

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

PETITIONER:

Employer Account No. - 2605504
SOOTHING ARTS-HEALING THERAPIES INC
ATTN VON KELLER OWNER
12605 EMERALD COAST PKWY W
MIRAMAR BEACH FL 32550

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-8156L**

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 November 26, 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 **September, 2013**.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
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, 2013.

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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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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RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
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**PROTEST OF LIABILITY
DOCKET NO. 2013-8156L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated November 26, 2012.

After due notice to the parties, a telephone hearing was held on July 31, 2013. The Petitioner was represented by its attorney. The Petitioner's president, a massage and skin care instructor, and a kinesiology instructor, testified as witnesses. The Petitioner, represented by a Department of Revenue Tax Auditor IV, 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 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 is a corporation formed in 1999 to provide massage therapy and to also operate a school to teach massage therapy. Since the inception of the business the Petitioner has used individuals who are classified as independent contractors to teach the various classes.

2. There are no written agreements or contracts between the Petitioner and the instructors. The instructors are required to be licensed therapists in order to teach the classes. Generally, the classes are taught at the Petitioner's school on the days and times established by the Petitioner. However, the instructors have the right to change the class times and have the right to teach the students at locations other than at the Petitioner's school. Many, if not all, of the instructors operate separate businesses providing therapy to their own clients. The instructors are free to teach at other schools, even if those schools are in competition with the Petitioner.
3. The instructors are verbally engaged to teach a class or a course of classes for a specific period of time. The Petitioner and each instructor negotiate a rate of pay for teaching the class or course. Generally, the instructors are paid by the hour based on the number of classroom hours required by the State of Florida for completion of the course. The curriculum is set by the State of Florida, however, the instructors determine which textbooks or other study materials to use as long as they comply with the requirements of the State.
4. The instructor sets the work goals for each class session and if the work goals are met in less than the scheduled time for the class and the class is dismissed early, the instructor is paid for the scheduled hours. If the instructor needs to extend the class time the instructor is only paid for the scheduled time. The instructors are not paid for any time spent outside of class to perform duties such as grading tests.
5. If an instructor is unable to teach a scheduled class the instructor may notify the Petitioner so that the Petitioner may schedule a substitute, may switch classes with another instructor, may hire a substitute instructor, or may reschedule the class. If the instructor hires a substitute the instructor is responsible for paying the substitute.
6. The Petitioner does not observe the instructors while they teach the classes. The Petitioner does not tell the instructors how to teach the classes and does not evaluate the teachers' performance. Upon conclusion of each course the instructors notify the Petitioner whether the students completed the course by attending for the required number of hours and whether the students passed or failed the course.
7. Generally, the Petitioner pays an instructor whenever the instructor requests payment rather than on an established payday. Some of the instructors request to be paid on a weekly basis, some request to be paid at irregular intervals, and some choose to wait until after the course is completed to request payment. No taxes are withheld from the pay. The Petitioner does not provide fringe benefits such as health insurance, life insurance, paid vacations, paid holidays, paid sick days, retirement benefits, workers' compensation coverage, or bonuses. At the end of each year the compensation paid to the instructors is reported to the Internal Revenue Service on Form 1099-MISC.
8. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law, now known as the Florida Reemployment Assistance Program Law.
9. The Tax Auditor examined the Petitioner's books and records and discovered the 1099 forms issued to the instructors and issued to individuals who performed therapy services for the Petitioner. Based on the information provided to the Tax Auditor, the Tax Auditor concluded that the individuals performing services as therapists were independent contractors and that the individuals performing services as instructors were employees.
10. On November 26, 2012, the Department of Revenue issued a *Notice of Proposed Assessment* advising the Petitioner of the results of the audit. The Petitioner filed a timely protest by mail postmarked December 14, 2012.

