

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

PETITIONER:

Employer Account No. - 2613831
TEAM MELLMAN CHIROPRACTIC INC
ATTN DR LEON MELLMAN
408 E HALLANDALE BEACH BLVD #B
HALLANDALE BEACH FL 33009-5563

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-41684L**

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 March 5, 2012, be MODIFIED to reflect excess wages of \$27,529.67 and taxable wages of \$17,584.83. It is also ORDERED That the determination be 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 November, 2012.



Altemese Smith,
Assistant Director,
Reemployment Assistance 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 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 November, 2012.

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:

TEAM MELLMAN CHIROPRACTIC INC
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408 E HALLANDALE BEACH BLVD #B
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CORAL SPRINGS TAX OFFICE
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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

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**PROTEST OF LIABILITY
DOCKET NO. 2012-41684L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
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 March 5, 2012.

After due notice to the parties, a telephone hearing was held on September 27, 2012. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Auditor testified as a witness.

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.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which operates a chiropractic medical office.
2. The Petitioner has used the services of the Petitioner's witness, the Certified Public Accountant, since August 2009. In January of each year the Petitioner delivers its books and records to the Certified Public Accountant so that the accountant can do the after-the-fact bookkeeping for the prior year. The Certified Public Accountant also prepares the quarterly tax reports for Florida unemployment tax, the quarterly federal tax reports, and the year end federal tax return for the corporation.

3. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2010 tax year to ensure compliance with the Florida Unemployment Compensation Law. The Tax Auditor contacted the Petitioner concerning the audit and, in response, the Petitioner requested that the audit be conducted at the location of the Petitioner's Certified Public Accountant.
4. The Tax Auditor conducted the audit at the office of the Certified Public Accountant and examined the individual earnings record, cash disbursements journal, payroll ledger, payroll summaries, general ledger, income statement, balance sheet, Florida quarterly unemployment tax reports, annual federal unemployment tax report, employer's federal quarterly tax report, Form W-2, Form W-3, and the Petitioner's federal income tax return.
5. The Petitioner only issued one Form W-2, which was for the Petitioner's principal, the doctor. The Petitioner did not issue any 1099 forms. The total wages reported for the doctor were \$25,000. The Petitioner correctly paid tax on the first \$7,000 in wages.
6. The Tax Auditor discovered recurring payments made to four individuals, Yehuda Mizrahi, Elvis Montoya, Edward Tucker, and Adam Sawyer. The total payments to Yehuda Mizrahi for 2010 were \$2,048.50. The total payments made to Elvis Montoya for 2010 were \$6,463.08. The total payments made to Edward Tucker for 2010 were \$34,529.67. The total payments made to Adam Sawyer for 2010 were \$2,073.25. A 1099 form had not been issued to any individual.
7. The Tax Auditor asked the Certified Public Accountant about the payments, however, the Petitioner was not able to explain the nature of the payments. The Tax Auditor asked for the social security numbers for the workers. The Certified Public Accountant was not able to produce social security numbers for Adam Sawyer and Edward Tucker.
8. Since the Petitioner did not provide any information concerning the duties performed by the four workers and did not provide any information that the workers were bona fide independent contractors, the Tax Auditor made an adjustment to reclassify the workers as employees subject to the Florida Unemployment Compensation Law.
9. The Tax Auditor entered the information on the four workers into the Department of Revenue computer system amounting to additional gross wages of \$45,114.50 for the year. The computer system identifies workers by social security number rather than by name. Since there was no social security number available for Edward Tucker the computer system identified the entire total paid to Edward Tucker as taxable wages rather than just the first \$7,000.
10. On March 5, 2012, the Department of Revenue issued a *Notice of Proposed Assessment* showing additional gross wages of \$45,114.50, excess wages of \$9,700.81, and taxable wages of \$35,413.69. The Petitioner filed a timely protest on March 19, 2012.

Conclusions of Law:

11. 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.
12. 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).
13. 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.

14. 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.
15. 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.
16. 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.
17. 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.
18. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
19. The Petitioner's witness testified that he has never met or spoken to any of the four individuals who have been reclassified as employees by the Tax Auditor. He testified that prior to the hearing he was informed by the doctor that two of the individuals are temporary office workers, one individual does equipment repairs, and one individual does insurance billing. The witness's only knowledge of the terms and conditions under which the four individuals performed services for the Petitioner is what the doctor told the witness.
20. Section 90.801(1)(c), Florida Statutes, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or

evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.

21. The evidence presented by the Petitioner is not sufficient to establish that the determination of the Department of Revenue holding that services performed by Yehuda Mizrahi, Elvis Montoya, Edward Tucker, and Adam Sawyer constitute insured employment, is in error. However, there is sufficient evidence to conclude that a portion of the wages earned by Edward Tucker are excess wages.
22. Section 443.1217, Florida Statutes, provides:
 - (1) The wages subject to this chapter include all remuneration for employment, including commissions, bonuses, back pay awards, and the cash value of all remuneration paid in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash must be estimated and determined in accordance with rules adopted by the Agency for Workforce Innovation or the state agency providing tax collection services. The wages subject to this chapter include tips or gratuities received while performing services that constitute employment and are included in a written statement furnished to the employer under s. 6053(a) of the Internal Revenue Code of 1954. As used in this section only, the term “employment” includes services constituting employment under any employment security law of another state or of the Federal Government.
 - (2) For the purpose of determining an employer’s contributions, the following wages are exempt from this chapter:
 - (a)1. Beginning January 1, 2010, that part of remuneration paid to an individual by an employer for employment during a calendar year in excess of the first \$7,000 of remuneration paid to the individual by an employer or his or her predecessor during that calendar year, unless that part of the remuneration is subject to a tax, under a federal law imposing the tax, against which credit may be taken for contributions required to be paid into a state unemployment fund.
23. The wages paid to Edward Tucker during 2010 are \$34,529.67 of which only the first \$7,000 are taxable wages. Edward Tucker was the only individual out of the four reclassified employees who received wages of \$7,000 or more during 2010. As stated on the *Notice of Proposed Assessment* the total gross wages are \$45,114.50. The correct amount of excess wages is \$27,529.67 and the correct amount of the taxable wages is \$17,584.83.

Recommendation: It is recommended that the determination dated March 5, 2012, be MODIFIED to reflect excess wages of \$27,529.67 and taxable wages of \$17,584.83. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on October 1, 2012.

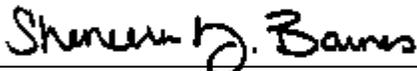


R. O. SMITH, Special Deputy
Office of Appeals

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 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:
October 1, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

CORAL SPRINGS TAX OFFICE
ATTN JOYCE FLAKES TAX SPECIALIST II
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DEPARTMENT OF REVENUE
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