Unemployment Insurance Tax Program
Appeals Board Decisions – 2014

1st Quarter of Calendar Year 2014

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1413569-001-B

****

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

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.

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** 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

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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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.

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.

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

****

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
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

GARY R. BLANTON, Acting Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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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   3. refers to specific hearing testimony and evidence.

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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
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(x) CHIEF OF TAX
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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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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

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.

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 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.

l. 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

HUGO M. FRANCO, Chairman

GARY R. BLANTON, Member

JANET L. FELTZ, Member

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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.

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

A copy of this Decision was mailed on
to:

(x) Er: *** Acct. No: ***-000

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By: _____
For The Appeals Board

2nd QUARTER OF
CALENDAR YEAR 2014

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1392473-001-B

***

STATE OF ARIZONA E S A TAX UNIT
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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) 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.

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

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

HUGO M. FRANCO, Chairman

GARY R. BLANTON, Member

JANET L. FELTZ, Member

HOW TO ASK FOR REVIEW OF THIS DECISION

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

A copy of this Decision was mailed on to:

Er: *** Acct. No: ***-000

(x) Er Counsel: ****

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(x) CHIEF OF TAX
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By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1351495-001-BR

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Employer

Department

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
AFFIRMED UPON REVIEW

The **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on May 2, 2013, which affirmed the Department's Reconsidered Determination dated April 11, 2012, and held that the December 12, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES remains in full force and effect because the Employer filed a late request for reconsideration.

The request for review 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 e-mailed copy of the Determination of Liability for Employment or Wages does not constitute a valid determination which "triggered" the need for an appeal

within 15 days because the determination was not served on the Employer personally or by certified mail pursuant to A.R.S. § 23-724. The December 12, 2011 Determination of Liability for Employment or Wages was initially sent by certified mail, and, according to the records kept by the post office, the certified letter was delivered on December 21, 2011 (Bd. Exh. 2). However, the Employer never received the determination by mail (Tr. pp. 19, 27). Based on the testimony of the Employer witnesses, this Board determined that the December 12, 2011 Determination of Liability for Employment or Wages was not received by the Employer due to postal error. The Department re-mailed the determination on January 19, 2012, and unsuccessfully attempted to fax it to the Employer (Tr. pp. 76, 77). The Employer did not receive the re-mailed determination or the faxed copy.

Despite not receiving the Determination of Liability for Employment or Wages by mail, the Employer was aware that the determination was forthcoming because the Employer had been in contact with the Department employee, who conducted the audit, about the determination. Accordingly, the Employer was on notice that a Determination of Liability for Employment or Wages would be forthcoming. Because the Employer was having postal problems and never received the Determination of Liability for Employment or Wages by mail, the same Department employee, e-mailed a PDF file of the Determination of Liability for Employment or Wages to the Employer's acting general manager, Ms. L, on January 26, 2012 (Tr. pp. 77, 80, 81). The Department employee told Ms. L that the Employer needed to promptly file an appeal because it was already late (Tr. p. 77). Ms. L testified that she received the e-mail from the Department employee, and she sent the e-mail to the Employer's attorneys (Tr. p. 39). Accordingly, the Employer became aware of the December 12, 2011 Determination of Liability for Employment or Wages on January 26, 2012. As a result, we conclude that the e-mailed copy of the determination was a valid determination that "triggered" the need for an appeal, especially considering the Employer was aware that it was coming. The manner of delivery was modified due to postal problems the Employer claimed that it was experiencing.

In addition, the Employer's counsel has never provided a reason why an appeal was not filed until more than eight weeks after it was received by the Employer's counsel. Further, it is unclear why the Employer's counsel decided to file an appeal at all, if he believed that the e-mailed determination was not a valid determination that "triggered" the need for an appeal.

The Employer's counsel also contends that the e-mailed determination was not official because it was not signed. However, A.R.S § 23-724 does not require a determination to be signed in order to be valid or official.

The Employer's counsel further contends that the e-mailed copy of the Determination of Liability for Employment or Wages does not constitute a valid determination which "triggered" the need for an appeal within 15 days because

the Employer did not consent in writing to personal service by electronic transmission. In support of this contention, the Employer's counsel cites A.R.S. § 23-724(J), which states in pertinent part that a determination may be served by electronic means if the party being served consents in writing to service by electronic means. However, A.R.S. § 23-724(J), was not in effect during the time frame at issue, and is therefore, not applicable. A.R.S. § 23-724(J) did not become effective until March 2012. Further, the revised statute does not make mention of A.R.S. § 23-724(J) being retroactive.

The issue properly before the Board is whether the Employer's request for reconsideration was filed on time.

In its prior decision, the Appeals Board made its own findings of fact and used its own reasoning and conclusions of law. In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. § 23-724, and Arizona Administrative Code, Section R6-3-1404, to the facts in this case and found that the Employer did not file a timely request for reconsideration within the statutory time period allowed.

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 (Tr. p. 15; Bd. Exh. 1). The Employer never received the Determination of Liability for Employment or Wages by mail (Tr. pp. 19, 27). As noted in the Board's prior decision, the Employer did not receive the Determination of Liability for Employment or Wages by certified mail due to postal error.

On January 19, 2012, the Department re-mailed the Determination of Liability for Employment or Wages to the Employer's address of record, but the Employer again did not receive it due to postal error (Tr. pp. 76, 77). The Department employee, who conducted the investigation, also unsuccessfully attempted to fax the Determination of Liability for Employment or Wages to the Employer (Tr. p. 77). Finally, on January 26, 2012, the same Department employee e-mailed a PDF file of the Determination of Liability for Employment or Wages to the Employer's acting general manager, Ms. L (Tr. pp. 77, 80, 81). Ms. L testified that she received the e-mail from the Department employee, and she sent the e-mail to the Employer's attorneys (Tr. p. 39). Accordingly, the Employer had actual knowledge of the contents of the December 12, 2011 Determination of Liability for Employment or Wages on January 26, 2012.

The Determination of Liability for Employment or Wages contained appeal rights, which stated, "This determination becomes **FINAL** unless written request for reconsideration is filed with this Department at the above address within fifteen (15) days after the date of this determination as provided in A.R.S. §23-724" (Bd. Exhs. 1 & 3). In the Board's prior decision, it was determined that the Employer's appeal period began on January 26, 2012, the date the Employer

actually received the Determination of Liability for Employment or Wages. The Appeals Board made this decision because the Employer was experiencing several problems receiving its mail in December 2011 and January 2012.

The Employer, through counsel, filed its request for reconsideration on March 23, 2012 (Bd. Exh. 3). In accordance with the version of A.R.S. §23-724 in effect during December 2011 and January 2012, the Employer's request for reconsideration was due by February 10, 2012. Therefore, the Employer's request for reconsideration was not filed on time. In its request for reconsideration and petition for hearing, the Employer, through counsel, made several procedural arguments intended to invalidate the Determination of Liability for Employment or Wages because it was received by e-mail. The Employer's counsel, however, does not provide an explanation regarding why a request for reconsideration was not filed until more than eight weeks after the Employer's counsel received the Determination of Liability for Employment or Wages.

As noted in the Board's prior decision, 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. The Employer and its counsel received the Determination of Liability for Employment or Wages on January 26, 2012. However, no steps were taken to file a request for reconsideration until March 23, 2012. The Employer was also on notice that the determination was forthcoming because of previous conversations with the Department employee, and the Employer was told on January 26, 2013, that an appeal needed to be filed promptly.

Under Arizona Administrative Code, Section R6-3-1404(B)(3), we find that the Employer's more than eight-week delay from January 26, 2012 to March 23, 2012, was unreasonable. Therefore, the Employer's written request for reconsideration was not timely filed. Accordingly,

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

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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 the foregoing was mailed on
to:

(x) Er: xx Acct. No: xx-000

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

(x) LULU GUSS
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-1435160-001-B

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xx

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
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.

