

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

**PETITIONER:**

Employer Account No. - 2354941  
NEW RIVER FINE ART, INC  
ATTEN:LISA BURGESS  
914 EAST LAS OLAS BLVD  
FT LAUDERDALE FL 33301

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2012-62747L**

**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 February 27, 2012, is AFFIRMED.

**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:

NEW RIVER FINE ART, INC  
ATTN:LISA BURGESS  
914 EAST LAS OLAS BLVD  
FT LAUDERDALE FL 33301

DEPARTMENT OF REVENUE  
ATTN: VANDA RAGANS - CCOC #1-4857  
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TALLAHASSEE FL 32399

FLORIDA DEPARTMENT OF REVENUE  
ATTN: JOYCE FLAKES  
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MARGATE FL 33063-7704

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. - 2354941

NEW RIVER FINE ART, INC

ATTEN:LISA BURGESS

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**PROTEST OF LIABILITY**

**DOCKET NO. 2012-62747L**

**RESPONDENT:**

State of Florida

DEPARTMENT OF ECONOMIC

OPPORTUNITY

c/o Department of Revenue

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Assistant Director,  
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 February 27, 2012.

After due notice to the parties, a telephone hearing was held on September 12, 2012. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's bookkeeper, the Petitioner's Certified Public Accountant, and an accountant from the office of the Certified Public Accountant, testified as witnesses. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Auditor III 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 received from the Petitioner.

**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, New River Fine Art, Inc., is a corporation which operates a retail art gallery. Prior to 2006 the individuals who sold the Petitioner's products were classified as employees and were leased through an employee leasing company. In approximately 2006 the Petitioner discontinued using the services of the employee leasing company and paid the sales persons and other workers directly. Although there was no change in the way the workers performed their duties, the Petitioner reclassified the employees as independent contractors.

2. An individual filed a claim for unemployment compensation benefits effective September 1, 2009, claiming to have worked for the Petitioner from April 10, 2006 through June 13, 2008. That individual did not receive credit for earnings with the Petitioner and an investigation was issued to the Department of Revenue to determine if the individual performed services as an employee or as an independent contractor.
3. On February 18, 2009, the Department of Revenue issued a determination holding that persons performing services for New River Fine Art, Inc. as art sales/consultants were the Petitioner's employees retroactive to January 1, 2004. Among other things the determination advised the Petitioner "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter." The Petitioner did not file a protest.
4. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for 2009 to ensure compliance with the Florida Unemployment Compensation Law. The audit was performed at the location of the Petitioner's Certified Public Accountant on March 10, 2011.
5. The Petitioner used the services of a payroll service company to prepare the payroll and to prepare the W-2 forms. During 2009 the Petitioner changed payroll service companies. At the end of 2009 the payroll service companies provided the Petitioner with the W-2 forms. The W-2 forms reported more income than what was actually received by the employees because of overlapping services provided by the payroll service companies. One of the payroll service companies also processed a payment as wages to one of the individuals who was classified by the Petitioner as an independent contractor. The payroll service company withheld payroll taxes from the payment and at the end of the year prepared a W-2 form to report the payment as wages. The Petitioner was not aware of any errors made by the payroll service providers.
6. During the audit the Tax Auditor discovered that the wages which the Petitioner had reported to the Department of Revenue did not agree with the wages which the Petitioner had reported to the Internal Revenue Service on the W-2 forms. The Tax Auditor adjusted the unemployment compensation wages to agree with the W-2 wages. The adjustment did not result in any additional taxes due.
7. The Tax Auditor examined the 1099 forms issued by the Petitioner for 2009. Two of the workers who received a 1099 form, Jule Mummert and Christopher Anderson, performed services for the Petitioner as sales consultants. Based on the February 18, 2009, determination the Tax Auditor reclassified those individuals as employees resulting in additional tax due.
8. Two other workers, Judith Carpenter and Daniel McGowan, were also reclassified as employees by the Tax Auditor resulting in additional tax due. Judith Carpenter performed services as a bookkeeper and Daniel McGowan managed the Petitioner's inventory, shipped the Petitioner's products, installed the artwork, and performed facilities management.
9. By *Notice of Proposed Assessment* mailed to the Petitioner's Certified Public Accountant on February 27, 2012, the Department of Revenue notified the Petitioner that additional tax in the amount of \$33.60 was due as a result of the reclassification of independent contractors to employees. The Petitioner filed a timely written protest by letter dated March 9, 2012.
10. Daniel McGowan signed an *Independent Contractor Services Agreement* on May 21, 2008. The Agreement was for a period of one year with automatic renewal for subsequent years. The Agreement specifies that Daniel McGowan would have the title of "Art Services Manager" and the duties would include, but not be limited to, management of the Petitioner's inventory, installation of artwork, shipping of product, and facilities maintenance. Daniel McGowan was not allowed to subcontract or otherwise delegate his obligations under the Agreement without prior written consent from the Petitioner. Daniel McGowan was to make himself available to the Petitioner for approximately forty hours per week, although the weekly work schedule would vary based on the

