

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

**PETITIONER:**

Employer Account No. - 2406289  
BLACKHAWK MOTOR WORKS INC  
ATTN: FRANK ALIANO, PRESIDENT  
4570 BABCOCK ST NE STE 20  
PALM BAY FL 32905-2827

**PROTEST OF LIABILITY  
DOCKET NO. 0019 5021 94-02**

**RESPONDENT:**

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

**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 August 29, 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 11<sup>th</sup> day of April, 2014.



*Magnus Hines*

Magnus Hines,  
RA Appeals Manager,  
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

4.11.14

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 11<sup>th</sup> day of April, 2014.

*Shanendra 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:

BLACKHAWK MOTOR WORKS INC  
ATTN: FRANK ALIANO, PRESIDENT  
4570 BABCOCK ST NE STE 20  
PALM BAY FL 32905-2827

JULIE ROWAN  
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PALM BAY FL 32905-3537

DEPARTMENT OF REVENUE  
WILLA DENNARD  
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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

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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 August 29, 2013.

After due notice to the parties, a telephone hearing was held on December 16, 2013. The company president appeared for the Petitioner; the Joined Party did not appear; 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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner was formed in 2002. The company president has held his position with the Petitioner since it was formed. The Petitioner operates a specialty motorcycle repair facility, concentrating on one brand of motorcycle. The manufacturer of that brand is no longer in business. The Petitioner deals with customers all over the country.
2. The Joined Party worked with the Petitioner from September 8, 2011 to July 9, 2013. The president of the Petitioner had taken a job with another company, so he was unable to be at the Petitioner's facility all day as he had been previously. The Joined Party would take messages and perform other clerical tasks while the president of the Petitioner was working at his other job. The president told the Joined Party that she should work Tuesday through Friday, 10 a.m. to 5 p.m., for

\$250 per week. The Joined Party would be entirely responsible for paying her own taxes. The Joined Party agreed to this. The weekly amount was raised to \$300 after several months of satisfactory work.

3. The Petitioner did not issue a remuneration summary, either a form 1099 or a W-2, for any year in which the Joined Party worked. Since the Joined Party was responsible for paying her own taxes, the president of the Petitioner did not believe he was obligated to issue any kind of annual summary.
4. The Joined Party was given a key to the office, and was given the alarm code. She could not give these things to someone else. When at work the Joined Party would use the Petitioner's telephone and computer. The Joined Party did not supply any of the equipment or supplies for the job. The Joined Party would prepare checks for the president to sign. He would sign them when he came to the office in the middle of the day when he was on break from his other job.
5. On more than one occasion the Joined Party did not answer the telephone during the agreed upon hours when the president called, or she was not in the office when he came by in the middle of the day. The company president reminded the Joined Party more than once of her obligation to be at the office.
6. The Joined Party would receive between one and two dozen calls per day. Typically such calls would last a minute or less. In between calls the Joined Party could and did engage in personal projects. The president was aware of this because he would see unfamiliar websites open on the computer when he came to the office either in the middle of the day or after he was done with his other job. The president did not object to this, so long as it did not interfere with the Joined Party getting the clerical work done.
7. On two occasions while the Joined Party worked with the Petitioner, the Joined Party announced that she would be away for a week. She did not clear the time period with the president, but instead simply announced that she would be going. The president paid the Joined Party the amount she normally would have received for those two weeks, because he believed that the Joined Party needed the financial assistance.
8. In the summer of 2013, the president became increasingly dissatisfied with the performance of the Joined Party. She was less reliable than she had been before. As a result of this, and because the business of the Petitioner was increasing, and because the president wanted to decrease some of his activities he quit the other job and began working primarily for the Petitioner once again. He told the Joined Party on July 9, 2013 that she was no longer needed. The president gave the Joined Party a small amount of money, less than a week's worth, because he believed that the Joined Party needed it.
9. The Joined Party filed a claim for benefits effective July 7, 2013. After an investigation, the Florida Department of Revenue issued a determination on August 29, 2013 finding that the Joined Party was an employee.

#### **Conclusions of Law:**

10. 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.

11. 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.
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. 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).
14. 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."
15. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).

16. In Keith v. News and Sun-Sentinel Co., 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:

Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.

17. 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.

18. The Joined Party worked in the Petitioner's business, on the Petitioner's premises, using the Petitioner's equipment. The Joined Party was paid by time—a weekly salary—and the relationship was a long term one, rather than being created for a specific period. The Joined Party was expected to work within the time periods set by the Petitioner. The Joined Party could not have the work performed by a substitute, since that would require that she turn over the office key and alarm code to someone else. Further, the president of the Petitioner exerted control by admonishing the Joined Party when she was not at work during the specified office hours. These factors show that the Joined Party was an employee, rather than an independent contractor.

19. The Petitioner did not make any deduction for taxes, but this is just one factor out of many, and it is not the most important factor, since the lack of tax deductions does not directly show one way or the other whether there is a right to control the method of providing services or not.

20. The circumstances of the end of the relationship also tend to show employment. The president of the Petitioner notified the Joined Party that the relationship was at an end. There was no liability associated with the end of the relationship. As noted in the quotation above (paragraph 14) from Cantor v. Cochran, the power to end the relationship without further liability tends to show employment rather than independence. The Petitioner was not obligated to give any notice, and was not obligated to allow the Joined Party to finish any work undertaken. The president did pay a small amount to the Joined Party beyond what was owed for work already performed, but the testimony of the president shows that this was a matter of compassion, rather than due to any contractual requirement.

21. Accordingly, while one factor—non-deduction of taxes—is consistent with a status of independent contractor, this is outweighed by the other aspects of the relationship. The Petitioner had the right to control the Joined Party in her work because it controlled the premises, equipment, and schedule by which the work was to be done, and it could and did end the relationship without being legally liable to allow the Joined Party to complete any contractual obligation. The Petitioner has not carried the burden of proof on it of establishing that the Joined Party was an independent contractor rather than an employee.



**Recommendation:** It is recommended that the determination dated August 29, 2013, finding that the Joined Party was an employee, retroactive to September 8, 2011, be AFFIRMED.  
Respectfully submitted on January 7, 2014.



*J. Jackson Houser*  
 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 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.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

January 7, 2014

Copies mailed to:

Joined Party:  
 JULIE F. ROWAN  
 2828 GLASSNER AVE NE  
 PALM BAY FL 32905

Other Addresses:  
 WILLA DENNARD  
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DEPARTMENT OF REVENUE  
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