

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

PETITIONER:

Employer Account No. - 1198585
LONG'S SERVICES INC
4057 S CHICKASAW TRAIL
ORLANDO FL 32829-8616

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-75918L**

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 June 20, 2012, is MODIFIED to include only skycaps performing services for the Petitioner under a permit issued by the Greater Orlando Airport Authority for the operation of a skycap service within a rental car garage. It is also ORDERED that the determination is REVERSED 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 December, 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 December, 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:

LONG'S SERVICES INC
4057 S CHICKASAW TRAIL
ORLANDO FL 32829-8616

JASON BAYLEY
507 PIGEON CIRCLE
ORLANDO FL 32825

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

FLORIDA DEPARTMENT OF REVENUE
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2301 MAITLAND CENTER PARKWAY
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ORLANDO FL 32825-3333

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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TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 1198585

LONG'S SERVICES INC

4057 S CHICKASAW TRAIL

ORLANDO FL 32829-8616

PROTEST OF LIABILITY

DOCKET NO. 2012-75918L

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 June 20, 2012

After due notice to the parties, a telephone hearing was held on October 2, 2012. The Petitioner, represented by the Petitioner's President, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party did not appear.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals 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.

Findings of Fact:

1. The Petitioner is a corporation that was formed in 1989. The Petitioner provides janitorial, skycap, and unarmed security services.
2. In August 2011, the Petitioner obtained a permit from the Greater Orlando Airport Authority ("GOAA") to operate a skycap service in a rental car garage located at the Orlando International Airport. The Petitioner operated the service in conjunction with a rental car agency located in the garage. The Petitioner was required to carry liability insurance naming GOAA and the rental car agency as additional insureds, and to comply with GOAA's ground transportation rules and regulations.

3. The Joined Party performed services as a skycap for the Petitioner from September 11, 2011, until May 1, 2012. The Joined Party had been working for another skycap service providing wheelchair service. The Joined Party told the Petitioner's president that he was tired of wheelchair duty and wanted to work in the garage.
4. The Petitioner operated the business from the airport rental car garage from 4:00 a.m. until 8:00 p.m., seven days per week. The skycaps could set their own work days and hours. The Petitioner's president asked skycaps to let him know when they planned to work, so that the Petitioner could have a sufficient number of carts available.
5. The Petitioner utilized experienced skycaps to provide the permitted services. The Petitioner did not provide any training to the skycaps. The skycaps were required under GOAA rules and regulations to pass a background check and to obtain a badge.
6. The Petitioner provided four wheeled dollies, or carts, to the sky caps. The Petitioner charged the skycaps \$20 per day to rent a cart. The skycaps purchased hats and shirts bearing the Petitioner's name from the Petitioner.
7. The Petitioner did not supervise the skycaps. The skycaps were required to perform their services in accordance with GOAA rules and regulations. If GOAA determined that a skycap had committed a serious rule violation, GOAA could revoke the badge issued to the skycap and direct the Petitioner to terminate the skycap's services.
8. The skycaps were not permitted to subcontract the work. The skycaps could not provide similar services for others while working under the Petitioner's permit. On February 1, 2012, the Joined Party signed a *Confidentiality Agreement*, requiring him to keep certain information pertaining to the Petitioner's business confidential. On the same date, the Joined Party signed a *Non-Compete Agreement* that prohibited the Joined Party from engaging in commercial activities similar to those of the Petitioner, renting his cart to another skycap, or purchasing carts with another skycap for the purpose of creating an illegal skycap business.
9. The skycaps received no direct payments from the Petitioner. The skycaps received tips from the passengers they serviced. The skycaps were not required to pool their tips or to report their tips to the Petitioner.
10. At the end of the calendar year 2011, the Petitioner asked each skycap how much he or she received in tips and reported the information provided on forms 1099-MISC. The Petitioner reported the Joined Party's earnings of \$3,000 on a form 1099-MISC for 2011.
11. The Petitioner ended the relationship with the Joined Party when GOAA revoked the Petitioner's permit.
12. The Petitioner also provides skycap services under contracts with airlines. The Petitioner considers the individuals performing services as skycaps in connection with the airline contracts to be employees. Those individuals work under terms and conditions that are different from the terms and conditions under which the Joined Party and other skycaps worked in the Petitioner's rental car garage operation.

Conclusions of Law:

13. 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.
14. 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).
15. 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).
16. 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.
17. 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.
18. 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.
19. 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.

20. 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.”
21. 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 Joined Party was an experienced skycap. The Petitioner provided no training to the Joined Party. The Joined Party determined his hours of work. The Petitioner did not supervise the Joined Party. The rules and regulations that governed the Joined Party’s performance were established and enforced by GOAA.
22. The Joined Party provided the instrumentalities needed for the work. The Joined Party rented a cart from the Petitioner, purchased a shirt and hat, and obtained a badge from GOAA.
23. The Joined Party was paid by the job, rather than by time. The Joined Party was compensated solely by tips. No taxes were withheld from the Joined Party’s earnings. The Petitioner reported the Joined Party’s earnings as non-employee compensation.
24. It is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured work.

Recommendation: It is recommended that the determination dated June 20, 2012, be MODIFIED to include only skycaps performing services for the Petitioner under a permit issued by the Greater Orlando Airport Authority for the operation of a skycap service within a rental car garage. As MODIFIED, it is recommended that the determination be REVERSED.

Respectfully submitted on October 26, 2012.

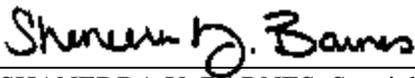


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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:
October 26, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

JASON BAYLEY
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