

**Unemployment Insurance Tax  
Program  
Appeals Board Decisions – 2013**



**1st QUARTER OF  
CALENDAR YEAR 2013**

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1360350-001-BR

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**DECISION**  
**AFFIRMED UPON REVIEW**

The **EMPLOYER** requests review of the Appeals Board decision issued on September 26, 2012, which dismissed the Employer's petition for hearing because it was not timely filed, and held that the Department's decision letter issued February 29, 2012, remains in full force and effect.

The request was filed on time and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F).

In the request for review, the Employer raises contentions regarding the employment status of persons that the Department classified as employees of the Employer. The issue of the employment status of these workers is not properly before the Board. The only issue before the Board is whether the Employer filed a timely petition for hearing from the Department's February 29, 2012 decision

letter.

In its prior decision, the Appeals Board found facts and used its own reasoning and conclusions of law. In reaching our decision, the Appeals Board applied the appropriate law, A.R.S. § 23-724, and Arizona Administrative Code, Sections R6-3-1506 and R6-3-1404, to the facts in this case. The Appeals Board found that the Employer's petition for hearing was filed late, and therefore, the Department's decision letter issued February 29, 2012, remains in full force and effect.

The evidence of record establishes that, on February 29, 2012, the Department mailed a decision letter to the last known address of record of the Employer's representative (Tr. p. 14; Bd. Exh. 5). The Employer's petition for hearing was filed by the Employer's representative, by facsimile, on June 6, 2012, more than thirty days from the date of the decision letter (Bd. Exh. 6). The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for hearing timely filed.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER** has not submitted any newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;
2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;
3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;
4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;
5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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## **RIGHT OF APPEAL TO THE ARIZONA TAX COURT**

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
  - 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
  - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action

may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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A copy of this Decision was mailed on  
to:

Er: xxxx

Acct. No: xxxx

(x) Er Rep: xxxx

(x) CHRISTINA M HAMILTON  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1376171-001-B

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Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

\_\_\_\_\_.

**DECISION**  
**DISMISSED**

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
  - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record. The Employer withdrew its petition on the record on December 20, 2012, the scheduled hearing date and, therefore, no hearing was conducted for this case.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. No further hearing will be scheduled for this matter. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

---

GARY R. BLANTON, Acting Chairman

---

WILLIAM G. DADE, Member

---

JANET L. FELTZ, Member

---

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the

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- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.

- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions.**

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to:

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1275 W WASHINGTON – SITE CODE 040A  
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- (x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1376180-001-B

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Employer

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

THE **EMPLOYER** petitioned for hearing from the Department's two decision letters, issued on June 19, 2012, which held that the Benefit Charge Notices, dated January 20, 2012 and April 13, 2012, are final because the Employer's application for redetermination was filed late.

The Employer filed a timely petition for hearing on July 3, 2012. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephone hearing, for December 5, 2012, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Benefit Charge Notices, UC-602A, dated January 20, 2012 and April 13, 2012, became final during the interim period before the Employer filed an application for redetermination.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Employer established an experience rating account with the Department in 1997, and provided an address of record on "A Road" (Tr. p. 7).
2. In November 2008, the Employer moved from A Road to a new address on "B Road" (Tr. p. 17). The Employer did not notify the Department of the change in address when it moved (Tr. pp. 10, 18, 25).
3. On January 20, 2012, the Department mailed a Benefit Charge Notice, for the quarter ending December 31, 2011, to the Employer's address of record on A Road (Tr. p. 7; Bd. Exh. 1).
4. On April 13, 2012, the Department mailed a Benefit Charge Notice, for the quarter ending March 31, 2012, to the Employer's address of record on A Road (Tr. p. 8; Bd. Exh. 2).
5. The Employer did not receive the two Benefit Charge Notices in the mail (Tr. p. 15).
6. On April 24, 2012, the Employer received a call from a Department employee (Tr. pp. 16, 27). During this conversation, the Employer first became aware of the two benefit charge notices (Tr. pp. 15, 16). Also during this conversation, the

Employer advised the Department that the Employer had moved to B Road (Tr. pp. 23, 24).

7. The Department updated the Employer's address of record on April 25, 2012 (Tr. pp. 10, 30, 31).
8. The Employer filed an application for redetermination of the January 20, 2012 and April 13, 2012 Benefit Charge Notices by facsimile on June 4, 2012 (Tr. pp. 9, 20, 21; Bd. Exh. 3).
9. On June 19, 2012, the Department issued two decision letters on the timeliness of the Employer's application for redetermination of charges payable to two claimants (Bd. Exh. 4). The Department's decisions stated that since the Employer's "application was not filed within fifteen (15) days and because [the Employer has] not established a good and sufficient reason for the delay in submitting the application," the January 20, 2012 and April 13, 2012 Benefit Charge Notices "must be held to be final" (Bd. Exh. 4).
10. On July 3, 2012, the Employer petitioned for a hearing (Bd. Exh. 5).

The issue properly before this Board is whether the Employer filed timely applications for redetermination of the January 20, 2012 and April 13, 2012 Benefit Charge Notices.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding on the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery of the redetermination or denial an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. [Emphasis added]

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current mailing address. The date mailed shall be presumed

to be the date of the document, unless otherwise indicated by the facts. (Emphasis added)

Arizona Administrative Code, Section R6-3-1703, provides in pertinent part:

\* \* \*

C. Report of Changes

Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business. (Emphasis added).

The record establishes that two Benefit Charge Notices were mailed to the Employer, one on January 20, 2012, and the other on April 13, 2012. The Employer filed an application for redetermination of the Benefit Charge Notices by facsimile on June 4, 2012, more than fifteen days after the notices were mailed. Under Arizona Administrative Code, Section R6-3-1404(B), a request for reconsideration filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the United States Postal Service, or (3) the individual having changed his mailing address at a time when there would have been no reason to notify the Department of the address change.

At the Appeal Tribunal hearing, the Employer's president testified that the Department should have been aware of the Employer's change in address because of tax filings that had been submitted by the Employer's payroll company (Tr. pp. 17, 18, 23). We infer the Employer contends that the Department committed error by failing to update the Employer's address from these filings. The Department witness testified that the documents mentioned by the Employer would have been submitted to the Internal Revenue Service, and would not have been received by the State of Arizona (Tr. p. 28). The Employer failed to submit copies of any of these documents, and no one from the Employer's payroll company appeared to testify in support of the Employer's assertion (Tr. pp. 36,

37). The record does not establish that Department error caused a delay in the updating of the Employer's address of record.

The application for redetermination was filed late because the Employer did not receive the Benefit Charge Notices in the mail as a result of the Employer failing to notify the Department of a change in the Employer's address. Under Arizona Administrative Code, Section R6-3-1703(C), the Employer was obligated to promptly notify the Department of a change in its business address. The Employer failed to notify the Department of its November 2008 change in address until April 24, 2012. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the application for reconsideration timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's two decision letters dated June 19, 2012, regarding the late filing of the Employer's application for redetermination of the January 20, 2012 and April 13, 2012 Benefit Charge Notices.

The Employer did not file an application for redetermination of the Determination of the January 20, 2012 and April 13, 2012 Benefit Charge Notices within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notices dated January 20, 2012 and April 13, 2012, remain in full force and effect.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

GARY R. BLANTON, Member

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JANET L. FELTZ, Member

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- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
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- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1376187-001-B

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

**THE EMPLOYER**, through counsel, has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
  - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
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1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions.**

---

A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxx

(x) CHRISTINA M HAMILTON, ASSISTANT ATTORNEY GENERAL  
CFP/CLA SC #040A

(x) JOHN NORRIS, CHIEF OF TAX - EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1383758-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

---

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

**THE EMPLOYER**, through counsel, petitioned for hearing from the Department's decision letter issued on June 12, 2012, which held that "the Determination [of Unemployment Insurance Liability] issued October 18, 2011 is final" because the Employer's written request for reconsideration was not timely filed.

The Employer's petition was dated and filed electronically on October 11, 2012. The Appeals Board has jurisdiction to consider the timeliness of the petition for hearing filed in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **January 30, 2013**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer's petition to the Appeals Board for a hearing and review from the Department's decision on late filing issued on June 12, 2012, should be considered timely filed.

On the scheduled date of the hearing, counsel for the Department was present, and a witness for the Department testified. Counsel for the Employer was present and a witness for the employer appeared but did not testify. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case, because the Employer has failed to comply with the regulatory prerequisites that would entitle the Employer to a review of the Department's decision letter.

Arizona Revised Statutes § 23-724, provides in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board. [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

- B. Petition for hearing or review
1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. ...  
\* \* \*
  2. The petition must be filed within 30 days (unless the time is extended for good cause) after mailing of the reconsidered determination or denial thereof involving one of the following issues:  
\* \* \*
    - f. Transfer of the entire experience rating account of predecessor employer to successor (A.R.S. § 23-733);

- g. Liability of successor employer for predecessor's unpaid contributions (A.R.S. § 23-733) ... [Emphasis added].

The record reveals that the Department's decision letter was sent by certified mail on June 12, 2012, to the Employer's last known address of record (Bd. Exh. 3). The letter was delivered to the Employer's address by the United States Postal Service on June 15, 2012 (Bd. Exh. 4). The petition to the Appeals Board, however, was filed, via electronic mail, on October 11, 2012 (Bd. Exh. 5), more than 30 days from the date of the decision letter. The petition, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404, provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
    - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
    - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
- \* \* \*
- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address

at a time when there would have been no reason for him to notify the Department of the address change.

\* \* \*

In the petition for hearing, the Employer, through counsel, stated no reason for the late filing of the petition (Bd. Exh. 5). At the Appeals Board hearing, the Employer declined to present any evidence regarding the reason for the late filing of the petition.

Under Arizona Administrative Code, Section R6-3-1404(B), an appeal or petition filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the United States Postal Service, or (3) the individual changed his mailing address at a time when there would have been no reason to notify the Department of the address change. Here, the Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for review timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition. The decision letter issued June 12, 2012, remains in full force and effect.

DATED:

APPEALS BOARD

---

GARY R. BLANTON, Acting Chairman

---

WILLIAM G. DADE, Member

---

JANET L. FELTZ, Member

---

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The

Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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### **HOW TO ASK FOR REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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---

A copy of this Decision was mailed on  
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- (x) Er: xxxx Acct. No: xxxx
- (x) Er Rep: xxxx
- (x) CHRISTINA M HAMILTON  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926
- (x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1385257-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON  
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1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

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---

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

**THE EMPLOYER**, through counsel, has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
  - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record. On February 26, 2013, the Employer, through counsel, submitted a written request to withdraw its petition.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. No hearing will be scheduled in this matter. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

GARY R. BLANTON, Member

---

JANET L. FELTZ, Member

---

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**2<sup>nd</sup> QUARTER OF  
CALENDAR YEAR 2013**

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1261706-001-BR

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB  
ASST ATTORNEY GENERAL CFP/C  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

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**DECISION  
REQUEST TO REOPEN DENIED**

**THE EMPLOYER** has filed a request to reopen the Appeals Board hearing that was conducted on December 13, 2011. On April 26, 2012, the Appeals Board issued a decision in Appeals Board No. T-1261706-001-B. The Board's decision dismissed the Employer's petition for a hearing because the Employer did not appear at the hearing on December 13, 2011.

The request to reopen the hearing having been timely filed, the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F). The Employer previously petitioned for hearing from the Department's Reconsidered Determination issued on June 28, 2010, which held that the services performed by the workers for the Employer as bread merchandisers were correctly determined to constitute employment, and the remuneration paid for such services constituted wages.

Following notification to the parties, a telephone hearing was conducted before JOSE R. PAVON, an Appeals Board Administrative Law Judge in Phoenix, Arizona, on Wednesday, December 4, 2012. At that time, all parties were given an opportunity to present evidence on the following issue(s):

1. Whether the Employer had good cause for its nonappearance at the scheduled hearing of December 13, 2011.

On the scheduled date of the hearing, two Employer witnesses appeared and testified. Counsel for the Department and a witness for the Department also appeared. Board Exhibits 1 through 5 were identified but never formally admitted into evidence. As neither party expressed any objection to the admission of the exhibits, we will now admit those exhibits into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On November 1, 2011 (mistakenly shows November 1, 2012 on the notice), the Appeals Board mailed a Notice of Rescheduled Telephonic Appeals Board Hearing to the Employer's address of record (Tr. p. 5; Bd. Exhs. 1A-1F and 7A-7E).
2. The notice informed the parties that the Appeals Board hearing was rescheduled for December 13, 2011, at 10:00 a.m. MST (Bd. Exhs. 1A, 7A).
3. The Employer received the Notice of Rescheduled Hearing (Bd. Exh. 3).
4. On December 13, 2011, the Employer did not appear at the Appeals Board hearing (Tr. pp. 5-7; Bd. Exh. 4).
5. On April 26, 2012, the Appeals Board dismissed the Employer's petition for a hearing (Bd. Exh. 2).
6. On May 24, 2012, the Employer filed its request to reopen the December 13, 2011 Appeals Board hearing (Bd. Exh. 3).

Arizona Revised Statutes, § 23-681(C) provides as follows:

- C. The department of economic security shall adopt rules:
  - 1. To set standards under which a party may be excused for failure to attend a hearing for good cause.
  - 2. To allow a party who failed to attend a hearing to file a written or electronic request to reopen the hearing.

Arizona Administrative Code, Section R6-3-1503, provides in part as follows:

- B. Appeal Tribunal hearings
  - 3. Failure of a party to appear
    - b. If a decision is issued adverse to any interested party that failed to appear at a scheduled hearing, that party may file 1 written request for a hearing to determine whether good cause exists to reopen the hearing. The request to reopen shall be filed within 15 calendar days of the mailing date of the decision or disposition and shall list the reasons for the failure to appear.
      - \* \* \*
    - c. Good cause warranting reopening of a case shall be established upon proof that both the failure to appear and failure to timely notify the hearing officer were beyond the reasonable control of the nonappearing party. [Emphasis added].
      - \* \* \*

In Maldonado v. Arizona Department of Economic Security, 182 Ariz. 476, 897 P.2d 1362 (App. 1994), the Court of Appeals held that the language in Arizona Administrative Code, Section R6-3-1503(B)(3)(d), must be interpreted in such a way as to allow an “excusable neglect” standard to be considered in

determining whether to reopen a hearing, similar to the test under Arizona Rule of Civil Procedure 60(c).

In interpreting the term “excusable neglect,” as expressly included in Ariz. R. Civ. P. 60(c), Appellate Courts have held that such standard does not apply if the action occurred because of a party's mere neglect, inadvertence or forgetfulness without a reasonable excuse therefor, Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984). The term “excusable neglect” is not synonymous with carelessness, Ulibarri v. Gerstenberger, 178 Ariz. 151, 871 P.2d 698 (App. 1993), and a party claiming excusable neglect must have promptly sought relief, Baker Intern. Associates, Inc. v. Shanwick Intern. Corp., 174 Ariz. 580, 851 P.2d 1379 (App. 1993). The standard for determining whether an action constitutes “excusable neglect” is whether the neglect involves an error such as might be made by a reasonably prudent person who attempted to handle a matter in a prompt and diligent fashion. Beal v. State Farm Mutual Automobile Insurance Co., 151 Ariz. 514, 729 P.2d 318 (App. 1986).

The Employer witness testified that, on December 13, 2011, the Employer did not appear at the Appeals Board hearing because they were experiencing “a horrible storm” and when it was time to call in for the hearing, they lost power (Tr. p. 5). The Employer further testified that there were snow and storm warnings for the Tucson area (Tr. p. 9). In support of her testimony the Employer read an excerpt from an article from the Arizona Daily Star dated December 14, 2011 (Tr. p. 10). The article covered the storms that affected Arizona on December 13, 2011. The storms that were covered in the article mainly took place in the eastern area of the Mogollon Rim where more than a foot of snow fell. The snow storms also affected the communities of Alpine, Strawberry and Pine (Tr. pp. 11, 12). Power outages occurred around the Payson, Arizona area. The article also states that huge black clouds loomed over central Phoenix and Tucson in the afternoon and that forecasters called for a quarter inch or more of rain (Tr. p. 12).

The Arizona Daily Star article was dated Wednesday, December 14, 2011, the day after the hearing. It is evident that on Tuesday, December 13, 2011, the potential storms were not due to hit Tucson until the afternoon, which was after the 10:00 a.m. Appeals Board hearing. The article outlined that there were power outages in northern Arizona, but it did not mention any power outages in Tucson. The Employer’s testimony regarding storms hitting the Tucson area and causing a power outage in the morning at the time of the hearing is not supported by the article. When specifically asked if the article said anything about the power outages around Tucson, the Employer’s witness testified “I came across an article that did, but that was not it so I’m going to have to kind of just look through all of this, um, and see exactly where I did see where it said Tucson. Okay, what I printed out right here doesn’t exactly say power outages, uh, but I do know that I did come across something that did have that with the date in it.” (Tr. p. 12).

The Employer witness' testimony did not provide specific information as to when and where the alleged power outages took place in Tucson. The Employer witness' testimony was communicated only in general terms. Even assuming that the Employer missed the hearing due to a power outage, that does not explain why the Employer waited until January 30, 2012, to first contact the Department, as is reflected in the Department's computer records. The delay in contacting the Department was not a reasonable action, and it does not support the Employer's testimony of diligence in trying to attend the hearing. Therefore, the Employer's testimony is insufficient to establish that a power outage occurred sometime before or during the time scheduled for the hearing. We conclude the Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1503, and would establish that the Employer's failure to appear was caused by a circumstance beyond its reasonable control and permit the Board to find good cause to reopen the scheduled hearing. Similarly, we find insufficient evidence of excusable neglect in accordance with Maldonado. Accordingly,

THE APPEALS BOARD **DENIES** the Employer's request to reopen the hearing.

The APPEALS BOARD DECISION dated April 26, 2012, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The

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### **RIGHT OF APPEAL TO THE ARIZONA TAX COURT**

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
  - 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's

decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

---

A copy of this Decision was mailed on  
to:

(x) Er: xxxx Acct. No: xxxx

(x) ELI GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
UI TAX SECTION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1272745-001-BR

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON  
ASST ATTORNEY GENERAL CFP/CLA  
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PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANTE** --- The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

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**DECISION**  
**AFFIRMED UPON REVIEW**

The **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on September 14, 2012, which affirmed the Reconsidered Determination issued by the Department on March 11, 2011, and held:

The Determination of Liability for Employment or Wages issued on August 26, 2005, stands unmodified.

All forms of remuneration paid to these individuals constitute wages. This includes the individuals and amounts shown on the Notice of Assessment Report(s) for the quarters ending March 31, 2004 through June 30, 2005.

The request was filed on time, and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F).

We note that the Employer filed a request for review and a supplement to the request for review. As it appears that the supplement is merely a copy of the original request, with citations to the record inserted, for the sake of simplicity we will refer to the two documents collectively as the “request for review”.

In the request for review, the Employer, through counsel, reprints a large portion of the Employer’s petition for hearing (Bd. Exh. 9) which excoriates the Department for the more than five-year delay between the filing of the Employer’s request for reconsideration in September of 2005 and the issuance of the Department’s Reconsidered Determination on March 11, 2011. The Employer contends that “[i]t is too late for the Department to now assert liability against [the Employer]” and that “one would think that the Department ... would be too embarrassed to assert that [the Employer] is now liable for contributions allegedly due in 2004 and 2005.”

The Employer cites no legal authority to support this contention. While the Department’s delay in issuing the Reconsidered Determination was certainly unfortunate, it is not relevant. The Employer has not set forth any legal basis for barring the Department’s pursuit of this matter, based on the timeliness of the Department’s actions.

Next, the Employer turns its sights on the Appeals Board with a section entitled: “THE DECISION DEMONSTRATES THE APPEAL [sic] BOARD’S BIAS”. The Employer contends that the Appeals Board exhibited this purported “bias” against the Employer by referring to the Employer as “the Employer” in its decision, by not printing the text of A.R.S. § 23-613.01(A)(4) in its decision, and by concluding that three factors favored an employment, rather than an independent contractor, relationship. The Employer concludes its ad hominem attack as follows: “[The Employer] should be entitled to have its Appeal decided by an independent panel of arbitors [sic], not by three men who merely rubber stamp the DES Reconsidered Determination that was the subject of the Appeal”.

The Board’s use of the term “the Employer” to refer to the business entities involved in these Unemployment Insurance Tax matters is long-standing and implies nothing. We note that, in its petition for hearing, the Employer devoted an entire paragraph to explaining why the use of the term “employed” in its “Employment Agreement” was simply a “generic term” that did not actually mean “employed” (Bd. Exh. 9C). The Board’s use of the term “the Employer” is simply a generic term of convenience and in no way denotes that the Board is simply a “rubber stamp” for the Department’s decisions. We invite the Employer to research published Board decisions in prior Unemployment Insurance Tax cases wherein the Board used the term “the Employer” and yet reversed the Department’s prior decision and found in favor of “the Employer”, which plainly refutes this argument.

Additionally, although it does nothing to show any “bias” by the Board, it is true that the Board did not print the text of A.R.S. § 23-613.01(A)(4) in its prior decision. However, in the paragraph the Board devoted to the Employer’s arguments regarding licensed real estate agents, the Board did cite A.R.S. § 23-613.01, which of course would include subsection (A)(4). The Board dismissed the Employer’s arguments quickly and briefly because, for reasons set forth in further detail later in this decision, that was all the attention those arguments merited.

Finally, the Employer selected three factors that the Board determined favored an employment relationship, rather than an independent contractor relationship, and declared: “It is difficult to conceive of a reason other than bias for the Board to make the blatantly erroneous conclusions discussed above.” One conceivable reason, other than bias, is that reasonable minds can differ. Apparently, it is the Employer’s position that anyone who reaches a different conclusion than that favored by the Employer must be acting out of bias, rather than a good faith effort to apply the law to the facts of a case. We disagree.

Under A.R.S. § 23-672, the Appeals Board is a legislatively constructed component of the Department. The legislature has directed, in A.R.S. § 23-724, that the Board’s duties include entertaining appeals of reconsidered liability determinations. The Board has acted in accordance with its statutorily prescribed duties.

After attacking the motives and integrity of the Department and the Appeals Board, the Employer eventually delves into its primary argument regarding the merits of the case. In the Employer’s petition for hearing, at the Appeals Board hearing, and in the Employer’s request for review, the Employer has made endless references to how the Federal government and the Arizona legislature have purportedly “classified” licensed real estate agents as “independent contractors” and how, therefore, the unlicensed hunting trip sales representatives at issue here should also be treated as independent contractors. In the request for review, the Employer reprints a portion of the Board’s prior decision that discusses the Employer’s licensed real estate agent argument and asserts: “The Appeals Board missed the point.”

On the contrary, it is the Employer that has “missed the point”. The Employer submitted a copy of 26 U.S.C. § 3508(a) and (b) for inclusion in the record, apparently in an attempt to support its argument (Bd. Exh. 13). However, that Federal statute does not support the Employer’s argument. Nowhere in that Code Section is there any indication that licensed real estate agents have been “classified” by Congress as “independent contractors”. In fact, the term “independent contractor” does not even appear in that Code Section. That Code Section only states that licensed real estate agents, who meet certain criteria, “shall not be treated as an employee” for Federal tax purposes. They

are simply exempt. Congress has not classified licensed real estate agents as “independent contractors”.

Similarly, Arizona Revised Statutes § 23-617(14) states:

Exempt employment; definition

"Exempt employment" means employment not considered in determining whether an employing unit constitutes an "employer" under this chapter and includes:

\* \* \*

14. Service performed by an individual for an employing unit as a licensed real estate broker or a licensed cemetery broker or a licensed real estate salesman or licensed cemetery salesman, if all such service performed by the individual for such employing unit is performed for remuneration solely by way of commission, except that any service performed as a real estate broker, a cemetery broker, a real estate salesman or a cemetery salesman for an employing unit to which the provisions of section 23-750 apply is not exempt employment.

\* \* \*

Nowhere in Arizona’s statutes or regulations are licensed real estate agents referred to as “independent contractors”. The Arizona legislature, like Congress, has simply elected to treat licensed real estate agents as exempt, and not considered employees, for tax purposes. The Arizona legislature has not classified licensed real estate agents as “independent contractors”.

Ironically, an exhibit supplied by the Employer to support its argument that licensed real estate agents are classified as “independent contractors” actually undercuts the argument. The Employer submitted a “revenue ruling” (Tr. p. 9; Bd. Exh. 12) regarding the application of 26 U.S.C. § 3508 which states, in pertinent part:

A, an individual, is a licensed real estate agent. Substantially all of the cash and noncash remuneration for services that A performs as a real estate agent for X, a corporation, is directly related to A’s sales and not to the number of hours A works. A’s services for X are

performed under a written contract between A and X which specifies that X [sic] will not be treated as an employee with respect to those services for federal tax purposes. A therefore meets the description of a qualified real estate agent contained in section 3508(b)(1) of the Code.

