

**Unemployment Insurance Tax  
Program  
Appeals Board Decisions – 2014**



**1<sup>st</sup> Quarter of Calendar  
Year 2014**

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1413569-001-B

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

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**  
**DISMISSED**

THE **EMPLOYER** petitioned for a hearing from the Decision Letter issued on June 15, 2012, which affirmed the Determination of Unemployment Insurance Liability issued by the Department on February 3, 2012. The Decision Letter held that "the Determination issued February 3, 2012 is final and binding on [Employer] because no request for reconsideration was filed within the prescribed statutory period."

The Employer filed a timely petition for hearing on July 14, 2012. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-733(B).

THE APPEALS BOARD scheduled a telephone hearing for January 16, 2014, 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 request for reconsideration by the Department; and
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.

Counsel for the Department was present, and a witness for the Department testified. At the hearing, Board Exhibits 1 through 7B were admitted into the record as evidence.

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 petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence disputing that its March 15, 2012 request for reconsideration was timely filed. The Employer's default means that no evidence was presented to support reversing or modifying the Department's June 15, 2012 Decision Letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing.

The June 15, 2012 Decision 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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GARY R. BLANTON, 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: \*\*\*\*  
Acct. No: \*\*\*\*-000
  
- (x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL  
CFP/CLA  
1275 W WASHINGTON  
PHOENIX, AZ 85007-2926  
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-1411499-001-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

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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 January 6, 2014, 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 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

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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

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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,
  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: \*\*\*\* Acct. No: \*\*\*\*-000
- (x) Er Rep: \*\*\*\*
- (x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
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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-1399896-001-B

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STATE OF ARIZONA E S A TAX UNIT  
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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**

**REVERSED, IN PART, SET ASIDE AND REMANDED, IN PART**

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on January 25, 2013, which affirmed the Determination of Liability for Employment or Wages issued on May 5, 2011. The Reconsidered Determination held that "the services of Field Staff were correctly determined to constitute employment and all forms of remuneration paid for such services constitute wages." The Reconsidered Determination further affirmed the Determination of Unemployment Insurance Liability issued on May 5, 2011.

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 16, 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 Field Staff constituted employment effective September 1, 2009, as defined in A.R.S. § 23-615.
2. Whether the services performed by individuals as Field Staff 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 Field Staff 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 December 31, 2009 through March 31, 2011 are accurate.

At the hearing, one Employer witness appeared and testified. The Department was represented by counsel, and one witness testified for the Department. Board Exhibits 1 through 8 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 Arizona business that provides auto glass repair services to the public (Bd. Exhs. 1, 6A; Tr. pp. 17-19).
2. On May 5, 2011, the Department issued a Determination of Liability for Employment or Wages that held the “[s]ervices performed by individuals as Field Staff constitute employment” for the quarters ending December 31, 2009 through March 31, 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-F). A Determination of Unemployment Insurance Liability was also issued by the Department on May 5, 2011 (Bd. Exh. 2).

3. Generally, an automobile glass repair takes approximately thirty minutes to complete (Tr. pp. 38, 42).
4. Field Staff members usually travel to the location of the customer with the damaged automobile window (Tr. p. 39). Field Staff first contact the customer's insurance company for approval of the planned services (Tr. pp. 20, 38). If approved, Field Staff would repair the window with liquid resin (Tr. pp. 23, 36, 42). The Employer provided no instruction on how to complete a job (Tr. pp. 23, 38).
5. On Fridays, Field Staff members would submit invoices of the jobs they completed to the Employer (Tr. pp. 34, 36, 37, 52, 53). The Employer would submit all Field Staff invoices to another company, "\*\*\*\*" (Tr. pp. 25, 26, 29, 34). \*\*\*\* would bill the insurance companies and then pay the Employer for the invoices submitted (Tr. pp. 25, 26, 29). In turn, the Employer would pay individual Field Staff members based upon the invoices they submitted (Tr. p. 61). The amount of compensation for Field Staff would be determined by negotiation between the individual Field Staff member and the Employer (Tr. pp. 21, 26, 44, 61, 62).
6. The Employer does not maintain a worksite and Field Staff members generally did not make any significant investment in facilities of their own (Tr. pp. 54, 67, 68). The Employer's owner, "\*\*\*", uses his mother's home address as the Employer's business address (Tr. p. 54).
7. In addition to being the owner, \*\* also performs auto glass repair like the Field Staff (Tr. pp. 20, 24, 35). Jobs that are not completed personally by \*\* are offered to Field Staff members (Tr. pp. 24, 35). Jobs accepted by Field Staff could freely be delegated by them to others without notice to the Employer (Tr. pp. 40, 41). Field Staff members would incur no liability for failure to complete a job (Tr. p. 64).
8. Though the Employer could cease referring jobs to a Field Staff member at any time, Field Staff generate approximately ninety percent of their jobs on their own (Tr. pp. 36, 64, 65). Field Staff could end their working relationship with the Employer at any time by simply submitting their invoices to another company (Tr. pp. 28, 66). Field Staff obtained most of their

