

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

PETITIONER:

Employer Account No. - 2413751
IMAGING CENTER NETWORK LLC
EDWARD FRANCO
7852 JAMES ISLAND WAY
JACKSONVILLE FL 32256-2313

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-125595L**

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 1, 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 July, 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 July, 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:

IMAGING CENTER NETWORK LLC
EDWARD FRANCO
7852 JAMES ISLAND WAY
JACKSONVILLE FL 32256-2313

DEPARTMENT OF REVENUE
ATTN: JODY BURKE - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: BLAKE HARTLAND
921 NORTH DAVIS STREET
SUITE A-215
JACKSONVILLE FL 32209-6829

DEPARTMENT OF REVENUE
ATTN: DELAINE ARLINGTON
921 NORTH DAVIS STREET
SUITE A-215
JACKSONVILLE FL 32209-6829

HUGHES & WARNER CPA'S
ATTN HEATHER HUGHES IMAGING
CENTER NETWORK
4540 SOUTHSIDE BLVD SUITE 601
JACKSONVILLE FL 32216-5465

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

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**PROTEST OF LIABILITY
DOCKET NO. 2012-125595L**

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 1, 2012.

After due notice to the parties, a telephone hearing was held on May 22, 2013. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Petitioner's Administrator testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Audit Administrator. A Tax Auditor IV 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, Imaging Center Network LLC, is a limited liability company which operates a medical diagnostic imaging practice. The business is owned and operated by Dr. Edward Franco, a radiologist.
2. 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 conducted at the location of the Petitioner's Certified Public Accountant.

3. The Tax Auditor discovered a clerical error of 19 cents for the first quarter 2009. The Tax Auditor also discovered that the Petitioner had paid an employee a flat fee as an expense reimbursement for each trip to the Post Office. The Tax Auditor added the payments as additional wages for the employee because the employee was paid a flat fee and was not required to account for the actual expense. The additional wages added by the Tax Auditor were excess wages and did not result in any additional tax due.
4. The Tax Auditor examined the 1099 forms issued to workers by the Petitioner. The Tax Auditor determined that payments made to a Diagnostic Radiological Physician were properly classified as payments to an independent contractor. The Tax Auditor determined that payments made to a transcriptionist were properly classified as payments to an independent contractor.
5. The Tax Auditor examined a 1099 form which had been issued to a worker to whom the Petitioner also issued a W-2 form. The Tax Auditor was informed that the worker performed services as a front desk assistant or helper and at the time of hire it was known that the position would be temporary. The worker's duties included copying medical records and the Petitioner trained the worker how to do the medical records. The volume of the Petitioner's business declined during the year and the Petitioner reduced the worker's hours of work. It was reported to the Tax Auditor that the worker obtained other employment and notified the Petitioner of her intent to leave her employment with the Petitioner at which time the worker requested that if the workload increased in the future that the Petitioner allow the worker to return to work as an independent contractor. The Petitioner paid unemployment tax on the worker's earnings during the first, second, and third quarters 2009 but did not report the worker's earnings for the fourth quarter 2009. The worker performed the services at the Petitioner's place of business during the fourth quarter 2009 under the same terms and conditions as during the first three quarters 2009 with the exception that the work during the fourth quarter 2009 was performed on an as-needed basis. The Petitioner provided all equipment and supplies and paid the worker by the hour. The Tax Auditor reclassified the fourth quarter payments as wages. The Petitioner had paid the worker more than \$7000 during the first three quarters and the reclassified fourth quarter wages did not result in additional tax due.
6. The Tax Auditor examined a 1099 form issued to a nuclear medicine technician, Deitra Andrews. The Tax Auditor was informed that the nuclear medicine technician began performing services for the Petitioner during 2008 and was responsible for injecting the patients referred to the Petitioner for nuclear medical studies with radioactive isotopes used in diagnostic imaging studies. The radiologist would then read the data, dictate a report, and send the report to the referring physician. The nuclear medicine technician performed the work at the Petitioner's location using the Petitioner's equipment and tools. The Petitioner provided the Tax Auditor with a copy of an *Independent Agent Agreement* signed and dated by the worker on February 16, 2009. The Agreement states that the worker is an independent contractor and that the Petitioner will not withhold any state or federal taxes. The Agreement states, among other things, "While I am providing my services as an independent contractor to the Imaging Centers I will at no time or occurrence file claim upon Imaging Centers Workers Compensation Insurance." The Petitioner informed the Tax Auditor that the purpose of the *Independent Agent Agreement* was to exempt the Petitioner from providing workers' compensation insurance for the worker.
7. The Petitioner also provided the Tax Auditor with a copy of an agreement entitled *Imaging Center Network's Subcontractor Service Agreement for Deitra Andrews, Nuclear Medicine Technologist*, dated and signed September 14, 2009. The Agreement states that the terms of the Agreement are effective November 2, 2009. The Agreement states that the Petitioner will pay Deitra Andrews \$260 per day, that working hours are from 12:30 PM until 6:30 PM on Tuesdays and Thursdays, that the daily fee includes next day follow-up studies that are less than one hour, that the Petitioner will pay \$43.75 per hour to Deitra Andrews if the follow-up study takes more than one hour, that Deitra Andrews will give the Petitioner twenty-four hours notice if she is not able to work on a