**The direction and control that X exercises over A in the performance of X's [sic] services would establish the relationship of employer and employee under applicable common-law rules. Thus, but for the application of section 3508(a) of the Code, A would be X's employee within the meaning of section 3121(d)(2). As such, A would be an employee for purposes of the Federal Insurance Contributions Act (FICA). [Bold added]**

Not only does this revenue ruling not state that licensed real estate agents are "independent contractors", it specifically indicates that the "direction and control" that a real estate broker exercises over a licensed real estate agent "would establish the relationship of employer and employee under applicable common-law rules". It goes on to state that "but for" the exemption contained in 26 U.S.C. § 3508(a), a licensed real estate agent would be considered an employee for tax purposes. The Employer's argument that the Arizona legislature and the Federal government have classified licensed real estate agents as "independent contractors" fails. Likewise, any attempt by the Employer to rely on the treatment of licensed real estate agents as a basis for determining that the Employer's unlicensed hunting trip sales representative are "independent contractors" also fails.

After disposing of the Employer's erroneous proposition that licensed real estate agents have been classified as "independent contractors", the last remaining legal argument for the Employer involving licensed real estate agents is the Employer's contention regarding the applicability of Arizona Revised Statutes § 23-613.01(A)(4). Arizona Revised Statutes § 23-613.01(A)(4) states:

Employee; definition; exempt employment

- A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Indications of control by the employing unit include controlling the individual's hours of work, location of work, right to perform services for others, tools, equipment, materials,

expenses and use of other workers and other indicia of employment, except employee does not include:

\* \* \*

4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

\* \* \*

Licensed real estate agents, who meet certain criteria, do constitute a “class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes”. However, the Employer presented insufficient credible evidence to establish that the unlicensed hunting trip sales representatives at issue here are “similarly situated” to licensed real estate agents, as required by this statute. The Employer cites no legal authority to support its proposition. Furthermore, the Employer presented no evidence to show that Arizona Revised Statutes § 23-613.01(A)(4) has been applied to find any type of worker “similarly situated” to licensed real estate agents, and thus exempt from being classified as employees for Unemployment Insurance Tax purposes.

The Board finds that the mere fact the Federal government chose to specifically limit the applicability of 26 U.S.C. § 3508(a) to “licensed” real estate agents ends any debate as to whether unlicensed hunting trip sales representatives are “similarly situated” to licensed real estate agents. It is worth noting that the Arizona legislature also specifically limited the exemption contained in Arizona Revised Statutes § 23-617(14) to “licensed” real estate agents. The only real similarity between the unlicensed hunting trip sales representatives and licensed real estate agents is that both are salespeople who work on commission. To adopt the Employer’s proposed usage of Arizona Revised Statutes § 23-613.01(A)(4) would mean that any unlicensed salesperson working on commission in any field would be exempt from the definition of employee. This is an untenable position that has no basis in the law.

The Employer concludes its request for review by listing a number of factors addressed by the Board in its prior decision and simply indicating, without citing any additional legal authority, that the Employer believes those factors either favor an independent contractor relationship or should be considered neutral. At the end of this recitation, the Employer includes, in part, the following summary:

**To summarize, the proper analysis of the factors should be as follows:**

**The factors that support an employment relationship include:**

1. Tools, equipment or premises provided by [the Employer].
2. The sales representatives' inability to enter into simultaneous contracts elsewhere or perform similar services for a six month period after termination of their working relationship.
3. The sales representatives did not maintain their own business that they held out to the public. [Emphasis added]

The factors that the Employer concedes "support an employment relationship" are so overwhelming that it is not possible to conceive of any constellation of the other factors that could overcome them and result in any outcome other than a finding of an employer/employee relationship. The Employer concedes that it provided tools, equipment, and premises to the sales representatives. The Employer concedes that none of the sales representatives maintained their own business that they held out to the public. Finally, and most tellingly, the Employer concedes that the sales representatives were prohibited from entering into simultaneous contracts with other business entities while the "Employment Agreement" was in force and for six months after the termination of the working relationship.

The Employer's own concessions establish that the sales representatives were entirely *dependent* on the Employer. The Employer had absolute control over the sales representatives' ability to perform their services, as they were prohibited from providing those services to anyone other than the Employer. This prohibition continued even after the Employer or the sales representative terminated the working relationship. No serious argument can be made that the sales representatives were "independent contractors" in any sense of that term, given the control the Employer had over the sales representatives' ability to ply their services. Therefore, we will not go through the factor by factor analysis that was exhaustively explained in our prior decision.

In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. §§ 23-724(B), 23-615, 23-613.01, and 23-622(A), as well as Arizona Administrative Code, Sections R6-3-1723 and R6-3-1705(B), and case law, to the facts in this case and found the services performed by individuals as sales representatives constitute employment, remuneration paid to such individuals by the Employer constitute wages, and the Employer is liable for Arizona

Unemployment Insurance taxes on wages for the quarters ending March 31, 2004 through June 30, 2005.

The Board thoroughly examined the factors established by the facts in this case, and considered the relevant law and administrative rules as they are applicable to those facts. The Board has considered the evidence as it relates to the factors set out in Arizona Administrative Code, Subsections R6-3-1723(D) and (E). In reaching its decision, the Board is mindful of the holdings in Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), and Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975) which provide for a liberal interpretation of the Arizona Employment Security Act. The Board concludes that the weight of the evidence establishes that the services performed by sales representatives constituted employment of these individuals by the Employer.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER** has not submitted any newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;
2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;
3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;
4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;
5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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**RIGHT OF APPEAL TO THE ARIZONA TAX COURT**

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-

901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
  - 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
  - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
  - 4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request

for review under section 23-672 or 41-1992 and a decision on review has been issued.

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A copy of this Decision was mailed on  
to:

Er: xxxx

Acct. No: xxxx

(x) Er Rep: xxxx

(x) CHRISTINA M HAMILTON  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
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PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
UI TAX SECTION  
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By: \_\_\_\_\_  
For The Appeals Board

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1273370-001-BR

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB  
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PHOENIX, AZ 85007-2926

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

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**DECISION**  
**REQUEST TO REOPEN DENIED**

**THE EMPLOYER** has filed a request to reopen the Appeals Board hearing that was conducted November 21, 2011. On December 1, 2011, the Appeals Board issued a decision in Appeals Board No. T-1273370-001-B. The Board's decision affirmed the Department's Reconsidered Determination dated March 11, 2011.

The request for review was filed on time, and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F). The Employer previously petitioned for a hearing from the Department's decision letter issued on March 11, 2011, which held that the Determination of Unemployment Insurance Liability dated January 25, 2010, and the Determination of Liability for Employment or Wages dated January 25, 2010, had become final because the Employer did not timely file the request for reconsideration.

Following notification to the parties, a telephone hearing was conducted before JOSE R. PAVON, an Administrative Law Judge in Phoenix, Arizona, on December 4, 2012. At that time, all parties were given an opportunity to present evidence on the following issue(s):

1. Whether the Employer had good cause for its nonappearance at the scheduled hearing of November 21, 2011.

On the scheduled date of hearing, two Employer witnesses appeared to testify. Counsel for the Department and a witness for the Department appeared. Board Exhibits 1A through 5F were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On November 7, 2011, the Appeals Board mailed a Notice of Rescheduled Appeals Board Telephone Hearing to the Employer's address of record (Bd. Exhs. 1A-1F).
2. The Notice informed the parties that the Appeals Board hearing was rescheduled for November 21, 2011, at 9:30 a.m. MST (Bd. Exhs. 1A-1B).
3. The Employer received the Notice of Rescheduled Hearing about one month after it was mailed to them because it had moved and had not updated the address with the Department (Tr. pp. 10, 11, 14-16; Bd. Exh. 3).
4. On November 21, 2011, the Employer did not appear at the Appeals Board hearing (Bd. Exh. 4).
5. On December 1, 2011, the Appeals Board issued a decision affirming the Department's decision dated March 11, 2011 (Bd. Exh. 2)
6. On December 24, 2011, the Employer filed its request to reopen the Appeals Board hearing (Bd. Exh. 3).

Arizona Revised Statutes, § 23-681(C) provides as follows:

- C. The department of economic security shall adopt rules:
  1. To set standards under which a party may be excused for failure to attend a hearing for good cause.

2. To allow a party who failed to attend a hearing to file a written or electronic request to reopen the hearing.

Arizona Administrative Code, Section R6-3-1503, provides in part as follows:

- \* \* \*
- B. Appeal Tribunal hearings
- \* \* \*
3. Failure of a party to appear
- \* \* \*
- b. If a decision is issued adverse to any interested party that failed to appear at a scheduled hearing, that party may file 1 written request for a hearing to determine whether good cause exists to reopen the hearing. The request to reopen shall be filed within 15 calendar days of the mailing date of the decision or disposition and shall list the reasons for the failure to appear.
- \* \* \*
- c. Good cause warranting reopening of a case shall be established upon proof that both the failure to appear and failure to timely notify the hearing officer were beyond the reasonable control of the nonappearing party. [Emphasis added].
- \* \* \*

In Maldonado v. Arizona Department of Economic Security, 182 Ariz. 476, 897 P.2d 1362 (App. 1994), the Court of Appeals held that the language in Arizona Administrative Code, Section R6-3-1503(B)(3)(d), must be interpreted in such a way as to allow an “excusable neglect” standard to be considered in determining whether to reopen a hearing, similar to the test under Arizona Rule of Civil Procedure 60(c).

In interpreting the term “excusable neglect,” as expressly included in Ariz. R. Civ. P. 60(c), Appellate Courts have held that such standard does not apply if the action occurred because of a party's mere neglect, inadvertence or forgetfulness without a reasonable excuse therefor, Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984). The term “excusable neglect” is not synonymous with carelessness, Ulibarri v. Gerstenberger, 178 Ariz. 151, 871 P.2d 698 (App.

1993), and a party claiming excusable neglect must have promptly sought relief, Baker Intern. Associates, Inc. v. Shanwick Intern. Corp., 174 Ariz. 580, 851 P.2d 1379 (App. 1993). The standard for determining whether an action constitutes “excusable neglect” is whether the neglect involves an error such as might be made by a reasonably prudent person who attempted to handle a matter in a prompt and diligent fashion. Beal v. State Farm Mutual Automobile Insurance Co., 151 Ariz. 514, 729 P.2d 318 (App. 1986).

The November 7, 2011, Notice of Hearing was mailed to the Employer’s address of record at the time (Tr. p. 12). The Employer was out of town in Arizona from November 3, 2011 through December 14, 2011, and it did not receive the Notice of Hearing until it returned (Tr. p. 12; Bd. Exh. 3). The Employer testified that, during that same time period, it was having its mail forwarded from Rexburg, ID to Boise, ID, by the U. S. Postal Service. The Employer also testified that it did not update its address with the Department, and that it was a failure on their part (Tr. p. 15).

Under Arizona Administrative Code, Section R6-3-1503, good cause warranting a reopening of a case shall be established upon proof that both the failure to appear and the failure to notify the hearing officer were beyond the reasonable control of the non-appearing party.

Here, the Employer did not attend the Appeals Board hearing because of its own actions. The Employer went out of town for over a month during the time that the Notice of Rescheduled Hearing was mailed to the Employer’s address of record. The Employer also chose to forward the mail with the U. S. Postal Service, but did not update its address with the Department. Both of these situations were well within the Employer’s control. We conclude the Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1503, and would establish that the Employer’s failure to appear was caused by a circumstance beyond its reasonable control and permit finding good cause to reopen the scheduled hearing. Similarly, we find no adequate evidence of excusable neglect under Maldonado. The Employer’s failure to update its address with the Department is not an error that would have been made by a reasonable prudent person who attempted to handle a matter in a prompt and diligent manner. Accordingly,

**THE APPEALS BOARD DENIES** the Employer’s request to reopen the hearing.

The APPEALS BOARD DECISION dated December 1, 2011, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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JANET L. FELTZ, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: (602) 506-3776.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
  
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
  
  - 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
  
  - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
  
  - 4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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A copy of this Decision was mailed on  
to:

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By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1312241-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
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PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED, BUT MODIFIED**

The **EMPLOYER**, through counsel, petitioned for a hearing from the Reconsidered Determination issued on September 2, 2011, which affirmed both the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued by the Department on April 30, 2009 (Bd. Exh. 2). The Reconsidered Determination held that:

... we conclude that [Employer] is a Temporary Services Employer and, therefore, an employing unit under the

provisions of A.R.S. § 23-614(I)(2) and that under A.R.S. § 23-615(4) the services performed by any officer of a corporation constitutes employment and remuneration received constitutes wages whereby [Employer] is subject to Unemployment Insurance tax. (Bd. Exh. 12).

We note that the Reconsidered Determination inadvertently did not include services performed by pet-sitters and remuneration received by pet-sitters. Therefore, we modify the findings contained in the Reconsidered Determination to include that services performed by pet-sitters constitutes employment and their remuneration constitutes wages whereby the Employer is subject to Unemployment Insurance tax.

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

At the direction of the Appeals Board, an in-person hearing was held before MORRIS L. WILLIAMS, III, an Administrative Law Judge, on **July 13, 2012**. At the hearing, the parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer is a “temporary services employer” liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-614.

The following persons appeared at the hearing: one Employer witness who testified, Employer’s counsel, one Department witness who testified, the Assistant Attorney General as the Department’s counsel, and an observer. At the hearing, Board Exhibits 1 through 20 were admitted into the record as evidence.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is a corporation and its president, a corporate officer, operates the business of the corporation. Hereafter, the president shall be referred to as “Employer.”
2. The Employer provides pet care for pet owners in or at the homes of the pet owners while the pet owner is out of town (Tr. pp. 56, 64, 65, 67). The Employer also provides home care services for the homeowner, if requested (Tr. pp. 57-59).
3. The Employer negotiates rates directly with the pet owners, and she makes them aware that there may be times when she has to get another pet-sitter to substitute for her because she is not able to complete all of her various assignments, which include assignments with other clients (Tr. p. 63). The Employer is

solely responsible for the owner's pets and their home until the owner returns (Tr. p. 56).

4. Only the Employer negotiates and communicates with the pet owners. None of the pet owners directly communicate with any of the substitute pet-sitters. Also, none of the substitute pet-sitters provide any home care services.
5. When the pet-sitter accepts an assignment, the pet-sitter picks up the keys to the pet owner's residence from the Employer (Tr. pp. 54, 55). The pet owners specify, on the pet instruction sheet, the time of day each pet-sitting visit should occur and the tasks to be performed (Tr. p. 54).
6. All of the pet-sitters use their own grooming supplies (Tr. pp. 55, 56).
7. After the substitute pet-sitter submits an invoice to the Employer, the Employer pays each substitute pet-sitter, from its business account, a negotiated fee based upon the nature, frequency and duration of the services performed by the substitute pet-sitter (Tr. pp. 54, 60, 67).
8. The Employer enters into a written contract with all prospective pet-sitters, and they are required to have insurance (Tr. pp. 60, 62).
9. Following a tax audit, the Department concluded the Employer was a "temporary services employer" and was liable for unemployment insurance taxes.
10. The owner conceded that the corporate officer is an employee of the Employer (Tr. pp. 7, 11, 14).

The Department contended that the Employer acted as a "temporary services employer" and, as such, employed the pet-sitters and sent them to provide services for the Employer's clients.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01(A) provides in part:

Employee; definition; exempt employment

- A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit

as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes. ... [Emphasis added].

The Department has based its ruling largely upon its conclusion "... that the relationship between the workers and TLC meet all of the prerequisites of A.R.S., § 23-614(I)(2)," which provides in pertinent part as follows:

I. For the purposes of this section:

\* \* \*

2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:
  - (a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.
  - (b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
  - (c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined

unacceptable by a specific client or customer.

- (d) Assigns or reassigns the worker to perform services for a client or customer.
- (e) Sets the rate of pay of the worker, whether or not through negotiation.
- (f) Pays the worker from its own account or accounts.
- (g) Retains the right to hire and terminate workers.

In the Reconsidered Determination, the Department noted that: 1) the pet-sitters services were obtained through Craig's List job postings and submitted their applications and resumes to the Employer; 2) the pet-sitters were reimbursed for mileage; 3) the pet-sitters were provided with the Employer's business cards, pet care instruction sheets and supplies; 4) the clients of the Employer paid the Employer directly for their services and the Employer set the pet-sitters rate of pay at \$9.00 per hour; 5) the pet-sitters services were personally performed and they did not provide substitutes; 6) the pet-sitters were licensed and bonded through the Employer; and 7) the pet-sitters did not have simultaneous contracts, did not advertise their services to the public, and devoted their time in furtherance of the Employer's pet-sitting enterprise and not their own business endeavors (Bd. Exh. 12) While the owner denied some of the above-mentioned findings, we find that many of the factors upon which the field auditor based his conclusions, which were contained in the Reconsidered Determination, are supported by the evidence in this case.

During the hearing, the Department's witness testified that, after reviewing the file, she found that all seven factors under A.R.S., § 23-614(I)(2), had been met (Tr. p. 30). We agree. The evidence of record establishes that the Employer negotiates with the pet owners for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services (Tr. p. 54). The potential pet-sitters are offered work assignments where the time of work, the place of work, the type of work, the working conditions and the quality of services as already been discussed and agreed upon by the Employer and the pet owner. The potential pet-sitter has no input in these negotiations. The owner also negotiates a rate with the pet owner on behalf of her corporation, and she sets or negotiates a separate rate with a potential pet-sitter that is independent of the rate she negotiates with a customer (Tr. p. 67). As noted earlier, the pet-sitters are paid from the Employer's business account (Tr. pp. 67, 68). Next, the Employer determines which potential pet-sitters she will offer assignments to from a list of potential pet-sitters even though the pet-sitter may refuse the assignment (Tr. pp. 68-70). The

potential pet-sitters are required to fill out a comprehensive questionnaire before being placed on the list, and the Employer requires the potential pet-sitter to enter into a one year contract, which requires the pet-sitter to provide 60-day notice should he/she desire to terminate the contract (Tr. p. 60; Bd. Exh. 8).

The Employer also retains the right to assign or reassign workers to various clients as the need arises. While the owner offers her personal services, the evidence of record establishes that she uses other pet-sitters more often than she provides personal services (Bd. Exh. 3). The Employer retains the right to substitute another pet-sitter, if the Employer or pet owner is not satisfied with a particular pet-sitters work performance (Tr. p. 68). Further, while the Employer may not hire and terminate pet-sitters in the traditional sense, she does contact them for work opportunities and uses a pet-sitter if the pet-sitter accepts the assignment. The owner also has the option of not using a particular pet-sitter if she is not satisfied with their work, which has the effect of terminating the pet-sitter (Tr. p. 68). Accordingly, the Employer does retain the right to hire and terminate the pet-sitters. In conclusion, based on the foregoing facts, we find that the Department met its burden to establish all of the statutory requirements under A.R.S., § 23-614(I)(2).

**THE APPEALS BOARD AFFIRMS, BUT MODIFIES** to supplement the decision language contained in the Reconsidered Determination issued on September 2, 2011, to include pet-sitters as employees and their remuneration as wages.

The Employer is a “temporary services employer” liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-614, and services performed by individuals as pet-sitters and corporate officers constitute employment, and remuneration paid to individuals as pet-sitters and corporate officers constitute wages.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 771-9036 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxx

(x) Er Rep: xxxx

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
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PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1312460-001-BR

XXXX

STATE OF ARIZONA E S A TAX UNIT  
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Employer

Department

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**IMPORTANTE** --- The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

DECISION  
**AFFIRMED UPON REVIEW**

The **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on November 19, 2012, which affirmed the Reconsidered Determination issued by the Department on August 8, 2011, and held:

The Determination of Liability for Employment or Wages issued on February 9, 2007, stands unmodified.

1. SERVICES CONSTITUTE EMPLOYMENT as defined in A.R.S. § 23-615, and are not exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617 or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.

2. REMUNERATION CONSTITUTES WAGES as defined in A.R.S. § 23-622. Wages for insured work may be used to pay benefits to eligible unemployed individuals and your account could be charged per A.R.S. § 23-727.
3. Services performed by individuals as technicians constitute employment effective January 1, 2005. All forms of remuneration paid to these individuals constitute wages. This Determination includes the individuals and amounts shown on the Notice of Assessment Report(s) for the quarters ending: March 31, 2005 through June 30, 2006.

The request was filed on time and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F).

In the request for review, the Employer, through counsel, contends that the Board erred in its application of “the factors set forth in existing law and regulations interpreting the distinction between independent contractors and employees, as applied to the facts of this case.” Counsel proceeds to contend that not a single one of the factors enumerated in Arizona Administrative Code, Sections R6-3-1723(D)(2) and R6-3-1723(E), indicates the presence of an employer-employee relationship in this case. The Board considers counsel’s contentions for those factors upon which counsel has disputed the Board’s prior findings.

Regarding “Authority over Individual’s Assistants,” counsel for the Employer contends that this factor favors finding an independent contractor relationship as the technicians “had the authority to hire assistants to perform their work, whether they chose to do so or not.” In support of this position, counsel cites Fullerton v. Arizona Dept. of Economic Sec., 135 Ariz. 360, 362, 661 P.2d 210, 212 (App.1983). In Fullerton, the class of workers considered was process servers. The Board distinguishes the case of the Employer’s technicians, who were trained and licensed individuals performing personal services (Tr. pp. 24, 25, 66). Indeed, counsel for the Employer admits that “[p]ersonal performance by the technician of the job is inherent in the nature of this work” (Employer Request for Review at p. 13). The fact assistants were not used by any of the Employer’s technicians demonstrates the inapplicability of this factor in considering the circumstance of the technicians. The Board properly concluded that this factor was neutral.

Regarding “Compliance with Instructions,” counsel contends that this factor supports a finding of an independent relationship as the Employer was obligated by law to impose many of the instructions identified in the Board’s prior decision. However, as licensed professionals, the technicians themselves were obligated to comply with the requirements of A.R.S. § 32-574. By giving

the technicians instruction on areas where they already have their own obligations under law, the Employer has exercised a right to instruct or direct. This right is further evidenced by the Employer's instruction on areas where it has no statutory obligations, such as the dress code and appointment scheduling instructions. Moreover, counsel for Employer cites A.R.S. § 32-574(A)(4) as a basis for the legal requirements placed upon the Employer. The statute provides:

A. A person shall not:

\* \* \*

4. Permit an employee or another person under the person's supervision or control to perform cosmetology, aesthetics or nail technology without a license issued pursuant to this chapter. [Emphasis added].

By relying upon A.R.S. § 32-574(A)(4) as a reason why the Employer had to provide instructions to the technicians, the Employer by necessity concedes that these technicians were either employees or under the Employer's supervision or control. Such control clearly establishes that the technicians were not independent.

Regarding "Place of Work," counsel contends that A.R.S. § 23-574(A)(5) required the technicians to work in a licensed salon and the fact services were provided at the Employer's place of business is "more a function of the nature of the services than any control by [the Employer]". However, A.R.S. § 23-574(A)(5) specifically provides an exception for practicing services in a salon when requested by a customer. Though permitted to work elsewhere by statute, all work was done on the Employer's premises. Counsel also contends that the technicians were free to work independently at other facilities. However, being a part-time employee for multiple employers would not make one an independent contractor.

Regarding "Right to Discharge," counsel contends that there was not a right to discharge, but rather the contract could be terminated at any time. Counsel analogizes the present case with that in Dial-A-Messenger v. Arizona Dept. of Economic Sec., 133 Ariz. 47, 661 P.2d 1053 (App.1983). In Dial-A-Messenger, the Court held that the agreement provides for termination upon notice and is, therefore, not indicative of the existence of the right to control. The Court also noted that discharges were for cause. Here, the agreement between the Employer and the technicians specifically states that "the Employment Agreement is 'AT WILL' and can be terminated by either party at any time for any reason" [underline added] (Bd. Exh. 12). The two key factors of notice and termination for cause are specifically not present. Further, the contract specifically refers to the relationship as an "Employment Agreement" in

this section. Contrary to counsel's contentions, the language used does not evidence a right to terminate a contract, but rather a right to end the employment.

Regarding "Amount of Time," counsel contends that because the technicians set their own hours and made their own schedules, this factor indicates an independent contractor relationship. Counsel mistakes this factor with Arizona Administrative Code, Section R6-3-1723(D)(2)(h), "Set Hours of Work," which the Board considered in favor of an independent relationship based upon the very points raised by counsel. As stated in the Board's prior decision, no evidence was presented regarding the number of hours a technician worked each week. The Board correctly determined this factor to be neutral.