jobs through word of mouth, but some Field Staff members used signs to advertise their services (Tr. p. 61).

9. Field Staff members could freely use assistants (Tr. p. 31). Field Staff members could also submit invoices to the Employer for work performed by others (Tr. pp. 26, 31-33).
10. The Employer did not set hours for Field Staff members, and they could freely schedule their own hours (Tr. pp. 49, 50, 69). Field Staff could work as much or as little as they desired (Tr. pp. 50, 69).
11. Field Staff members provided their own tools and materials, as is standard for the trade, and Field Staff did not require training from the Employer (Tr. pp. 30, 36, 52, 54, 56, 57, 60). Though Field Staff did not incur business expenses, they were responsible for their own travel expenses (Tr. p. 58).

The Employer contends that the Field Staff were independent contractors and not employees. The employment status of the Field Staff 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.

\* \* \*

The evidence of record establishes that the Employer did not enter into written contracts with the Field Staff (Tr. pp. 20, 21). The Employer did, however, make verbal agreements with Field Staff wherein Field Staff were told they were not employees (Tr. pp. 20, 23, 71). However, neither a written contract nor a verbal agreement proves conclusive as to the nature of a work relationship, and we must look at the actual practice of the parties. *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 Field Staff.

The primary issue presented is whether the services of the Field Staff 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 Field Staff. 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.

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.

Field Staff could freely use their own assistants (Tr. p. 31). This factor shows an absence of control, and indicates an independent 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 offered jobs to Field Staff, but approximately ninety percent of the work of Field Staff was generated by the Field Staff themselves, thereby directing their own times and locations of work (Tr. pp. 35-37). No instruction was given on how to achieve the results of a job (Tr. p. 23, 38). 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. 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.

No reports were submitted by Field Staff to the Employer other than weekly invoices (Tr. pp. 37, 38). 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 Employer maintained no premises at which to conduct work (Tr. p. 54). The Field Staff generally worked at the location of customers (Tr. p. 39). The Employer exerted no control over where Field Staff worked. This factor shows an absence of control, and indicates an independent 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.

Field Staff could freely delegate jobs from the Employer to others without notice to the Employer (Tr. pp. 40, 41). Field Staff also submitted invoices to the Employer for work done by others (Tr. p. 26, 31-33). There was no requirement of personal performance (Tr. p. 33). 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.

Jobs were completed generally within half an hour with a work sequence of first acquiring approval from a customer's insurance company and then performing the windshield repair (Tr. pp. 20, 38, 40, 42). This sequence was necessary to receive payment from the customer's insurance company (Tr. pp. 43, 44). The record does not suggest that the Employer had any authority regarding 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 Employer could cease offering jobs to Field Staff for any reason (Tr. pp. 64, 65). However, since Field Staff generated most of their own sales to customers, Field Staff could continue to submit invoices to the Employer without such referrals (Tr. pp. 36, 48, 49). As such, the Employer had no legitimate threat to dismiss Field Staff. This factor shows an absence of control, and indicates an independent 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.

Field Staff scheduled their own hours (Tr. pp. 49, 50, 69). The Employer did not require set hours (Tr. p. 50). 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 Employer did not provide any training to the Field Staff (Tr. p. 52). 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.

Field Staff were free to work as much or as little for the Employer as they wished (Tr. pp. 50, 69). Field Staff who did not work would simply not submit an invoice. 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.

