

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

**PETITIONER:**

Employer Account No. - 2908676  
FAT CITY AUTOMOTIVE GROUP INC  
GAIL LAMBORN  
825 SE MONTEREY RD STE 1  
STUART FL 34994-4538

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2013-23711L**

**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 February 27, 2013, is MODIFIED to apply only to the Joined Party. It is further ORDERED that the determination be AFFIRMED as modified.

### 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:

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DEPARTMENT OF REVENUE  
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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

TALLAHASSEE FL 32399-4143

**PETITIONER:**

Employer Account No. - 2908676  
FAT CITY AUTOMOTIVE GROUP INC  
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**PROTEST OF LIABILITY  
DOCKET NO. 2013-23711L**

**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 February 27, 2013.

After due notice to the parties, a telephone hearing was held on May 7, 2013. The Petitioner, represented by its manager, appeared and testified. The Respondent, represented by a Department of Revenue investigator, appeared and testified. The Joined Party 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 not received.

**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 corporation which was formed to operate an automobile sales and repair business.
2. In 2012, the Petitioner was seeking to hire an individual to work as an automobile detailer. The Petitioner advertised the position on Craigslist, and the Joined Party responded to the advertisement. The Joined Party had previously worked as an automobile detailer, and was thoroughly familiar with the process of detailing an automobile. The Petitioner's manager interviewed the Joined Party, and informed the Joined Party that he would receive 50% of the fee that the Petitioner charged its customers for detailing services. The parties did not enter into any written agreement or contract, and there was no discussion during the interview regarding whether

the Joined Party would be considered the Petitioner's employee or an independent contractor. The Joined Party began performing services for the Petitioner on June 8, 2012

3. The Joined Party was not in business for himself and did not have an occupational license. The Joined Party believed that he was an employee of the Petitioner. Approximately one month after he began performing services, the Joined Party learned that he would be receiving a 1099 from the employer, and not a W-2.
4. The Joined Party was not trained to perform detailing work due to his previous experience performing detailing services prior to his relationship with the Petitioner. The Petitioner set the fee that it charged its customers, collected the fee from its customers, and distributed the Joined Party's portion of the fee to the Joined Party approximately once per week.
5. The Joined Party worked during the Petitioner's business hours, and began working at 9:00 a.m. each day. The claimant left each day after all work was complete and he was instructed to do so by the manager. The Joined Party asked the manager at the end of each work day whether there would be work available the following day. The Joined Party was expected to notify the manager if he was unavailable to work.
6. The Joined Party was required to personally perform the work. The manager occasionally inspected the Joined Party's work, and required that the Joined Party redo work that did not meet the manager's expectations.
7. The Petitioner provided the place of work and all equipment which was needed to perform the work including hoses, chemicals, wax, and a vacuum. The Joined Party did not have any expenses associated with the work, and did not have an investment in the business.
8. The Petitioner required that the Joined Party perform services outside of those of a detailer. The Petitioner's manager required that the Joined Party clean the shop, trim hedges, and take out the trash. The manager set the rate of compensation for these tasks, and added the additional compensation to the Joined Party's pay whenever these tasks were performed.
9. The Petitioner did not provide the Joined Party with any fringe benefits such as paid sick days, paid vacations, paid holidays, or health insurance.
10. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract.
11. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance benefits, after his services with the Petitioner ceased. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was conducted by the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. On February 27, 2013, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to June 8, 2012. The Petitioner filed a timely protest.

### **Conclusions of Law:**

12. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals 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.
13. 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).

14. 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.
15. 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.
16. 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.
17. 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.
18. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
19. There was no written agreement or contract between the parties. The only evidence of an agreement of any kind is that the manager told the Joined Party that the Joined Party would be paid 50% of the detailing fee that the Petitioner charged to its customers and the claimant agreed to perform services at that rate. The fact that Joined Party accepted the offer of work does not necessarily establish an independent contractor relationship, especially since there was no meeting of the minds as to the status of the work relationship. 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 cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties." Id. At 171.

20. The Petitioner's business is an automobile sales and repair business. The services that the Petitioner provides to its customers, and for which it charges its customers a fee, include auto detailing. The Joined Party's services as a detailer were not separate and distinct from the employer's business, but were a part of the Petitioner's business. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from performing services for the Petitioner. The Joined Party did not have a business or occupational license, and was not operating a business himself. In Hilldrup Transfer & Storage of New Smyrna Beach, Inc. v. Department of Labor and Employment Security, 447 So.2d 414 (Fla. 5th DCA 1984), the Court stated, "if the work performed in the relationship under consideration is a part of the principle's business, this factor indicates an employment status, even if the work requires a high level of skill to perform it."
21. The Petitioner determined both the method of pay and the rate of pay. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose to report the Joined Parties pay on an IRS Form 1099, does not, standing alone, establish an independent contractor relationship.
22. The Petitioner controlled what work was performed, where it was performed, and when it was performed. 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.
23. While the Joined Party may have had some freedom in how he performed the services provided to the Petitioner, the Petitioner controlled the financial aspects of the relationship, the amount of work, the time the work was performed, and location where the work was performed. It is concluded that, given the level of control the Petitioner exercised over the Joined Party, the services performed for the Petitioner by the Joined Party constitute insured employment.
24. 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 was shown that the Joined Party performed his services under different terms and conditions as other individuals performing services as detailers for the Petitioner.
25. The Joined Party had a representative for the hearing. The Joined Party's representative has not requested a fee for services rendered to the Joined Party; therefore, no fee has been approved by the Special Deputy.

**Recommendation:** It is recommended that the determination dated February 27, 2013 be MODIFIED to apply only to the Joined Party. As MODIFIED, it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 5, 2013.




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NICHOLAS CRONK, 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*

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SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**  
**June 5, 2013**

Copies mailed to:

Petitioner  
Respondent  
Joined Party

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