Regarding "Tools and Material," counsel contends that this factor should be deemed neutral as the technicians provided some of their tools and the Employer was obligated to provide tools under Arizona Administrative Code, Section R4-10-403. We note that the requirement of "enough equipment, materials, supplies, tools, and instruments to ensure infection control" is equally imposed upon the technicians themselves by Code Section R4-10-403(D). Additionally, the tools provided by the technicians were not of substantial cost, and it is customary in the trade for technicians to provide their own tools (Tr. pp. 25, 29, 31). These facts do not indicate a lack of control. The Board correctly determined this factor indicates an employment relationship.

Regarding "Expense Reimbursement", counsel contends that because the Employer did not reimburse business expenses, this factor indicates independence. However, the record contains no evidence of business or traveling expenses being incurred by the technicians. The factor is properly considered as neutral.

Regarding "Compensation", counsel contends that compensation to technicians is paid by the job, analogous to the circumstances of the workers in Fullerton and Dial-A-Messenger. In Fullerton, the process servers were compensated strictly on a job completion basis. Fullerton, 135 Ariz. at 364, at 661 P.2d at 214. In Dial-A-Messenger, the drivers were paid on a per job commission basis. Dial-A-Messenger, 133 Ariz. at 53, 661 P.2d at 1059. Here, the Employer applied a more complicated formula wherein the commission rate varied based on several factors, including the technician's experience and the technician's average weekly revenue (Tr. p. 81; Bd. Exh. 12). A sliding scale bonus increased commission rates after obtaining a certain weekly revenue amount over a specified period of time (Bd. Exh. 12). Technicians also received retail product incentive commissions which were only disbursed on a quarterly basis if the technician was still active with the Employer (Bd. Exh. 12). The arithmetical gymnastics exercised in the Employer's commission structure is not indicative of the payment on a per job basis that is customary when a worker is independent.

Regarding “Realization of Profit or Loss”, counsel contends that because technicians are required to pay for their own expenses, they are subject to realization of profit or loss. However, as stated above, the record contains no evidence of business or traveling expenses being incurred by the technicians. The record contains no evidence that the technicians had continuing and recurring significant liabilities or obligations in connection with the performance of their work. This factor indicates an employment relationship.

Regarding “Obligation”, counsel contends that Arizona Administrative Code, Section R6-3-1723(E)(4) “relates to the non-completion of a specific job, not the contract between the parties.” Counsel should review the entirety of Code Section R6-3-1723(E)(4) which also provides that an employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. The Board finds this portion of Code Section R6-3-1723(E)(4) more appropriately contemplates the type of work involved where, as here, the workers performed numerous jobs of minimal duration, continuously booking in fifteen minute increments jobs that mostly lasted under two hours each (Bd. Exhs. 12-A7, 12-C21). The technicians’ lack of obligation to the work is indicative of an employment relationship.

Regarding “Significant Investment”, counsel contends that this factor should be neutral as the technicians obtained their own training and licensing, “various” technicians paid rent, some technicians used office supplies offset by a reduction in commission, and the technicians provided their own tools. As set forth in Arizona Administrative Code, Section R6-3-1723(E)(5), a significant expenditure of time or money for an individual’s education is not necessarily indicative of an independent relationship. Code Section R6-3-1723(E)(5) also provides that tools provided as common practice in the workers trade are not considered as facilities. Here, the technicians had no significant investment in the facilities involved. As such, this factor indicates an employment relationship.

Regarding “Simultaneous Contracts”, counsel contends that the Board erred for having “relied on the fact that there was no evidence that technicians had contracts with other companies.” Counsel contends that the factor should favor a finding of independence as several of the technicians worked at different facilities. However, as set forth in Arizona Administrative Code, Section R6-3-1723(E)(6), a person may work for a number of people or firms and still be an employee of one or all of them. The lack of evidence that the technicians had contracts with other businesses, even if they performed work elsewhere, indicates an employment relationship.

Counsel further contends that the intent to create an independent contractor relationship is evidenced by the “Independent Contractor Agreements” signed by the Employer and technicians, and the receipt of 1099 tax forms by the

technicians. An employer's attempts to define the work relationship are not dispositive. Where, as here, a review of the totality of circumstances establishes, by the weight of the evidence, that workers were subject to the direction rule or control of the employing unit, those workers shall be considered employees, not independent contractors.

In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. §§ 23-724(B), 23-615, 23-613.01, and 23-622(A), and Arizona Administrative Code, Sections R6-3-1723 and R6-3-1705(B), and case law, to the facts in this case and found the services provided as technicians constitute employment, remuneration paid to individuals by the Employer constitutes wages, and the Employer is liable for Arizona Unemployment Insurance taxes on wages for the quarters ending March 31, 2005 through June 30, 2006.

The Board thoroughly examined the factors established by the facts in this case, and considered the relevant law and administrative rules as they are applicable to those facts. The Board has considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Subsections R6-3-1723(D) and (E). In reaching a decision, the Board is mindful of the holdings in Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), and Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975) which provide for a liberal interpretation of the Arizona Employment Security Act. The Board concludes that the weight of the evidence establishes that the services performed technicians constituted employment of these individuals by the Employer.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER** has not submitted any newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;
2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;
3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;
4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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## **RIGHT OF APPEAL TO THE ARIZONA TAX COURT**

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
  - 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
  - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action

may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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A copy of this Decision was mailed on  
to:

Er: xxxx

Acct. No: xxxx

(x) xxxx

(x) CHRISTINA M HAMILTON  
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By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1351495-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

THE EMPLOYER petitioned for hearing from the Department's decision letter issued on April 11, 2012, which held that the Determination of Liability for Employment or Wages issued December 12, 2011, is final because the Employer's request for reconsideration was filed late.

The Employer filed a timely petition for hearing by hand-delivery on May 11, 2012. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724.

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **September 25, 2012**, before Appeals Board Administrative Law Judge Jose R. Pavon. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration by the Department.
2. Whether the Determination of Liability for Employment or Wages issued on December 12, 2011, became final during the interim period before the Employer filed a request for reconsideration.

On the scheduled date of the hearing, three witnesses for the Employer appeared and testified. Counsel for the Department was present, and three witnesses for the Department testified. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On December 12, 2011, the Department mailed a Determination of Liability for Employment or Wages to the Employer's address of record (Tr. pp. 15, 64, 65; Bd. Exh. 1). The determination was sent via certified mail (Bd. Exh. 1).
2. The Employer is a business that provides therapeutic services to children (Tr. p. 26). The Employer's address of record was a post office box (P.O. Box) (Tr. pp. 16-18, 22, 23).
3. At the end of October 2011, the Employer was informed that the post office where it had a P.O. Box was closing. The Employer had the option to keep their same P.O. Box, but the mail would be delivered to a different post office location (Tr. pp. 16-18).
4. The Employer chose to keep the same P.O. Box as its address of record (Tr. p. 16). Mail is picked up by the Employer, approximately five days a week (Tr. p. 25).
5. During the Department's December 2011 tax audit, the Employer was advised by the Department employee to be alert for the determination, which would be mailed to the Employer. The Employer looked for the determination during its daily mail runs (Tr. pp. 19-21, 38, 70, 92).

6. The Employer experienced many problems in obtaining its mail from the P.O. Box. That Post Office location reduced the number of staff and its hours in preparation for the closing of the facility. That facility was having problems sorting through all of the mail due to the reduction in staff (Tr. p. 23).
7. An employee from the Department requested an investigation from the Postal Service into whether the December 12, 2011, determination was delivered to the Employer. The Department employee had problems mailing a copy of the determination to the Employer and ultimately had to e-mail a copy to the Employer (Tr. pp. 76, 77, 86).
8. On March 23, 2012, the Employer filed a request for reconsideration of the Determination of Liability for Employment or Wages dated December 12, 2011 (Bd. Exh. 3).
9. On April 11, 2012, the Department issued a decision letter (Bd. Exh. 4). The Department found that the March 23, 2012 request for reconsideration was not timely because it was not filed within the fifteen-day appeal period which expired on Monday, December 27, 2011. The Department held that "the Determination issued December 12, 2011 is final." (Bd. Exh. 4)

Arizona Revised Statutes, Section 23-724, provided in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration. (Emphasis added).

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case. [Emphasis added]

\* \* \*

The evidence of record establishes that on December 12, 2011, the Department mailed a Determination of Liability for Employment or Wages to the Employer's address of record. The United States Postal Service's records indicated that mail was delivered by certified letter on December 21, 2011 (Bd. Exh. 2). The Employer's address of record was a P.O. Box at a postal facility that reduced its staff in December 2011. The Employer had the option to keep its same P.O. Box at a new postal facility which was at a different location. The old post office facility reduced the number of staff and its hours in preparation for the closing of the facility. The post office experienced misdeliveries to mail recipients. As a result, the Employer experienced many problems in obtaining its mail from the P.O. Box. On January 19, 2012, the Department employee who conducted the audit in December of 2011, re-mailed the Determination of Liability for Employment or Wages to the Employer's address of record and experienced problems getting the mail delivered to the Employer (Tr. p. 76). Finally, on January 26, 2012, the Department employee who conducted the audit e-mailed a PDF file of the Determination of Liability for Employment or Wages to the Employer because of the mailing issues (Tr. pp. 77, 80, 81).

Pursuant to Arizona Administrative Code, Section R6-3-1404(B), a late request for redetermination will be considered timely filed when the delay in filing is attributable to United States Postal Service delay or other action. Here, the evidence is sufficient to establish that the delay in delivery to the Employer was caused by the postal service. However, this does not end the inquiry as to whether the Employer's request for reconsideration of the Department's determination was timely filed.

On January 26, 2012, the Department mailed a copy of the December 12, 2011 Determination of Liability for Employment or Wages to "LL", the Employer's counsel (Tr. p. 77). The determination is a one page document, which contains the words, "APPEAL RIGHTS". The appeal rights paragraph states in pertinent part that the determination becomes final unless written request for reconsideration is filed with the Department within 15 days. The Employer's counsel received the determination on January 26, 2012. Fifteen days from that day is February 10, 2012. To be timely filed, the Employer had to file a written request for reconsideration on or before February 10, 2012. The

Employer did not file a written request for reconsideration until March 23, 2012, which is more than fifteen days after January 26, 2012.

In order for the Board to find that the Employer's delay in filing the written request for reconsideration was timely filed, we must find that the delay was reasonable under the circumstances. After the Employer received the determination on January 26, 2012, it did not take any action to file an appeal until March 23, 2012. Under Arizona Administrative Code, Section R6-3-1404(B)(3), we find that the Employer's eight-week delay from January 26, 2012, to March 23, 2012, to file a written request for reconsideration was unreasonable. Therefore, the Employer's written request for reconsideration was not timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision letter dated April 11, 2012, based upon the evidence of record.

The Employer filed a late request for reconsideration of the Determination of Liability for Employment or Wages issued December 12, 2011. The Department's decision letter dated April 11, 2012, is final.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take

any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

Er: xxxx

Acct. No: xxxx

(x) Er Rep: xxxx

(x) CHRISTINA M HAMILTON  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1351565-001-BR

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANTE** --- The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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DECISION

**SET ASIDE UPON REVIEW** (Appeals Board No. T-1351565-001-B)

**SET ASIDE AND REMANDED** (Department's decision letter dated 2/6/2012)

**THE EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on August 1, 2012, which dismissed the Employer's petition for hearing because the Employer failed to appear at the Appeals Board hearing scheduled for July 25, 2012, and held that the "Department's February 6, 2012 Decision Letter remains in full force and effect." We infer the Employer also requests reopening of the July 25, 2012 Appeals Board hearing.

The request having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-672(F).

**THE APPEALS BOARD** scheduled a hearing, which was convened on **November 20, 2012**, before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issue:

Whether the Employer had good cause for its nonappearance at the scheduled hearing of July 25, 2012.

On the scheduled date of the hearing, counsel for the Employer was present and one witness for the Employer appeared and testified. Counsel for the Department was present, and a witness for the Department appeared but did not testify. Board Exhibits 1 through 13 were admitted into evidence.

THE APPEALS BOARD then scheduled a continued hearing, which was convened on **December 20, 2012**, before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated November 10, 2011, and the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated November 10, 2011.
2. Whether the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated November 10, 2011, and the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated November 10, 2011, became final in the interim period before the Employer filed a request for reconsideration.

On the scheduled date of the continued hearing, counsel for the Employer was present, and two witnesses for the Employer appeared and testified. Counsel for the Department was present, and two witnesses for the Department appeared and testified. Board Exhibits 14 through 19 were admitted into evidence. We have carefully reviewed the record, which consists of the transcripts of the two hearings and Board Exhibits 1 through 19.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On November 10, 2011, the Department mailed a Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages [hereinafter "the Determinations"] to the Employer (Tr. pp. 42-44; Bd. Exhs. 1A-C). The Determinations were sent via certified mail (Tr. p. 44; Bd. Exh. 1C). The Determination of

Unemployment Insurance Liability printed by the Department on November 10, 2011, contains an incorrect zip code for the Employer (850418 instead of 85048) (Bd. Exh. 1A).

2. The address for the Employer that appears on the envelope used to mail the Determinations was printed on a Department printer (Tr. pp. 50, 66, 67). However, a portion of the Employer's address was written by hand (Tr. pp. 49, 50, 90, 91; Bd. Exh. 1C). It is not known when that handwriting was applied to the envelope (Tr. pp. 50, 56, 91).
3. The United States Postal Service [hereinafter "USPS"] attempted to deliver the Determinations on Saturday, November 12, 2011 (Bd. Exh. 17). It is not known to which address the USPS attempted to deliver the Determinations (Bd. Exh. 17).
4. The USPS stamped the November 10, 2011 envelope "UNCLAIMED" and returned the Determinations to the Department on or about December 1, 2011 (Tr. p. 79; Bd. Exhs. 1C, 17).
5. The Employer receives mail at its address of record (Tr. pp. 93, 94). The Employer never received the Determinations at its address of record (Tr. pp. 96, 100, 103; Bd. Exhs. 1A-C). The Employer never received any notice from the USPS, at its address of record, that the USPS had attempted to deliver a certified letter in November 2011 (Tr. pp. 94, 96, 99).
6. On December 22, 2011, the Department mailed a two-page Unemployment Tax Statement [hereinafter "UTS"] to the Employer (Bd. Exh. 15). The UTS printed by the Department on December 22, 2011, contains an error in the Employer's address: it erroneously states "D 46TH ST" instead of the correct "S 46TH ST" (Bd. Exh. 15). However, the Employer received the UTS, and the Employer's representative, "CS", responded to the UTS by letter postmarked January 17, 2012 (Tr. pp. 96, 97, 100, 104; Bd. Exhs. 2A, 2B).
7. The Department treated the January 17, 2012 letter from CS as a request for reconsideration of the November 10, 2011 Determinations (Tr. pp. 82, 84; Bd. Exhs. 3A, 3B).

8. On February 6, 2012, the Department issued a decision letter (Tr. pp. 80, 83; Bd. Exhs. 3A, 3B). The decision letter found that the “letter of Tuesday, January 17, 2012 requesting a review of the Determinations is untimely because it was not made within the fifteen (15) day appeal period which expired on Friday, November 25, 2011” and, therefore, held that “the Determinations issued November 10, 2011 are final” (Bd. Exhs. 3A, 3B).
9. On February 22, 2012, the Employer’s representative CS filed a timely petition for a hearing before the Appeals Board (Bd. Exhs. 4A-G).
10. On June 22, 2012, a Notice of Appeals Board Telephone Hearing [hereinafter “the Notice”] setting a hearing date and time for July 25, 2012, at 1:00 p.m. was mailed to the Employer’s representative CS (Bd. Exh. 5). CS received the Notice in a timely manner (Tr. pp. 12, 13).
11. When CS received the Notice, he mistakenly entered into his computer’s Outlook calendar that the hearing was on Wednesday, August 8, 2012, rather than on Wednesday, July 25, 2012 (Tr. pp. 13, 15).
12. CS was the person designated to appear on the Employer’s behalf at the July 25, 2012 Appeals Board hearing (Tr. pp. 13, 14). CS did not appear at the July 25, 2012 Appeals Board hearing because he had erroneously entered the hearing date into his Outlook calendar as August 8, 2012 (Tr. pp. 13-16, 18).
13. On August 1, 2012, the Appeals Board issued a decision dismissing the Employer’s petition for hearing because the Employer failed to appear at the July 25, 2012 Appeals Board hearing (Bd. Exh. 6).
14. On August 30, 2012, the Employer, through counsel, filed a timely request for review of the Appeals Board’s August 1, 2012 decision (Bd. Exhs. 7A-J). That document was also treated as a timely request to reopen the July 25, 2012 Appeals Board hearing.

The initial issue to be addressed by the Board is whether the Employer established good cause for its nonappearance at the July 25, 2012 Appeals Board hearing, such that the Employer’s request to reopen this case should be granted.

Arizona Revised Statutes, § 23-681(C), provides as follows:

The department of economic security shall adopt rules to set standards under which a party may be excused for failure to attend a hearing for good cause.

Arizona Administrative Code, Section R6-3-1503, provides in pertinent part as follows:

\* \* \*

B. Appeal Tribunal hearings

1. Manner of holding hearings. The Appeal Tribunal shall conduct all hearings in accordance with A.R.S. § 23-674, in a manner that will ascertain the substantial rights of the persons involved. The Appeal Tribunal shall require all testimony to be taken under oath or affirmation.

\* \* \*

3. Failure of a party to appear
  - a. If there is no appearance on behalf of an interested party at a scheduled hearing, the Appeal Tribunal may:
    - i. Adjourn the hearing to a later date;  
or
    - ii. Proceed to review the evidence of record and other admissible evidence as may be presented at the scheduled hearing, and make a disposition or decision on the merits of the case.

- b. If a decision is issued adverse to any party that failed to appear at a scheduled hearing, that party may file 1 written request for a hearing to determine whether good cause exists to reopen the hearing. The request to reopen shall be filed within 15 calendar days of the mailing date of the decision or disposition and shall list the reasons for the failure to appear.
- c. The Appeal Tribunal shall hold a hearing to determine whether there was good cause for the failure to appear and, in the discretion of the hearing officer, to review the merits of the case. Upon a finding of good cause for failure to appear at the scheduled hearing, the disposition or decision on the merits shall be vacated and the case rescheduled for hearing under R6-3-1502, unless the hearing on the merits is held concurrently with the good cause hearing.
- d. Good cause warranting reopening of a case shall be established upon proof that both the failure to appear and failure to timely notify the hearing officer were beyond the reasonable control of the nonappearing party.

\* \* \*

In Maldonado v. Arizona Department of Economic Security, 182 Ariz. 476, 897 P.2d 1362 (App., 1994), the Court of Appeals held that the language in Arizona Administrative Code, Section. R6-3-1503(B)(3)(d), must be interpreted in such a way as to allow an “excusable neglect” standard to be considered in determining whether to reopen a hearing, similar to the test under Arizona Rule of Civil Procedure 60(c).

In interpreting the term “excusable neglect”, as expressly included in Ariz. R. Civ. P. 60(c), Appellate Courts have held that such standard does not apply if the action occurred because of a party's mere neglect, inadvertence or

forgetfulness without a reasonable excuse therefor, Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984). The term “excusable neglect” is not synonymous with carelessness, Ulibarri v. Gerstenberger, 178 Ariz. 151, 871 P.2d 698 (App. 1993), and a party claiming excusable neglect must have promptly sought relief, Baker Intern. Associates, Inc. v. Shanwick Intern. Corp., 174 Ariz. 580, 851 P.2d 1379 (App. 1993). The standard for determining whether an action constitutes “excusable neglect” is whether the neglect involves an error such as might be made by a reasonably prudent person who attempted to handle a matter in a prompt and diligent fashion. Beal v. State Farm Mutual Automobile Insurance Co., 151 Ariz. 514, 729 P.2d 318 (App. 1986).

At the November 20, 2012 Appeals Board hearing, the Employer’s representative CS testified credibly that he failed to appear at the Appeals Board hearing scheduled for July 25, 2012, because he miscalendared the hearing date by erroneously entering into his computer’s Outlook calendar that the hearing was scheduled for August 8, 2012 (Tr. pp. 13-16, 18). There is no credible evidence in the record to refute CS’s testimony.

In the Maldonado case cited above, the Arizona Court of Appeals specifically held that it was “excusable neglect”, and therefore good cause for nonappearance, when a party’s failure to appear at a scheduled hearing was caused by that party’s error in entering on the party’s calendar the incorrect time for a hearing. The Appeals Board follows the Arizona Court of Appeals’ holding in Maldonado when such a fact pattern occurs.

Under the circumstances of this case, we conclude that the Employer has established good cause for its nonappearance at the Appeals Board hearing scheduled for July 25, 2012. The Employer’s failure to appear was due to “excusable neglect” and involved an error such as might be made by a reasonably prudent person who attempted to handle a matter in a prompt and diligent fashion. Therefore, under Maldonado, the Employer had good cause for its nonappearance at the July 25, 2012 Appeals Board hearing.

Having found that the Employer established good cause for its nonappearance at the hearing scheduled for July 25, 2012, the Board will now address the issue of the timeliness of the Employer’s request for reconsideration of the Department’s November 10, 2011 Determinations.

As of February 6, 2012, Arizona Revised Statutes, Section 23-724, provided in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services

performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration. (Emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other

action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.  
(Emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

Here, there is no dispute that the Employer never physically received the Determinations that were mailed by the Department on November 10, 2011. Additionally, there is no dispute that the Employer did not file a request for reconsideration of the Determinations within 15 days of November 10, 2011. The issue to be decided is whether the late filing of the Employer's request for reconsideration can be attributed to a reason recognized under Arizona Administrative Code, Section R6-3-1404(B), that would excuse a late filing.

At the December 20, 2012 continued Appeals Board hearing, the Employer's vice-president, "MM", testified credibly that she is the person responsible for handling the Employer's incoming mail at the Employer's address of record (Tr. pp. 93, 94). MM testified that in November 2011 the Employer did not receive any notification from the USPS regarding a certified letter (Tr. pp. 94, 96, 99). MM further testified that the first notification the Employer received regarding this matter was when she received the December 22, 2011 UTS from the Department (Tr. pp. 96, 97; Bd. Exh. 15). We find MM's testimony credible that the Employer did not receive any notification from the USPS regarding the Department's November 10, 2011 certified mailing.

Additionally, the evidence of record raises serious questions regarding whether the Department mailed the November 10, 2011 Determinations to the

Employer's correct address of record. At the December 20, 2012 continued hearing, the Department acknowledged that the envelope containing the Determinations was printed on a Department printer, but that a portion of the Employer's address on the envelope was hand-written (Tr. pp. 49, 50, 90, 91; Bd. Exh. 1C). Department witness, "VF", testified that she prepared the Determinations and the November 10, 2011 envelope (Tr. pp. 41-44, 66, 67). VF admitted that she has no specific recollection of how or when the handwriting in the Employer's address came to be on the envelope (Tr. pp. 50, 56). The Department admitted that it was unable to locate the original November 10, 2011 envelope (Tr. p. 57). As a result, it is not known when the handwriting in the Employer's address was added to the November 10, 2011 envelope, and the Department failed to prove that it mailed the Determinations to the Employer's correct address of record.

The likelihood of Department error in mailing the Determinations is further heightened by the fact that two of the three documents prepared by the Department for mailing to the Employer in November and December of 2011 contain errors in the Employer's address. The November 10, 2011 Determination of Unemployment Insurance Liability prepared by the Department contains an incorrect zip code for the Employer (Bd. Exh. 1A). The December 22, 2011 UTS prepared by the Department contains an error in the Employer's street address (Bd. Exh. 15). These errors make it more plausible to accept the possibility that the Department also erred in preparing the November 10, 2011 envelope.

Likewise, the evidence of record regarding the efforts made by the USPS to deliver the November 10, 2011 certified letter consists of inconsistent hearsay and speculation. The Department did not call any witness from the USPS to testify regarding the actions of the USPS in this matter or to explain the markings on the November 10, 2011 envelope. The Department witnesses were only able to offer their own unsubstantiated speculations regarding the USPS's delivery efforts and what the USPS's markings on the envelope might mean.

Furthermore, Department witness, "MAS", specifically cited a "Track & Confirm" e-mail from the USPS (Bd. Exh. 17) as somehow establishing that the USPS left multiple notices at the Employer's address of record regarding the November 10, 2011 certified letter (Tr. pp. 79, 81, 83). The "Track & Confirm" e-mail does nothing of the kind. First, the "Track & Confirm" e-mail does not state to which address the USPS attempted to deliver the certified letter. Second, the November 10, 2011 envelope contains the following handwritten dates, presumably written by the USPS: "11-12-11", "11-17", and "11-27" (Bd. Exh. 1C). The Department witnesses speculated that these dates indicate when the USPS attempted delivery and left notices. However, the "Track & Confirm" e-mail does not indicate any actions taken by the USPS on November 17 or November 27, which Department witness MAS ultimately conceded (Tr. pp. 85, 86; Bd. Exhs. 1C, 17). The "Track & Confirm" e-mail is inconsistent with the USPS notations on the November 10, 2011 envelope, and there is insufficient

credible evidence in the record to establish either that the USPS ever attempted to deliver the November 10, 2011 Determinations to the Employer's correct mailing address of record or that the USPS actually left any notices at the Employer's correct mailing address of record.