Field Staff provided their own tools and materials (Tr. pp. 30, 36, 52, 54, 56, 57, 60). The Employer testified that some employers in this trade would provide tool kits to windshield repair persons, though frequently at a cost (Tr. pp. 55, 56). Supplying one's own tools and material would be standard for the trade (Tr. p. 56). This factor suggests neither control nor a lack of control, and is therefore considered neutral.

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 record establishes that Field Staff incurred no business expenses, but they were responsible for their own travelling expenses (Tr. p. 58). 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.

Some Field Staff used signs to advertise for their services (Tr. p. 61). Most jobs worked by the Field Staff were obtained by word of mouth (Tr. p. 61). 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.

Field Staff were paid only for the jobs completed, as identified on the invoices they submitted to the Employer (Tr. p. 61). The individual Field Staff members negotiated the amount of their compensation with the Employer (Tr. pp. 21, 26, 44, 61, 62). 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.

Field Staff generally incurred minimal expenses and had no continuing and recurring significant liabilities (Tr. pp. 62, 63). This factor 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.

A worker could accept an individual job offered by the Employer, not complete the job, and incur no liability (Tr. p. 64). Field Staff could also end the work relationship at any time by not submitting further invoices to the Employer (Tr. pp. 28, 66). 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.

For the most part, no significant investment in facilities was required by either Field Staff or the Employer. One Field Staff member rented space at a car wash to perform services, and the Employer split the rental costs with this Field Staff member (Tr. pp. 67, 68). Since facilities were not commonly necessary for the work, this factor demonstrates neither control nor the absence thereof, and is considered as neutral.

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.

Field Staff generated their own work and could freely submit their invoices to another company rather than to the Employer (Tr. p. 28). This factor shows an absence of control, and indicates an independent 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 Employment Security Law of Arizona, we conclude that the evidence of independent contractor status far outweighs the evidence of employee status as to the Field Staff.

The Field Staff were not employees of the Employer, effective September 1, 2009, but rather they performed services pursuant to an independent contractor relationship. We conclude that all payments to the Field Staff for their services did not constitute wages, by operation of A.R.S. § 23-622(A). Accordingly,

**THE APPEALS BOARD REVERSES, IN PART,** the Reconsidered Determination dated January 25, 2013.

From September 1, 2009 through March 31, 2011, services performed by individuals as Field Staff did not constitute employment, because the parties had an independent contractor relationship.

None of the remuneration paid to the Field Staff from September 1, 2009 through March 31, 2011, constituted wages.



THE APPEALS BOARD **SETS ASIDE, IN PART**, the Reconsidered Determination dated January 25, 2013.

THE APPEALS BOARD **SETS ASIDE** the Determination of Unemployment Insurance Liability dated January 25, 2013.

The APPEALS BOARD **REMANDS** to the Department to investigate the issue of the Employer's liability for unemployment insurance, if any. The reason for remand is to determine if there is any basis for liability of the Employer based on a gross payroll of at least \$1,500 in a calendar quarter or employment of one or more employees for 20 weeks (including corporate officers), after the Appeals Board's holding that Field Staff were not employees of, and did not earn wages from, the Employer. If necessary, the Department shall issue a new determination or determinations from which a timely appeal may be taken by the party adversely affected. In the absence of such an appeal, the new determination or determinations will be the final administrative decision of this agency.

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

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

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1392473-001-B

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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**

**SET ASIDE** (Department's decision letter dated 12/18/2012)

**SET ASIDE AND REMANDED** (Determination of Liability for Employment or Wages dated 4/30/2010)

**THE EMPLOYER**, through counsel, petitioned for hearing from the Department's Reconsidered Determination letter issued on December 18, 2012, which affirmed the Determination of Liability for Employment or Wages issued on April 30, 2010. The Reconsidered Determination held that "the services performed by individuals as fitness trainers constitute employment and the 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 originally convened on **July 11, 2013**, and was reconvened on **August 21, 2013**, before Appeals Board Administrative Law Judge Eric T. Schwarz. On those dates, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination affirmation of the April 30, 2010 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "fitness trainers" constitute employment, as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as "fitness trainers" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "fitness trainers" 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 "fitness trainers" factually and legitimately were independent contractors for the quarters ending: March 31, 2007 through December 31, 2009.