Conclusions of Law:

11. The issue in this case, whether services performed for the Petitioner by instructors constitute employment subject to the Florida Reemployment Assistance Program Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
12. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
13. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.
14. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.
15. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
 - (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
 - (2) The following matters of fact, among others, are to be considered:
 - (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant;
 - (j) whether the principal is or is not in business.
16. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.
17. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly

classified an employee or an independent contractor often can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.

18. 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."
19. In this case the testimony of the Petitioner's president establishes that it was the intent of the Petitioner to enter into an independent contractor relationship with each of the instructors. Although the understanding and intent of all of the instructors is not known, the testimony of the two instructors who testified reveals that it was the intent of both instructors to enter into an independent contractor relationship with the Petitioner.
20. The instructors are required to be licensed therapists in order to teach a class. Thus, the instructors are skilled professionals. Generally, 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) However, in James v. Commissioner, 25 T.C. 1296, 1301 (1956), the court stated in holding that a doctor was an employee of a hospital “The methods by which professional men work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of an employer over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over the non-professional employees.” In University Dental Health Center, Inc. v. Agency for Workforce Innovation, 89 So. 3rd 1139 (Fla. 4th DCA 2012), a case involving a dentist who performed services for a dental office, the court found that the dentist was a highly skilled professional who performed services without supervision, who determined what treatments were necessary, and who determined how to perform the treatments. The court found that the relationship was at-will, that the dental office provided the tools and space for the dentist, that the dental office scheduled the patients, that the dentist could not refuse patients, that the dentist was required to report for work at a particular time, and that the dentist could leave only if there were no scheduled patients. The court determined that the dentist was an employee of the dental office.
21. Generally, the Petitioner provides the place of work and everything that is needed to perform the work. The testimony establishes, however, that the instructors are free to teach the classes away from the Petitioner's premises if they so desire.
22. The Petitioner pays the instructors at a negotiated hourly rate of pay. The hourly rate is paid for scheduled classroom hours. The number of hours for each course is not established by the Petitioner or by the instructors but is mandated by the State of Florida. If an instructor works additional hours to teach the course or is able to complete the course in fewer hours, the instructor is paid only for the scheduled course hours. Thus, the instructors are paid by the job rather than by time worked. No payroll taxes were withheld from the pay and no fringe benefits were provided which is typical of an independent contractor relationship.
23. The school curriculum is mandated by the State of Florida and the Petitioner and the instructors are required to comply with the mandated curriculum. As long as the instructors comply with the State mandates the instructors are free to teach the course using their own methods. The instructors are not trained by the Petitioner concerning how to teach. The instructors are not supervised by the Petitioner. Regulation imposed by governmental authorities does not evidence control by the employer for the purpose of determining if the worker is an employee or an independent contractor. NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, 922 (11th Cir. 1983); Global Home Care, Inc. v. D.O.L. & E.S., 521 So. 2d 220 (Fla. 2d DCA 1988).

24. 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.
25. It is concluded that the services performed for the Petitioner by the instructors during 2009 do not constitute insured employment.
26. The Petitioner timely submitted *Proposed Findings of Fact and Conclusions of Law*. The proposed findings which are supported by relevant, material, and competent evidence are incorporated herein. In its proposed conclusions the Petitioner relied upon Section 440.02, Florida Statutes, to conclude that the instructors performed services as independent contractors for the purpose of determining if the Petitioner was required to pay unemployment compensation tax on the earnings of the instructors. The Petitioner's reliance on Chapter 440 is misplaced. Chapter 440 is the Florida Workers' Compensation Law and is not controlling concerning the issue in this case.
27. The Petitioner also submitted *Initial Brief of Petitioner* with attached documents marked as exhibits "A" through "D." Rule 73B-10.035(10)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing has been closed. Thus, the additional evidence presented by the Petitioner is rejected and has not been considered in this recommended order.

Recommendation: It is recommended that the determination dated November 26, 2012, be REVERSED.

Respectfully submitted on August 26, 2013.

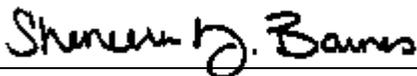


R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
August 26, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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