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 ***** June 2, 2014 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on November 21, 2013, which held that the Determination of Liability for Employment or Wages dated September 11, 2013, is final because the Employer's request for reconsideration was not filed within the 60-day appeal period.

The Employer filed a timely petition for hearing to the Appeals Board. The Appeals Board has jurisdiction to consider this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **April 24, 2014**. 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 written request for reconsideration of the Determination of Liability for Employment or Wages dated September 11, 2013.
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, two Employer witnesses 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 the facts pertinent to the issue before us and necessary to our decision are:

1. On September 11, 2013, 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 determination was delivered to the Employer on September 13, 2013 (Bd. Exh. 2).
3. On November 14, 2013, the Employer mailed its request for reconsideration (Bd. Exh. 3). The request for reconsideration was filed more than 60 days after the September 11, 2013 Determination of Liability for Employment or Wages, because the Employer witness, Ms. H, was waiting for her husband to help her correct some errors on the determination. When her husband finished, the appeal deadline had already passed.
4. On November 21, 2013, 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 60 days, the

Determination of Liability for Employment or Wages dated September 11, 2013, had become final (Bd. Exh. 4).

5. The Employer filed a petition for hearing on December 11, 2013 (Bd. Exh. 5).

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 sixty 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:
>
> 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. <u>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.</u>
>
> 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 September 11, 2013, 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 determination was delivered to the Employer on September 13, 2013 (Bd. Exh. 2). The Employer witness, Ms. H, testified that the Employer's request for reconsideration was filed late because she was waiting for her husband to help her correct errors on the determination, and when her husband finished, the appeal deadline had already passed.

Under the provisions of Arizona Administrative Code, Section R6-3-1404(B), the only reasons that will allow this Board to consider the Employer's request for reconsideration as timely filed include: 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 reason provided by the Employer for its late request for reconsideration does not support a finding that the Employer's late request 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 the Employer to notify the Department of the address change. As a result, 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 November 21, 2013.

The Employer did not file a timely written request for reconsideration within the statutory time period allowed.

The Determination of Liability for Employment or Wages dated September 11, 2013, remains in full force and effect.

DATED: 5/2/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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

A copy of the foregoing was mailed on 5/2/2014
to:

(x) Er: xx Acct. No: xx-000

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

(x) LULU GOSS, 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-1426094-001-B

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xx

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 --- 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.

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

*****July 18, 2014*****.

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 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: 6/18/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

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.

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.

A copy of the foregoing was mailed on 6/18/2014 to:

(x) Er: xx Acct. No: xx-000

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

(x) LULU B GUSS, 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-1422116-001-B

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xx

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
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.

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 *******

July 7, 2014 ***.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on March 27, 2013, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued on May 5, 2011.

The Employer's petition was dated and filed on September 20, 2013. 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 May 13, 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 petition for a hearing from the Department's Reconsidered Determination letter dated March 27, 2013.

2. Whether the Department's March 27, 2013 Reconsidered Determination letter became final during the interim period before the Employer filed a written petition for a hearing.

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 8 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 March 27, 2013 Reconsidered Determination 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:

a. An employing unit constitutes an employer (A.R.S. § 23-724);

The record reveals that the Department's Reconsidered Determination was sent by certified mail on March 27, 2013, to the Employer's last known address of record (Bd. Exh. 4). The letter was returned to the Department's mailing address because the Employer's United Parcel Service (U.P.S.) postal box had been closed (Bd. Exh. 6A). The petition to the Appeals Board was filed on September 20, 2013 (Bd. Exh. 7), more than 30 days from the date of the Department's Reconsidered Determination. The petition, therefore, was not filed within the statutory time.

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.

On May 5, 2011, the Department issued a Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages to the Employer's address of record (Tr. pp. 12, 13; Bd. Exhs. 1, 2). The Employer timely appealed the determinations on May 13, 2011 (Tr. p. 14; Bd. Exhs. 3A, 3B).

On June 23, 2011, the Employer submitted a Report of Change form to the Department to change the business address from West Elm Street in Phoenix, Arizona, to an address on Indian School Road in Goodyear, Arizona (Tr. p. 15). The Department received the Employer's Report of Change form and properly updated the Employer's address of record.

On March 27, 2013, the Department issued its Reconsidered Determination which affirmed the May 5, 2011 Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages (Bd. Exhs. 4A-4F). The Reconsidered Determination was mailed to the Employer's address of record that was updated on June 23, 2011 (Bd. Exhs. 4A-4F). On April 1, 2013, the Reconsidered Determination was returned to the Department with a stamp from the post office which indicated that the mailbox was closed and that the item could not be forwarded (Tr. pp. 17, 23, 24; Bd. Exhs. 5, 6A). On September 20, 2013, the Employer appealed the March 27, 2013 Reconsidered Determination (Tr. pp. 18, 19; Bd. Exhs. 7A-7Q). The Employer's appeal listed a new address for the Employer on Bullard Avenue in Goodyear, Arizona (Bd. Exh. 7A).

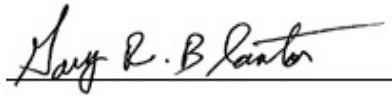
During the Appeals Board hearing, the Employer's witness testified that he opened the U.P.S. postal box in 2011 (Tr. p. 31). The Employer prepaid for the postal box and it remained open for one year (Tr. p. 31). Although the Employer's witness testified that he filed a subsequent Change of Address form with the Department, he did not provide evidence to substantiate his claim (Tr. pp. 32, 39). The Department's witness testified that the Department was not notified that the Employer changed its address from the postal box until the Department received the Employer's September 20, 2013 appeal (Tr. pp. 40, 41; Bd. Exh. 7).

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,

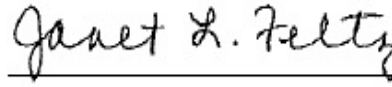
THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing. The Department's Reconsidered Determination issued March 27, 2013, remains in full force and effect.

DATED: 6/5/2014

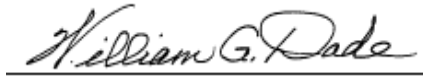
APPEALS BOARD



GARY R. BLANTON, Chairman



JANET L. FELTZ, Member



WILLIAM G. DADE, Member

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(x) Er: xx
Acct. No: xx-000

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

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

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1413783-001-B

xx
ATTN: xx
xx

Employer

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

Department

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 *******

June 5, 2014 ***.

DECISION
DISMISSED

THE **EMPLOYER,** through its representative, petitioned for a hearing from the Department's Reconsidered Determination letter issued on May 28, 2013, which held in part as follows:

> *... We considered all of the foregoing in accomplishing this "balance" and conclude that an employer-employee relationship exists between the workers and D&D.*
>
> *Accordingly, this Reconsidered Determination affirms the Determination of Liability for Employment or Wages issued December 21, 2012. ...*

The petition for a hearing having been filed by mail on June 10, 2013, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

Arizona Administrative Code, Section R6-3-1502(A) provides in 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:
>
> * * *
>
> 2. By dismissal, if the appellant fails to file the appeal within the time permitted by the Employment Security Law or Department rules; or
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

The validity of the appeal is a preliminary issue that must be established before the merits of the appeal can be considered. Accordingly, a prehearing conference of the parties was convened before **ROBERT T. NALL,** an Administrative Law Judge on **Thursday, April 17, 2014.** Further, the parties were ordered to file written briefs containing memoranda of points and authorities to the Appeals Board regarding the following issues:

1. Whether the Certified Public Accountant (CPA) who filed the request for hearing on her own letterhead and who signed over her name, meets the requirements necessary to file a valid appeal, or to file a valid request for hearing.
2. Whether a valid request for hearing was filed before the deadline established by law to file an appeal. Specifically, whether the CPA was charging a fee for this representation. Further, who decided to file the request for hearing, without presenting any indication that the Employer directly approved and authorized the appeal to be filed.
3. Whether sufficient authority exists to allow review by the Appeals Board, on the merits of an appeal, of evidence relating to the May 28, 2013 Reconsidered Determination.
4. Whether the May 28, 2013 Reconsidered Determination became final, thirty days after May 28, 2013.