On the scheduled dates of the hearing, counsel for the Employer appeared along with two Employer witnesses. Counsel for the Department was present, and one witness for the Department appeared and testified. Board Exhibits 1 through 24 were admitted into evidence. We have carefully reviewed the record.

This Board, pursuant to A.R.S. § 23-674(D), on its own motion, admits a printout from the Arizona GUIDE System, which is the database for the Unemployment Insurance program. We admit Screen 58, "EBI INQUIRY", into evidence as **Board Exhibit 25**. A copy of **Board Exhibit 25** is enclosed along with this decision.

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

1. Between January 1, 2007, and December 31, 2009, \*\*\* (hereinafter “\*\*\*\*”) required each fitness trainer to sign an “Independent Contractor Agreement” (hereinafter “ICA”) that detailed the agreement between the fitness trainer and \*\*\*\* (Tr. pp. 84-86, 206, 207, 224, 225, 249; Bd. Exhs. 6A-C). The Employer was not mentioned in, or a party to, the ICA (Bd. Exhs. 6A-C).
2. \*\*\*\* is a separate and distinct entity apart from the Employer, with its own employer account number (Tr. p. 44; Bd. Exhs. 2, 25).
3. After performing services for \*\*\*\*, the fitness trainers would submit invoices to \*\*\*\* using \*\*\*\* invoice forms (Tr. pp. 111-113, 145, 146, 171, 172, 216, 226, 227, 229; Bd. Exhs. 11A-D). \*\*\*\* would then forward those invoices to the Employer to process the invoices as the payroll company for \*\*\*\*, and the Employer would issue checks to the fitness trainers for the services they provided to \*\*\*\* (Tr. pp. 43, 45, 47-49, 96-98, 145, 146, 171, 172, 202, 206, 207, 216, 226, 227, 229, 230, 245, 247, 258, 259).
4. On April 30, 2010, the Department issued a Determination of Liability for Employment or Wages (hereinafter “the Determination”) which held that “[s]ervices performed by individuals as fitness trainers constitute employment” with the Employer, not \*\*\*\*, for the time period from January 1, 2007 through December 31, 2009 (Bd. Exh. 2).
5. The Department determined that the Employer, and not \*\*\*\* or any other entity, was the “employer” of the fitness trainers based solely on the fact that the Employer wrote the checks to the fitness trainers (Tr. pp. 41, 50, 96-98, 200, 204).
6. On May 14, 2010, the Employer, through counsel, filed a timely request for reconsideration of the Determination (Bd. Exhs. 4A-4C).
7. On December 18, 2012, the Department issued a Reconsidered Determination letter which affirmed the Determination (Bd. Exhs. 5A-H). In that decision letter, the Department relied heavily on the

ICA as a primary basis for affirming the Determination (Bd. Exhs. 5A-H).

8. At the Appeals Board hearing, Department witness "TO", the person who prepared the Department's December 18, 2012 decision letter, repeatedly cited to the provisions of the ICA as a primary basis for the Department's determination that the fitness trainers were employees of the Employer for unemployment insurance tax liability purposes (Tr. pp. 102-106, 114-116, 118, 122, 137, 143-145, 149-153, 175, 176, 194).

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.

\* \* \*

The employment status of the fitness trainers and whether their pay constituted wages are in dispute in this case. The Department bears the burden of proving the employment status and designation as wages. Furthermore, we note that both the Determination and the Department's December 18, 2012

Reconsidered Determination letter each explicitly listed the Employer as the purported employer of the fitness trainers. Therefore, this decision is limited to determining whether the Department has met its burden of proving that the fitness trainers were “employees” of the Employer from January 1, 2007 through December 31, 2009, as required under the Employment Security Law of Arizona. The Department failed to meet that burden.

The Department presented virtually no evidence to establish that the fitness trainers were subject to the control of, and were “employees” of, the Employer during the relevant time period. Instead, the Department presented extensive evidence regarding the relationship between the fitness trainers and \*\*\*\* during that period. However, \*\*\*\* is not a party to this matter. As counsel for the Department clearly acknowledged at the Appeals Board hearing: “[The Department is] not making any allegations as far as [\*\*\*\*] as the employer” (Tr. p. 173) and “We’re not dealing with [\*\*\*\*] – [the Department is] not making any allegations as far as [\*\*\*\*]” (Tr. p. 199). Additionally, Department witness TO testified: “... these determinations do not carry over to separate legal entities. It is solely for [the Employer]” (Tr. p. 69) and “... that determination does not carry over to [\*\*\*\*]” (Tr. p. 72).