A preponderance of the credible evidence of record establishes that the Employer never received any notification from the USPS regarding the November 10, 2011 certified letter. We find that the most likely explanation for this is either Department or USPS error. Either the Department mailed the letter to an incorrect address for the Employer, or the USPS failed to properly deliver any notification to the Employer regarding the letter.

Pursuant to Arizona Administrative Code, Section R6-3-1404(B), a late request for redetermination will be considered timely filed when the delay in filing is attributable to Department or United States Postal Service error. The late filing of the Employer's request for reconsideration can be attributed to a reason recognized under Arizona Administrative Code, Section R6-3-1404(B), that would excuse a late filing. Therefore, the Employer's request for reconsideration shall be considered timely filed. Accordingly,

**THE APPEALS BOARD SETS ASIDE UPON REVIEW** the decision of the Appeals Board issued on August 1, 2012, in Appeals Board No. T-1351565-001-B based upon the evidence of record.

The Employer established good cause for its nonappearance at the Appeals Board hearing scheduled for July 25, 2012.

**THE APPEALS BOARD SETS ASIDE** the Department's decision letter dated February 6, 2012, based upon the evidence of record.

The Employer filed a timely request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued on November 10, 2011. The Employer is entitled to a Reconsidered Determination by the Department addressing the merits of the Employer's request for reconsideration.

THE APPEALS BOARD **REMANDS** the matter to the Department to issue a Reconsidered Determination, pursuant to A.R.S. § 23-724(B), addressing the merits of the Employer's request for reconsideration. If adversely affected by the Reconsidered Determination, the Employer may file a timely petition for hearing or review. In the absence of such petition, the Reconsidered Determination shall be the final administrative decision of this agency.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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## **RIGHT OF APPEAL TO THE ARIZONA TAX COURT**

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
  
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
  
  - 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
  
  - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court

or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx Acct. No: xxxx

(x) Er Rep: xxxx

(x) CHRISTINA M HAMILTON  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1360333-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON  
ASST ATTORNEY GENERAL CFP/C  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED BUT MODIFIED**

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination letter issued on May 11, 2012, which affirmed the Determination of Liability for Employment or Wages and the Determination of Unemployment Insurance Liability issued on May 1, 2009. The Reconsidered Determination held that "the services performed by individuals as executive producers, writers, talent, and editors were correctly determined to constitute employment and that all remuneration paid for such services constitutes wages."

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **October 17, 2012**, before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by individuals as executive producers, writers, talent, and editors constituted employment for the period January 1, 2007 through December 31, 2008.
2. Whether the services performed by individuals as executive producers, writers, talent, and editors are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
3. Whether all forms of remuneration paid to individuals for services performed as executive producers, writers, talent, and editors constituted wages as defined in A.R.S. § 23-622.

We note that the May 1, 2009 Determination of Liability for Employment or Wages, and the Department's May 11, 2012 Reconsidered Determination, listed four categories of workers: Executive Producers, Writers, Talent, and Editors (Bd. Exhs. 3, 6A-F). Based upon those determinations, the Notice of Appeals Board Telephone Hearing also listed those four categories (Bd. Exh. 9).

At the Appeals Board hearing, the Employer's CEO, "KPC", [hereinafter "the Employer"] identified a single worker, "RB", as an Executive Producer (Tr. pp. 44-46, 54, 80). The Employer testified that he issued checks for RB's services to RB's company, "TZE", and not to RB personally, because RB insisted upon it and because RB "had a Federal Tax Number" (Tr. p. 57). He also admitted that no other payments for services were paid to companies, but instead were paid directly to individuals (Tr. pp. 21, 22, 56, 57). There is insufficient credible evidence in the record to establish that the Employer used any Executive Producers other than RB.

The Department acknowledged that it considered RB, and only RB, to have been an independent contractor for the Employer due to RB's company TZE and his "Federal ID Number" (Tr. pp. 61, 74, 75). The Department also pointed out

that RB is not listed on any of the Department's tax assessments in this matter (Tr. pp. 56, 57; Bd. Exhs. 4A-D). As counsel for the Department stated: "We're not alleging anything as far as [RB is] concerned" (Tr. p. 75).

For the foregoing reasons, the Board concludes that the category "Executive Producers" was improperly included in the May 1, 2009 Determination of Liability for Employment or Wages and the Department's May 11, 2012 Reconsidered Determination. Therefore, this decision will be limited to examining the employment status of those individuals who performed services as Writers, Talent, and Editors [hereinafter "the WTE"], which we find includes workers "CM" and "RR" who were identified by the Employer as having been "assistants" to an Editor and a Talent person, respectively (Tr. pp. 41, 44-46, 50).

On the scheduled date of the hearing, three Employer witnesses appeared and testified. Counsel for the Department was present, and one witness for the Department appeared and testified. Board Exhibits 1 through 9 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer's company produced a daily news program performed entirely in sign language (Tr. pp. 13, 14; Bd. Exh. 8A). The Employer uploaded the news program to the Internet each evening (Tr. pp. 18, 19; Bd. Exh. 8A). The Employer hoped that a television or cable channel would decide to buy the concept of an all-sign language news program to air on their channel (Tr. p. 14). The Employer ceased operations on November 22, 2008 (Bd. Exh. 8B).
2. In 2007 and the majority of 2008, the Employer required the WTE to report to the Employer's studio each morning at approximately 9:00 a.m. to shoot the footage for that day's news program (Tr. pp. 17, 18, 55). The Editors were then required to edit the footage into a finished program and provide that finished program to the Employer by 3:00 p.m. each day so that the Employer could upload the program to the Internet (Tr. pp. 18, 19, 48, 55).
3. At the Employer's studio, the Employer provided all the equipment for the WTE to use to produce the daily program (Tr. pp. 19, 20). In the final two to three months before the Employer ceased operations, the Employer became ill and faced financial difficulties (Tr. pp. 47, 51, 52). Because of the Employer's illness and financial difficulties, Editor "TC" offered the use of a spare bedroom in her home as a location to continue shooting the programs (Tr. pp. 51, 52). The Employer

provided equipment for Editor TC to continue shooting the Employer's programs in her home (Tr. pp. 51, 52).

4. The Employer had each of the WTE sign a "Contractor, Vendor Information" contract [hereinafter "the Contract"] (Bd. Exh. 7). The Contract contained the following provision: "All Contractors and Vendors are aware that they are doing work for [the Employer] on a 'contract basis' and that they are responsible for any taxes on income. [The Employer] will furnish a 1099 to said Contractor/Vendor as required by IRS regulations" (Bd. Exh. 7).
5. The WTE were skilled in their fields (Tr. pp. 16, 17, 47). The Employer did not provide training for the WTE (Tr. p. 49). Until the Employer became ill in the latter part of 2008, the Employer provided direct oversight of the WTE at the job location, i.e., the Employer's studio, each day (Tr. pp. 39, 40, 47).
6. The Employer expected the WTE to perform the work personally (Tr. pp. 46, 47). None of the WTE used their own assistants, and the Employer paid to provide assistants to an Editor and a Talent person (Tr. pp. 41-43, 50).
7. The Writers and Talent worked approximately two hours each day (Tr. pp. 55, 56). The Editors worked approximately six hours each day (Tr. pp. 55, 56).
8. The WTE were paid by the hour, at an hourly rate set by the Employer (Tr. pp. 20-22, 53). The Employer paid the WTE by check written to each individual WTE personally, and not to any company, based upon invoices submitted to the Employer by the WTE detailing their hours worked (Tr. pp. 20-22).
9. The Employer had the right to terminate the WTE at any time and without any notice (Tr. pp. 17, 22, 37, 38). The WTE had the right to terminate the working relationship at any time without penalty, and there was no requirement that the WTE give the Employer any notice of termination (Tr. pp. 22, 38).
10. The Employer had the "final say" over how the work had to be done by the WTE (Tr. pp. 40, 48, 49).

The Employer contends that the WTE were independent contractors and not employees. The employment status of the WTE and whether their pay constituted wages are in dispute in this case.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:

1. An individual's entire service performed within or both within and without this state if:
  - (a) The service is localized in this state. ...

\* \* \*

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
  1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
  2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
  3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.
  4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Revised Statutes § 23-622(A) provides as follows:

- A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
  1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
  2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
  1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
  2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the

organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

- a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
- b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

\* \* \*

To support his contention that the WTE were independent contractors, the Employer provided a copy of the Contract that the WTE signed (Bd. Exh. 7). However, such a contract is not conclusive as to the nature of a work relationship, and we must look at the actual practice of the parties which supplemented the written agreement. See Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947). Therefore, we must analyze the circumstances of the WTE.

The primary issue here is whether the services of the WTE were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the WTE. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The Employer was not aware of any instances where the WTE paid for any of their own assistants (Tr. p. 41). The Employer admitted, however, that he hired and paid an assistant for an Editor and an assistant for a Talent person (Tr. pp. 41, 50). This factor shows control, and indicates an employment relationship.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the Employer has the right to instruct or direct.

The Employer admitted that he set the schedule for production (Tr. pp. 17, 18, 40, 41). The Employer required the WTE to meet every day in a “central location” because “if we didn’t have a studio, then everybody would have to try to phone in a TV program, which is impossible” (Tr. pp. 18, 19). The Employer also testified that he had the “final say” over how the work had to be done by the WTE, which establishes that the Employer had the right to instruct or direct (Tr. pp. 40, 48, 49). This factor shows control, and indicates an employment relationship.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions.

The WTE were not required to submit “reports” to the Employer. However, the Employer required the WTE to work together to complete a finished news program, and to submit it to him, every day (Tr. pp. 17-19, 48, 55). That finished program effectively chronicled the services performed, and the actions taken, by the WTE each day. This factor shows control, and indicates an employment relationship.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit.

The evidence establishes that, until the final months of operation when the Employer became ill and faced financial difficulties, the services were performed at the Employer’s studio (Tr. pp. 17, 18, 47, 51, 52, 55). Even after the Employer accepted Editor TC’s offer to help the Employer by moving the production from the Employer’s studio to her home in the final months, it was still the Employer who directed the WTE to the location where their services were to be performed. This factor shows control, and indicates an employment relationship.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Personal performance might not be indicative of control if the work is highly specialized and the worker is hired on the basis of his professional reputation, as in

the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

At the Appeals Board hearing, the Employer was asked whether he expected the WTE to perform all of the work themselves or if they could send someone to perform the work in their place (Tr. p. 46). The Employer responded: "No. I expected them to do the work themselves because they were the persons that I hired, uh, so I was expecting they would do the work because they were the ones that had the skill sets" (Tr. p. 47).

The Employer's testimony indicates an expectation that the work be performed personally by the WTE as opposed to being assigned to a worker in the WTE's employ. While the WTE may be skilled in their fields, the record does not establish that the nature of their work is so highly specialized as to be comparable to that of an authority in an academic or professional field. The Employer's expectation of personal performance shows control, and indicates an employment relationship.

f. Establishment of Work Sequence

If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routines and schedules of the employing unit.

The Employer's own testimony establishes that he set the work sequence for the WTE and required the WTE to follow his schedule (Tr. pp. 17-19, 48, 55). This factor shows control, and indicates an employment relationship.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

The Contract between the Employer and WTE contained no specifications as to the type of services being performed or the duration of the relationship. The Employer testified that he could terminate the WTE at any time and without any notice (Tr. pp. 17, 22, 37, 38). Since the WTE could not require advance notice that the relationship would end, they did not possess the rights an independent contractor would expect in a contractual relationship. This factor shows control, and indicates an employment relationship.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker.

The Employer required the WTE to appear at a “central location” each day at approximately 9:00 a.m. to perform their services (Tr. pp. 17-19, 48, 55). This factor shows control, and indicates an employment relationship.

i. Training

Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, indicates control because it reflects that the Employer wants the services performed in a particular manner.

There is no evidence that the Employer provided any training to the WTE, who were skilled in their fields. This factor shows an absence of control, and indicates an independent relationship.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The WTE did not work full-time for the Employer, but they worked each day. As such an arrangement could be the same for either an employment or an independent relationship, this factor is neutral.

k. Tools and Materials

The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

The nature of the Employer’s business did not generally require the WTE or the Employer to furnish “tools” or “materials”, as those terms are commonly defined. Therefore, this factor is neutral. Investment in equipment and facilities, however, is addressed later in this decision.

1. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

The evidence of record does not establish that any expense reimbursement occurred. This factor shows an absence of control, and indicates an independent relationship.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), are equally appropriate for consideration in determining the relationship of the parties.

1. Availability to the Public

The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

The WTE were free to seek other employment when not working for the Employer. However, this circumstance does not indicate independence as it would hold true for any part-time employment situation. The Department's witness testified that none of the WTE had a "Federal ID Number" (Tr. p. 61). That testimony is unrefuted. Additionally, although some of the WTE performed other jobs while working for the Employer, the Employer presented insufficient credible evidence to establish that any of the WTE had their own office or assistants, held a business license, advertised, or otherwise engaged in an independently established business. Based on the evidence of record, this factor indicates an employment relationship.

2. Compensation on Job Basis

An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent.

The WTE were paid by the hour, at an hourly rate set by the Employer (Tr. pp. 20-22). The Employer issued checks made out to each WTE personally, and

not to any companies (Tr. pp. 20-22). This factor shows control, and indicates an employment relationship.

3. Realization of Profit or Loss

An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position.

The WTE had no opportunity to realize a profit or a loss from the business. The WTE faced no meaningful expenses directly connected with the work, such as wages, rents, or other ongoing operating costs. The WTE were subject to no significant recurring liabilities or obligations connected with the performance of the work and, therefore, had no viable concerns of balancing receipts against expenditures. This factor shows control, and indicates an employment relationship.

4. Obligation

An employee usually has the right to end his relationship with his employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

The Employer admitted that the WTE could terminate their working relationship with the Employer at any time without penalty (Tr. pp. 22, 38). The lack of liquidated penalties for non-completion indicates an employment relationship.

5. Significant Investment.

A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular trade.

The Employer provided all of the equipment for the WTE to use while producing the daily news program in the Employer's studio (Tr. pp. 19, 20). Even in the waning months of operation, when production moved to Editor TC's home, with the Employer's approval, because of the Employer's illness and financial difficulties, the Employer continued to provide equipment (Tr. pp. 51, 52). Even then, the only equipment provided by Editor TC was equipment she already owned (Tr. pp. 51, 52). The WTE were not required to invest anything in the business other than their personal time and efforts. This factor indicates an employment relationship.

6. Simultaneous Contracts

If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

As previously discussed, the evidence of record does not establish that the WTE had contracts with other companies for their services, although some appear to have been employees of other companies. This factor indicates an employment relationship.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the liberal interpretation required by the Employment Security Law of Arizona, we conclude that the evidence of employee status far outweighs the evidence of independent contractor status.

The WTE were employees of the Employer, effective January 1, 2007. We conclude all payments to the WTE for their services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS, BUT MODIFIES**, the Reconsidered Determination dated May 11, 2012, to delete any reference to services performed by Executive Producers.

From January 1, 2007 through December 31, 2008, services performed by individuals as Writers, Talent, and Editors constituted employment.

All forms of remuneration paid to these individuals for such services constituted wages. This decision includes the individuals and amounts shown on the Notice of Assessment reports for the period from January 1, 2007 through December 31, 2008.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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GARY R. BLANTON, Member

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JANET L. FELTZ, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 771-9036 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxx

(x) CHRISTINA M HAMILTON

ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
UI TAX SECTION  
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By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1376168-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON  
ASST ATTORNEY GENERAL CFP/C  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD ---** The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for a hearing from that part of the Department's Reconsidered Determination issued on August 3, 2012, which held: "... this Reconsidered Determination affirms the Determination of Unemployment Insurance Liability and Determination of Liability for Employment or Wages issued ... on February 2, 2009 ...", but only regarding "... the determination that its 'Satellite Installers' were employees rather than independent contractors ...".

The Department's Reconsidered Determination also held in part as follows:

... we must conclude that services performed by the Satellite Installers were correctly determined to constitute employment and all remuneration paid for such services to constitute wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

With notice to the parties, a telephone hearing was conducted before ROBERT T. NALL, an Administrative Law Judge, on December 6, 2012. Each party was given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination affirmation of the February 2, 2009 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY and the February 2, 2009 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "satellite tv dish installers" constitute "employment effective 7/5/06", as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as "satellite tv dish installers" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "satellite tv dish installers" performed work that is exempt or is excluded from Arizona Unemployment Insurance (UI) coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal UI Tax purposes.
5. Whether any of the individuals performing services as "satellite tv dish installers" factually and legitimately were independent contractors for the quarters ending: 6/30/06 through 9/30/08.

At the hearing, Board Exhibits 1 through 11 were admitted into the record as evidence and the witnesses were sworn. Counsel for the Employer appeared, with one witness who testified. Counsel for the Department appeared, with one witness who testified.

Prior to the petition for hearing, the Employer conceded that the services of its sales representatives were employment and that their remuneration was

wages (Bd. Exhs. 6, 10A, 10B). The Employer appealed only regarding the satellite TV dish installation technicians (Tr. p. 10; Bd. Exh. 5B). Thus, the Employer's contention that the satellite TV dish installation technicians were "Independent Contractors" during the period of time addressed by the Department's determination remains at issue, but the employment status of its other workers need not be considered (Bd. Exhs. 5, 6).

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer's business operations became the subject of benefit assignments and an audit by the Department's UI Tax Section. The Employer is a limited liability company with operations since 2006, over a large geographical area based in Arizona installing and repairing satellite TV dishes in residences or businesses as a "sub-contractor" to a satellite provider service which had contracted with the residents. The Employer also conducts sales operations (Tr. pp. 10, 67, 69, 79, 81; Bd. Exhs. 1C, 5B, 6A).
2. When notified that a worker had filed an initial claim for UI benefits on October 29, 2008, the Employer protested on November 6, 2008, that the former worker had been an independent contractor who set his own hours and who used his own vehicle (Bd. Exh. 8A-8B).
3. Each morning, work was assigned by the Employer's dispatcher to the satellite dish installation technicians at the Employer's location, as "add ons for volume" to accomplish work that the owners could not do. Upon completion of each assignment, the satellite dish installation technicians reported back to the dispatcher (Tr. pp. 17-19, 79, 80).
4. The men and women who worked as satellite dish installation technicians did not need proficiency certifications, but the Employer checks to be certain they know what they are doing in compliance with the satellite provider service's contractual requirements (Tr. pp. 17, 74, 83). Many of the satellite dish installation technicians previously worked for the satellite provider service itself and, thus, knew the task requirements. Most had done low-voltage installation jobs before, such as telephone or alarm systems (Tr. p. 78).
5. The satellite dish installation technicians purchase all of their materials, such as coaxial cable ends, fittings, and silicone sealant. The satellite provider service charges the Employer in advance for each dish, low noise block (LNB), and receiver, then reimburses the Employer after the satellite dish installation technicians install that equipment in a customer's

home (Tr. pp. 74-76; Exh. 5C). No satellite dish installation technicians could have the LNB, antenna, and receiver necessary for each installation without receiving it from the Employer (Tr. p. 25).

6. The satellite dish installation technicians optionally wear a company t-shirt at work sites. Side jobs and working elsewhere are allowed, including non-standard work for the homeowners such as wall fish, other low voltage electrical work, or a TV installation. Three of the satellite dish installation technicians had helpers, who were accepted by the Employer's management (Tr. pp. 76-78, 84-86).
7. None of the satellite dish installation technicians possessed a contracting license with the Arizona Registrar of Contractors. However, the Employer maintains a contractor license (Tr. p. 12).
8. The Employer had no written independent contractor agreement with any of the satellite dish installation technicians during the time period at issue between 2006 through 2008. Pay rates varied between the satellite dish installation technicians, but were set by the Employer without negotiation with each satellite dish installation technician at \$75 to \$100 per work order depending on the number of receivers involved. Each worker was paid on a per-job basis. The satellite dish installation technicians were subject to chargebacks when a job is not done to standard, or if another installer was sent out to the customer's home within 90 days of each job completion (Tr. pp. 19, 25, 26, 30, 82; Bd. Exh. 5C).
9. The Employer's gross payroll exceeded \$1,500 in a calendar quarter.
10. Following a tax audit report, the Department concluded that the satellite dish installation technicians were employees and that their remuneration constituted payment of wages effective April 29, 2006. The Department assessed taxes for the quarters ending June 30, 2006 through September 30, 2008, plus penalties and interest (Bd. Exhs. 1A-4G).
11. No federal tax audit or tax ruling specified that the satellite dish installation technicians held independent contractor status (Tr. pp. 57, 70, 71).
12. The Employer filed a timely petition for hearing from the February 2, 2009 Determination of Unemployment Insurance Liability (which superseded a September 14, 2006 determination), and from the February 2, 2009 Determination of Liability for Employment or Wages (Exhs. 2, 3, 5A-5C). The

Employer also filed a timely written petition for hearing following receipt of the Department's August 3, 2012 Reconsidered Determination (Exhs. 6A-6G, 10A, 10B).

The Employer contends that all of the satellite dish installation technicians, whose employment is in dispute in this case, were independent contractors rather than employees. The Employer contends that it did not extend direction or control to the satellite dish installation technicians to the extent contemplated by A.R.S. § 23-613.01 (Bd. Exhs. 5A-5C, 10A, 10B).

The Employer also contended that the satellite dish installation technicians were not required to possess a professional license and professional liability insurance, because the installation tasks were valued within the "handyman" exception under a particular dollar limit. However, the homeowners involved were not the Employer's client and neither the Employer nor the satellite dish installation technicians contracted directly with the homeowner. The "handyman" exception to the contractor licensing requirement did not apply because no privity of contract with the homeowner existed, and because the satellite dish installation technicians acted under the Employer's contractor license (Tr. pp. 31-33).

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01 provides in part as follows:

Employee; definition; exempt employment

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristics of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the

organization, trade or business of the employing unit.

3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

\* \* \*

- D. The following services are exempt employment under this chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are performed by an individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees.
2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit. [Emphasis added].

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be affected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
  2. "Method" is defined as the way, procedure or process for doing something; the means used

in attaining a result as distinguished from the result itself.

- B. “Employee” as defined in subsection (A) does not include:
1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
  2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit “. . . solely because of a provision of law regulating the organization, trade or business of the employing unit”. This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
    - a. “Solely” means, but is not limited to: Only, alone, exclusively, without other.
    - b. “Provision of law” includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
    - c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made. [Emphasis added].

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, rather than an employee, are enumerated in Arizona Administrative Code, Section R6-3-1723(E): (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms.

The Department bears the burden of establishing a *prima facie* case to support its ruling regarding the employment status and designation as wages, to which independent contractor status is a recognized exception (Tr. p. 62). When applying the guidelines set forth in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes consideration of the following factors:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The three satellite dish installation technicians who used assistants were required to utilize persons who were accepted by the Employer. The nature of the work involves personal services by experienced or trained individuals. This factor is neutral.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

The location, schedule, and nature of duties were specified by the Employer's subcontract with the satellite

service provider and each homeowner client. The Employer backcharged any satellite dish installation technician whose work needed a return visit. Thus, the Employer controlled legal responsibility for proper completion of tasks, and wanted to be informed when tasks were deemed completed. This factor indicates an employment relationship.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions.

The performance instructions, location of work order, and appointment times came from the satellite service provider. Each satellite dish installation technicians also had to provide an oral report to the Employer after every installation. A billing report was used to obtain reimbursement from the satellite service provider. This factor indicates an employment relationship.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

All work orders were performed at work sites, but were dispatched while the satellite dish installation technicians were present at the Employer's premises. This factor is neutral because elements tend both towards an independent relationship and an employment relationship.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

The evidence establishes that the workers acted in furtherance of the Employer's subcontracting business, and not in furtherance of their own independent business (Tr. p. 23). Only the specifically-assigned satellite dish installer technician was entitled to fulfill any of the Employer's work orders. Substitution was not possible. This factor indicates an employment relationship.

f. Establishment of Work Sequence

If a person must perform services in the order set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routine and schedules of the employing unit.

Specifications were contained within work orders presented by the Employer's dispatcher at its premises, to the satellite dish installation technicians. A completion window was assigned, and the Employer was to be informed of delays and deviations. The satellite dish installation technicians were not free to schedule their services in any other sequence. This factor indicates an employment relationship.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

For unsatisfactory performance, the satellite dish installation technicians were subject to a backcharge against the per job amount already paid. No specific penalty for a re-visit was specified by contract, such as liquidated damages or other legal ramifications (Tr. p. 29). The satellite dish installation technicians could be replaced by the Employer, or upon request by the client, or simply not given another work order. The satellite dish installation technicians could request another work order, or not, without penalty. This factor indicates an employment relationship.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being the master of his own time, which is the right of an independent worker.