Authorities:

A.R.S. §§ 23-671 through 23-675; and
Arizona Supreme Court rule 31; and
Arizona Administrative Code, Sections R6-3-1502 through R6-3-1506.

The Employer did not appear at the scheduled conference. The Employer also did not file briefs or any other response to support the request for hearing. According to counsel for the Department, he unsuccessfully attempted to reach the Employer directly and he mailed documents directly to the Employer after staff in the accountant's office, which had filed the request for a hearing, explained that the accountant no longer worked with or for the Employer.

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to consider the Employer to have filed a valid request for hearing. The reconsidered determination became final 30 calendar days after May 28, 2013. Accordingly,

THE APPEALS BOARD **DISMISSES** the request for hearing. The May 28, 2013 Reconsidered Determination remains in effect, and the December 21, 2012 Determination of Liability for Employment or Wages remains in effect. This decision does not affect any separate agreement entered into between the Employer and the Department, either concurrently with the scheduled prehearing conference or subsequent thereto.

DATED: 5/6/2014

APPEALS BOARD

Gary R. Blanton

GARY R. BLANTON, Chairman

Janet L. Feltz

JANET L. FELTZ, Member

William G. Dade

WILLIAM G. DADE, Member

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(x) Er: xx Acct. No: xx-000

(x) Dept. Rep: ELI D GOLOB
ASSISTANT ATTORNEY GENERAL
CFP/CLA

(x) LULU GUSS, 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-1413601-001-B

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xx

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**, through counsel, petitioned for hearing from the Department's Reconsidered Determination letter issued on April 3, 2013, which affirmed the Determination of Liability for Employment or Wages issued on December 12, 2012. The Reconsidered Determination held that "services performed by the technicians were correctly determined to constitute employment and all remuneration, including commissions, 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 **January 29, 2014,** and was reconvened on **February 19, 2014,** 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 services performed by individuals as field workers (technicians) constituted employment effective January 1, 2010, as defined in A.R.S. § 23-615.
2. Whether the services performed by individuals as field workers (technicians) 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 workers (technicians) constitutes wages as defined in A.R.S. § 23-622.

On the scheduled dates of the hearing, counsel for the Employer appeared along with two Employer witnesses who testified. Counsel for the Department was present, and one witness for the Department appeared and testified. Board Exhibits 1 through 11 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 a garage door repair company operating in Maricopa and Pima counties in Arizona (Feb. 19, 2014 Tr. pp. 46, 47, 127).
2. When a potential customer contacts the Employer regarding a need for garage door repairs, the Employer dispatches one of its technicians to the customer’s home or place of business to assess the situation and to negotiate with the potential customer regarding any needed repairs (Jan. 29, 2014 Tr. pp. 71-78; Feb.

19, 2014 Tr. p. 10). When an agreement is reached between the technician and the customer, the technician performs the repairs and replaces any defective parts using parts supplied by the Employer (Jan. 29, 2014 Tr. pp. 71-78; Feb. 19, 2014 Tr. p. 10).

3. All of the technicians are required to read and sign a "Technician Handbook" supplied by the Employer, and the technicians are bound by the contents of the Technician Handbook (Jan. 29, 2014 Tr. pp. 112, 113; Feb. 19, 2014 Tr. pp. 21, 22, 108, 116, 124; Bd. Exhs. 9, 11). The Employer has the right to enforce all of the provisions of the Technician Handbook (Feb. 19, 2014 Tr. pp. 108, 116).

4. The Technician Handbook contains the following provisions:

> **3. CONFLICTS OF INTEREST**
>
> a [sic] "conflict of interest" exists when a person's private interest interferes in any way, or even appears to interfere, with the interests of the [Employer]. ...
>
> It is a conflict of interest for a company Technician or Manager to work for a competitor, customer or supplier. You should avoid any direct or indirect business connection with our customers, suppliers or competitors; except as required on our behalf.
>
> Conflicts of interest are prohibited as a matter of [Employer] policy; except as approved by the owner. ...
>
> **4. CORPORATE OPPORTUNITIES**
>
> ... no technician or manager may compete with the [Employer] directly or indirectly. Technicians and managers owe a duty to the [Employer] to advance the [Employer's] interests when the opportunity to do so arises (Bd. Exh. 11, pp. 3, 4). [Emphasis in original]

5. A technician may not work for any other garage door repair company while working for the Employer (Feb. 19, 2014 Tr. p. 123; Bd. Exh. 11, pp. 3, 4).

6. The Employer requires the technicians to wear uniform shirts bearing the Employer's logo, and the technicians must pay for those shirts (Feb. 19, 2014 Tr. pp. 108, 109).

7. While the technicians are working, the Employer requires the technicians to drive trucks bearing advertisements for the Employer (Feb. 19, 2014 Tr. pp. 67, 68, 141). If a technician uses his own truck for work, he must pay for the Employer's advertisements to be placed on his truck (Feb. 19, 2014 Tr. pp. 67, 68, 141).

8. The technicians are required to be "on call" until midnight one night every week for the Employer (Jan. 29, 2014 Tr. pp. 109, 110; Feb. 19, 2014 Tr. pp. 7-9, 116; Bd. Exh. 9).

The Employer contends that the technicians were independent contractors and not employees. The employment status of the technicians 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 primary issue here is whether the services of the technicians 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 technicians. 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 technicians and the Employer. However, the Board sees no reason to engage in that exercise here, since a number of undisputed facts so overwhelmingly establish an employment relationship that it is not possible to conceive of any constellation of the other

factors that could overcome them and result in finding an independent contractor relationship.

At the Appeals Board hearing, the Employer's owner, CG, admitted that the technicians are prohibited from working for any other garage door repair company while they were working for the Employer (Feb. 19, 2014 Tr. p. 123). This prohibition is further codified, and broadened to an all-encompassing extent, in the Technician Handbook which contains the following unequivocal restrictions on a technician's ability to perform garage door repair services for anyone but the Employer:

> It is a conflict of interest for a company Technician or Manager to work for a competitor, customer or supplier. You should avoid any direct or indirect business connection with our customers, suppliers or competitors; except as required on our behalf.
>
> Conflicts of interest are prohibited as a matter of [Employer] policy; except as approved by the owner. ...
>
> ...
>
> ... no technician or manager may compete with the [Employer] directly or indirectly. Technicians and managers owe a duty to the [Employer] to advance the [Employer's] interests when the opportunity to do so arises (Bd. Exh. 11, p. 4).

CG admitted that all technicians are required to sign the Technician Handbook and that he has the right to enforce all of the provisions contained in the Technician Handbook (Feb. 19, 2014 Tr. pp. 108, 116, 124).

The hallmark of being an "independent contractor" is the ability to perform one's particularized services for multiple businesses simultaneously. Here, the Employer's own testimony, and the Employer's own Technician Handbook, establish that the technicians are entirely *dependent* on the Employer. The Employer has absolute control over the technicians' ability to perform their services, as they are prohibited from providing those services to anyone other than the Employer. No serious argument can be made that the technicians are "independent contractors" in any sense of that term, given the control the Employer has over the technicians' ability to ply their services.

