONER:

Employer Account No. - 2937574
GLOBAL JETCARE INC
ATTN: BART T GRAY PRESIDENT
16479 RUNWAY DRIVE
BROOKSVILLE FL 34604-6858

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-119939L**

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 October 15, 2012, holding that the Joined Party's services as a Flight Nurse were performed as an employee 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 _____ day of May, 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 May, 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:

GLOBAL JETCARE INC
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LISA KRAMER
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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RESPONDENT:

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DOCKET NO. 2012-119939L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: SECRETARY,
Bureau Chief,
Reemployment Assistance 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 October 15, 2012.

After due notice to the parties, a telephone hearing was held on February 6, 2013. The Petitioner, represented by the Petitioner's 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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation, formed April 6, 2009, which operates an air ambulance service. The Petitioner utilizes registered nurses, paramedics, and therapists to provide medical services to patients during transport.
2. The Joined Party is a registered nurse. In 2011, the Joined Party was employed on a full time basis as a hospital emergency room nurse. The Joined Party had an interest in providing in-flight medical services and learned of the Petitioner's business through an acquaintance. The Joined Party contacted the Petitioner and met with the Petitioner's Chief Flight Nurse. The Joined Party was informed of the business operations, the general duties of a flight nurse, and the rate of compensation. The Joined Party was told that she would be considered an independent contractor.

The Joined Party provided her medical credentials to the Petitioner, signed-up for the Petitioner's call list, and executed an *Independent Contractor Agreement*.

3. The Joined Party performed services on two or three flights for the Petitioner in the third quarter 2011. Thereafter, the Joined Party suffered an injury and was unable to work. At that time her name was removed from the Petitioner's call list. The Joined Party contacted the Petitioner when she was able to work again and executed another *Independent Contractor Agreement*, for the duration of one year effective January 1, 2012. The Joined Party performed services as a flight nurse for the Petitioner in the third quarter 2012.
4. The *Independent Contractor Agreement* identifies the Joined Party as "Contractor" and provides that the agreement is not an employment agreement. The agreement states that the medical services will be provided in accordance with the Petitioner's Medical Operations Manual. The agreement states that the Joined Party has full control over how the services will be performed as long as the services meet the Petitioner's standards. The agreement allows the Joined Party to hire assistants to perform the services covered under the agreement.
5. The Joined Party did not receive training from the Petitioner. The Joined Party was given an orientation of the aircraft and the medical equipment installed in the aircraft. The Petitioner maintained a Medical Operations Manual containing standardized protocols, a copy of which was kept on board the aircraft. The Petitioner's Medical Director provided the Joined Party with a basic outline of the patient's needs.
6. The Joined Party did not have set hours for work as a flight nurse. The Petitioner maintained a call list of nurses and other medical personnel who were contacted when their services were needed. The Joined Party was free to accept or decline any flight offered. If the Joined Party was not available for a flight, the Petitioner contacted another registered nurse. If the Joined Party accepted a flight, she was told the time to meet for the flight departure, the medical diagnosis of the patient, and the basic services that would be required for the transport of the patient.
7. All of the Joined Party's services were performed aboard the Petitioner's aircraft or in an ambulance used to transport the patient to and from the aircraft. The Petitioner provided most of the equipment needed for the care of the patient. In some instances, the patient's physician provided medication, tubing, and other supplies. The Joined Party used her personal stethoscope, tape, clipboard, and writing pens. The Joined Party was not required to wear a uniform. The Joined Party was asked to wear a gray scrub top to coordinate with the Petitioner's company colors. The Joined Party was not required to wear a badge or other form of identification associating her with the Petitioner.
8. The Joined Party was not restricted from performing similar services for competitors of the Petitioner.
9. The Joined Party did not operate a business.
10. The Joined Party was paid on a per patient basis. After a flight, the Joined Party completed forms relating to the patient's care and status and returned them to the Petitioner. A week or two later, the Petitioner mailed a check to the Joined Party. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party did not receive bonuses, sick pay, vacation pay, holiday pay, or other fringe benefits. The Petitioner maintained professional liability and worker's compensation insurance that covered the Joined Party.
11. As of January 1, 2013, the Petitioner requires workers performing medical services for the Petitioner, including flight nurses, to complete a three to four day training program. The workers are also required to wear a uniform and identification badge associating them with the Petitioner. In connection with the increased requirements placed upon the workers, the Petitioner has reclassified all workers providing medical services as employees. The Joined Party has been employed by the Petitioner as the Petitioner's Chief Flight Nurse since December 2012.

Conclusion of Law:

12. 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.
13. 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).
14. 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).
15. 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.
16. 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.
17. 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.
18. 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.

19. The parties entered into two written agreements evidencing an intent to enter into an independent contractor relationship. In Keith v. News & Sun Sentinel Co., 667 So. 2d 167 (Fla. 1995), the Florida Supreme Court held that in determining the status of a working relationship, the agreement of the parties should be honored, unless other provisions of the agreement, or the actual practice of the parties demonstrates that the agreement is not a valid indicator of the status of the working relationship.
20. The Joined Party is a skilled professional who is engaged in a distinct profession or occupation. 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).
21. 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."
22. It was not shown in this case that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship. The Petitioner did not determine what work was performed, when the work was performed, or how the work was performed. The Joined Party did not have set hours for work. The Joined Party was free to accept or decline an assignment of work. The Joined Party did not receive any training from the Petitioner. The Joined Party's work was not supervised. By the agreements, the Joined Party had the right to hire others to assist her in the performance of the work. The Joined Party was not restricted from performing similar services for a competitor of the Petitioner.
23. The Petitioner did not withhold taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits to the Joined Party.
24. It is concluded that the services performed for the Petitioner by the Joined Party as a flight nurse do not constitute insured work.

Recommendation: It is recommended that the determination dated October 15, 2012, be REVERSED.

Respectfully submitted on February 25, 2013.

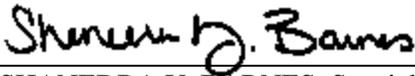


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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 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:
February 25, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

LISA KRAMER
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SPRING HILL FL 34608

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