

**DEPARTMENT OF ECONOMIC OPPORTUNITY**  
**Reemployment Assistance Appeals**  
**PO BOX 5250**  
**TALLAHASSEE FL 32399-5250**

**PETITIONER:**

Employer Account No. - 2905006  
G TIRES & WHEELS INC  
ATTN LILIAN CARDOSO  
445 W 26TH ST  
HIALEAH FL 33010 -1316

**RESPONDENT:**

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

**PROTEST OF LIABILITY**  
**DOCKET NO. 0019 3444 59-01**

**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 July 25, 2013, 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 17<sup>th</sup> day of **January, 2014**.



Altemese Smith  
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.

Shanetra Y. Barnes  
DEPUTY CLERK

1-22-14  
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 22<sup>nd</sup> day of January, 2014.

Shanetra Y. Barnes  
SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250

By U.S. Mail:

G TIRES & WHEELS INC  
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State of Florida  
DEPARTMENT OF ECONOMIC OPPORTUNITY  
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**RESPONDENT:**

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

**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 July 24, 2013.

After due notice to the parties, a telephone hearing was held on October 29, 2013. An accounting department representative appeared for the Petitioner; the Joined Party appeared; and a Senior Tax Specialist appeared for the Respondent. No proposed findings of fact or conclusions of law were received. 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 tire wholesaler, in business since 2009. The Joined Party began providing services to the Petitioner on November 29, 2011. The principal owner of the Petitioner told the Joined Party that he could work in the warehouse from 7 a.m. to 6 p.m., Monday through Saturday, starting at \$200 per week. The Joined Party would be responsible for paying any taxes. The Joined Party agreed to this and started work. The Joined Party last worked for the Petitioner on May 11, 2013.

2. The Joined Party was paid weekly. The weekly amount did not change in relation to the type of work assigned or in relation to the number of hours worked. The pay rate was raised from time to time, to \$300 per week, then \$360, then \$400, and finally to \$440. The Joined Party received a \$200 bonus in late 2012. Other workers got a bigger bonus. The Petitioner paid the Joined Party \$7820 in 2012, which was reflected on a 1099-MISC issued to the Joined Party.
3. The warehouse manager or the principal owner would assign duties to the Joined Party each day. Typically the duties would consist of unloading cargo containers and stacking tires in the warehouse, updating company records, or making deliveries. The Petitioner has other workers in the warehouse, some of whom it considers employees. When the Joined Party worked in the warehouse he performed the same kinds of tasks as the warehouse employees. On February 11, 2013, the Joined Party was assigned primarily to delivery driver duties, although he also worked in the warehouse when he was not out delivering tires. When the Joined Party made deliveries he would drive a company pickup truck. The Petitioner had other drivers, all of whom wore uniforms, but no uniform was given to the Joined Party. Most, but not all, other warehouse workers wore company uniforms, as did workers in the office. A manager told the Joined Party at one point that he had not been issued a uniform because he was too skinny.
4. The Petitioner believed that the claimant was not an employee, because he was treated differently than other employees in such areas as withholding of taxes and provision of uniforms. The Joined Party believed that he was an employee. He did not raise an objection about taxes or the uniform because he thought he might lose his job if he did so.
5. On one occasion while the Joined Party was working as a driver, the company truck he was driving hit the corner of a customer's building, causing some minor damage to the structure and no damage to the truck. The Petitioner paid the customer for the damages. The Joined Party did not pay the customer or the Petitioner for the damages.
6. The Joined Party filed a claim for reemployment assistance benefits effective May 19, 2013. After an investigation the Florida Department of Revenue issued a determination on July 25, 2013 which found: "*...the person(s) performing services as TRANSPORTATION & WAREHOUSING are employees. This determination is retroactive to 1/01/2012.*"

### Conclusions of Law:

7. 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.
8. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
  - (h) whether or not the work is 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.
9. 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. 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. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1<sup>st</sup> DCA 2011).
10. Section 73B-10.035, Florida Administrative Code, provides:
  - (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
11. The Joined Party worked on the Petitioner’s premises, or in the Petitioner’s vehicle. The Petitioner’s managers directed the Joined Party as to which tasks he was to perform. When the Joined Party was performing those tasks he worked in the same way as those workers that the Petitioner admits are employees. The Petitioner exercised direction and control over the activities of the Joined Party. The Joined Party was therefore an employee.
12. The witness for the Petitioner testified that the Petitioner merely put the Joined Party to work when he showed up at the warehouse. Even if that was true, it does not show that the Joined Party was an independent contractor. It is consistent with the Joined Party being an employee, but one without a formal regular work schedule. It does not show that the Joined Party was responsible only for specific results, without regard to how those results were achieved. A better view of the evidence is that the Petitioner had two classes of warehouse employees and drivers. One class was that of top tier workers who had company uniforms and whose wages were subject to withholding for taxes; the other class of employees was that of the claimant and perhaps others: lower tier employees, who were not provided with uniforms, and whose work schedules were more variable.
13. A further sign that the Joined Party was an employee and not an independent contractor is the treatment of the accident that the Joined Party had while driving the Petitioner’s truck. The Petitioner paid the damages, and the Joined Party did not. The payment by the Petitioner to the customer might not necessarily imply anything other than that the Petitioner recognized its non-delegable duty to operate its own motor vehicles with due care. But if the Joined Party had been an independent contractor, it would be expected that the Petitioner would have tried to get some payment from the Joined Party rather than absorbing the loss by itself.
14. The Petitioner treated the Joined Party as an employee in all functional respects. The lack of tax withholding and lack of a uniform did not substantially affect the way the Joined Party functioned in his job. The Petitioner has not carried the burden of proof on it of establishing that the Joined Party was more likely than not an independent contractor rather than an employee as ruled in the determination.

**Recommendation:** It is recommended that the determination dated July 25, 2013 be AFFIRMED.  
Respectfully submitted on November 20, 2013.




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J. Jackson Houser, 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 anè 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:**

**November 20, 2013**



Copies mailed to:

Petitioner

Respondent

Joined Party

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