Specifications were contained within work orders presented by the Employer's dispatcher at its premises, to the satellite dish installation technicians. A completion window was assigned, and the Employer was to be informed of delays and deviations. The satellite dish installation technicians were not free to schedule their services in any other sequence. However, irregular hours were tolerated and completion time was not specified. This factor is neutral because it partly indicates

independence and partly indicates an employment relationship.

i. Training

Training of an individual by an experienced employee working with him, or by required attendance at meetings, is indicative of control because it reflects that the Employer wants the service performed in a particular manner.

No formal training was undertaken by the Employer because all workers, except the son who was trained on the job by his father, already possessed the appropriate skills. However, the Employer assured itself of competence before allowing anyone to proceed. This factor is neutral because it partly indicates independence and partly indicates an employment relationship.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, it indicates control over the amount of time the worker spends working, and impliedly restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The practice was to require completion on the day a work order was assigned. Otherwise, the satellite dish installation technicians were free to expend their time otherwise. This factor indicates independence.

k. Tools and Materials

If an employing unit provides the tools, materials and wherewithal for the worker to do the job, it indicates control over the worker. Conversely, if the worker provides the means to do the job, a lack of control is indicated.

The contention that these satellite dish installation technicians needed a ladder and a personal pickup truck to reach their job site destinations, does not establish a factor indicative of independent contractor status. Such vehicles are reasonably suited to personal use and, presumably, were used for commuting to the Employer's dispatch location as well as to assigned work sites (Tr. pp. 24, 46, 88, 89). These were not work-only trucks, although transportation provided the means to do the job. This factor is neutral.

i. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

No evidence was presented that expenses were reimbursable. The crucial satellite equipment was provided at no cost. This factor indicates independence.

The following additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), also are significant and appropriate for consideration in determining the relationship of the parties:

1. Availability to the Public

Generally, an independent contractor makes his or her services available to the general public, while an employee does not.

None of the satellite dish installation technicians contracted directly with the satellite service provider, which was the Employer's contracted customer. Nothing indicated that any of the satellite dish installation technicians were permitted to simultaneously accept subcontracted work orders from the satellite service provider. Their opportunity to perform occasional side jobs were not in competition with the Employer. None were demonstrated to maintain their own business premises, separate business cards, or office hours held out to the public. This factor indicates an employment relationship.

2. Compensation

Payment on a job basis is customary where the worker is independent, whereas an employee is usually paid by the hour, week or month.

Payment was calculated on a per job basis. Nothing was negotiated with the satellite dish installation technicians. This factor indicates control and an employment relationship.

3. Realization of Profit or Loss

An employee generally is not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with the work being performed. The success or failure of his ende-

avors depends in large degree upon the relationship of income to expenditures.

The satellite dish installation technicians did not have any recurring liabilities in connection with the work being performed. This factor indicates an employment relationship.

4. Obligation

An employee usually has the right to end the relationship with an employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

Each satellite dish installation technician could cease efforts at any time without penalty to the Employer. The lack of liquidated penalties for non-completion indicates an employment relationship.

5. Significant Investment.

A significant investment, by the worker, in equipment and facilities would indicate an independent status. The furnishing of all necessary equipment and facilities by the employing unit would indicate the existence of an employee relationship.

The satellite dish installation technicians were not required or permitted to invest anything in the business enterprise beyond their personal time, transportation, certain materials, and labor efforts. Arizona requires a contracting license to perform low-voltage installation services, which the Employer possessed. This factor indicates an employment relationship.

6. Simultaneous Contracts

An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.

The satellite dish installation technicians were permitted to work elsewhere. This factor indicates independence.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), other factors not specifically identified in subsections of the rule also may be considered. The Arizona Court of Appeals, in the case of *Arizona Department of Economic Security v. Little*, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given the long-

established liberal construction in an effort to include as many types of employment relationships as possible, when the Court held:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See*, A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals in the case of *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court ruled:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

We also find the concepts in *Solis v Cascom and Gress*, 2011 U.S. Dist. LEXIS 122573 (9/21/2011), to be instructive and helpful. Due to a similar arrangement in the television cable installation industry, the factors of control, required skills, and permanence of relationship weighed heavily toward employee status. Similarly to the evidence in this case, the cable television installers were paid for the completion of certain tasks, but were subject to back charges at a later date without an opportunity to dispute them. Similarly to the evidence in this case, the cable television installers did not invest in advertising their services or in other respects hold themselves out as independent businessmen, despite purchasing tools costing \$2,000-\$5,000 and providing a vehicle, while materials such as modems were provided by the firm.

In this case, the factors that tend to support the Employer's contention of independent contractor relationship include: the professional license requirement for many workers, the lack of performance reviews by the Employer, the lack of performance instructions provided to satellite dish installation technicians by the Employer, the lack of required performance reports, the lack of tools or equipment or premises provided by the Employer itself, and the expectation that satellite dish installation technicians would provide their own transportation to meet the schedule requirements of each client agency. Factors that are characteristic of independence include: the absence of hours for work set by the Employer, the lack of extensive training and meetings with the Employer about how to perform the satellite dish installation work, the ability to enter into occasional separate side work with residents who were not the Employer's satellite installation service client, and the lack of equipment or vehicles provided to any of the satellite dish installation technicians. However, we conclude that the evidence of employee status outweighs these factors.

Arizona Revised Statutes, § 23-614, provides in pertinent part as follows:

\* \* \*

- C. Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit shall be deemed to be engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work. ...
- D. Notwithstanding any other provision of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, except as provided in subsections E and G of this section with respect to a leasing employer or a temporary services employer.
- E. A professional employer organization or a temporary services employer that contracts to supply a worker to perform services for a customer or client is the employer of the worker who performs the services. A customer or client who contracts with an individual or entity that is not a professional employer organization or a temporary services employer to engage a worker to perform services is the employer of the worker who performs the services. Except as provided in subsection F of this section, an individual or entity that is not a professional employer organization or a temporary services employer, that contracts to supply a worker to perform services to a customer or client and that pays remuneration to the worker acts as the agent of the employer for purposes of payment of remuneration.

\* \* \*

- I. For the purposes of this section:
  - 1. "Professional employer organization" has the same meaning prescribed in section 23-561.
  - 2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:

- (a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.
- (b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
- (c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined unacceptable by a specific client or customer.
- (d) Assigns or reassigns the worker to perform services for a client or customer.
- (e) Sets the rate of pay of the worker, whether or not through negotiation.
- (f) Pays the worker from its own account or accounts.
- (g) Retains the right to hire and terminate workers. [Emphasis added].

These provisions expressly stand as exceptions to the control requirements of Arizona Revised Statutes, § 23-613.01. We conclude that the State met its burden to establish that these requirements were met, particularly because the Employer sets the rate of pay and pays the worker from its own accounts.

We conclude that the factors tending to support an employer/employee relationship in this case include: the lack of any statutory exclusion from employee status, the use of a fee schedule established by the Employer rather than by the satellite dish installation technicians, a flow of funds from the satellite service provider through the Employer's accounts to the satellite dish installation technicians, the lack of any advertising by any of the satellite dish installation technicians who had a history of employment elsewhere rather than holding themselves out to the public, and the lack of significant investment by the satellite dish installation technicians in their enterprise. We find that no risk of financial loss to the satellite dish installation technicians was demonstrated. In addition, no contract or other document specified an independent contractor relationship with any of the satellite dish installation technicians, no evidence established that the satellite dish installation technicians maintained their own liability insurance or bonding, and the

Employer itself maintained the contractor license appropriate to performing the satellite dish installations.

The enumerated factors that are not directly applicable to our considerations, based upon the evidence presented in this case, include the absence of evidence that satellite dish installation technicians exercised authority over assistants. This factor was neutral in this case. Similarly neutral factors included the lack of need for training by the Employer, the lack of set hours of work, and the performance of work at locations outside the Employer's premises.

We have thoroughly examined the factors established by the evidence in this case, and we have considered the relevant law and administrative rules as they are applicable to that evidence. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Subsections R6-3-1723(D) and (E). We conclude that the business enterprise consists of sending satellite dish installation technicians to residences and businesses under the Employer's subcontract relationship with a satellite services provider, then paying the satellite dish installation technicians from the accounts of the Employer, at a rate established by the Employer. The Employer maintained control and could backcharge the satellite dish installation technicians, and the Employer maintained the contractor license appropriate to performing the installation services. None of the satellite dish installation technicians was a licensed contractor, and none advertised their services out to the public or maintained their own separate business premises. We conclude that the relationship was demonstrated to be other than an employment relationship.

Arizona Revised Statutes § 23-622(A) defines “wages” as:

“Wages” means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. ...

Arizona Administrative Code, Section R6-3-1705(B) provides in pertinent part:

The name by which the remuneration for employment, or potential employment as provided in ... [A.A.C. R6-3-1705(G)], is designated or the basis on which the remuneration is paid is immaterial. It may be paid in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or it may be paid on an hourly, daily, weekly, monthly, annual or other basis. The remuneration may also be paid on the basis of an estimated or agreed upon amount in order to resolve an issue arising out of an employment or potential employment relationship.

In this case, the tasks of the satellite dish installation technicians were thoroughly integrated into the Employer’s course of business according to the rate of payment specified by the Employer, rather than their own independent trade or business (Tr. pp. 47, 95). We conclude from the evidence that such remuneration to the satellite dish installation technicians constitutes wages, as contemplated by the applicable statutes and administrative rules. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Reconsidered Determination issued on August 3, 2012.

The February 2, 2009 Determination of Unemployment Insurance Liability stands unmodified.

The February 2, 2009 Determination of Liability for Employment or Wages stands unmodified.

1. Effective April 29, 2006, services performed by individuals as satellite TV dish installation technicians constitute employment as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are employees within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.
2. The remuneration paid to individuals for the services performed constitutes wages within the

meaning of A.R.S. § 23-622, which must be reported and on which state taxes for Unemployment Insurance are required to be paid.

3. The Employer is liable for Arizona Unemployment Insurance taxes on wages for the quarters ending June 30, 2006 through September 30, 2008, under A.R.S. § 23-613.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
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to:

Er: xxxx

Acct. No: xxxx

(x) Er. Rep: xxxx

(x) Dept. Rep:  
CHRISTINA M HAMILTON – SC 040A  
ASSISTANT ATTORNEY GENERAL CFP/CLA

(x) CHIEF OF TAX –  
UI TAX SECTION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1376169-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA M HAMILTON ASST  
ATTORNEY GENERAL CFP/C  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER** appeals from the Department's denial letter issued on June 28, 2012, which held that the Employer's request for review was not timely filed and that, as a result, the Determination of Unemployment Tax Rate for Calendar Year 2011, issued by the Department on January 5, 2011, and the Determination of Unemployment Tax Rate for Calendar Year 2012, issued by the Department on January 6, 2012, were final.

The petition having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(A).

At the direction of the Appeals Board and following proper notice to all parties, a hearing was conducted before JOSE R. PAVON, an Administrative Law Judge, at **9:00 a.m.**, Mountain Standard Time, on **January 29, 2013**. The issues set for hearing were:

1. Whether the Employer filed timely appeals to the, DETERMINATIONS OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEARS 2011 AND 2012.
2. Whether the DETERMINATIONS OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEARS 2011 AND 2012, became final during the interim period before the Employer filed an appeal.

The Employer did not appear at the scheduled Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance.

A Department witness appeared, and an Assistant Attorney General appeared as the Department's counsel.

Arizona Administrative Code, Section R6-3-1502(A), provides in part as follows:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:  
\* \* \*
4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

We have carefully reviewed the record, and

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's appeal. The Employer did not appear at the scheduled Board hearing to present evidence disputing the Department's denial letter. The Employer's default means that no evidence was presented to support reversing or modifying the Department's June 28, 2012 denial letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's appeal.

The June 28, 2012 denial letter remains in full force and effect.

This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

JANET L. FELTZ, Member

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxx

(x) CHRISTINA M HAMILTON  
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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1392496-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
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Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on December 10, 2012, which affirmed the Determination of Liability for Employment or Wages issued on June 29, 2010. The Reconsidered Determination held that "the services performed by the Certified Nurse Anesthetist were correctly determined to constitute employment and all remuneration paid for such services to constitute wages."

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **May 1, 2013**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination affirmation of the June 29, 2010 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by "Certified Nurse Anesthetist" constitute employment, as defined in A.R.S. § 23-615.
3. Whether remuneration paid to the person service [sic] as "Certified Nurse Anesthetist" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether the individual performing services as "Certified Nurse Anesthetist" performed work that is exempt or is excluded from Arizona Unemployment Insurance (UI) coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal UI Tax purposes.
5. Whether the individual performing services as "Certified Nurse Anesthetist" factually and legitimately was an independent contractor for the quarters ending: September 30, 2009 and December 31, 2009.

At the hearing, the Employer was represented by counsel, and one witness testified for the Employer. The Department was also represented by counsel and two witnesses testified for the Department. Board Exhibits 1 through 10 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is an anesthesia services provider (Tr. p. 60). The Employer provides the services of Certified Registered Nurse Anesthetists to its clients (Tr. pp. 89, 90).
2. On June 29, 2012, the Department issued a Determination of Liability for Employment or Wages that held the "[s]ervices

performed by Certified Nurse Anesthetist constitute employment” for the quarters ending September 30, 2009 and December 31, 2009 (Bd. Exh. 2). The Department also issued a Notice of Assessment and a Report of Wages Paid Each Employee that identified the specific Certified Registered Nurse Anesthetist (the CRNA) that was held to be an employee (Bd. Exh. 3A-B).

3. The CRNA was a registered nurse with an additional certification in anesthesia (Tr. pp. 38, 39). The CRNA was responsible for his own training and licensure (Tr. pp. 47, 48, 68). Standards for professional performance by Certified Registered Nurse Anesthetists are set by the American Association of Nurse Anesthetists (Tr. pp. 72-75). The Employer instructed the CRNA how to comport himself for operating procedures pursuant to the preferences of its individual clients (Tr. pp. 45, 46, 71).
4. The Employer gave the CRNA locations and times for assignments (Tr. p. 34, 46). The CRNA could refuse individual assignments and could limit assignments based upon his availability (Tr. pp. 46, 67, 68, 76). The assignments took place at the Employer’s clients’ locations: hospitals, outpatient facilities, or physicians’ offices (Tr. pp. 35, 45). The Employer reimbursed the CRNA’s expenses when he did assignments out of town (Tr. pp. 36, 50, 69).
5. Equipment needed by the CRNA was usually provided by the clients, however, the Employer maintained equipment for the CRNA to use should a particular client not have it (Tr. pp. 35, 36, 50, 70, 71). The CRNA required no special tools or materials for his work (Tr. p. 49). The CRNA’s malpractice insurance was covered by a third party who was paid by the Employer for the coverage associated with assignments worked by the CRNA (Tr. pp. 21, 43, 64, 82).
6. The CRNA personally performed the assignments he received (Tr. p. 49). If the CRNA could not perform an assignment, he was required to inform the Employer (Tr. pp. 34, 72).
7. The CRNA provided monthly reports to the Employer containing a list of procedures done, patients’ names, surgeons involved, and his time spent on each case (Tr. pp. 34, 35, 42, 65; Bd. Exh. 6A-G). The Employer used these reports for billing and payment purposes (Tr. p. 69). The CRNA was paid on an hourly basis by the Employer for his services (Tr. pp. 36-38, 51, 66).
8. The CRNA submitted reports to the Employer indicating he worked 108.2 hours between June 1, 2009 and December 31,

2009 (Bd. Exhs. 6A-G). The CRNA also worked part-time for another employer as a registered nurse, administering flu shots, and as a part-time employee of a company that scores national tests (Tr. pp. 48, 49). The CRNA neither advertised his services nor worked as a certified registered nurse anesthetist for anyone other than the Employer between June 1, 2009 and December 31, 2009 (Tr. pp. 36, 48, 50, 51). While the Employer did not prohibit the CRNA from working elsewhere as a certified registered nurse anesthetist, he was prohibited from soliciting the Employer's clients for work (Tr. pp. 51, 67, 68, 77).

9. The Employer and the CRNA had no signed contract governing their work relationship (Tr. p. 40). The CRNA was free to end the relationship at any time without penalty (Tr. pp. 36, 37, 81). The Employer had the ability to discharge certified registered nurse anesthetists and had done so in the past pursuant to a "three strike" policy for behaviors such as drug use, failure to abide by standards of care, and tardiness (Tr. pp. 74, 75). The CRNA was discharged following the Employer's loss of clients and one client's request that the CRNA not return (Tr. p. 70).

The Employer contends that the CRNA was an independent contractor and not an employee. The employment status of the CRNA and whether his pay constituted wages are in dispute in this case.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:

1. An individual's entire service performed within or both within and without this state if:
  - (a) The service is localized in this state. ...

\* \* \*

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or

accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.
4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Revised Statutes § 23-622(A) provides as follows:

- A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an

employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
  2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
  2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
    - a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
    - b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
    - c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for

unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

\* \* \*

To support its contention that the CRNA was an independent contractor, the Employer has provided copies of two contracts (Bd. Exhs. 4C-D, 10).

The Employer initially contends that the CRNA is “employed by and contracted through a third party” (Bd. Exh. 7B). In support of this argument, the Employer has submitted an “Agreement for Self-Employed Certified Registered Nurse Anesthetist” signed by the CRNA and the purported third party employer, “NAS” (Bd. Exh. 10). The Employer submits as supporting documentation an e-mail chain between NAS and the Employer regarding the CRNA’s work schedule, and various invoices paid by the Employer to NAS for the Claimant’s services (Bd. Exh. 10).

The Board finds the Employer’s contention as to this point unconvincing. The record established that the Claimant’s working relationship with the Employer had begun before the involvement of NAS (Tr. pp. 39, 40, 42, 43). The CRNA credibly testified that he had no interaction with NAS other than to secure malpractice insurance from them, through the Employer (Tr. pp. 42, 43). The Claimant received no work placements from NAS (Tr. p. 43). The Employer’s witness testified that in addition to malpractice insurance, NAS also provided “credentialing” for the CRNA, however this would have been necessary to obtain insurance for him (Tr. pp. 64, 80, 83). The invoices submitted by the Employer show payment to NAS only for medical malpractice insurance for the CRNA (Bd. Exh. 10). When asked specifically in cross-examination if the purpose of the scheduling e-mail chain was for malpractice insurance, the Employer’s witness responded that the question would have to be asked of NAS (Tr. p. 83), though the Employer produced no witnesses from NAS to substantiate any of the Employer’s claims. The Employer’s witness testified that the CRNA could have been paid by NAS rather than the Employer, but it was faster for the Employer to pay him directly (Tr. pp. 64, 65). Even if payments could have been made through NAS, this establishes only that NAS could have acted as a payroll company in addition to an insurance provider. The record does not support a finding that the CRNA had a business relationship with NAS beyond NAS obtaining medical malpractice insurance for the CRNA.

The second contract is purportedly between the CRNA and the Employer (Bd. Exh. 4C-D). The contract is dated July 28, 1998, over ten years prior to the quarters for which the Employer has been assessed wages by the Department for the CRNA. The contract submitted contains signatures from neither the

Employer nor the CRNA, and a signature page was not even included (Bd. Exh. 4C-D). The CRNA testified that he did not recall ever signing a written contract with the Employer (Tr. p. 40). The Employer's witness testified that the Employer's signed contracts are at her attorney's office (Tr. p. 76), though no signed contract for the CRNA was submitted to the Department or offered as evidence at the hearing.

A recognized legal presumption arises when a party refuses or fails to produce material available evidence to sustain that party's position. Nonproduction creates an inference that the evidence, if produced, would be unfavorable to the position argued. Udall and Livermore, "*Law of Evidence*" § 141, *Presumptions*, pages 315 and 316 (1982). When weighing the conflicting testimony of the CRNA and the Employer's witness, the inference presented by the Employer's failure to produce a signed copy of the contract leads the Board to find the CRNA's testimony more credible on this point. The Board concludes that the CRNA did not have a signed contract with the Employer.

Even without the questions regarding the authenticity of this second contract, such a contract is not conclusive as to the nature of a work relationship, and we must look at the actual practice of the parties which supplemented the written agreement. See Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947). Therefore, we must analyze the circumstances of the CRNA.

The primary issue here is whether the services of the CRNA were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the CRNA. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l)

whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The nature of the work required the performance of a single licensed and trained CRNA (Tr. pp. 33, 34, 43, 44, 56). The CRNA had no use for assistants and there was no place for them (Tr. pp. 43, 44). This factor is neutral, with no impact on the issue to be determined.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the Employer has the right to instruct or direct.

The Employer directed the CRNA as to where and when he would work assignments (Tr. p. 34). The Claimant was a skilled professional who did not require instructions as to how he should perform his work. However, the Employer would provide instructions for the CRNA based upon how particular client physicians preferred to handle operating procedures (Tr. pp. 45, 46, 71). The factor demonstrates a right to control, and indicates an employment relationship.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the

employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

At the Employer's direction, the CRNA provided reports at the end of every month with list of procedures done, patient's names, surgeons involved, and the amount of time spent on each case (Tr. pp. 34, 35, 42, 65; Bd. Exh. 6A-G). Sometimes the CRNA also included patient insurance and identification information so the Employer could directly bill the patient's insurance (Tr. pp. 35, 44, 65). The reports submitted to the Employer were used for proper billing and payment. The CRNA made no reports regarding the manner of job completion (Tr. p. 69). This factor shows an absence of control, and indicates an independent relationship.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit.

The Claimant worked at the locations of the Employer's clients. These included doctor's offices and outpatient facilities (Tr. pp. 35, 45). Though the CRNA did not work on the Employer's premises, the Employer directed the CRNA to the locations where services would be performed. This factor shows control, and indicates an employment relationship.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Personal performance might not be indicative of control if the work is highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

The CRNA was expected to personally perform any assignment he accepted. He could not provide his own substitute, but had to tell the Employer if he could not complete an assignment (Tr. pp. 34, 72). Though a trained professional, the record does not establish that the CRNA was hired based upon his professional reputation, or that he is known in academic and professional circles as an authority in his field. This factor shows control, and indicates an employment relationship.

f. Establishment of Work Sequence

If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

Work sequence was established neither by the Employer nor the CRNA, but rather was largely dictated by the standards of the American Association of Nurse Anesthetists (Tr. pp. 72-75). As neither the Employer nor the CRNA maintained any significant ability to direct the proper work sequence for the CRNA, this factor favors neither a finding of control nor independence and is, therefore, considered neutral.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given.

The CRNA was discharged by the Employer based upon the Employer's loss of clients and one facility's request that the CRNA not return (Tr. p. 70). The Employer admitted discharging Certified Registered Nurse Anesthetists in the past (Tr. p. 74). The Employer has reprimanded and discharged Certified Registered Nurse Anesthetists over drug use, failure to abide by standards of care and tardiness (Tr. pp. 74, 75). The Employer uses a "three strikes" approach whereby a third reprimand results in discharge (Tr. pp. 75, 85). This factor shows control, and indicates an employment relationship.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the

independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

Due to the nature of the work, the CRNA had no fixed hours, but he would receive assignments from the Employer when jobs were available (Tr. pp. 46, 47, 67). The CRNA could refuse any assignment (Tr. pp. 46, 67, 68). The CRNA could limit assignments from the Employer based upon his reported availability (Tr. p. 76). This factor shows an absence of control, and indicates an independent relationship.

i. Training

Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, indicates control because it reflects that the Employer wants the services performed in a particular manner.

The Claimant maintained his own certifications (Tr. pp. 47, 48). The Employer provided no training to the CRNA (Tr. p. 68). This factor shows an absence of control, and indicates an independent relationship.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The CRNA was not needed full-time and could work elsewhere (Tr. p. 77). The CRNA could alert the Employer as to his availability, and thereby limit the time spent working for the Employer (Tr. p. 76). This factor shows an absence of control, and indicates an independent relationship.

k. Tools and Materials

The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

The CRNA did not require tools or materials to perform his job (Tr. p. 49). Therefore, this factor is neutral.

l. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

The CRNA paid for his local expenses, but the Employer paid for his expenses if an assignment was out of town (Tr. p. 50). The Employer compensated the CRNA for gas on an out of town assignment (Tr. p. 69). The CRNA testified that he had been reimbursed for meals and hotel accommodations when he had traveled out of town (Tr. p. 36). This factor shows control, and indicates an employment relationship.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), are equally appropriate for consideration in determining the relationship of the parties.

