

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

PETITIONER:

Employer Account No. - 3083205
DWDB,INC
ATTN: DANIEL BREWER
1601 N PACE BLVD
PENSACOLA FL 32505-6029

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-63976L**

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated May 11, 2012, 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 **October, 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 October, 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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PENSACOLA FL 32505-6029

JOSEPH WISE
738 EL CAMINO DRIVE
CANTONMENT FL 32533

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

FLORIDA DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
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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

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PROTEST OF LIABILITY

DOCKET NO. 2012-63976L

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 May 11, 2012.

After due notice to the parties, a telephone hearing was held on August 16, 2012. 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.

Issues:

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.

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 Alabama corporation that is authorized to do business in the state of Florida. The Petitioner is engaged in the business of wood and chain link fence installation. The Petitioner's principal place of business is located in Mobile, Alabama. The Petitioner also utilizes a lot located in Pensacola, Florida for equipment and material storage. The Petitioner leases workers it considers employees, including the Petitioner's president, from an employee leasing company.

2. The Petitioner hired the Joined Party as a fence installer in late 2006 or early 2007. From the date of hire until some time in 2008, the Joined Party was leased by the Petitioner through the leasing company, and was considered an employee. In 2008, due to a poor driving record, the Petitioner's insurance company would no longer cover the Joined Party as a driver on the Petitioner's policy. At about the same time, the Petitioner experienced a decline in business. As a result, the Joined Party separated from employment with the leasing company.
3. The Petitioner's president told the Joined Party the Petitioner would offer the Joined Party work, when available, as a subcontractor. The Petitioner's president told the Joined Party he would have to provide his own transportation and that he would be responsible for his own taxes.
4. The Joined Party did not have set hours for work. When the Petitioner had a fence installation job, the Petitioner contacted the Joined Party by telephone. The Joined Party was free to accept or decline a job. If the Joined Party declined a job, the Petitioner would offer the job to another worker. The Petitioner would continue to offer jobs to the Joined Party. If the Joined Party accepted the job, the Petitioner gave the Joined Party the name and telephone number of the customer's superintendent for contact.
5. The Joined Party was paid a price per linear foot of installed fence. For standard jobs, the Joined Party was paid at a recognized industry rate. For custom jobs or jobs with atypical site conditions, the Joined Party and Petitioner negotiated the price per foot. The Joined Party was paid when the job was completed. The Joined Party was required to correct defective work without additional compensation. No taxes were withheld from the Joined Party's pay. The Joined Party did not receive fringe benefits. The Joined Party was not covered under the Petitioner's workers' compensation insurance. The Petitioner reported the Joined Party's earnings on a form 1099-MISC.
6. The Joined Party provided his own hand tools. The Petitioner supplied any heavy equipment needed for the work. The Joined Party picked up the materials from a building supply store, or the materials were delivered directly to the job site. The Joined Party used his personal vehicle or rode with another worker to the job site. If the Joined Party used his personal vehicle, the Petitioner reimbursed the Joined Party for the cost of fuel. The fuel cost was charged to the Petitioner's customer as a material cost. The Joined Party was responsible for maintenance and insurance costs associated with the use of his vehicle.
7. The Joined Party is a skilled laborer. The Petitioner did not provide any training to the Joined Party. The Petitioner did not supervise the Joined Party's work. The Joined Party contacted the Petitioner when the job was finished and provided the total linear footage of fence and the number of gates installed. The Petitioner did not inspect the work performed by the Joined Party unless the Petitioner's customer had a complaint about the work.
8. The Joined Party had the right to perform similar services for competitors of the Petitioner. The Joined Party had the right to subcontract or hire others to perform the work.

Conclusions of Law:

9. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(2)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.

10. 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).
11. 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).
12. 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.
13. 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.
14. 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.
15. 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.
16. 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.”

17. 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, how the work was performed, or when the work was performed. The Joined Party could accept or decline a job. The Joined Party was not trained or instructed by the Petitioner as to how to perform the work. The Joined Party did not have set hours for work. The Joined Party’s work was not supervised. The Joined Party could hire another individual to perform all or part of the work. The Joined Party could perform similar services for a competitor of the Petitioner.
18. The Joined Party was paid on a piecework basis, rather than by time. The price was either based on industry standards or was negotiated. The Joined Party utilized his own vehicle and hand tools in connection with the performance of the work.
19. The Petitioner did not withhold taxes from the Joined Party’s pay. The Petitioner did not provide any fringe benefits to the Joined Party. The Petitioner reported the Joined Party’s earnings as non-employee compensation.
20. It is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured work.
21. The record shows the Petitioner’s president and other individuals considered employees by the Petitioner are leased by the Petitioner under a contract with an employee leasing company. Accordingly, pursuant to Section 443.1215(1), Florida Statutes, the Petitioner does not meet liability requirements for Florida reemployment assistance contributions.

Recommendation: It is recommended that the determination dated May 11, 2012, be REVERSED.

Respectfully submitted on September 7, 2012.

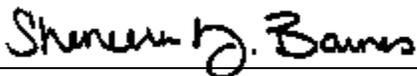


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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:
September 7, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

JOSEPH WISE
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CANTONMENT FL 32533

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