Although the Board finds the foregoing non-compete factor to be dispositive in and of itself, we feel compelled to highlight several additional factors from the Board hearing that forestall further argument regarding the employment status of the technicians. At the Board hearing, CG admitted that

the technicians are required to wear uniform shirts bearing the Employer's logo (Feb. 19, 2014 Tr. pp. 108, 109). Additionally, the technicians are required to pay for those shirts (Feb. 19, 2014 Tr. pp. 108, 109). The technicians are also required to drive vehicles bearing additional advertisements for the Employer. If the technician uses his own truck for work he is required to pay to have the advertisements placed on his vehicle (Feb. 19, 2014 Tr. pp. 67, 68, 141). Finally, the technicians are required to be "on call" for the Employer, to be available to service the Employer's customers, one night per week, every week, until midnight (Jan. 29, 2014 Tr. pp. 109, 110; Feb. 19, 2014 Tr. pp. 7-9, 116; Bd. Exh. 9).

The fact that the technicians are required to be walking, driving advertisements for the Employer, and that they must pay for that privilege out of their own pockets, further demonstrates the extensive control the Employer exercises over the technicians. A true independent contractor would be free to market his own services, not to advertise or market for another. Likewise, the fact that the technicians are required to be "on call" to service the Employer's customers one night per week until midnight is anathema to the concept of being an independent contractor. A true independent contractor is the master of his own time, while an employee is subject to the scheduling controls of his employer such as mandated weekly late night "on call" duty.

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 technicians were employees of the Employer, effective January 1, 2010. We conclude that all payments to the technicians for their services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination letter dated April 3, 2013.

From January 1, 2010 through March 31, 2012, services performed by individuals as technicians constituted employment.

All forms of remuneration paid to these individuals for such services constituted wages.

DATED:

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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(x) ELI D GOLOB
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1275 W WASHINGTON – SITE CODE 040A
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(x) LULU GUSS, CHIEF OF TAX
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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-1413577-001-BR

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xx

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 REGARDING YOUR CLAIM FOR BENEFITS
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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.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** June 30, 2014 *****.

DECISION
AFFIRMED UPON REVIEW

THE **EMPLOYER** requests review of the Appeals Board decision issued on September 30, 2013, which affirmed the Department's decision letter dated June 14, 2013, and held that, because the Employer's request for reconsideration was filed late, the Determination of Liability for Employment or Wages [hereinafter "the Determination"] dated December 7, 2012, remains in full force and effect.

The request for review 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 submits additional information that was not presented at the Appeals Board hearing. On review, this Board confines itself to the record established at the Appeals Board hearing and elects not to allow the introduction of additional information, unless it can be shown that such information could not have been presented at the Appeals Board hearing with the exercise of due diligence, or unless the facts of the case establish some unusual circumstances that would justify supplementing the record and deciding the case on a new record. This record does not establish either ground. Here, the Employer had sufficient notice of the issues to be addressed at the Appeals Board hearing to have previously produced the information now submitted for inclusion in the record. The Appeals Board will not exercise its discretion to supplement this record under the facts of this case.

Additionally, the Employer contends that it "is also adding a new witness", whom the Employer identifies as "AW". From this we infer an expectation on the part of the Employer that another hearing will be held to take additional testimony. The time to present evidence was at the August 16, 2013 Appeals Board hearing. AW did not appear at the Appeals Board hearing, and the Employer has offered no explanation for why it chose not to call AW as a witness at that hearing. On review, the Appeals Board elects to hold another hearing and supplement the record only when the record is incomplete. Our examination of the record shows the record is complete and another hearing is not justified.

In the request for review, the Employer does not rely upon, or cite to, the evidence of record. The Employer does not cite any legal authorities and does not ascribe any specific error to the Appeals Board. Instead, the Employer simply offers the following sentence, which generally reiterates the Employer's primary contention from the Appeals Board hearing, that the late filing of the Employer's request for reconsideration was caused because Department employee "DD" purportedly "misinformed" the Employer: "Evidence had been previously submitted that [DD] misinformed [the Employer's president, "BK"] of the dollar amount stating that the total dollar could be lowered to as little as $10,000.00 giving [BK] the impression that the state would work with [the Employer] in this matter."

As explained in detail in the Board's prior decision, the Employer failed to prove this contention by the evidence of record. In his July 2, 2013 petition for hearing, and in his testimony at the Appeals Board hearing, BK made various allegations regarding DD, and alleged that the late filing of the request for reconsideration was caused by "misinformation" provided to him by DD (Tr. pp. 40-43, 45; Bd. Exhs. 5A-C). At the Board hearing, DD credibly and consistently

denied BK's allegations, and testified that she did not give any misinformation to BK (Tr. pp. 16-18, 24, 25, 53-56). The Employer failed to bring forth sufficient credible evidence to refute DD's denials and to prove its allegations. As a result, the Employer has failed to prove this contention by the evidence of record.

The credible and probative evidence of record establishes that the Determination was mailed to the Employer's correct mailing address of record on December 7, 2012, and further establishes that the Employer received the Determination on December 10, 2012 (Tr. pp. 29, 30, 37, 38; Bd. Exhs. 1, 2). The Employer bears the burden of proving that the late filing of its request for reconsideration should be excused under Arizona Administrative Code, Section R6-3-1404(B). The Employer failed to prove that the late filing of its request for reconsideration was caused by Department error or misinformation, by delay or other action by the United States Postal Service, or by a change of address by the Employer at a time when there would have been no reason 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. As explained in detail in the Board's prior decision, the evidence shows that the Employer's actions alone were the sole and proximate cause of the late filing of the Employer's request for reconsideration.

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 request for reconsideration 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: 5/29/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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 the foregoing was mailed on 5/29/2014 to:

(x) Er: xx Acct. No: xx-000

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

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

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1409120-001-B

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xx

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 **June 2, 2014**.

DECISION
REVERSED AND REMANDED

THE **EMPLOYER** petitioned for a hearing from the Department's reconsidered determination letter issued on May 1, 2013, which held that the Determination of Liability for Employment or Wages dated January 10, 2013, became final because the Employer's request for reconsideration was not filed within the 60-day appeal period.

The Employer filed a timely petition for a hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD rescheduled a telephone hearing, for **April 15, 2014**. 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 request for reconsideration.
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, the Employer witness appeared in-person 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 January 10, 2013, the Department mailed a Determination of Liability for Employment or Wages to the Employer's correct last address of record (Bd. Exh. 1).
2. The determination was sent by certified mail.
3. On January 29, 2013, the determination was returned to the Department in an envelope marked "unclaimed" (Bd. Exh. 3).
4. The Employer did not receive the determination or any notice of the receipt of certified mail.
5. The Employer was made aware of the determination in early April 2013, when the Employer was contacted by the Department concerning a collections matter.
6. The Employer filed a request for reconsideration on April 16, 2013.
7. The Employer has experienced postal problems in the past. Specifically, the Employer has received mail that belongs to other individuals, and the Employer has had its mail delivered to other individuals by mistake.
8. The Department issued its reconsidered determination letter on May 1, 2013, regarding the timeliness of the Employer's

request for reconsideration (Bd. Exh. 5). The Department's determination held that, because the Employer's request for reconsideration was not filed within 60 days, the Determination of Liability for Employment or Wages dated January 10, 2013, had become final (Bd. Exh. 5)

9. On May 17, 2013, the Employer filed a timely petition for a hearing from the Department's decision letter dated May 1, 2013 (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 sixty 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:
>
> 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, <u>delay or other action of the United States Postal Service or its successor</u>, 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].

* * *

On January 10, 2013, the Department mailed a Determination of Liability for Employment or Wages to the Employer's correct address of record (Bd. Exh. 1). The determination was sent by certified mail, and it was allegedly delivered to the Employer's post office box on January 11, 2013. The Employer witness, however, credibly testified that he regularly checks the post office box, and he did not receive the determination or any notice of the receipt of certified mail. The Employer witness further testified that the Employer has frequently received mail that belongs to other individuals, and the Employer has had its mail delivered to other individuals by mistake.