1. Availability to the Public

The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

The CRNA was not prohibited from advertising (Tr. p. 77). However, the CRNA did not do any advertising between July 2009 through December 2009, and advertising is extremely rare for the profession (Tr. pp. 36, 50, 51, 77). The CRNA was allowed to work elsewhere (Tr. pp. 67, 68). However, the CRNA was instructed by the Employer that he was not allowed to compete with the Employer by directly soliciting business from any place where the Employer had a working relationship (Tr. pp. 51, 77). If a Certified Registered Nurse Anesthetist had taken an assignment directly from a client, "they would've heard from [the Employer's] attorney," and the Employer has taken legal action against one Certified Registered Nurse Anesthetist for accepting such employment (Tr. pp. 84, 86). This factor shows control and indicates an employment relationship.

2. Compensation on Job Basis

An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent.

The CRNA was paid hourly, based on his work assignments, at rates set by the Employer (Tr. pp. 36-38, 51, 66). This factor shows control and indicates an employment relationship.

3. Realization of Profit or Loss

An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position.

The CRNA incurred no significant liabilities or operating expenses that would leave him susceptible to realize a profit or loss (Tr. p. 38). The CRNA incurred minimal expenses to maintain his license as a registered nurse, which cost \$140 every four years, and paid approximately \$40 per year for certification training (Tr. pp. 54, 55, 57). The CRNA's medical malpractice insurance was covered by a third party who was paid by the Employer (Tr. pp. 21, 43, 64, 82). This factor shows control and indicates an employment relationship.

4. Obligation

An employee usually has the right to end his relationship with his employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

The CRNA was free to end the relationship at any time without penalty (Tr. pp. 36, 37, 81). Failure of the CRNA to perform or appear for a job would result only in the CRNA not being paid (Tr. p. 88). The lack of liquidated penalties for non-completion indicates an employment relationship.

5. Significant Investment.

A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular trade. If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

Certain equipment is needed to properly administer anesthesia, including an anesthesia machine, resuscitative equipment, a positive pressure device for ventilating the patient, equipment to intubate a patient, and medications for

emergency purposes (Tr. pp. 49, 50). The Employer maintains equipment that may be used by its Certified Registered Nurse Anesthetists (Tr. p. 71). When working at a hospital or outpatient facility, necessary equipment was provided by the client (Tr. p. 50). When the CRNA worked at a physician's office, the equipment would be provided by either the physician or the Employer (Tr. pp. 35, 36, 50, 70, 71). The CRNA had no financial investment in the equipment (Tr. p. 36). This factor shows control and indicates an employment relationship.

6. Simultaneous Contracts

If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

While working for the Employer, the CRNA worked two other jobs (Tr. p. 48). The CRNA worked as a registered nurse administering flu shots for one employer and he also worked for a company that acts as a scoring center for national testing (Tr. pp. 48, 49). The CRNA worked as an employee, not an independent contractor, for these other companies (Tr. pp. 16, 17). The CRNA had no concurrent contractual work and did no other work as a CRNA while working for the Employer. This factor indicates an employment relationship.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. We find one such factor to be the role of the CRNA within the Employer's business model. The Employer's business was providing anesthesia services (Tr. p. 60). In the second half of 2009, the Employer used approximately eight Certified Registered Nurse Anesthetists to provide services (Tr. pp. 88, 89). The Employer utilized no other personnel to provide its services (Tr. pp. 89, 90). Therefore, the services provided by Certified Registered Nurse Anesthetists were not ancillary to the Employer's business, but rather, their services constituted the only product offered by the Employer's business. This degree of reliance upon the services of the Certified Registered Nurse Anesthetists indicates an employment relationship.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

The declaration of policy in the Act itself is the achievement of social security by encouraging

employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the liberal interpretation required by the Employment Security Law of Arizona, we conclude that the evidence of employee status far outweighs the evidence of independent contractor status.

The CRNA was an employee of the Employer, effective July 1, 2009. We conclude all payments to the CRNA for his services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

**THE APPEALS BOARD AFFIRMS** the Reconsidered Determination dated December 10, 2012.

From July 1, 2009 through December 31, 2009, services performed by the individual as a “Certified Nurse Anesthetist” constituted employment.

All forms of remuneration paid to this individual for such services constituted wages. This decision includes the individual and amounts shown on the Notice of Assessment reports for the period from July 1, 2009 through December 31, 2009.

DATED:

APPEALS BOARD

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GARY R. BLANTON, Acting Chairman

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WILLIAM G. DADE, Member

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JANET L. FELTZ, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 771-9036 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxx

(x) Er Atty: xxxx

(x) CHRISTINA M HAMILTON  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
UI TAX SECTION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1392508-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2926

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letter issued on January 4, 2013, which held:

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 10-19-2012 must be held to be final.

On January 7, 2013, the Employer filed a timely appeal with the Appeals Board. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephone hearing for **April 25, 2013**, before Appeals Board Administrative Law Judge Eric T. Schwarz. Following a request by the Department, through counsel, the hearing was rescheduled for **June 6, 2013**. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination of the BENEFIT CHARGE NOTICE dated October 19, 2012.
2. Whether the BENEFIT CHARGE NOTICE dated October 19, 2012, became final in the interim period before the Employer filed an application for redetermination.

On the scheduled date of the hearing, one Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Benefit Charge Notice to the Employer's correct mailing address of record on October 19, 2012 (Bd. Exh. 1). The Benefit Charge Notice arrived at the Employer's address of record in a timely manner.
2. The Benefit Charge Notice reads, in pertinent part: "**PROTEST RIGHTS:** The charges shown will become conclusive and binding, pursuant to A.R.S. § 23-732(B), unless a written request for redetermination is filed within 15 days of the mailing date shown above. ... If a protest is filed by mail, the postmark date is considered the date of the protest" [Emphasis in original] (Bd. Exh. 1).
3. In response to the Benefit Charge Notice, the Employer filed an application for redetermination by letter postmarked on November 8, 2012, which is more than 15 days from the date of mailing of the Benefit Charge Notice (Bd. Exhs. 2A, 2B). In the

application for redetermination, the Employer offered no explanation for the late filing of its application for redetermination (Bd. Exh. 2).

4. On January 4, 2013, the Department issued a decision letter regarding the timeliness of the Employer's application for redetermination (Bd. Exh. 3). The Department's decision stated, in part: "Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 10-19-2012 must be held to be final" (Bd. Exh. 3).
5. On January 7, 2013, the Employer filed an appeal with the Appeals Board (Bd. Exhs. 4A, 4B). In the appeal, the Employer offers no explanation for the late filing of its application for redetermination (Bd. Exhs. 4A, 4B).
6. The Employer's application for redetermination was filed late because the Employer's accountant did not give the Benefit Charge Notice to the Employer's owner until November 5, 2012. The Employer's owner then took time to investigate the matter, drafting her application for redetermination on November 6, 2012, and mailing the application for redetermination to the Department on November 8, 2012 (Bd. Exhs. 2A, 2B).

Arizona Revised Statutes § 23-732(B) provides as follows:

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding on the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery of the redetermination or denial an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of

contributions of any employer for any calendar year.  
[Emphasis added]

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part as follows:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

3. Computation of time shall be made in accordance with and limited to subdivision (a) of Rule 6 of the Rules of Civil Procedure.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.  
[Emphasis added]

\* \* \*

The Rules of Civil Procedure, Rule 6(a), provides in pertinent part as follows:

In computing any period of time prescribed or allowed by these rules, by any local rules, by order of court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. When the period of time prescribed or allowed, exclusive of any additional time allowed under subdivision (e) of this rule, is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall not be included in the computation. When that period of time is 11 days or more, intermediate Saturdays, Sundays and legal holidays shall be included in the computation. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. [Emphasis added].

The evidence of record establishes that the Benefit Charge Notice was mailed to the Employer's correct mailing address of record on October 19, 2012 (Bd. Exh. 1). At the Appeals Board hearing, the Employer's owner admitted that the Employer received the Benefit Charge Notice, and the Employer made no allegation that the Benefit Charge Notice arrived at the Employer's address of record in an untimely manner. The owner also admitted that the late filing of the Employer's application for redetermination was caused because the Employer's accountant did not give the Benefit Charge Notice to the owner until November 5, 2012, and that the owner then took it upon herself to engage in an investigation of the matter. The owner further admitted that she did not mail the application for redetermination to the Department until November 8, 2012, which is more than 15 days after the date the Benefit Charge Notice was mailed to the Employer (Bd. Exhs. 2A, 2B).

The Employer bears the burden of proving that the late filing of its application for redetermination should be excused under Arizona Administrative Code, Section R6-3-1404(B). The evidence shows that the actions of the Employer and the Employer's accountant were the sole and proximate cause of the late filing of the Employer's application for redetermination. The Employer failed to prove that the late filing of its application for redetermination was caused by Department error or misinformation, by error or delay by the Postal Service, or by a change of address by the Employer at a time when there would have been no reason for the Employer to notify the Department of the address

change. These are the only reasons recognized under Arizona Administrative Code, Section R6-3-1404(B), that would excuse a late filing.

In Wallis v. Arizona Department of Economic Security, 126 Ariz. 582, 617 P.2d 534, 537 (App. 1980), the Court of Appeals stated: "We must assume that the legislature meant what it said, and therefore hold that where the statutory prerequisites for finality to a deputy's determination are established, that decision becomes 'final' unless a timely appeal is perfected." We find similar reasoning applicable to the filing of an application for redetermination.

The Employer failed to carry its burden of proof and has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the application for redetermination of the October 19, 2012 Benefit Charge Notice timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision letter dated January 4, 2013, regarding the late filing of the Employer's application for redetermination.

The Employer did not file an application for redetermination of the October 19, 2012 Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated October 19, 2012, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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GARY R. BLANTON, Member

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JANET L. FELTZ, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx Acct. No: xxxx

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
UI TAX SECTION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1395967-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER** petitioned for hearing from the Department's decision letter issued on February 8, 2013, which held that the April 6, 2012 Determination of Unemployment Insurance Liability is final because the written request for reconsideration was not timely filed.

The Employer's letter, postmarked, and therefore filed, on February 15, 2013, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-733(B).

At the direction of the Appeals Board and following proper notice to all parties, a hearing was scheduled on April 25, 2013, before Appeals Board Administrative Law Judge Mark H. Preny. Following the filing of a motion to continue by counsel for the Department, the hearing was rescheduled to June 6, 2013, with proper notice given to all parties on April 29, 2013. At the hearing, all parties were given an opportunity to present evidence on the following issue(s):

1. Whether the Employer filed a timely request for reconsideration by the Department.
2. Whether the Determination of Unemployment Insurance Liability, UC-016, became final during the interim period before the Employer filed a request for reconsideration.

The Employer did not appear at the scheduled Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance.

A Department witness appeared, and an Assistant Attorney General appeared as the Department's counsel.

Arizona Administrative Code, Section R6-3-1502(A), provides in part as follows:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

\* \* \*

4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

We have carefully reviewed the record, and

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the issue of the timeliness of the Employer's request for reconsideration. The Employer did not appear at the scheduled Board hearing to present evidence disputing the Department's February 8, 2013 decision letter. The Employer's failure to appear at the hearing means that no evidence was presented to support reversing or modifying the Department's February 8, 2013 decision letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing.

The Department's February 8, 2013 decision letter remains in full force and effect.

DATED:

APPEALS BOARD

---

GARY R. BLANTON, Acting Chairman

---

WILLIAM G. DADE, Member

---

JANET L. FELTZ, Member

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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**3<sup>rd</sup> QUARTER OF  
CALENDAR YEAR 2013**

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1406828-001-B

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STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2926

Employer

Department

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---

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

---

**DECISION**  
**AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letter issued on April 5, 2013, which held that the Benefit Charge Notice dated January 18, 2013, is final because the Employer's application for redetermination was not filed within the 15-day appeal period.

The Employer filed a timely request for a hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephone hearing, for **August 26, 2013**. Appeals Board Administrative Law Judge Morris L. Williams, III presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination.
2. Whether the Benefit Charge Notice became final during the interim period before the Employer filed an application for redetermination.

On the scheduled date of the hearing, one Employer witness appeared by telephone to testify. Counsel for the Department appeared in-person and a witness for the Department also appeared in-person to testify. Board Exhibits 1 through 4 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 18, 2013, the Department mailed a Benefit Charge Notice to the Employer's correct address of record (Bd. Exh. 1).
2. On February 5, 2013, the Employer faxed to the Department an application for redetermination (Bd. Exh. 2). The application for redetermination was filed more than 15 days after January 18, 2013, because the Employer delayed in checking and processing its mail.
3. On April 5, 2013, the Department issued its decision letter regarding the timeliness of the Employer's application for redetermination (Bd. Exh. 3). The Department's decision letter held that, because the Employer's application for redetermination was not filed within 15 days, the Benefit Charge Notice dated January 18, 2013, had become final (Bd. Exh. 3).
4. On April 12, 2013, the Employer filed a timely petition for hearing from the Department's decision letter dated April 5, 2013 (Bd. Exh. 4).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

\* \* \*

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such

notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was be-

cause the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case. [Emphasis added].

\* \* \*

On January 18, 2013, the Department sent a Benefit Charge Notice to the Employer's correct address of record (Bd. Exh. 1). The Employer witness testified that the Benefit Charge Notice was sent to the correct address, but there was a delay in getting the mail from the main corporate office, which is where all the mail is sent for to the parent company and all its subsidiaries. The main corporate office and the Employer's office are located in the same complex. The Employer witness also testified that as a subsidiary, the Employer is not allowed to change the mailing address. Prior to the current office manager being employed in April 2013, the Employer did not have a designated person who picked up the mail from the main corporate office.

The evidence of record establishes that the Employer's late application for redetermination was caused by a delay in the Employer retrieving its mail from the main corporate office and processing it in a timely manner. Accordingly, the evidence does not support a finding that the Employer's late application for redetermination was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding that the application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated April 5, 2013.

The Employer did not file a timely application for redetermination within the statutory time period allowed.

The Benefit Charge Notice dated January 18, 2013, remains in full force and effect.

DATED:

APPEALS BOARD

---

WILLIAM G. DADE, Acting Chairman

---

GARY R. BLANTON, Member

---

JANET L. FELTZ, Member

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(x) CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1395980-001-B

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Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

**THE EMPLOYER**, through counsel, has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

On July 23, 2013, the Employer, through counsel, submitted a written request to withdraw its petition.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. No further hearing will be scheduled in this matter. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

GARY R. BLANTON, Member

---

JANET L. FELTZ, Member

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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1395975-001-B

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Employer

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER**, through counsel, has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

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On July 12, 2013, the Employer, through counsel, submitted a written request to withdraw its petition.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

GARY R. BLANTON, Member

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JANET L. FELTZ, Member

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(x) Er Counsel: \*\*\*

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By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1394783-001-B

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STATE OF ARIZONA E S A TAX UNIT  
% CHRISTINA HAMILTON  
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1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2926

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**

**AFFIRMED, IN PART, AND REVERSED, IN PART**

THE **EMPLOYER**, through counsel, petitioned for hearing from the Department's Reconsidered Determination issued on December 10, 2012, which affirmed the Determination of Liability for Employment or Wages issued on December 31, 2011. The Reconsidered Determination held that "services performed by the workers at issue were correctly determined to constitute employment and all remuneration paid for such services to constitute wages."

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **June 3, 2013**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by individuals as corporate officers, tailors, and alteration persons constituted employment effective January 1, 2010, as defined in A.R.S. § 23-615.
2. Whether the services performed by individuals as corporate officers, tailors, and alteration persons are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
3. Whether all forms of remuneration paid to individuals for services as corporate officers, tailors, and alteration persons constitutes wages as defined in A.R.S. § 23-622.
4. If the liability issues affecting the assessment have become final, whether the individuals and amounts shown on the Notice of Assessment reports for the quarters ending March 31, 2010 through September 30, 2011 are accurate.

At the hearing, the Employer was represented by counsel, and one witness testified for the Employer. The Department was also represented by counsel and one witness testified for the Department. Board Exhibits 1 through 12 were admitted into evidence. The record was held open without objection following the hearing for the Department to submit any additional auditors' reports, however, no such reports were found to exist by the Department. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is an Arizona corporation that provides clothing alteration services to the public (Bd. Exhs. 1A, 6B).
2. On December 31, 2011, the Department issued a Determination of Liability for Employment or Wages that held the "[s]ervices performed by individuals as corporate officers, tailors, and alterations persons constitute employment" for the quarters

ending March 31, 2010 through September 30, 2011 (Bd. Exh. 3). The Department also issued Notices of Assessment and Reports of Wages Paid Each Employee that identified specific persons held to be employees and their wages for this period (Bd. Exh. 4A-D).

3. The Employer's owner, "N.Y.", is the Employer's President/CEO (Tr. p. 90; Bd. Exhs. 6B, 10C). N.Y. performs duties as a seamstress, opens and closes the business, takes orders from customers, does fittings, and charges customers (Tr. pp. 54, 59, 64, 89).
4. "M.S." is a Vice President for the Employer (Tr. p. 90; Bd. Exhs. 6B, 10C). M.S. provides bookkeeping services for the Employer (Tr. p. 90).
5. N.Y. deals personally with the Employer's customers (Tr. pp. 56, 89). N.Y. would attach a receipt to the garments indicating what work the customer wanted to have done and the date the customer would be returning to pick up the item (Tr. pp. 59, 61; Bd. Exh. 10D)
6. Tailoring and alterations persons (the TAP) provided tailoring and alterations services to the Employer (Tr. p. 59). The TAP did not work directly with the Employer's customers (Tr. pp. 59, 64, 89; Bd. Exh. 1A)
7. The Employer maintained a large area where customers' garments were kept with N.Y.'s receipts attached (Tr. pp. 61, 63, 64). The TAP chose the garments they wanted to alter or tailor based upon their individual skills (Tr. pp. 55, 63, 64). The Employer had no interest in which of the TAPs performed any particular assignment and the TAPS were free to use assistants or substitutes, though none of them actually used assistants (Tr. pp. 62, 69-71, 91, 92; Bd. Exhs. 10D-E)
8. The TAP worked hours of their choice, without a production requirement, either at the Employer's place of business or offsite (Tr. pp. 55, 66-68, 77-79, 2nd Tr. pp. 10, 11; Bd. Exh. 10D-E). Pursuant to industry custom, the Employer maintained machines, tools and materials available for the TAP to use, including thread, zippers, binding, rulers, scissors, tables, and sewing machines (Tr. pp. 79, 80). The Employer had seven different types of machines, ranging in cost between \$1,200 through \$12,000 (Tr. pp. 93, 94). The TAP were free to use their own tools and materials, or they could use those maintained by the Employer (Tr. pp. 54, 55, 79-81, 93; Bd. Exh. 10E). Some TAP worked offsite but would return to use the Employer's more expensive equipment when needed (Tr. p. 66; Bd. Exh. 10D)

- 9 The TAP were skilled workers who received no instructions from the Employer other than the receipt describing the work needed and the customer pick-up date for each garment (Tr. pp. 13, 14, 25, 59, 61, 62; Bd. Exh. 10D-E). The TAP made no reports regarding their work to the Employer, and they received no training from the Employer (Tr. pp. 13, 14, 25, 32, 65, 78; Bd. Exh. 10D-E). The TAP were financially responsible for damages to garments they worked on; however, the Employer would assume responsibility on the first three occasions (Tr. pp. 72, 73, 86, 2nd Tr. p. 7).
10. The Employer did not have written contracts with any of the TAP (Tr. p. 90; Bd. Exhs. 6B, 10C). Both the Employer and the TAP were free to end the business relationship at any time (Tr. pp. 71, 72, 87, 88, 2nd Tr. p. 3; Bd. Exhs. 10E, 10G).
11. The TAP were free to work elsewhere, and they had their own customers (Tr. pp. 55, 79, 83; Bd. Exh. 10F). Many TAP had their own websites and business cards advertising their services (Tr. p. 83)
12. The TAP were generally paid 45% of the revenue per job, or 50% if the work was done offsite, as is customary in the industry (Tr. pp. 48, 68, 2nd Tr. pp. 3-5). One of the TAP negotiated with the Employer to be paid hourly as he is an eighty-three year-old man who takes longer to complete work because of his shaky hands (Tr. pp. 69, 77). The TAP received no compensation for expenses (Tr. p. 82).

The Employer contends that the tailors and alterations persons were independent contractors and not employees. The Employer further contends that one of the corporate officers has been improperly considered by the Department. The employment status of the corporate officers, tailors and alterations persons, and whether their pay constituted wages, are in dispute in this case.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:

1. An individual's entire service performed within or both within and without this state if:

- (a) The service is localized in this state. ...

\* \* \*

4. Service performed by any officer of a corporation.

\* \* \*

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
  2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
  3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.
  4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Revised Statutes § 23-622(A) provides as follows:

- A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
  - 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
  - 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
  - 1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
  - 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
    - a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

- b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

\* \* \*

### Corporate officers

The owner, "N.Y.", functions as a corporate officer for the Employer as the President and Chief Executive Officer (Tr. p. 90; Bd. Exhs. 6B, 10C). In the request for hearing, the Employer, through counsel, "concedes to the Reconsidered Determination's finding" with respect to N.Y. and requests the Board "[a]ffirm the Reconsidered Determination as to the services of [N.Y.] in her capacity as a corporate officer" (Bd. Exhs. 10C, 10I). N.Y. performs services including seamstress duties, opening and closing the business, taking orders from customers, doing fittings, and charging customers (Tr. pp. 54, 59, 64, 89). We conclude from the evidence that N.Y.'s services constituted employment, by operation of A.R.S. § 23-615(4). This outcome is consistent with Internal Revenue Code, §§ 3306(i) and 3121(d). We conclude any payment to N.Y. for her services constituted wages, by operation of A.R.S. § 23-622(A).

"M.S." functions as a corporate officer for the Employer as a Vice President (Tr. p. 90; Bd. Exhs. 6B, 10C). M.S. performs bookkeeping services for the Employer (Tr. p. 90). We conclude from the evidence that M.S.'s services constituted employment, by operation of A.R.S. § 23-615(4). Further, we conclude that any payment to him for his services constituted wages, by operation of A.R.S. § 23-622(A). We note that the evidence does not establish that any amount was paid to M.S., including wages, during the time period at issue (Tr. p. 10; Bd. Exhs. 5E, 5H).

### Tailors and alterations persons (TAP)

The primary issue pertaining to the TAP is whether the services of the TAP were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-

3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the TAP. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The Employer did not prohibit the use of assistants (Tr. pp. 62, 91, 92; Bd. Exh. 10D). However, none of the TAP actually used assistants (Bd. Exh. 10D). As paid assistants were not used by the TAP, this factor is neutral.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work.

Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the Employer has the right to instruct or direct.

The Employer attached basic instructions to each garment advising the TAP as to what work the Employer's customer had requested and when the customer would return to pick up the garment (Tr. pp. 59, 61; Bd. Exh. 10D). The TAP would select which jobs they wanted to do based upon their own particular preferences and skill sets (Tr. pp. 55, 63, 64). The TAP received no direction regarding when, where or how to complete the work (Tr. p. 62; Bd. Exh. 10D). This factor shows an absence of control, and indicates an independent relationship.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

The TAP submitted neither written nor oral reports to the Employer (Tr. p. 65; Bd. Exh. 10D). This factor shows an absence of control, and indicates an independent relationship.

d. Place of Work

Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

The TAP could work offsite or work on the Employer's premises (Tr. pp. 55, 66-68; Bd. Exh. 10D). This decision was made by the TAP, and was often based upon whether that individual possessed the necessary machine for a job, or

would need to use the Employer's equipment (Tr. pp. 64-68, 2nd Tr. pp. 8-12; Bd. Exh. 10D). This factor shows an absence of control, and indicates an independent relationship.

e. Personal Performance

If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

The Employer was indifferent as to who completed any particular job (Tr. pp. 69-71; Bd. Exh. 10E). The TAP were free to switch jobs among themselves or delegate work to others (Tr. pp. 69-71; Bd. Exh. 10E). This factor shows an absence of control, and indicates an independent relationship.

f. Establishment of Work Sequence

If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

The Employer would identify the work needed and the date that garments were to be picked up by the customer (Tr. pp. 61, 68; Bd. Exh. 10D-E). However, the Employer gave no instruction as to work sequence (Tr. p. 71, 2nd Tr. pp. 2, 3; Bd. Exh. 10E). Some TAP ordered their work sequence to do what work they could at home and later return to the place of business to use the Employer's machines (Tr. p. 66). As the TAP were free to establish their own work sequence, this factor shows an absence of control, and indicates an independent relationship.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal,

which causes the worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis.

The Employer maintained the right to end its relationship with any of the TAP at any time (Tr. pp. 71, 72, 2nd Tr. p. 3; Bd. Exh. 10E). Since the TAP could be dismissed without notice or cause, they did not possess the rights that one would expect in a contractual relationship. This factor shows control, and indicates an employment relationship.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

The TAP were free to set their own hours (Tr. p. 77; Bd. Exh. 10E). This factor shows an absence of control, and indicates an independent relationship.

i. Training

Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner.