Petitioner's schedule. In return for the duties performed by Daniel McGowan the Petitioner would compensate him at the rate of \$2,917 per month, paid in bi-monthly installments on the first and the sixteenth of each month. The rate of pay was based on an annual pay of \$35,000. In addition, the Petitioner agreed to pay Daniel McGowan a commission of 10% of profit on all sales generated by Daniel McGowan on the Petitioner's EBay sales site and that the commissions would be paid on the sixteenth of the month. The Petitioner agreed to pay Daniel McGowan \$125.00 month for expenses and to reimburse him for any additional expenses as long as the expenses were approved by the Petitioner in advance and as long as Daniel McGowan provided documentation. No part of the compensation would be subject to payroll withholding taxes and the Petitioner would report the amounts paid to Daniel McGowan to the Internal Revenue Service on Form 1099-MISC.

11. The *Independent Contractor Services Agreement* provides that from May 21, 2008, until June 15, 2008, Daniel McGowan would be in a training and evaluation period during which he would learn the Petitioner's policies and procedures and would receive training on specifics of the products and the industry. At the end of the training period an evaluation would be performed by the Petitioner at which time Daniel McGowan would be expected to demonstrate an understanding of the company and of the industry.
12. The *Independent Contractor Services Agreement* provides that, unless the Petitioner provides express, written consent, Daniel McGowan "will not accept work, enter into a contract, provide financial support, or accept an obligation, inconsistent or incompatible with his obligations, or the scope of services rendered for Company under this Contractor Agreement, including, but not limited to, directly or indirectly competing with Company in any way, including, without limitation, engaging in competitive research and development activities, or acting as an officer, director, partner, manager, employee, consultant, stockholder, volunteer, lender, principal, or agent of any business enterprise of the same nature as, or which is in direct competition with, any business in which Company is now engaged or in which Company becomes engaged during the term of this Contractor Agreement. Contractor warrants that, to the best of his knowledge, there is no other contract or duty on his part that conflicts with or is inconsistent with this Contractor Agreement. Notwithstanding the above, Contractor is permitted to own up to 1% of the listed or traded stock of any publicly held corporation."
13. The *Independent Contractor Services Agreement* was terminated by the Petitioner during 2009 because the Petitioner was not satisfied with the amount of time that Daniel McGowan devoted to the Petitioner's business.
14. Christopher Anderson signed an *Independent Contractor Services Agreement* on December 30, 2008, as an "Art Consultant." The Agreement was for a period of one year with automatic renewal for subsequent years. The duties were specified to include, but not be limited to, the sale of artwork and the development of new clients for the Petitioner. He agreed to be available to perform the duties forty hours per week although the weekly schedule and hours would vary according to the Petitioner's schedule. The Agreement provides that the Petitioner would pay Christopher Anderson a commission on the first and the sixteenth of each month. The Agreement did not specify how the commission would be computed with the exception of sales made on the Petitioner's EBay sales site, on which the Petitioner would pay a commission of 10% of the selling price for all EBay sales generated by Christopher Anderson. In addition, the Petitioner agreed to reimburse Christopher Anderson for all expenses incurred in connection with the performance of duties, provided that the expenses were approved in writing by the Petitioner, in advance. No part of the compensation would be subject to payroll withholding taxes and the Petitioner would report the amounts paid to Christopher Anderson to the Internal Revenue Service on Form 1099-MISC.

