

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

PETITIONER:

Employer Account No. - 3062433
GURMIT S CHEEMA
DBA: CHEEMA TRUCKING
P O BOX 1721
ENGLEWOOD FL 34299-4143

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-41685L**

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 January 31, 2012, is MODIFIED to reflect a retroactive date of January 1, 2008. 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 **September, 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 September, 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:

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JOHN D SANDERS
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DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
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DOR BLOCKED CLAIMS UNIT
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TALLAHASSEE FL 32314-6417

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
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**PROTEST OF LIABILITY
DOCKET NO. 2012-41685L**

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 January 31, 2012.

After due notice to the parties, a telephone hearing was held on July 24, 2012. The Petitioner 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 and other individuals working as truck drivers constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is an individual who operates a cross country trucking company as a sole proprietorship. The Petitioner began the business in California in approximately 2001. In 2003 the Petitioner moved to Florida and began operating the business from Florida. Initially, the Petitioner and his wife drove the Petitioner's trucks and also brokered loads to other drivers who

owned their own trucks. The Petitioner purchased other trucks and hired drivers to drive the Petitioner's trucks. By January 2008 the Petitioner owned approximately ten trucks and paid the drivers in excess of \$1,500 during the first quarter 2008.

2. The Joined Party has been employed as a truck driver for several years for other companies. One of the Joined Party's former co-workers went to work for the Petitioner and in 2011 informed the Joined Party that the Petitioner was hiring. The Joined Party contacted the Petitioner and completed an application.
3. The Petitioner interviewed the Joined Party and asked about the Joined Party's past experience as a truck driver. The Petitioner then required the Joined Party to complete a road test to determine if the Joined Party was a competent driver and to determine if the Joined Party knew how to complete a log book. After the Joined Party passed a drug test paid for by the Petitioner, the Petitioner told the Joined Party that the Petitioner paid the drivers a flat rate for trips to and from California. For trips to northern California the pay rate was \$1,500 and for trips to southern California the pay rate was \$1,400. The Joined Party accepted the offer of work.
4. The Joined Party began work for the Petitioner on September 23, 2011. There was no written contract or agreement.
5. The Petitioner has written rules and policies which the drivers are required to follow. The Petitioner did not provide a copy of the rules and policies to the Joined Party.
6. The Joined Party worked under the same terms and conditions as the other truck drivers who drive the Petitioner's trucks.
7. The Petitioner provided the truck which the Joined Party drove. The Petitioner was responsible for paying for the fuel, maintenance, and repairs. The Petitioner provided the insurance and paid for all other costs of operating the truck. The Joined Party did not have any expenses in connection with the work other than minor expenses such as the cost of purchasing a log book or maps.
8. The Petitioner determined when the Joined Party was required to pick up the loads and when he was required to deliver the loads based on the needs of the Petitioner's customers. The Joined Party was not allowed to transport any load that was not authorized by the Petitioner. Sometimes the Petitioner assigned two drivers to the same truck so that the drivers could take turns driving to expedite the delivery.
9. The Joined Party was required to personally perform the work. The Joined Party was not allowed to hire others to perform the work for him.
10. The Petitioner requires the drivers to call in by at least 10 AM each morning to report their location. The Joined Party used his cell phone to contact the Petitioner. The Petitioner frequently contacted the Joined Party while the Joined Party was on the road to ask how things were going. If the truck had mechanical problems the Joined Party was required to contact the Petitioner so that the Petitioner could tell the Joined Party where to have the truck repaired.
11. The Petitioner does not withhold any payroll taxes from the pay of the drivers and does not provide any fringe benefits such as health insurance, paid holidays, or paid vacations. The Petitioner reports the earnings of the drivers on Form 1099-MISC.
12. Either party may terminate the relationship at any time without incurring liability for breach of contract.
13. The Joined Party completed his last trip to California on or about November 14, 2011. During that trip an exhaust stack on the truck was damaged and the Joined Party had it repaired without permission. When the Joined Party notified the Petitioner of the repair the Petitioner inspected the repair work and told the Joined Party that it had not been repaired to the Petitioner's standards and

that the Petitioner needed to have the work redone. Because of the additional repair work the Petitioner refused to pay the Joined Party for the trip. As a result the Joined Party refused to continue working for the Petitioner.