New workers were tested by the Employer to insure they were capable of performing the work (Tr. p. 78). The TAP were skilled and proficient in their craft, and they did not receive training from the Employer (Tr. pp. 13, 14, 25, 32, 77, 78; Bd. Exh. 10E). This factor shows an absence of control, and indicates an independent relationship.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The TAP were not required to work any set number of hours or produce any minimum amount of work (Tr. pp. 78, 79; Bd. Exh. 10E). The TAP were free to manage their time to work elsewhere (Bd. Exh. 10E). This factor shows an absence of control, and indicates an independent relationship.

k. Tools and Materials

The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

The Employer maintained tools and materials that the TAP could use, including thread, zippers, binding, rulers, scissors, irons, tables, and sewing machines (Tr. pp. 79, 80). By industry custom, the business provides tools and materials to the workers (Tr. p. 80). However, many of the TAP had their own tools, and they had the discretion to use their own tools if they preferred (Tr. pp. 54, 55, 79-81, 93; Bd. Exh. 10E). As the TAP were free to use their own tools, this factor shows an absence of control, and indicates an independent relationship.

l. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

The TAP were not reimbursed for any business or travelling expenses in the course of their work (Tr. p. 82). However, the record does not establish that the TAPS had any business or travelling expenses. The Employer testified that if one of the TAP used his own thread and requested compensation, the Employer would pay him (2nd Tr. p. 2). Such a circumstance had never presented itself, though on one occasion, a tailor used his own thread, which he kept (2nd Tr. pp. 1, 2). As the record does not establish that the TAP incurred any business or

travelling expenses, other than this one-time de minimis occasion, we find this factor to be neutral.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), are equally appropriate for consideration in determining the relationship of the parties.

1. Availability to the Public

The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

The Employer did not prohibit the TAP from working for others, and they had their own customers (Tr. pp. 55, 79, 83; Bd. Exh. 10F). Many of the TAP had their own websites and business cards to advertise their services (Tr. p. 83). This factor shows an absence of control, and indicates an independent relationship.

2. Compensation on Job Basis

An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent.

With one exception, the TAP were paid by the job, receiving 45% of the revenue per job, or 50% if the work was done off the Employer's premises (Tr. pp. 48, 68, 2nd Tr. pp. 3-5). These percentages are customary for the industry (2nd Tr. pp. 4, 5). The one exception, "W.M.", is an eighty-three year-old man who requested the Employer pay him by the hour as he takes longer to complete work because of his shaky hands (Tr. pp. 69, 77; Bd. Exhs. 4B, 4D). The TAP's compensation, though generally based on customary practice, can be negotiated between the worker and the Employer. This factor shows an absence of control, and indicates an independent relationship.

3. Realization of Profit or Loss

An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position.

The record does not establish that the TAP were subject to any recurring liabilities or expenses connected with the work. As such, the TAP had no viable concerns of balancing receipts against expenditures. This factor shows control and indicates an employment relationship.

4. Obligation

An employee usually has the right to end his relationship with his employer at any time without incurring liability. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally obligated to make good for failure to complete the job, if legal relief were sought.

The TAP were free to end the relationship at any time without penalty (Tr. pp. 87, 88; Bd. Exh. 10G). Though TAP could be financially responsible for the satisfactory completion of the jobs they accepted, the Employer would bear responsibility for damages from the first three incidents (Tr. pp. 72, 73, 86, 2nd Tr. p. 7). This factor shows control and indicates an employment relationship.

5. Significant Investment.

A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular trade. If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

The Employer maintains seven different kinds of machines at the worksite (Tr. p. 79). Some of these machines are quite expensive, ranging in cost from approximately \$1,200 up to \$12,000 (Tr. pp. 93, 94). TAP who worked offsite would sometimes need to come in to use the Employer's specialty machines (Tr. pp. 64-66). As the TAP did not need to provide their own expensive machinery, they did not assume a significant investment to perform their work. This factor shows control and indicates an employment relationship.

6. Simultaneous Contracts

If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such

cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

In addition to working for the Employer, the TAP all maintained their own customers or worked for other businesses, with one operating a small business (Tr. pp. 55, 79, 83; Bd. Exh. 10F). This factor shows an absence of control, and indicates an independent relationship.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. One such factor has been identified by the Department, namely, the manner in which the Employer holds itself out to the public through the Employer's own marketing on its website. The Employer's website identifies its services and states that "[o]ur friendly and professional staff will gladly answer any questions you may have about our company and services" (Tr. p. 21; Bd. Exh. 9). However, the TAP do not take orders from the Employer's customers, do not do the fittings, and do not take payments from the customers (Tr. pp. 59, 64, 89; Bd. Exh. 1A). The record contains no evidence that the TAP ever interact directly with the Employer's customers. As such, the TAP cannot be considered members of the "professional staff" to which the website refers. Though considered by the Department as indicative of an employment relationship, the Board does not find the Employer's website marketing to demonstrate any indicia of control over the TAP.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation.

All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the Employment Security Law of Arizona, we conclude that the evidence of independent contractor status far outweighs the evidence of employee status as to the TAP.

The TAP were not employees of the Employer, effective March 31, 2010, but rather they performed services pursuant to an independent contractor relationship. We conclude that all payments to the TAP for their services did not constitute wages, by operation of A.R.S. § 23-622(A). Accordingly,

**THE APPEALS BOARD AFFIRMS, IN PART,** the Reconsidered Determination dated December 10, 2012.

From January 1, 2010 through September 30, 2011, services performed by individuals as Corporate Officers constituted employment.

All forms of remuneration paid to these individuals for such services constituted wages. This decision includes the one individual identified as a corporate officer, and the amounts shown paid to her, on the Notice of Assessment reports for the period from January 1, 2010 through September 30, 2011.

**THE APPEALS BOARD REVERSES, IN PART,** the Reconsidered Determination dated December 10, 2012.

From January 1, 2010 through September 30, 2011, services performed by individuals as Tailors and Alterations Persons did not constitute employment, because the parties had an independent contractor relationship.

None of the remuneration paid to the Tailors and Alterations Persons from January 1, 2010 through September 30, 2011, constituted wages.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

GARY R. BLANTON, Member

---

JANET L. FELTZ, Member

---

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

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1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
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- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
  1. explains why the Appeals Board decision is wrong,
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  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 771-9036 with any questions**

---

A copy of this Decision was mailed on  
to:

(x) Er: \*\*\*

Acct. No: \*\*\*

(x) CHRISTINA HAMILTON  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1392521-001-B

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STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB ASST ATTORNEY  
GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2926

Employer

Department

---

**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

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**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on August 13, 2012, which held in part as follows:

your e-mail requesting a review of the Determination is untimely because it was not made within the fifteen (15) day appeal period which expired on Monday, April 2, 2012 and is 108 days late. ...

Accordingly, it is the Department's decision that the Determination issued March 16, 2012 is final. ...

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

At the direction of the Appeals Board, a telephone hearing was conducted on June 10, 2013, before **JOSE R. PAVON**, an Appeals Board Administrative Law Judge located in Phoenix, Arizona. All parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer filed a timely petition for hearing to the Appeals Board.

A witness from the Department testified, and the Department was represented by counsel. The Employer's owner appeared and testified at the hearing. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On March 16, 2012, the Department mailed a DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY to the Employer's address of record (Bd. Exh. 1).
2. On July 19, 2012, the Employer filed a request for reconsideration of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY (Bd. Exh. 2).
3. On August 13, 2012, the Department issued a decision regarding the Employer's request for reconsideration, and found that the Employer's request was late because it was not made within the 15-day appeal period that expired on April 2, 2012, and that the March 16, 2012 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY is final (Bd. Exh. 3).
5. On November 10, 2012, the Employer filed a petition for hearing (Bd. Exh. 6).

Arizona Revised Statutes § 23-724, provides in part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing

unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice thereof is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review.... [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1404, provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The evidence establishes that the Department's August 13, 2012 decision letter was mailed to the Employer's last known address of record. The decision letter included the following explanation (Bd. Exh. 1):

This decision will also become final unless [Employer] files a written petition for hearing before the Department of Economic Security Appeals Board, on the issue of timeliness only, within thirty days of the date of this letter.

The Employer's petition for hearing was filed on November 10, 2012, which is more than 30 days from the date of the August 13, 2012 decision letter. The Employer's petition, therefore, was not filed within the statutory time.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for hearing timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing. The Department's August 13, 2012 decision letter remains in full force and effect.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

JANET L. FELTZ, Member

---

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals

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**Call the Appeals Board at (602) 771-9036 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: \*\*\*

Acct. No: \*\*\*

(x) ELI D GOLOB  
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1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
UI TAX SECTION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1392512-001-B

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Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

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**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letter issued on July 30, 2012, which held that the Determination of Liability for Employment or Wages dated May 16, 2012, is final because the Employer's request for reconsideration was not filed within the 15-day appeal period.

The Employer did not file a timely petition for hearing to the Appeals Board. However, we find that the Employer's late filing was due to postal error because the Employer did not receive a return receipt requested green card from

the United States Postal Service (USPS). Accordingly, the Appeals Board will consider the Employer's petition for hearing as timely filed. Therefore, the Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **June 27, 2013**. Appeals Board Administrative Law Judge Morris L. Williams, III presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely petition for hearing to the Appeals Board.
2. If the petition for hearing was filed timely, whether the Employer filed a timely request for reconsideration.
3. If the request for consideration was timely filed, whether the Determination of Liability for Employment or Wages became final during the interim period before the Employer filed a request for reconsideration.

On the scheduled date of the hearing, an Employer witness appeared by telephone to testify. Counsel for the Department appeared in-person and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On May 16, 2012, the Department sent by certified mail a Determination of Liability for Employment or Wages to the Employer's correct address of record (Bd. Exh. 1).
2. The USPS left a notice of certified mail for the Employer on May 17, 2012 (Bd. Exh. 3).
3. The certified mail from the Department was retrieved by the Employer on June 8, 2012 (Bd. Exh. 3).
4. On June 11, 2012, the Employer faxed to the Department a request for reconsideration (Bd. Exh. 2). The request for reconsideration was filed more than 15 days after the May 16, 2012 Determination of Liability for Employment or Wages, because no one from the Employer retrieved the certified mail in a timely manner.
5. On July 30, 2012, in response to the Employer's late request for reconsideration, the Department issued a decision letter regarding the timeliness of the Employer's

request for reconsideration (Bd. Exh. 4). The Department's decision held that, because the Employer's request for reconsideration was not filed within 15 days, the Determination of Liability for Employment or Wages dated May 16, 2012, had become final (Bd. Exh. 4).

Arizona Revised Statutes, § 23-724, provides in part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
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  - 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  - 2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case. [Emphasis added].

\* \* \*

On May 16, 2012, the Department mailed, by certified mail, a Determination of Liability for Employment or Wages to the Employer's correct address of record (Bd. Exh. 1). The USPS left notice of the certified mail for the Employer on May 17, 2012 (Bd. Exh. 3). The Employer did not retrieve the certified mail until June 8, 2012 (Bd. Exh. 3). The Employer witness testified that he had no idea why it took the Employer about three weeks to retrieve the certified mail from the USPS. The Employer witness further testified that there are one or two other people that retrieve mail for the Employer from the USPS.

The evidence of record established that the Employer filed a late request for reconsideration because the Employer did not retrieve its mail in a timely manner. Accordingly, the evidence does not support a finding that the Employer's late request for reconsideration was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address at a time when there would have been no reason for it to notify the Department of the address change.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding that the request for reconsideration was timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision letter dated July 30, 2012.

The Employer did not file a timely request for reconsideration within the statutory time period allowed.

The Determination of Liability for Employment or Wages dated May 16, 2012, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

GARY R. BLANTON, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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**Call the Appeals Board at (602) 771-9036 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: \*\*\*

Acct. No: \*\*\*

(x) ELI D GOLOB  
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(x) CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1383774-001-B

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STATE OF ARIZONA E S A TAX UNIT  
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Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** filed an appeal from the Department's decision letter issued on September 17, 2012, which held in part:

the Determination of Unemployment Insurance Tax Rate  
for Calendar Year 2012 is final.

The Employer's appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(A).

At the direction of the Appeals Board and following written notice to the parties, a telephone hearing was conducted before **JOSE R. PAVON**, an Administrative Law Judge, on January 31, 2013. At the scheduled time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for review within 15 days following mailing of the January 6, 2012 DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2012, with the Department.
2. Whether the January 6, 2012 DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2012, became final during the interim period before the Employer filed a request for review of the tax rate.

One of the Employer's owners appeared and testified. A witness for the Department appeared and testified. Counsel for the Department appeared. Four Board Exhibits were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 6, 2012, the Department mailed a DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2012 to the Employer's last known address of record (Tr. p. 5; Bd. Exh. 1).
2. On August 3, 2012, the Employer filed a request for review of the new tax rate. The Employer attached his latest account statements, and copies of two checks submitted as payment for his unemployment insurance tax for the quarters ending March 31, 2012 and June 30, 2012 (Bd. Exh. 2).
3. On September 17, 2012, the Department issued its decision letter regarding the timeliness of the Employer's request for review. The Department held that because the Employer did not file its request for review within 15 days, "...the Determination of Unemployment Insurance Tax Rate for Calendar Year 2012 is final" (Bd. Exh. 3).
4. On October 2, 2012, the Employer filed a timely appeal from the Department's September 17, 2012 decision letter (Bd. Exh. 4).

Arizona Revised Statutes § 23-732, provides as follows:

- A. The department shall promptly notify each employer of the employer's rate of contributions as

determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. [Emphasis added].

The record reveals that a copy of the DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2012 was sent by mail on January 6, 2012, to the Employer's last known address of record. The document included the following instructions (Bd. Exh. 1):

This determination becomes final unless a written request for review is filed within 15 days of the mailing date as provided in Section 23-732, Arizona Revised Statutes.

The Employer filed a request for review on August 3, 2012, which is more than 15 days after the date of the DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2012 was mailed. The Employer's request for review, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

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  - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
  - 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  - 2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  - 3. No submission shall be considered timely if the delay in filing was unreasonable, as

determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The Employer testified that he did not file a timely appeal because, prior to receiving the January 6, 2012 determination, he had tried to contact the Department regarding an unemployment insurance claim, but he did not receive a return call (Tr. p. 13). The appeal rights at the bottom of the determination notified the Employer that it had to submit a written request for review, so there was no reason for the Employer to expect a phone call from the Department after the January 6, 2012 determination was issued. The Employer did not meet the statutory requirement to permit review of the tax rate, because the Employer did not file a timely request for review and redetermination.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding that the Employer's request for review was timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's September 17, 2012 decision letter regarding the late filing of the Employer's request for review.

The January 6, 2012 DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2012 is final, because the Employer did not file a timely request for review.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

JANET L. FELTZ, Member

---

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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A copy of this Decision was mailed on  
to:

(x) Er: \*\*\*

Acct. No: \*\*\*

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1376186-001-B

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\*\*\*

STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB  
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PHOENIX, AZ 85007-2926

Employer

Department

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**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

The **EMPLOYER**, through counsel, petitioned for a hearing from the Reconsidered Determination issued on August 3, 2012, which affirmed both the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued by the Department on January 6, 2011 (Bd. Exhs. 2 & 3). The Reconsidered Determination held that:

“...we find that [Employer] is a temporary services employer liable for Arizona Unemployment Insurance

Taxes and that services performed by individuals as RN, LPN, CNA, Caregiver and Night Staffing Coordinator constitute employment and all forms of remuneration paid for such services constitutes wages”(Bd. Exh. 12).

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

At the direction of the Appeals Board, an in-person hearing was held before MORRIS L. WILLIAMS, III, an Administrative Law Judge, on **May 30, 2013**. At the hearing, the parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer is a “temporary services employer” liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-614.

On the scheduled date of the hearing, one Employer witness appeared by telephone to testify. The Employer’s counsel also appeared by telephone. Counsel for the Department appeared in-person and a witness for the Department also appeared in-person to testify. Board Exhibits 1 through 17 were admitted into evidence, with the exception of Exhibit #9. We have carefully reviewed the record.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer provides RNs, LPNs, CNAs, Caregivers and Night Staffing Coordinators (hereinafter “health care workers”) for various clients, including hospitals, nursing homes and private residences. The Employer has contracts with a few of its clients (Tr. p. 81).
2. The Employer has a rate sheet that sets forth how much the Employer will receive from the client for the services of the health care workers (Tr. p. 81). The Employer then takes a fee from the amount agreed to with the client, and the health care workers are paid the remainder of the agreed to amount (Tr. pp. 84, 86). The health care workers are paid from the Employer’s business account (Tr. p. 86).
3. The clients contact the Employer directly, and only the Employer communicates with the clients regarding each client’s staffing needs (Tr. pp. 77, 78). None of the clients directly communicate with any of the health care workers before an assignment is accepted.

4. The Employer carries liability and malpractice insurance that covers the health care workers it employs (Tr. p. 85).
5. The Employer's website states, "\*\*\* has provided over 20 years of temporary staffing services for the healthcare community in Arizona." (Bd. Exh. 7).
6. Following a tax audit, the Department concluded the Employer was a "temporary services employer" and was liable for unemployment insurance taxes.

The Department contended that the Employer acted as a "temporary services employer" and, as such, employed the health care workers and sent them to provide services for the Employer's clients.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01(A) provides in part:

Employee; definition; exempt employment

- A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
  1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
  2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
  3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for

federal unemployment tax purposes. ...  
[Emphasis added].

The Department has based its ruling largely upon its conclusion that the relationship between the Employer and the health care workers meet all of the prerequisites of A.R.S., § 23-614(I)(2),” which provides in pertinent part as follows:

I. For the purposes of this section:

\* \* \*

2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:
- (a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.
  - (b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
  - (c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined unacceptable by a specific client or customer.
  - (d) Assigns or reassigns the worker to perform services for a client or customer.
  - (e) Sets the rate of pay of the worker, whether or not through negotiation.
  - (f) Pays the worker from its own account or accounts.
  - (g) Retains the right to hire and terminate workers.

In the Reconsidered Determination, the Department noted that the Employer: 1) determines the time frame for the work, where the work is performed, the type of work, the licensing qualifications of the worker and the

price for the services; 2) assigns the worker to the client with the worker retaining the right of refusal; 3) retains the authority to reassign a worker to another client if the worker is deemed unacceptable by a specific client; 4) sets the rate of pay for the workers and pays the workers from its bank account; 5) retains the right to terminate workers (Bd. Exh. 6) While the Employer witness disagreed with some of the above-mentioned findings, we find that all of the factors upon which the field auditor based her conclusions, which were contained in the Reconsidered Determination, are supported by the evidence in this case.

During the hearing, the Department's witness testified that, after reviewing the file, he found that all seven factors under A.R.S., § 23-614(I)(2), had been met (Tr. pp. 24-26). We agree. The evidence of record establishes that the Employer negotiates with its clients involving such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services (Tr. pp. 16-18). The health care workers are offered work assignments where the time of work, the place of work, the type of work, the working conditions and the quality of services have already been discussed and agreed upon by the Employer and the client. The health care workers have no input in these negotiations. The Employer generally has a rate sheet that it uses with its clients setting forth what the Employer will be paid, and the Employer takes its portion out of the payment by the client and the health care workers receive the remaining money (Tr. p. 81). As noted earlier, the health care workers are paid from the Employer's business account (Tr. p. 86). Next, the Employer determines which health care workers it will offer assignments to from a database of qualified individuals, even though the health care workers may refuse the assignment (Tr. p. 16).

The Employer also retains the right to assign or reassign health care workers to various clients. The Employer retains the right to send a different health care worker, if the Employer's client is not satisfied with a particular health care workers work performance (Tr. pp. 75, 76). Further, while the Employer may not hire and terminate health care workers in the traditional sense, the Employer does contact them for work opportunities and uses the health care workers if they accept the assignment. The Employer also has the option of not using a particular health care worker if it is not satisfied with their work, which has the effect of terminating the health care worker. Accordingly, the Employer does retain the right to hire and terminate the health care workers. It must also be noted that the Employer's website states, "\*\*\* has provided over 20 years of temporary staffing services for the healthcare community in Arizona." (Bd. Exh. 7). In conclusion, based on the credible and probative evidence, we find that the Department met its burden to establish all of the statutory requirements under A.R.S., § 23-614(I)(2).

**THE APPEALS BOARD AFFIRMS** the Reconsidered Determination issued on August 3, 2012.

The Employer is a “temporary services employer” liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-614, and services performed by individuals as RNs, LPNs, CNAs, Caregivers and Night Staffing Coordinators constitute employment, and remuneration paid to individuals as RNs, LPNs, CNAs, Caregivers and Night Staffing Coordinators constitute wages.

DATED:

APPEALS BOARD

---

JANET L. FELTZ, Acting Chairman

---

WILLIAM G. DADE, Member

---

GARY R. BLANTON, Member

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**Call the Appeals Board at (602) 771-9036 with any questions**

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A copy of this Decision was mailed on  
to:

Er: \*\*\*

Acct. No: \*\*\*

(x) Er. Rep: \*\*\*

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1376185-001-B

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\*\*\*

STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB  
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1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2926

Employer

Department

---

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

\_\_\_\_\_.

**DECISION**  
**DISMISSED**

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
  - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

On June 27, 2013, the Employer submitted a written request to withdraw its petition.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

---

GARY R. BLANTON, Acting Chairman

---

WILLIAM G. DADE, Member

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JANET L. FELTZ, Member

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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1376173-001-B

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\*\*\*

STATE OF ARIZONA E S A TAX UNIT  
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Employer

Department

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---

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

---

**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on July 20, 2012, which affirmed the July 27, 2010 Determination of Unemployment Insurance Liability, and held that the Employer was properly determined to have acquired or succeeded the organization, trade, or business of the predecessor employer and that the experience rating account was properly transferred to the Employer.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter.

With notice to the parties, a hearing was conducted by MORRIS L. WILLIAMS, III, an Appeals Board Administrative Law Judge, on **June 4, 2013**. All parties were given the opportunity to present evidence on the following issues:

1. Whether the Employer was properly determined to be a successor to a liable employer.
2. Whether the Employer's experience rating account was properly assigned a tax rate of "3.12" percent for coverage beginning April 1, 2010.

The Employer witness appeared by telephone. The Department appeared with counsel and one witness who testified. Nine Board Exhibits were admitted into evidence without objection.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On March 31, 2010, the Employer acquired the business of the predecessor employer (Bd. Exhs. 1 & 5).
2. The Employer operates the same business, at the same location, as the predecessor employer.
3. The Employer continued to employ some of the same employees that were employed by the predecessor employer.
4. The Employer's owner acquired the business of the predecessor employer.

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor

- A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.

B. ... The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.

\* \* \*

D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience. [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part as follows:

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. Business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy proceedings, default, or through the transfer of a third party.
2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through (D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:
  - a. The place of business
  - b. The trade name
  - c. The staff of employees
  - d. The customers
  - e. The goodwill
  - f. The inventory
  - g. The accounts receivable/accounts payable
  - h. The tools and fixtures
  - i. Other assets.
3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if

the normal business activity was not interrupted for more than 30 days before or after the date of transfer. ...

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:
  - a. Exempt employment; or
  - b. Employment necessary for the liquidation of the trade or business; or
  - c. Employment arising from the activities establishing another trade or business; or
  - d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

\* \* \*

C. Transfer of entire business

1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.
2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

\* \* \*

E. Liability for predecessor's debt

1. Notwithstanding subsections (A) and (B) above, when an individual or employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets of an employer as defined in A.R.S. § 23-613, the successor shall be equally liable along with the predecessor for the contributions, interest and penalties due or accrued and unpaid by the predecessor as provided in A.R.S. § 23-733(D). [Emphasis added].

\* \* \*

The evidence of record in this case establishes that the Employer acquired the business of the predecessor employer on March 31, 2010. The Employer witness did not dispute that the predecessor's experience rating was properly transferred to the Employer. Also, according to the Department's records, and the Department's witness, no unemployment insurance debts were due and unpaid by the predecessor employer, at the time the business was acquired. In fact, the Employer is owed a credit by the Department.

We conclude, based on the Employer witness' testimony, that the Employer was correctly determined to be a successor to a liable employer and the predecessor employer's experience rating account was properly transferred to the Employer in accordance with A.R.S. § 23-733(A), and Arizona Administrative Code, Section R6-3-1713. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's Reconsidered Determination decision dated July 20, 2012.

The Employer is a successor to a liable employer.

The experience rating account of the predecessor employer was properly transferred to the Employer.

DATED:

APPEALS BOARD

---

GARY R. BLANTON, Acting Chairman

---

WILLIAM G. DADE, Member

---

JANET L. FELTZ, Member

---

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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---

A copy of this Decision was mailed on  
to:

(x) Er: \*\*\*

Acct. No: \*\*\*

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
UI TAX SECTION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1409130-001-B

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% ELI GOLOB  
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1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2926

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

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---

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on April 15, 2013, which affirmed the October 24, 2011 Determination of Unemployment Insurance Liability and the October 24, 2011 Determination of Liability for Employment or Wages.