15. The *Independent Contractor Services Agreement* provides that from December 30, 2008, until January 31, 2009, Christopher Anderson would be in a training and evaluation period during which he would learn the Petitioner's policies and procedures and would receive training on specifics of the products and the industry. At the end of the training period an evaluation would be performed by the Petitioner at which time Christopher Anderson would be expected to demonstrate an understanding of the company and of the industry.
16. The *Independent Contractor Services Agreement* provides that, unless the Petitioner provides express, written consent, Christopher Anderson "will not accept work, enter into a contract, provide financial support, or accept an obligation, inconsistent or incompatible with his obligations, or the scope of services rendered for Company under this Contractor Agreement, including, but not limited to, directly or indirectly competing with Company in any way, including, without limitation, engaging in competitive research and development activities, or acting as an officer, director, partner, manager, employee, consultant, stockholder, volunteer, lender, principal, or agent of any business enterprise of the same nature as, or which is in direct competition with, any business in which Company is now engaged or in which Company becomes engaged during the term of this Contractor Agreement. Contractor warrants that, to the best of his knowledge, there is no other contract or duty on his part that conflicts with or is inconsistent with this Contractor Agreement. Notwithstanding the above, Contractor is permitted to own up to 1% of the listed or traded stock of any publicly held corporation."
17. Jule Mummert signed an *Independent Contractor Services Agreement* on October 7, 2006, with the title of "Art Consultant." The Agreement was for a period of one year with automatic renewal for subsequent years. The duties were specified to include, but not limited to, the sale of artwork and the development of new clients for the Petitioner. Jule Mummert was required to personally perform the work and she could not subcontract the work or delegate the duties without the Petitioner's prior written consent. The Agreement provides that the Petitioner would pay Jule Mummert a commission on the first and the sixteenth of each month. The Agreement did not specify how the commission would be computed. The Agreement provides that Jule Mummert would be responsible for expenses incurred in connection with the work, however, from time to time, the Petitioner may agree to partially or fully reimburse Jule Mummert for unusual expenses which the Petitioner deems necessary provided that the expenses are approved in writing in advance by the Petitioner. No part of the compensation would be subject to payroll withholding taxes and the Petitioner would report the amounts paid to Jule Mummert to the Internal Revenue Service on Form 1099-MISC.
18. The *Independent Contractor Services Agreement* provides that, unless the Petitioner provides express, written consent, Jule Mummert "will not accept work, enter into a contract, provide financial support, or accept an obligation, inconsistent or incompatible with his obligations, or the scope of services rendered for Company under this Contractor Agreement, including, but not limited to, directly or indirectly competing with Company in any way, including, without limitation, engaging in competitive research and development activities, or acting as an officer, director, partner, manager, employee, consultant, stockholder, volunteer, lender, principal, or agent of any business enterprise of the same nature as, or which is in direct competition with, any business in which Company is now engaged or in which Company becomes engaged during the term of this Contractor Agreement. Contractor warrants that, to the best of his knowledge, there is no other contract or duty on his part that conflicts with or is inconsistent with this Contractor Agreement. Notwithstanding the above, Contractor is permitted to own up to 1% of the listed or traded stock of any publicly held corporation."
19. In 2007 Judi Carpenter was working as a travel agent and was referred to the Petitioner for the position of bookkeeper. At the time, Judi Carpenter was not performing bookkeeping services for any other company. The Petitioner's president interviewed Judi Carpenter and on November 4, 2007, the Petitioner and Judi Carpenter entered into an *Independent Contractor Services*



*Agreement* which specifies that the Petitioner agrees to retain Judi Carpenter "as an Independent Sales Person with the title of 'Bookkeeping Services' to provide, but not limited to, accounting and bookkeeping services for the Company.". The Agreement was for a period of one year with automatic renewal for subsequent years. Judi Carpenter was required to personally perform the work and was prohibited from subcontracting or delegating the work to others without the Petitioner's prior written consent. The Petitioner agreed to pay Judi Carpenter \$2,916.66 per month, with payments made on the first and the sixteenth of each month. The rate of pay was based on \$35,000 per year. No part of the compensation would be subject to payroll withholding taxes and the Petitioner would report the amounts paid to Judi Carpenter to the Internal Revenue Service on Form 1099-MISC.