The Employer was made aware of the determination, in early April 2013, after receiving a call from the Department concerning a collections matter. The Employer witness then called the Department witness, Ms. O, after being made aware of the determination, and he filed a request for reconsideration on April 16, 2013.

The evidence of record established that the Employer filed a late request for reconsideration because it did not receive the determination by certified mail. The Employer witness credibly testified that it did not receive the determination due to postal error. Accordingly, the evidence supports a finding that the Employer's late request for reconsideration was due to delay or other action of the United States Postal Service.

The Employer has established sufficient facts that invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration was timely filed. Accordingly,

THE APPEALS BOARD **REVERSES** the Department's determination dated May 1, 2013.

The Employer filed a timely request for reconsideration.

THE APPEALS BOARD **REMANDS** the matter to the Tax Unit of the Department for a reconsidered determination of the Determination of Liability for Employment or Wages dated January 10, 2013. The Department shall issue a reconsidered determination from which a timely appeal may be taken by the

party adversely affected. In the absence of such appeal, the new decision will be the final administrative decision of this agency.

DATED: 5/2/2014

APPEALS BOARD

GARY R. BLANTON, 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.

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

A copy of the foregoing was mailed on 5/2/2014
to:

(x) Er: xx Acct. No: xx-000

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

(x) LULU GUSS, 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-1405923-001-B

xx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
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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 *******

June 12, 2014 ***.

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 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: 5/13/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

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.

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.

A copy of the foregoing was mailed on 5/13/2014 to:

(x) Er: xx Acct. No: xx-000

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

(x) LULU B GUSS, 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-BR

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xx

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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DECISION
DISMISSED

The **EMPLOYER** requests review of the Appeals Board decision issued on October 29, 2013, which affirmed the Department's decision letter dated March 6, 2013. The Department's March 6, 2013 decision letter held that because the Employer's petition for reassessment was filed late, the two Notices of Estimated Assessment issued by the Department on February 15, 2012, remain in full force and effect.

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case.

Arizona Revised Statutes § 23-672(F) states in pertinent part:

> A party dissatisfied with the decision under subsection E of this section may file a request for review within thirty days from the date of the decision, which shall be a written or electronic request and memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. On motion, and for good cause, the appeals board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal. ... [Emphasis added].

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

* * *

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].

Our previous decision included the following cautionary instructions:

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 NOV 29 2013.

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. ...

The record reveals that a copy of our previous decision was sent by mail on October 29, 2013, to the Employer's last known address of record. To be timely, a request for review of that decision had to be filed by November 29, 2013. Neither a request for review, nor a request for an extension of time to file the request for review, was filed by that date. The request for review was filed, on December 3, 2013, as indicated by the Department's date received stamp.

In the request for review, the Employer has offered no explanation for filing a late request for review. Instead, the Employer addresses the underlying issue regarding the Notices of Estimated Assessments for Delinquent Reports that were issued by the Department on February 15, 2012. The issues regarding the Notices of Estimated Assessments for Delinquent Reports are not properly before the Board because the Employer has not filed a timely request for review of our prior decision. The timely filing of a request for review is jurisdictional and is a prerequisite to further review of the underlying issue in this case.

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 request for review timely filed. Therefore, the Employer has failed to meet the statutory requirements for review. Accordingly,

THE APPEALS BOARD **DISMISSES** the request for review. The Appeals Board decision issued on October 29, 2013, remains in full force and effect.

DATED:

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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: xx
Acct. No: xx-000

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

(x) LULU B GUSS
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-1404266-001-B

xx

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
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
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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 June 2, 2014.

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).

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

THE APPEALS BOARD **DISMISSES** the petition. The hearing scheduled for April 15, 2014 at 9:00 a.m. MST was 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: 5/1/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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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.

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.

A copy of the foregoing was mailed by certified mail on 5/1/2014 to:

(x) Er: xx Acct. No: xx-000

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

(x) LULU GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
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PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1399886-001-B

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xx

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
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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 *******

June 2, 2014 ***.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's reconsidered determination letter dated August 27, 2012, which affirmed the Department's Determination of Unemployment Insurance Liability issued October 12, 2011.

The Appeals Board has jurisdiction to consider the timeliness of the Employer's petition for a hearing pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was held on April 24, 2014, before Appeals Board Administrative Law Judge Morris L. Williams, III. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer filed a timely petition for a hearing before the Appeals Board.

On the scheduled date of the hearing, one Employer witness appeared in-person to testify. Counsel for the Department appeared in-person and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 5 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 August 27, 2012 reconsidered determination.

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. <u>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</u>

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:

* * *

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].

* * *

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

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.
>
> * * *

The record reveals that the Department's reconsidered determination letter was sent by certified mail on August 27, 2012, to the Employer's correct address of record at that time (Bd. Exh. 3). The petition to the Appeals Board, however, was filed on January 28, 2013, as indicated by the postmark on the envelope in which the petition was mailed (Bd. Exh. 4). The petition was filed more than 30 days from the mailing date of the reconsidered determination letter. The petition, therefore, was not filed within the statutory time.

In the petition, the Employer makes no arguments relating to the reason it did not file a timely petition for a hearing before the Appeals Board (Bd. Exh. 4). At the Appeals Board hearing, the Employer witness testified that he never

personally received the reconsidered determination letter dated August 27, 2012. The Employer witness also testified that he does not check the mail, and his step-mother or nephew could have received the reconsidered determination. The Employer witness also testified that the reconsidered determination could have been thrown out as junk mail. The Employer witness testified that the Employer has had problems receiving its mail in the past, and the Employer has complained to the USPS about the problems. The Employer witness, however, could not say with any certainty what happened to the reconsidered determination letter.

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 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 that the petition for a hearing was timely filed. Accordingly,

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

The reconsidered determination letter issued August 27, 2012, remains in effect.

DATED: 5/1/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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.

HOW TO ASK FOR REVIEW OF THIS DECISION

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A copy of the foregoing was mailed on 5/1/2014 to:

(x) Er: xx Acct. No: xx-000

(x) ELI D GOLOB
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PHOENIX, AZ 85007-2926

(x) LULU GUSS, 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-1392529-001-B

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xx

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**, through counsel, petitioned for hearing from the Department's Reconsidered Determination letter issued on December 10, 2012, which affirmed the Determination of Liability for Employment or Wages and the Determination of Unemployment Insurance Liability issued on April 6, 2011. The Reconsidered Determination held that the Employer "is a temporary services employer and, therefore, an employing unit under the provisions of A.R.S. § 23-614(I)(2) and that the services performed by individuals as stagehands and

technicians constitute employment and all forms of 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 A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **August 1, 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 issues:

1. Whether the Employer is a "temporary services employer", and therefore an employing unit, under the provisions of A.R.S. § 23-614, and whether the services performed by individuals as corporate officer, supervisor, stagehand, and technician constituted employment effective January 1, 2008, as defined in A.R.S. § 23-614.
2. Whether the services performed by individuals as corporate officer, supervisor, stagehand, and technician 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 officer, supervisor, stagehand, and technician constitutes wages as defined in A.R.S. § 23-622.

We note that the April 6, 2011 Determination of Liability for Employment or Wages listed four categories of workers: corporate officer, supervisor, stagehand, and technician. However, in the Employer's September 27, 2012 request for reconsideration, the Employer conceded that corporate officer "MS" and supervisor "JW" are employees (Bd. Exh. 7A). The Department noted this concession in its December 10, 2012 Reconsidered Determination letter, and, as a result, the Reconsidered Determination letter only examined the employment status of the remaining categories: stagehands and technicians (Bd. Exhs. 8A-E). Therefore, this decision will be limited to examining the employment status of those individuals who performed services as stagehands and technicians [hereinafter "the ST"].