The Appeals Board has jurisdiction to consider the timeliness of the Employer's petition for hearing pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a hearing, which was held on June 26, 2013, before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issue:

Whether the Employer's petition to the Appeals Board for a hearing and review from the Department's Reconsidered Determination issued on April 15, 2013, should be considered timely filed.

On the scheduled date of the hearing, one Employer witness appeared by telephone to testify. Counsel for the Department appeared in-person, and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS that we are unable to proceed to a review of the merits of this case, because the Employer has failed to comply with the statutory prerequisites that would entitle the Employer to a review of the Department's April 15, 2013 Reconsidered Determination.

Arizona Revised Statutes § 23-724 provides in pertinent part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
  
- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is

served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board. [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part as follows:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. ...

\* \* \*

2. The petition must be filed within 30 days (unless the time is extended for good cause) after mailing of the reconsidered determination or denial thereof involving one of the following issues:

\* \* \*

- c. Services performed for or in connection with the business or the employing unit constitute employment (A.R.S. § 23-724);

- d. Remuneration for services constitute wages (A.R.S. § 23-724) ... [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1404, provides in part as follows:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

\* \* \*

The record reveals that the Department's Reconsidered Determination was sent by certified mail on April 15, 2013, to the Employer's correct address of record (Bd. Exhs. 4A-F). The Employer received that Reconsidered Determination within a few days after it was mailed. The Employer's petition to the Appeals Board, however, was filed by mail postmarked on May 16, 2013, which is more than 30 days after the mailing date of the Reconsidered Determination (Bd. Exhs. 5A, 5B). The petition, therefore, was not filed within the statutory time.

At the Appeals Board hearing, the Employer's president, "DJ", testified that he was the person who prepared and filed the petition on behalf of the Employer. DJ admitted that the Employer received the Department's April 15, 2013 Reconsidered Determination in a timely manner, and admitted that he did not file a written petition for hearing until May 16, 2013. DJ admitted that the late filing of the Employer's written petition was entirely his fault and was the result of a "clerical error" on his part.

The Employer bears the burden of proving that the late filing of its petition for hearing should be excused under the Employment Security Law of Arizona. Under Arizona Administrative Code, Section R6-3-1404(B), an appeal or petition filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the Postal Service, or (3) the individual having changed his mailing address at a time when there would have been no reason to notify the Department of the address change. Here, the evidence establishes that the Employer's failure to file a petition for hearing on or before May 15, 2013, was the sole cause of the late filing of the Employer's petition for hearing. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for hearing timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing.

The Department's Reconsidered Determination issued on April 15, 2013, remains in effect.

DATED:

APPEALS BOARD

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GARY R. BLANTON, Acting Chairman

---

WILLIAM G. DADE, Member

---

JANET L. FELTZ, Member

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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**4<sup>th</sup> QUARTER OF  
CALENDAR YEAR 2013**

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1401649-001-B

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Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**REVERSED AND REMANDED**

**THE EMPLOYER**, through counsel, petitioned for a hearing from the Department's decision letter issued on June 12, 2012, which held that "the Determination [of Liability for Employment or Wages] issued April 6, 2012, is final" because the Employer's request for reconsideration was filed late.

Employer's counsel filed a timely petition for hearing by certified mail on July 5, 2012. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724.

THE APPEALS BOARD scheduled a telephone hearing, which convened on October 8, 2013, before Appeals Board Administrative Law Judge Denise C. Sanchez. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely written request for reconsideration or review following the April 6, 2012 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES.
2. Whether the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES became final during the interim period before the Employer filed a request for reconsideration.

On the scheduled date of the hearing, counsel for the Employer was present, and a witness for the Employer testified. Counsel for the Department was also present, and three witnesses for the Department testified. Board Exhibits 1 through 8 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On February 28, 2012, Employer's counsel issued a letter to the Department that documented counsel's representation of the Employer "in this matter" (Bd. Exh. 5). Counsel's letter stated: "In turn, all future meetings with or communications with the taxpayer shall be directed through our office" (Bd. Exh. 5). Counsel also included a Limited Power of Attorney, signed by the Employer and dated February 28, 2012, affirming counsel's representation of the Employer (Bd. Exh. 5).
2. On April 6, 2012, the Department mailed a Determination of Liability for Employment or Wages, via certified mail, to the Employer's mailing address of record, a post office box in Phoenix, Arizona (Tr. pp. 14-17; Bd. Exhs. 1, 2). The field auditor did not mail the determination to Employer's counsel (Tr. p. 19-24; Bd. Exh. 1).
3. Prior to mailing the April 6, 2012 determination, a Department field auditor called Employer's counsel

and explained the reasoning for the determination (Tr. pp. 19, 20).

4. On April 24, 2012, counsel for the Employer filed a request for reconsideration with the Department via facsimile and certified mail (Bd. Exh. 3).
5. On June 12, 2012, the Department issued a decision letter which was mailed to counsel's address of record and found that the "letter postmarked April 24, 2012 requesting a review of the Determination is untimely because it was not made within the fifteen (15) day appeal period which expired on Monday, April 23, 2012" and therefore held that "the Determination issued April 6, 2012 is final" (Bd. Exh. 4).

As of April 6, 2012, Arizona Revised Statutes, Section 23-724, provided in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted

to the Department shall be considered received by and filed with the Department:

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2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (Emphasis added).

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as

determined by the Department after considering the circumstances in the case.

The evidence of record establishes that on February 28, 2012, Employer's counsel sent a letter to the Department that documented counsel's representation of the Employer "in this matter" (Bd. Exh. 5). Counsel's letter stated: "In turn, all future meetings with or communications with the taxpayer shall be directed through our office" (Bd. Exh. 5). Counsel also included a Limited Power of Attorney, signed by the Employer and dated February 28, 2012, affirming counsel's representation of the Employer (Bd. Exh. 5).

On April 6, 2012, the Department mailed a Determination of Liability for Employment or Wages to the Employer's mailing address of record, a post office box in Phoenix, Arizona (Tr. pp. 14-17; Bd. Exhs. 1, 2). Prior to mailing the April 6, 2012 determination, a Department field auditor called Employer's counsel and explained the reasoning for the determination (Tr. pp. 19, 20). Despite the field auditor's knowledge that the Employer was represented by counsel, the field auditor did not mail the April 6, 2012 Determination of Liability for Employment or Wages to Employer's counsel (Tr. pp. 19-24; Bd. Exh. 1). Due to the delay, Employer's counsel did not receive the April 6, 2012 determination in a timely manner (Tr. p. 49).

Pursuant to Arizona Administrative Code, Section R6-3-1404(B), a late request for redetermination will be considered timely filed when the delay in filing is attributable to Department error. Here, the Department field auditor had verbal authorization to discuss the Employer's case with its counsel, as well as written notification of counsel's representation of the Employer, in the form of a February 28, 2012 Limited Power of Attorney (Tr. p. 18; Bd. Exh. 5). Nevertheless, the Department field auditor failed to mail Employer's counsel the April 6, 2012 Determination of Liability for Employment or Wages (Tr. pp. 19-24; Bd. Exh. 1). The Department's erred by failing to mail the April 6, 2012 Determination of Liability for Employment or Wages to Employer's counsel, as provided by the February 28, 2012 Limited Power of Attorney. Because the Department did not send the Determination to the Employer's counsel, the Employer's counsel was deprived of the opportunity to file a timely appeal. Therefore, we find that the late filing of its request for reconsideration is attributed to Department error. As such, Arizona Administrative Code, Section R6-3-1404(B), applies to the Employer's late request for reconsideration. The Employer's request for reconsideration shall be considered timely filed. Accordingly,

**THE APPEALS BOARD REVERSES** the Department's decision letter dated July 5, 2012, based upon the evidence of record.

The Employer filed a timely request for reconsideration of the Determination of Liability for Employment or Wages issued April 6, 2012. The Employer is entitled to a Reconsidered Determination by the Department addressing the merits of the Employer's request for reconsideration.

THE APPEALS BOARD **REMANDS** the matter to the Department to issue a Reconsidered Determination, pursuant to A.R.S. § 23-724(B), addressing the merits of the Employer's request for reconsideration. If adversely affected by the Reconsidered Determination, the Employer may file a timely petition for hearing or review. In the absence of such petition, the Reconsidered Determination will be the final administrative decision of this agency.

DATED:

APPEALS BOARD

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JANET L. FELTZ, Acting Chairman

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WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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**Call the Appeals Board at (602) 771-9036 with any questions**

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A copy of this Decision was mailed on  
to:

Er: \*\*\*\*  
Acct No: \*\*\*\*

(x) Er Rep: \*\*\*\*

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL  
CFP/CLA  
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SITE CODE 040A

(x) CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028  
PHOENIX, AZ 85005-6028  
SITE CODE 911B

By: \_\_\_\_\_  
For the Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1424581-001-B

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PHOENIX, AZ 85007-2926

Employer

Department

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**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

On November 20, 2013, the Employer submitted a written request to withdraw its petition.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. No hearing will be scheduled in this matter. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

JANET L. FELTZ, Member

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ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take

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### **HOW TO ASK FOR REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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1. explains why the Appeals Board decision is wrong,
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  3. refers to specific hearing testimony and evidence.
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**Call the Appeals Board at (602) 771-9036 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: \*\*\*\*

Acct. No: \*\*\*\*

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1404273-001-B

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STATE OF ARIZONA E S A TAX UNIT  
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1275 W WASHINGTON ST SC 040A  
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Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for hearing from the Department's decision letter, issued on March 6, 2013, which held that the Notices Of Estimated Assessment For Delinquent Reports, dated February 15, 2012, are final because the Employer's petition for reassessment was filed late.

The Employer filed a timely petition for hearing on April 3, 2013. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-738(B).

THE APPEALS BOARD scheduled a telephone hearing for October 8, 2013, before Appeals Board Administrative Law Judge Denise C. Sanchez. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely petition for reassessment or appeal following the Notices of Estimated Assessment for Delinquent Reports dated February 15, 2012.
2. Whether the Notices of Estimated Assessment for Delinquent Reports became final during the interim period before the Employer filed a petition for reassessment.
3. Whether the Employer properly completed and submitted all delinquent reports within 15 days after the date of the Notices of Estimated Assessment for Delinquent Reports.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 10 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On February 15, 2012, the Department issued to the Employer two Notices Of Estimated Assessment For Delinquent Reports (Bd. Exh. 2). The Notices were mailed by certified mail to the Employer's address of record (Bd. Exh. 2). One Notice listed the estimated assessments for the third and fourth quarters of 2010 (Bd. Exh. 2). The second Notice listed the estimated assessments for the first, second, and third quarters of 2011 (Bd. Exh. 2).
2. The Notices read in pertinent part: "This assessment becomes final unless a petition for reassessment is filed with this Department at the address shown above within 15 days of the date of this notice" (Bd. Exh. 2).
3. On March 17, 2012, the Department issued the Employer a Notice of Taxes Due; Notice of Intent to

Levy (Bd. Exh. 3). The Notice was mailed to the Employer's address of record (Bd. Exh. 3).

4. On October 3, 2012, the Department filed a Notice of Tax Lien and Intent to Levy (Bd. Exh. 4).
5. In a letter received by the Department on October 5, 2012, the Employer requested, "an appeal and review of the estimated taxes." (Bd. Exh. 5).
6. On March 6, 2013, the Department issued a decision letter to the Employer which identified that the Employer's petition for reassessment was received on October 5, 2012, "218 days past the deadline for the appeal to be considered timely". The Department's decision letter further stated: "Accordingly, it is the Department's decision that the Notices of Estimated Assessment for Delinquent Reports issued February 15, 2012 are final" (Bd. Exh. 6).
7. On April 3, 2013, the Employer petitioned for a hearing before the Appeals Board (Bd. Exh. 7).

The issue properly before this Board is whether the Employer filed a timely petition for reassessment from the February 15, 2012 Notices of Estimated Assessment for Delinquent Reports.

Arizona Revised Statutes, Section 23-738, provides in pertinent part:

- B. An employer against whom any delinquency assessment is made may petition for reassessment within fifteen days after written notice of the assessment is served personally or sent by certified mail to the employer's last known address. If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by § 23-745 shall attach.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the

satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. [Emphasis added]

The Employer bears the burden of proving that the late filing of its petition for reassessment should be excused under Arizona Administrative Code, Section R6-3-1404(B). Pursuant to Arizona Administrative Code, Section R6-3-1404(B), a petition for reassessment filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the United States Postal Service, or (3) the

individual having changed his mailing address at a time when there would have been no reason to notify the Department of the address change. Here, the evidence establishes that the Notices were mailed to the Employer's correct mailing address of record on February 15, 2012 (Bd. Exh. 2). In the Employer's October 5, 2012 petition for reassessment, the Employer does not provide an explanation or excuse to justify its late petition for reassessment (Bd. Exh. 5).

At the Appeals Board hearing, the Employer's witness acknowledged that he had recently become affiliated with the Employer's case two days prior to the hearing on October 8, 2013, and had no knowledge of the reason for the Employer's delay in submitting its petition for reassessment after the 15-day deadline. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for reassessment timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision letter dated March 6, 2013, regarding the late filing of the Employer's petition for reassessment.

The Employer did not file a timely petition for reassessment of the two Notices Of Estimated Assessment For Delinquent Reports issued on February 15, 2012, within the time period allowed, pursuant to Arizona Revised Statutes § 23-738(B).

The Notices Of Estimated Assessment For Delinquent Reports dated February 15, 2012, remain in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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JANET L. FELTZ, Member

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Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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EMPLOYMENT ADMINISTRATION  
P O BOX 6028  
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SITE CODE 911B

By: \_\_\_\_\_  
For The Appeals Board

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1376168-001-BR

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PHOENIX, AZ 85007-2926

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS ---** The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

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DECISION  
**AFFIRMED UPON REVIEW**

The **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on May 14, 2013, which affirmed the Department's Reconsidered Determination issued on August 3, 2012, and held that the February 2, 2009 Determination of Unemployment insurance Liability stands unmodified. The Appeals Board decision also held that the February 2, 2009 Determination of Liability for Employment or Wages stands unmodified.

The request was filed on time and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F).

In the request for review, the Employer's counsel contends that our previous decision "... exchanges the ordinary common-sense rules for a conclusion-first/facts-second approach" and is "heavily results-driven." Counsel contends that chargebacks for labor payments and a potential to hire helpers at their own expense were not adequately considered as factors. Counsel also contends that the facts support a finding of independent contractor status, which

counsel contends should be an obvious conclusion from the facts as found in our previous decision. Further, counsel contends that several statutorily-listed factors also should be deemed to favor independent contractor status.

Counsel does not cite any controlling Arizona case, particularly regarding the burdens of proof and persuasion that are placed by Arizona law upon the party seeking to establish an exception to the presumption to include as many types of employment relationships as possible. The Employer attempts to establish that the Employment Security Law of Arizona does not cover its relationship with the satellite dish installation technicians, and that payments made to them by the Employer are not "wages". Counsel makes no valid attempt to distinguish the long-standing presumption, as stated in both *Arizona Department of Economic Security v Little*, 24 Ariz. App. 480, 539 P.2d 954 (1975), and *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 627 P.2d 235 (App. 1981). Because the Department presented sufficient evidence to constitute a *prima facie* case for covered employment status the Employer bears the burden to prove that its relationship qualifies as an exception from the general rules applying covered employment status and identifying the payments as "wages".

Conspicuously absent from the arguments presented on behalf of the Employer, is analysis of the professional contracting license legally required in order to perform the satellite dish installation work. The Employer maintained the contractor's license appropriate to performing the installation services. As we explained in our prior decision, none of the satellite dish installation technicians was a licensed contractor, and none advertised their services out to the public or maintained their own separate business premises. The Employer maintained a licensed subcontractor and billing relationship with the satellite service provider whose customers the Employer serviced. The Employer paid the satellite dish installation technicians from the accounts of the Employer, at a rate established by the Employer. In our prior decision, the Appeals Board noted and relied upon these crucial factors establishing control. We conclude that these crucial factors of the relationship overwhelm all of those factors enumerated by the Employer's counsel in the request for review.

Counsel for the Employer refers to a "handyman exception", but he neither cites to the very limited Registrar of Contractors exception nor links it to the fundamental duties of satellite dish installation in a home or business. We conclude the evidence of record establishes that satellite dishes cannot be installed in a home or business, without the required contracting license (Tr. pp. 31-33). No evidence established that any of the satellite dish installation technicians advertised themselves to the public using the required language, "Not a licensed contractor". A.R.S. § 32-1121(14)(c). None of the satellite dish installation technicians possessed the required license or used the required "handyman" language and, thus, each satellite dish installation technician had to perform their installation assignments under the Employer's auspices. None of

the satellite dish installation technicians performed the duties assigned to them by the Employer in direct contractual relationship with the homeowner or with business owners who had contracted with the satellite service provider and, thus, Arizona's "handyman exception" does not apply to such installations. The satellite dish installation technicians were trained by the Employer and each worked under the Employer's license, providing services to customers of the satellite service provider that was the Employer's customer (Tr. p. 32).

Simply stated, the only way the satellite dish installation procedures could occur legitimately would be if the satellite dish installation technicians were covered employees of a licensed contractor, which is the Employer. Regardless of how the Employer calculates its payments to the satellite dish installation technicians (Tr. p. 40), under Arizona laws that include the Economic Security Law of Arizona, the payments made by the licensed contractor to the satellite dish installation technicians clearly are covered "wages". Contrary to the assertion by the Employer's counsel, the references by a witness (Tr. pp. 32, 62) to the requirements of A.R.S. § 32-1121(14)(c) comprise a valid and appropriate analysis, not merely "conclusory reasoning". Further, counsel's contentions regarding compliance with instructions, which state that "every general contractor in Arizona has just been transformed into the direct employer of all of its subcontractors", rely upon an assumption that all such subcontractors are themselves legitimately licensed. That assumption is contradicted by the evidence in this case, which is that no satellite dish installation technician was licensed and none advertised themselves to the public as "not a licensed contractor". See, *In the Matter of the Civil Penalty Citation Issued to Robert Atlas*, 2013 AZ Admin. Hearings LEXIS 185 (September 19, 2013). Indeed, none of the satellite dish installation technicians advertised themselves as a separate business at all, and none maintained their own business premises or accounts.

Counsel for the Employer contends that the Appeals Board should have considered and cited *Herman, US Secretary of Labor v. Mid-Atlantic Installation Services and COMCAST*, 164 F.Supp.2d 667 (2000), affirmed by *Chao, US Secretary of Labor v. Mid-Atlantic Installation Services and COMCAST*, 16 Fed.Appx.104 (2001). However, that case is legally and factually distinguishable because it involves allegations that workers were entitled to overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 *et seq.* By considering distinctly different factors and standards (*i.e.*, a six-factor FLSA standard based upon "economic reality") from those standards expressly required by the Employment Security Law of Arizona. The federal court held that, other than assigning routes, the cable installation companies did not exert significant control over the installers. The federal court ruled that the cable television provider, whose only relationship with the installers was via its contract with the cable installation companies, could not be considered the installers' employer. Thus, not only were different legal standards for the different FLSA-only laws applied in the cases cited by the Employer's counsel, but also a different relationship between the parties existed. These workers

installed cable equipment for a party to the litigation, not satellite equipment for a non-party (Bd. Exh. 5B). The legal requirement for installation to be performed by a licensed contractor was not expressly considered by the federal courts regarding overtime pay issues under the FLSA. Further, the cases cited by counsel for the Employer are not local jurisdictions.

In *Herman, supra* at 671, the Court explained that the concept of covered "employment" under the Fair Labor Standards Act (FLSA) is extremely encompassing. Employment is broader than the common law definition of "employment", and is even broader than several other federal employment-related statutes, such as the Internal Revenue Code. Its breadth stems from the definition of the term "employ" in the statute, 29 U.S.C.S. § 203(g), and courts' recognition of the remedial nature of the statute. We find similar concepts and presumptions broadly favoring employment and wages over independent contractor status in the Employment Security Law of Arizona, notably A.R.S. § 23-613.01(A) which is unimpacted by amendments subsequent to the hearing, and in *ADES v Little, supra*, and *Warehouse Indemnity Corporation v. ADES, supra*.

Similarly, *Dole v. Amerilink Corp*, 729 F.Supp. 73 (E.D. Mo. 1990), applied a six-factor, FLSA-only test that the Court stated is rooted in "economic reality" of relationships existing between the individuals and their alleged employers. One of these factors is whether the service rendered is an integral part of the employer's business.

The integral nature of satellite dish installation technicians, within the business of a firm engaged almost exclusively in such installations, cannot be disputed. According to its witness, the Employer constantly was being evaluated by the satellite service provider regarding installations for its customers, and would no longer use a satellite dish installation technician who it decided had done substandard work (Tr. pp. 78, 79; Bd. Exh. 5C). At the time when a worker applied for Unemployment Insurance benefits and a wage audit was conducted by the Department's Tax Section, the Employer did not chargeback for substandard work, but unilaterally started doing so later (Tr. pp. 81, 82). The Employer's business initially began with a single installer, and later brought in another partner who also was an installer in October 2006. Other satellite dish installation technicians were added on "for volume" accommodation (Tr. pp. 79, 80; Bd. Exh. 5C). Clearly, the satellite dish installation technicians always were an integral part of the Employer's satellite dish installation business.

We conclude that the absence of a negotiated penalty for abruptly ceasing to use a particular installer again, is consistent with employment and shows control. The installer's right to terminate without a contractual penalty contradicts the contention by the Employer's counsel that its satellite dish installation technicians actually were independent contractors. Regarding the other factors that the Department and the Appeals Board considered, the Appeals Board discussed each factor adequately and in detail within our previous decision.

In light of undisputed evidence that the satellite dish installations in homes and businesses, performed on behalf of the Employer's customer, required a contractor's license that none of the satellite dish installation technicians possessed, plus no indication that any of the satellite dish installation technicians ever advertised themselves to the public as "not a licensed contractor", we conclude that reiterating a detailed discussion of the other, less-crucial factors is not necessary in order to refute the contentions by the Employer's counsel. The Employer did not establish that it had any independent contractor agreement documented at the pertinent times (Tr. pp. 81, 82).

The Employer's February 15, 2009 letter referred to an Appeal Tribunal's decision after a hearing on February 4, 2009 (Bd. Exh. 5C). Appeal Tribunals possess no statutory authority to consider appeals or to rule upon the "Independent Contractor" or "Wages" issues in this case. We note that the Appeal Tribunal vacated the Department's determination and remanded the Claimant's benefits eligibility case to the Department, and he did not cite any statute pertaining to independent contractor status. Having vacated the Department's determination, he otherwise should have been silent regarding any further ruling. Any ruling regarding "employed as a subcontractor installer" status not only used confusing and self-contradictory terms but also exceeded the Appeal Tribunal's jurisdiction which, until he vacated the Department's determination, was restricted to considering a particular Claimant's eligibility for Unemployment Insurance benefits. His corrected decision in Arizona Appeal No. U-1096382-001, dated February 6, 2009, carries no precedential effect.

We incorporate the discussions and findings in our prior decision, by this reference. According to the evidence of record, the Employer allowed its workers to install satellite dishes and other receiving equipment for its customer's customers under the Employer's contractor license. That work needed to be done by its own employees or by properly-licensed subcontractors, because the work was integral to the Employer's business. Each satellite dish installation technician had to keep in contact with the Employer's dispatcher during the day and was required to report work progress (Bd. Exh. 5B).

We conclude that use of private vehicles to reach job sites, use of a small coaxial cable hand tool and "consumables" to install satellite receiving equipment that was provided or reimbursed by the Employer, and the opportunities to do non-exclusive side work or to use a helper who is not on the Employer's payroll (Tr. pp. 75, 76, 88, 92-95; Bd. Exh. 5), do not overcome the evidence of control by the Employer that absolutely is inherent in the use of its contractor's license to legitimize the satellite equipment installation process.

Each such activity could occur in a typical construction contractor's business or in an auto repair shop, both of which usually expect employees to reach job sites, to develop industry certifications, and to own hand tools. Such Employers might allow an employee to bring his son along in order to show him

the trade. Contrary to the contentions by counsel for the Employer, these were not established to be distinctly "independent contractor" attributes.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER**, through counsel, has not submitted any newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;

3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;

4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

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GARY R. BLANTON, Member

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### **RIGHT OF APPEAL TO THE ARIZONA TAX COURT**

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any

court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.

2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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A copy of this Decision was mailed on  
to:

Er: \*\*\*\*

Acct. No: \*\*\*\*

(x) \*\*\*\*

(x) ELI D GOLOB, ASSISTANT ATTORNEY GENERAL CFP/CLA

(x) CHIEF OF TAX, EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board