When asked to explain how the Department determined that the Employer, rather than \*\*\*\* or any other entity, was the purported “employer” in this matter, the only explanation offered by the Department witness, and by counsel for the Department, was that the Employer had written the checks to the fitness trainers (Tr. pp. 41, 50, 96-98, 200, 204). Counsel for the Department summarized the Department’s position as follows:

The Department will consider ... will look at who paid the workers. It’s I think that simple. And here we just, we found that [the Employer] was the entity that paid the workers, so that’s why they are the appellant here. So I don’t think there’s a need to go into these other entities (Tr. p. 200).

Employer witness “\*\*” conceded that the Employer issued the checks to the fitness trainers during the relevant time period (Tr. pp. 45, 47, 48, 202, 245). However, \*\* testified that the Employer was simply acting as a payroll company for \*\*\*\* and that “[\*\*\*\*] was the legal entity that [the fitness trainers] were performing the services for” (Tr. pp. 43, 45, 207, 247, 258, 259). The Department presented no evidence to refute that testimony from \*\*. Additionally, \*\* testified that the Employer and \*\*\*\* are “different entities. They’re not DBAs” (Tr. p. 44). The Department’s own records confirm that \*\*\*\* is a distinct entity, separate and apart from the Employer, with its own employer account number (Bd. Exh. 25).

The primary issue here is whether the services of the fitness trainers were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Furthermore, the only relationship being examined here is the relationship, if any, that existed between the fitness trainers and the Employer. 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 fitness trainers. 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.

Generally, the Board would set forth a detailed analysis of the 18 factors set out in Arizona Administrative Code, Sections R6-3-1723(D)(2) and R6-3-1723(E), regarding the relationship between the fitness trainers and the Employer. However, the Board sees no reason to engage in that exercise here since the Department has failed to establish a prima facie case that any relevant relationship, much less an employer/employee relationship, existed between the fitness trainers and the Employer.

The only evidence presented by the Department regarding any type of relationship between the fitness trainers and the Employer was the undisputed

fact that the Employer issued the checks to the fitness trainers during the relevant time period. The remainder of the evidence presented by the Department specifically involves the relationship between the fitness trainers and \*\*\*\*, a separate entity that the Department acknowledges is not a party to this matter. The Board concludes that there is insufficient evidence to establish that the fitness trainers performed services for the Employer, much less that the fitness trainers were subject to the direction, rule, or control of the Employer, as required under Arizona Revised Statutes § 23-613.01(A) and Arizona Administrative Code, Section R6-3-1723. The Department did not establish a *prima facie* case that the fitness trainers were “employees” of the Employer.

The Department failed to carry its burden of proving that the fitness trainers were employees of the Employer, as alleged in the Determination and the Reconsidered Determination letter. Furthermore, the evidence of record does not establish that the fitness trainers were independent contractors providing services to the Employer. We note that arguments could be made regarding the relationship between the fitness trainers and \*\*\*\*. However, \*\*\*\* is not a party to this matter, and the Board has no authority to address any such relationship at this time. Accordingly,

**THE APPEALS BOARD SETS ASIDE** the Department’s decision letter dated December 18, 2012, based upon the evidence of record.

**THE APPEALS BOARD SETS ASIDE** the Determination of Liability for Employment or Wages dated April 30, 2010, based upon the evidence of record.

The Department failed to carry its burden of proving that the fitness trainers were employees of the Employer as required under the Employment Security Law of Arizona. Furthermore, the evidence of record does not establish that the fitness trainers were independent contractors providing services to the Employer.

THE APPEALS BOARD **REMANDS** the matter to the Department to investigate whether the fitness trainers were employees of a business entity other than the Employer from January 1, 2007 through December 31, 2009, and to issue a new Determination of Liability for Employment or Wages, if required, from which a timely request for reconsideration may be filed by the party adversely affected. In the absence of such a request for reconsideration, the new determination will be the final administrative decision of this agency.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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GARY R. BLANTON, Member

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A copy of this Decision was mailed on  
to:

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