14. The Joined Party filed a claim for unemployment compensation benefits effective November 13, 2011. Although the work which the Joined Party had performed for the Petitioner was not within the base period of the claim an investigation was issued to the Department of Revenue to determine, for adjudication purposes, whether the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
15. During the course of the investigation the Petitioner completed an *Independent Contractor Analysis* form on which the Petitioner stated that the earliest date that any truck driver performed services for the Petitioner was September 23, 2011. The Petitioner provided that incorrect date because the Petitioner misunderstood the question and believed that it pertained only to the Joined Party.
16. On January 31, 2012, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as truck drivers were the Petitioner's employees retroactive to September 23, 2011. The Petitioner filed a timely protest by mail postmarked February 11, 2012.

Conclusions of Law:

17. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as truck drivers 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 Department 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. 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.
24. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
25. There was no written agreement or contract between the Petitioner and the Joined Party. The evidence does not show the existence of any verbal or written agreement establishing that the Joined Party agreed to perform services for the Petitioner as an independent contractor.
26. The Petitioner operates a trucking company which transports freight between California and Florida for the Petitioner's customers. The Joined Party drove the Petitioner's truck to transport the freight for the Petitioner. The work performed by the Joined Party and the other drivers was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.
27. The Petitioner provided the truck and was responsible for the costs of operation including fuel, maintenance, repairs, and insurance. The Joined Party did not have any investment in a business and did not have any expenses in connection with the work.
28. It was not shown that any special skill or knowledge is needed to drive a truck. 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)
29. The Petitioner paid the Joined Party by the job rather than by time worked. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

30. The Petitioner did not directly supervise the Joined Party because the Petitioner does not ride with the drivers. However, the Joined Party was required to remain in contact with the Petitioner while the Joined Party was on the road. The Petitioner determined when and where the Joined Party was required to pick up a load and when and where he was required to deliver the load. The Petitioner determined if the Joined Party drove alone or whether another driver was assigned to share the driving duties. The Petitioner had rules and policies which the drivers were required to adhere to. In VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984) the court stated that it is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration.
31. Either party was free to terminate the relationship at any time without incurring liability for breach of contract. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."
32. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if 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 the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.
33. In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), the Florida Supreme Court addressed a factual situation involving the relationship between a truck driver and a trucking company. In that case the parties entered into a written independent contractor agreement which specified that the driver was not to be considered the employee of the trucking company at any time, under any circumstances, or for any purpose. The driver owned his own truck and leased the trailer from the trucking company. The trailer was to be used by the driver exclusively for hauling freight for the trucking company. The trucking company told the driver where to pick up the freight and where to deliver the freight. The driver had the right to refuse any dispatch. The trucking company paid the driver a percentage of the freight charge for the shipment. Either party could terminate the relationship without cause upon thirty days written notice to the other. The Court concluded, based on these facts, that the driver was an employee of the trucking company.
34. It is determined that the services performed for the Petitioner by the Joined Party and other individuals as truck drivers constitute insured employment.
35. The Petitioner unintentionally provided erroneous information to the Department of Revenue concerning the date that a driver first performed services for the Petitioner. The retroactive date of the determination issued by the Department of Revenue is based on that erroneous information.
36. Section 443.1215, Florida Statutes, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or

2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

37. The Petitioner's testimony reveals that the Petitioner experienced truck driver payroll of at least \$1,500 during a calendar quarter as early as the first calendar quarter 2008. Thus, the Petitioner has established liability for payment of unemployment compensation taxes effective January 1, 2008.

Recommendation: It is recommended that the determination dated January 31, 2012, be MODIFIED to reflect a retroactive date of January 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on July 27, 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
July 27, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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DEPARTMENT OF REVENUE
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DOR BLOCKED CLAIMS UNIT
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