20. The *Independent Contractor Services Agreement* provides that, unless the Petitioner provides express, written consent, Judi Carpenter "will not accept work, enter into a contract, provide financial support, or accept an obligation, inconsistent or incompatible with his obligations, or the scope of services rendered for Company under this Contractor Agreement, including, but not limited to, directly or indirectly competing with Company in any way, including, without limitation, engaging in competitive research and development activities, or acting as an officer, director, partner, manager, employee, consultant, stockholder, volunteer, lender, principal, or agent of any business enterprise of the same nature as, or which is in direct competition with, any business in which Company is now engaged or in which Company becomes engaged during the term of this Contractor Agreement. Contractor warrants that, to the best of his knowledge, there is no other contract or duty on his part that conflicts with or is inconsistent with this Contractor Agreement. Notwithstanding the above, Contractor is permitted to own up to 1% of the listed or traded stock of any publicly held corporation."
21. The Petitioner's president owns companies other than the Petitioner. In 2009 Judi Carpenter did not perform bookkeeping or accounting services for any company other than the Petitioner and companies owned by the Petitioner's president.
22. Judi Carpenter performed services for the Petitioner at the Petitioner's place of business. In addition to performing bookkeeping and accounting services Judi Carpenter answered the Petitioner's business telephone and signed official documents using the titles of "Business Manager" and "Office Manager."

### **Conclusions of Law:**

23. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Reemployment Assistance Program Law, which was known as the Florida Unemployment Compensation Law in 2009, 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.
24. 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).
25. 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.

26. 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.
27. 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.
28. 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.
29. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
30. The Petitioner's business is the sale of fine art. Jule Mummert and Christopher Anderson were engaged by the Petitioner to sell the artwork. Daniel McGowan was engaged to manage the inventory of artwork, to ship the artwork, and to install the artwork. The services performed by Jule Mummert, Christopher Anderson, and Daniel McGowan were not separate and distinct from the Petitioner's business but were a necessary and integral part of the business. Judi Carpenter also signed an Agreement which specified that Judi Carpenter was retained as an independent sales person to provide bookkeeping services. All of the workers were prohibited from hiring others to perform the work and prohibited from performing services for others. The Agreements anticipate that the workers will perform full time services for the Petitioner. The workers did not have significant expenses in connection with the work and any expenses were reimbursed by the Petitioner.
31. Judie Carpenter and Daniel McGowan were paid by time worked rather than based on production or by the job. Jule Mummert and Christopher Anderson were paid by commission based on sales. The Petitioner chose not to withhold payroll taxes from the pay. The fact that taxes were not withheld from the pay, standing alone, does not establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment

Assistance Program 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.

- 32. The Petitioner terminated Daniel McGowan because the Petitioner was not satisfied with the amount of time that Daniel McGowan devoted to the Petitioner's business. 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."
- 33. 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). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, 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."
- 34. In this case the Agreements entered into by the parties specify that the workers are independent contractors and not employees. In spite of those declarations the Agreements establish the Petitioner's right to control who performs the work, when the work is performed, where the work is performed and how the work is performed. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
- 35. It is determined that the services performed for the Petitioner by Jule Mummert, Christopher Anderson, Daniel McGowan, and Judi Carpenter constitute insured employment.

**Recommendation:** It is recommended that the determination dated February 27, 2012, be AFFIRMED.

Respectfully submitted on October 18, 2012.



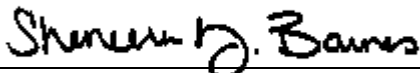

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R. O. SMITH, Special Deputy  
Office of Appeals

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 resumen 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 19, 2012**

Copies mailed to:

Petitioner  
Respondent  
Joined Party

FLORIDA DEPARTMENT OF REVENUE  
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DEPARTMENT OF REVENUE  
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FLORIDA DEPARTMENT OF REVENUE  
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