The following persons appeared at the hearing: five Employer witnesses who testified, Employer's counsel, one Department witness who testified, and

the Assistant Attorney General as the Department's counsel. At the hearing, Board Exhibits 1 through 14 were admitted into evidence.

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

1. The Employer provides stagehands and technicians [hereinafter "the ST"] to clients for programs and events being staged by the clients (Tr. pp. 20, 21; Bd. Exhs. 9A-E).

2. The Employer sends a pricelist to clients which details prices, i.e., "day rates", for various services the ST can provide (Tr. pp. 69, 78, 79; Bd. Exh. 10). The pricelist also informs clients that all the ST must be "hired at Full (10 hour) or Half (5 hour) Day Rates", about when "overtime" and "double time" rates will be applied, and that the day rates "may increase or decrease as show position requires" (Bd. Exh. 10).

3. The "process" starts when a client contacts the Employer regarding the client's "requirements for workers" for a job, and the client notifies the Employer of "whatever their requirements may be" (Tr. pp. 52, 53). The client informs the Employer about the "specifics" of the particular program the client will be running, including the particular jobsite, the setting in which the worker is needed, the type of work that is needed, and the prices the client is willing to pay for the services (Tr. pp. 66-70). Based upon the information provided to the Employer by the client regarding the specifics of a particular program, the Employer will determine which of the ST meet the requirements and then contact those ST to offer them the job assignment (Tr. pp. 53, 61, 62, 70, 77, 80, 84, 87).

4. It is solely up to the Employer whether or not any job assignments will be offered to any particular ST (Tr. pp. 74, 77, 78).

5. The ST retain the right to refuse specific assignments (Tr. pp. 53, 54, 86, 87).

6. The Employer has the authority to reassign a worker to other clients if the worker is determined to be unacceptable by a specific client (Bd. Exh. 7C).

7. If a client is unwilling to pay the day rates set forth on the Employer's pricelist, that "typically" ends the discussion between the Employer and the client (Tr. p. 79). However, the pricelist is a "guideline" and not a "hard, fast rule", and the prices on the Employer's pricelist have a "margin" (Tr. pp. 68, 69). There is "flexibility" in the pricelist day rates that the Employer is willing to adjust "depending on circumstances, time of year, whatever" (Tr. p. 79). The Employer sometimes accepts day rate offers from clients that are lower than the pricelist day rates, without first conferring with any of the ST, because Employer "[knows] that [the Employer] will be able to find some people who are willing to work for that day rate" (Tr. p. 79).

8. Once the day rate is established between the client and the Employer, the Employer "will take a percentage of that before paying out to the [ST]" (Tr. p. 80). The percentage the Employer takes out of the day rate paid by the client is not a set percentage but varies at the Employer's discretion (Tr. p. 81).

9. The Employer has workers' compensation insurance to cover the ST, "which is part of the percentage [the Employer takes] out of the day rate" (Tr. p. 83).

10. The Employer pays the ST from its own accounts (Tr. pp. 63, 76; Bd. Exh. 7D).

11. If the Employer is dissatisfied with a worker, the Employer "may or may not offer" that worker other job assignments (Tr. pp. 74, 77, 78).

The Department contends that the Employer acted as a "temporary services employer" and, as such, employed the ST 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 pertinent 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 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. ...

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

Employing unit; temporary services employer; professional employer organization; definitions

A. "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor of any of the foregoing, or the legal representative of a deceased person, which has, or subsequent to January 1, 1936 had, one or more individuals performing services for it within this state. Effective January 1, 1962, "employing unit" includes any federal instrumentality that is neither wholly nor partially owned by the United States and that has one or more individuals performing services for it within this state.

* * *

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 professional employer organization or a temporary services employer. The exceptions to the definition of employee prescribed in section 23-613.01, subsection A apply to determinations made pursuant to subsections E, F, G and H of this section.**

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:

* * *

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]

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.

In its December 10, 2012 Reconsidered Determination letter, the Department concluded that the Employer "is a temporary services employer and, therefore, an employing unit under the provisions of A.R.S. § 23-614(I)(2) ..." (Bd. Exh. 8D). 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. 39). We agree.

Arizona Revised Statues § 23-613(I)(2) defines a "temporary services employer" as "an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer". Here, there is no dispute that the Employer contracts with clients to supply workers to perform services for the clients.

The evidence of record establishes that the Employer negotiates with clients for such matters as the time of work, place of work, type of work, and, most importantly, the price of services. At the Board hearing, the Employer's president, "MS", admitted that the Employer sends a pricelist to clients which details prices for various services the Employer's workers, the ST, can provide (Tr. pp. 69, 78, 79; Bd. Exh. 10). That pricelist includes additional "terms" set forth by the Employer, such as a requirement that all the ST be "hired at Full (10 hour) or Half (5 hour) Day Rates", and it includes information regarding when "overtime" and "double time" rates will be applied (Bd. Exh. 10). The pricelist also specifies: "Day rates may increase or decrease as show position requires" (Bd. Exh. 10).

MS testified that the "process" starts when a client contacts the Employer regarding the client's "requirements for workers" for a job, and the client notifies the Employer of "whatever their requirements may be" (Tr. pp. 52, 53). MS testified that the client informs the Employer about the "specifics" of the particular program the client will be running, including the particular jobsite, the setting in which the worker is needed, the type of work that is needed, and the prices the client is willing to pay for the services (Tr. pp. 66-70). Based upon the information provided to the Employer by the client regarding the specifics of a particular program, the Employer will determine which of the ST meet the requirements, and then contact those ST to offer them the job assignment (Tr. pp. 53, 61, 62, 70, 77, 80, 84, 87). The evidence of record establishes the factor under A.R.S. § 23-613(I)(2)(a).

At the Board hearing, the Employer argued that the Employer does not "determine assignments" for the ST because after the ST is on the client's jobsite the client, and not the Employer, directs the ST's activities (Tr. pp. 54-58). This argument fails. The Employer "determines assignments" of the ST by choosing which workers the Employer will contact and offer the job assignments to in the first place. MS admitted that once the Employer receives a request for a worker from a client, the Employer decides which of the ST fits the requirements, and the Employer then contacts the ST and offers him or her the assignment (Tr. pp. 53, 61, 62, 70, 77, 80, 84, 87). It is irrelevant that on occasion a client will specifically request a particular worker for an assignment; the Employer still has the power to decide whether or not to offer that assignment to the requested worker. As MS admitted, it is solely up to the Employer whether or not any job assignments will be offered to any particular ST (Tr. pp. 74, 77, 78). Furthermore, there is no dispute that the ST retain the right to refuse specific

assignments (Tr. pp. 53, 54, 86, 87). The evidence of record establishes the factor under A.R.S. § 23-613(I)(2)(b).

In its September 27, 2012 request for reconsideration, the Employer admitted that the Employer has the authority to reassign a worker to other clients if the worker is determined to be unacceptable by a specific client (Bd. Exh. 7C). This establishes the factor under A.R.S. § 23-613(I)(2)(c).

For the reasons set forth in the preceding two paragraphs, the evidence of record establishes that the Employer "assigns or reassigns the worker to perform services for a client or customer". This establishes the factor under A.R.S. § 23-613(I)(2)(d).

