

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

PETITIONER:

Employer Account No. - 3148734
CDM CABLE CORPORATION
ATTN CARLOS DIAZ
2303 N STERLING AVENUE
TAMPA FL 33607-2541

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-48057L**

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 April 15, 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 _____ 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:

CDM CABLE CORPORATION
ATTN CARLOS DIAZ
2303 N STERLING AVENUE
TAMPA FL 33607-2541

LUIS CASANOVA
9817 ELM WAY
TAMPA FL 33635

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

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

TALLAHASSEE FL 32399-4143

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**PROTEST OF LIABILITY
DOCKET NO. 2013-48057L**

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 April 15, 2013.

After due notice to the parties, a telephone hearing was held on July 18, 2013. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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. Proposed Findings of Fact and Conclusions of Law were not received.

Issues:

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

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation, formed November 30, 2011, that engaged in the business of burying cable lines. The Petitioner's president was active in the business of the corporation from its inception until it ceased operations in the early part of 2013.

2. The Petitioner provided services as a subcontractor to a cable installation contractor for a network service provider. The Petitioner was paid per linear foot of buried cable.
3. The Joined Party performed services for the Petitioner as a helper from September 26, 2012, until February 22, 2013. The Joined Party responded to an advertisement placed on Craigslist by the Petitioner and met with the Petitioner's president. The Joined Party told the Petitioner he wanted to be paid in cash. The Petitioner's president told the Joined Party he would have to be paid by check. The Petitioner's president told the Joined Party that he would be hired as a "1099 helper/subcontractor" and would receive a form 1099 at the end of the year. There was no written agreement between the parties.
4. The Joined Party did not have prior experience burying cable lines. The Petitioner provided on-the-job training to the Joined Party for approximately three weeks. The Joined Party was paid during the training period. The Petitioner's president showed the claimant how to dig a trench, how to bury the cable, how to avoid cutting the cable, and how to install the cable to meet applicable standards. The Joined Party also attended an hour-long safety class with the Petitioner's president that was provided by the contractor.
5. The Joined Party rode to and from the job sites with the Petitioner's president in the Petitioner's president's vehicle. The Petitioner provided the tools and equipment needed for the work. The Petitioner carried liability insurance that covered any damage caused by the Joined Party in connection with the performance of the work.
6. The Petitioner's president supervised the Joined Party. The Petitioner's president and the Joined Party usually worked together. Sometimes the Petitioner's president left the Joined Party alone at a job site while he checked other job sites. At the end of the work day, the Petitioner told the Joined Party whether there was work available the next day. The Joined Party could decline a work assignment.
7. The Joined Party was not restricted from working for a competitor of the Petitioner.
8. The Petitioner paid the Joined Party on a weekly basis. The Joined Party did not bill the Petitioner for his services. The Joined Party and the Petitioner's president totalled the number of linear feet of cable installed at the various job sites at the end of each week. The Petitioner paid the Joined Party 25% of the amount to be paid the Petitioner by the contractor for the weekly linear footage of cable installed. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party did not receive sick pay, vacation pay, or holiday pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC for 2012.
9. Either party could terminate the relationship at any time without a penalty or liability for breach of agreement.
10. The Joined Party was the first helper utilized by the Petitioner. After hiring the Joined Party, the Petitioner also utilized other individuals as helpers. All of the individuals performing services for the Petitioners as helpers worked under the same terms and conditions.
11. The Joined Party filed a claim for reemployment assistance benefits effective February 24, 2013. When the Joined Party's wage transcript did not reflect credit for the Joined Party's earnings with the Petitioner, an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.

12. On April 15, 2013, the Department of Revenue issued a determination holding that the services performed by the Joined Party and other individuals as Helper/Laborer constitute insured employment retroactive to January 1, 2012. The Petitioner filed a timely protest.

Conclusions of Law:

13. 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)(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. The parties did not enter into a written agreement. Although the Petitioner informed the Joined Party he was hired as “a 1099 helper/subcontractor,” the evidence presented does not demonstrate an express agreement or meeting of the minds as to the status of the work relationship. The fact that the Joined Party accepted the offer of work does not necessarily establish an independent contractor relationship. Courts have held that an express statement in an agreement that the existing relationship is that of an independent contractor is not dispositive of the issue. Lee v. American Family Assurance Company, 431 So.2d 249 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So. 2d 131 (Fla. 1972), a case involving an independent contractor agreement that specified the worker was not to be considered an employee, 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.”
21. The Petitioner is in the business of burying cable lines. The Joined Party assisted the Petitioner’s president in burying the lines. The work performed was not separate and distinct from the Petitioner’s business, but was an integral and necessary part of the business.
22. 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). The Petitioner determined what work was performed, when the work was performed, where the work was performed, and, through training and direction, how the work was performed. The Joined Party’s work was supervised. The Petitioner provided all of the tools and equipment required for the work. The Petitioner provided liability insurance covering any damage caused by the Joined Party in connection with the performance of his work.
23. Either party could terminate the relationship at any time without incurring liability. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court, quoting 1Larson, Workmens’ Compensation Law, Section 44.35, stated: “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.”
24. The Joined Party was paid by production, at a rate determined by the Petitioner. The fact that the Petitioner chose not to withhold taxes from the Joined Party’s pay does not, standing alone, establish an independent contractor relationship.
25. In Adams v. Department of Labor and Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court determined the Department had the authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. It is concluded that the services performed for the Petitioner by the Joined Party and others as helpers constitute insured work.
26. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:

- (1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
 1. An officer of a corporation.
 2. An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee.

27. The Petitioner is a corporation. The Petitioner’s president performed service for the corporation. As such, the Petitioner’s president is a statutory employee.

28. Section 443.1215(1), Florida Statutes, provides in pertinent part:

- (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

29. Rule 73B-10.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered.

30. The Petitioner’s president was active in the business from November 30, 2011, until the business ceased operations in early 2013. Accordingly, the Petitioner meets the liability requirements for Florida reemployment assistance contributions effective January 1, 2012, based upon 20 weeks of corporate officer activity.

Recommendation: It is recommended that the determination dated April 15, 2013, be AFFIRMED.

Respectfully submitted on August 12, 2013.

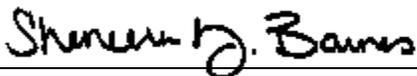


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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:
August 12, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

LUIS CASANOVA
9817 ELM WAY
TAMPA FL 33635

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417