scheduled work day, that the Petitioner will give Deitra Andrews twenty-four hours notice in the event of cancellation of services, and that the Petitioner has the right to terminate the Agreement with Deitra Andrews at-will.

8. The Tax Auditor was informed that Deitra Andrews was employed by a hospital and that her days and hours of work at the hospital took precedence over her days and hours of work with the Petitioner. The Tax Auditor was informed that Deitra Andrews was required to personally perform the work and that she could not hire others to perform the work for her. The Tax Auditor was informed that Deitra Andrews did not have liability insurance.
9. The Tax Auditor concluded that Deitra Andrews had been misclassified as an independent contractor and that she was an employee of the Petitioner, resulting in additional taxable wages of \$7,000.
10. On November 1, 2012, the Department of Revenue issued a *Notice of Proposed Assessment* notifying the Petitioner of the audit results. The Tax Auditor added additional gross wages of \$30,912.70, of which \$23,912.89 were excess wages, resulting in taxable wages of \$6,999.81. The Petitioner filed a timely protest on November 20, 2012.

Conclusions of Law:

11. The issue in this case, whether services performed for the Petitioner 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. The Tax Auditor was presented with two agreements which state that Deitra Andrews performed services for the Petitioner as an independent contractor. However, a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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.”
19. The Petitioner's business is to perform diagnostic medical imaging studies which are used to diagnose the medical conditions of patients. The duties performed by the two individuals who were reclassified as employees by the Tax Auditor were not separate and distinct from the Petitioner's business but were an integral and necessary part of the Petitioner's business. The Petitioner provided the place of work and the equipment and tools that were needed to perform the work. It was not shown that either individual had a business license or occupational license, had business liability insurance, offered services to the general public, or had an investment in a business. The workers were paid by time worked rather than by production or by the job. The fact that a worker works part time or on an as-needed basis does not, standing alone, establish an independent contractor relationship.
20. The September 14, 2009, *Imaging Center Network's Subcontractor Service Agreement for Deitra Andrews, Nuclear Medicine Technologist*, reveals a relationship of relative permanence which could be terminated by the Petitioner at-will at any time. 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.”
21. It was not shown that the front desk assistant was required to have any skill or special knowledge to perform the work. The Petitioner trained the front desk assistant how to perform the work. The nuclear medicine technologist, Deitra Andrews, was required to have special knowledge. 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.

22. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
23. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error. The competent evidence presented in this case supports the conclusion of the Department of Revenue that the services performed by the front desk assistant and by the nuclear medicine technologist constitute insured employment. The Petitioner has not shown by a preponderance of the competent evidence that the determination was in error.

Recommendation: It is recommended that the determination dated November 1, 2012, be AFFIRMED.

Respectfully submitted on June 12, 2013.

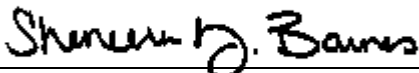


R. O. SMITH, Special Deputy
Office of Appeals

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:
June 12, 2013

Copies mailed to:

- Petitioner
- Respondent
- Joined Party

DEPARTMENT OF REVENUE
ATTN: BLAKE HARTLAND
921 NORTH DAVIS STREET
SUITE A-215
JACKSONVILLE FL 32209-6829

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
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HUGHES & WARNER CPA'S
ATTN HEATHER HUGHES IMAGING CENTER
NETWORK
4540 SOUTHSIDE BLVD SUITE 601
JACKSONVILLE FL 32216-5465