As previously discussed, the Employer sends a pricelist to clients which details the "day rates" for the ST, includes information regarding when "overtime" and "double time" rates will be applied, and notifies clients that the day rates "may increase or decrease as show position requires" (Tr. pp. 69, 78, 79; Bd. Exh. 10). At the Board hearing, MS admitted that if a client is unwilling to pay the day rates set forth on the Employer's pricelist, that "typically" ends the discussion between the Employer and the client (Tr. p. 79). However, MS also testified that the pricelist is a "guideline" and not a "hard, fast rule", and that the prices on the Employer's pricelist have a "margin" (Tr. pp. 68, 69). MS admitted that there is "flexibility" in the pricelist day rates that the Employer is willing to adjust "depending on circumstances, time of year, whatever" (Tr. p. 79).

Additionally, MS admitted that he sometimes accepts day rate offers from clients that are lower than the pricelist day rates, without first conferring with any of the ST, because he "[knows] that [he] will be able to find some people who are willing to work for that day rate" (Tr. p. 79). Furthermore, and most tellingly, MS admitted that once the day rate is established between the client and the Employer, the Employer "will take a percentage of that before paying out to the [ST]" (Tr. p. 80). MS admitted that the percentage the Employer takes out of the day rate paid by the client is not a set percentage but varies at the Employer's discretion (Tr. p. 81). All of the foregoing establish that the Employer ultimately determines the rate of pay for the ST, and establish the factor under A.R.S. § 23-613(I)(2)(e).

We note that MS admitted at the Board hearing that the Employer has workers' compensation insurance to cover the ST, "which is part of the percentage we take out of the day rate" (Tr. p. 83). Employers with employees are required to purchase workers' compensation insurance to cover the employees. There is no reason for a business to purchase workers' compensation insurance to cover independent contractors. MS offered no explanation for why the Employer would purchase workers' compensation insurance for the ST if, as

the Employer has alleged, the Employer believed that the ST were independent contractors and not employees.

In its September 27, 2012 request for reconsideration, and at the Board hearing, the Employer admitted that it pays the ST from its own accounts (Tr. pp. 63, 76; Bd. Exh. 7D). This admission establishes the factor under A.R.S. § 23-613(I)(2)(f).

Finally, regarding the provisions of A.R.S. § 23-613(I)(2)(g), MS asserted at the Board hearing: "I don't hire or fire anybody" (Tr. p. 64). This contention is contrary to the evidence of record, including MS's own subsequent testimony. At the hearing, MS admitted that, if the Employer is dissatisfied with a worker, the Employer "may or may not offer" that worker other job assignments (Tr. pp. 74, 77, 78). While the Employer may not hire and terminate the ST in the traditional sense, the Employer does contact the ST to offer work opportunities and uses the ST if the ST accept the assignments. The Employer also has the option of not using a particular ST if the Employer is not satisfied with their work, which has the effect of terminating the ST. Accordingly, the Employer does retain the right to hire and terminate the ST, and the factor under A.R.S. § 23-613(I)(2)(g) has been established.

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 Department met its burden to establish all of the factors under A.R.S. § 23-614(I)(2).

The ST were employees of the Employer, effective January 1, 2008. We conclude all payments to the ST for their services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination letter issued on December 10, 2012, based upon the evidence of record.

The Employer is a "temporary services employer" liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-614. Services performed by individuals as stagehands and technicians constitute employment, and remuneration paid to individuals as stagehands and technicians constitutes wages.

DATED:

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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

A copy of this Decision was mailed on to:

Er: xx Acct. No: xx-000

(x) Er Rep: xx

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

(x) LULU GUSS, 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-1392473-001-BR

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xx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
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1275 W WASHINGTON ST SC 040A
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Employer

Department

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.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** July 17, 2014 *****.

DECISION
AFFIRMED UPON REVIEW

THE **DEPARTMENT**, through counsel, requests review of the Appeals Board decision issued on January 8, 2014, which held:

> 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.

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 Department requested a copy of the Appeals Board hearing transcript and an extension of time in which to file a supplemental memorandum to the request for review. A copy of the hearing transcript was sent to the Department on April 10, 2014, and the Department's request for an extension of time in which to file a supplemental memorandum to the request for review was granted through April 30, 2014. To date, no supplement has been filed with the Appeals Board, and the Department's request for review is devoid of any citations to the record.

In the request for review, the Department submits additional information and documents that were not presented at the Appeals Board hearing. On review, this Board confines itself to the record established at the Appeals Board hearing and elects not to allow the introduction of additional information, unless it can be shown that such information could not have been presented at the Appeals Board hearing with the exercise of due diligence, or unless the facts of the case establish some unusual circumstances that would justify supplementing the record and deciding the case on a new record. This record does not establish either ground. Here, the Department had sufficient notice of the issues to be addressed at the Appeals Board hearing to have previously produced the

information now submitted for inclusion in the record. The Appeals Board will not exercise its discretion to supplement this record under the facts of this case.

The Department also refers to a December 16, 2010 Decision of Appeal Tribunal (Bd. Exh. 10) regarding an unemployment insurance benefits claimant, "BW". That decision had nothing to do with the issue of the employment status of the fitness trainers. Regardless, that decision has no precedential value and has no relevance in this matter.

Additionally, the Department contends: "The workers at issue are fitness trainers who provided personal training services at [the Employer's] physical fitness facilities." The Department offers no citations to the record to support this contention, and there is no evidence in the record to support the Department's implication that the Employer actually owned any "physical fitness facilities".

The Department also offers the following sweeping contention:

> At the Board hearing in this matter, the Department presented evidence showing that the fitness trainers performed services for [the Employer] and "were subject to the direction, rule or control of" [the Employer] "as to both the method of performing or executing the services and the result to be effected or accomplished," as required by A.R.S. § 23-613.01 *et al*.

The Department repeats this bald allegation several times throughout the request for review. However, the Department once again fails to cite where any of this purported "evidence" appears in the record, and the Department did not even attempt to describe this purported "evidence". A review of the record reveals that there is no evidence in the record to support the Department's contention that the fitness trainers performed services *for* the Employer. Furthermore, the evidence of record does not even begin to establish the Department's contention that the fitness trainers "were subject to the direction, rule or control of" the Employer "as to both the method of performing or executing the services and the result to be effected or accomplished".

As explained in our prior decision, the only evidence presented by the Department regarding any relationship between the Employer and the fitness trainers was the undisputed fact that the Employer issued the checks to the fitness trainers during the relevant time period. All of the other evidence presented by the Department regarding the concepts of "direction, rule or control . . . as to both the method of performing or executing the services and the result to be effected or accomplished" specifically involves the relationship between the fitness trainers and xxx LLC (hereinafter xxx), a separate entity that the Department acknowledges is not a party to this matter.

In the request for review, the Department contends for the first time that "the Board should find that the fitness trainers were [the Employer's] employees pursuant to A.A.C. § R6-3-1723(G)." Arizona Administrative Code, Section R6-3-1723(G), states: "An individual is an employee if he performs services which are subject to the Federal Unemployment Tax Act or performs services which are required by federal law to be covered by state law." In a response to the Department's request for review, counsel for the Employer addressed the Department's contention regarding Arizona Administrative Code, Section R6-3-1723(G), as follows: "[Arizona Administrative Code, Section R6-3-1723(G)] does not speak to the issue of who an employer is, but addresses an entirely different matter, a criterion for determining employee status." [Emphasis in original] We agree. Code Section R6-3-1723(G) sets forth guidelines for determining whether "an individual is an employee". However, that Code Section is silent regarding what entity would be deemed the "employer" of such an "employee".

In our prior decision, the Board concluded 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 has not presented sufficient evidence or argument to refute the Board's conclusion.

The Department's only remaining contention involves the position the Department took at the Appeals Board hearing, wherein the Department clearly and unequivocally acknowledged that the only reason the Department determined that the Employer, rather than another entity such as xxx, was the purported "employer" of the fitness trainers was that the Employer had issued the checks to the fitness trainers (Tr. pp. 41, 50, 96-98, 200, 204). As counsel for the Department stated:

> 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).

In the request for review, the Department contends: "The Department believes that [the Employer] employed fitness trainers during the audit period because [the Employer] paid the fitness trainers' wages." In support of this contention, the Department now cites 26 U.S.C. § 3401(d)(1), from the Internal Revenue Code, which states:

> For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that –
>
> > (1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term "employer" (except for purposes of subsection (a)) means the person having control of the payment of such wages ...

Although the Department uses the term "wages" in the request for review, which implies the existence of a common law employer/employee relationship, the Department fails to mention that the provisions of 26 U.S.C. § 3401(a), which defines "Wages", and 26 U.S.C. § 3401(d), which defines "Employer", only apply when a common law employer/employee relationship has, in fact, been established between the worker and the entity for whom the worker performed services. There has been no such showing here.

It is undisputed that the fitness trainers performed services for xxx, not for the Employer. Therefore, before the exception set forth in 26 U.S.C. § 3401(d)(1) can even become relevant, it must be established that a common law employer/employee relationship existed between the fitness trainers and xxx. By the Department's own admissions, that has not been established by the evidence of record. First, xxx is not a party to this matter. Second, although the vast majority of the evidence presented by the Department involved the relationship between the fitness trainers and xxx, the Department went to great lengths to unambiguously state that the Department was not alleging that xxx was the employer of the fitness trainers. As counsel for the Department clearly acknowledged at the Appeals Board hearing: "[The Department is] not making any allegations as far as [xxx] as the employer" (Tr. p. 173) and "We're not dealing with [xxx] – [the Department is] not making any allegations as far as [xxx]" (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 [xxx]" (Tr. p. 72).

The Department failed to establish by the evidence of record that a common law employer/employee relationship existed between the fitness trainers and xxx during the relevant time period set forth in the April 30, 2010 Determination of Liability for Employment or Wages, primarily because the Department admitted that it was not alleging that such a relationship existed.

This alone causes the Department's contentions regarding the applicability of 26 U.S.C. § 3401(d)(1) to fail.

However, even if the Department had established that a common law employer/employee relationship existed between the fitness trainers and xxx during the relevant time period, the Department's contention that the provisions of 26 U.S.C. § 3401(d)(1) transform the Employer into the "employer" for unemployment insurance purposes fails. Here, there is no dispute that the Employer, and not xxx, issued the checks to the fitness trainers. The applicability of 26 U.S.C. § 3401(d)(1) hinges on the meaning of the phrase "control of the payment of the wages", which is open to any number of interpretations.

Just as the Department cited to the Code of Federal Regulations in its request for review, the Board will look to the Code of Federal Regulations to shed further light on the question of what constitutes "control of the payment of the wages" under 26 U.S.C. § 3401(d)(1). As set forth in the Code of Federal Regulations, 26 C.F.R. 31.3401(d)-1 states, in pertinent part:

> (a) The term "employer" means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person.
>
> * * *
>
> (f) If the person for whom the services are or were performed does not have legal control of the payment of the wages for such services, the term "employer" means (except for the purpose of the definition of "wages") the person having such control. For example, where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the "employer."
>
> * * *

It is undisputed that the fitness trainers performed services for xxx, not for the Employer. Therefore, in order for 26 U.S.C. § 3401(d)(1) to apply, the evidence of record must establish that xxx "does not have control of the payment of the wages for such services". There is no such evidence in the record.

At the Appeals Board hearing, Employer witness "WM" testified that the Employer was simply acting as a payroll company for xxx (Tr. pp. 43, 45, 207, 247, 258, 259). The Department presented no evidence to refute that testimony

and presented no evidence to establish that the Employer acted in any role other than simply as a "payroll company". Additionally, the Department presented no evidence to establish that xxx "[did] not have control of the payment of wages" to the fitness trainers. The mere fact that the Employer is the entity that issued the checks to the fitness trainers on behalf of xxx does not establish that xxx did not have "control" over those payments.

The provisions of 26 C.F.R. 31.3401(d)-1(f), which closely mirror the provisions of 26 U.S.C. § 3401(d)(1), are highly instructive on this issue. In 26 C.F.R. 31.3401(d)-1(f), the word "control" is further clarified as "legal control". Additionally, 26 C.F.R. 31.3401(d)-1(f) includes the following example of when the provisions of 26 U.S.C. § 3401(d)(1) would apply: "For example, where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the 'employer.'"

Similarly, the Department's reliance on *Otte v. U.S.*, 419 U.S. 43, 95 S.Ct. 247 (1974), which the Department described in its request for review as having "upheld the legality of 26 U.S.C.A. § 3401(d)", only serves to emphasize the concept of "legal control" set forth in 26 C.F.R. 31.3401(d)-1(f). The *Otte* decision involved a bankruptcy case wherein the debtor common law employer had lost legal control over the payment of wages to its employees to the bankruptcy trustee, which made the trustee the "employer" under 26 U.S.C. § 3401(d)(1).

It is clear that 26 U.S.C. § 3401(d)(1) was created to address the unusual situations when a common law employer, through some legal mechanism, has lost "legal control" over the payment of wages to its employees. The Department presented no evidence to show that xxx, the entity for whom the services were performed, ever lost "legal control" over the payments made to the fitness trainers, through bankruptcy or any other means. The Board finds that the Department's contention that 26 U.S.C. § 3401(d)(1) transformed the Employer, who simply issued checks to fitness trainers who performed services for xxx, into the "employer" of the fitness trainers lacks merit. To find otherwise would lead to the absurd result that any payroll company that simply issued checks on behalf of a common law employer would automatically become the "employer" of the common law employer's employees for unemployment insurance purposes, regardless of the viability or legal status of the common law employer. Such a position is untenable.

As explained in our prior decision, 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 xxx during that period. However, as the Department conceded at the Appeals Board hearing, xxx is not a party to this matter, and the

Department is "not making any allegations as far as [xxx] as the employer" (Tr. p. 173). The Department further acknowledged that the only factor it used to conclude that the Employer, rather than xxx or any other entity, was the purported "employer" in this matter, was the fact that the Employer had written the checks to the fitness trainers (Tr. pp. 41, 50, 96-98, 200, 204).

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 xxx, a separate corporate 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, and the Department failed to carry its burden of proving that the fitness trainers were employees of the Employer, as alleged in the April 30, 2010 Determination of Liability for Employment or Wages and the Department's December 18, 2012 Reconsidered Determination letter.

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 **DEPARTMENT** 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: 6/17/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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 the foregoing was mailed on 6/17/2014 to:

Er: xx Acct. No: xx-000

(x) Er Counsel: xx

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
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(x) LULU GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: ____RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1360333-001-BR

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xx

STATE OF ARIZONA E S A TAX UNIT
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Employer

Department

IMPORTANT --- 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 --- 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.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** July 17, 2014 *****.

DECISION
AFFIRMED UPON REVIEW

THE **EMPLOYER** requests review of the Appeals Board decision issued on June 11, 2013, which affirmed, but modified to remove any reference to services performed by Executive Producers, the Reconsidered Determination issued by the Department on May 11, 2012, and held:

> 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.

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

A majority of the Employer's request for review consists of information and documents that were not presented at the Appeals Board hearing. On review, this Board confines itself to the record established at the Appeals Board hearing and elects not to allow the introduction of additional information, unless it can be shown that such information could not have been presented at the Appeals Board hearing with the exercise of due diligence, or unless the facts of the case establish some unusual circumstances that would justify supplementing the record and deciding the case on a new record. This record does not establish either ground. Here, the Employer had sufficient notice of the issues to be addressed at the Appeals Board hearing to have previously produced the information now submitted for inclusion in the record. The Appeals Board will not exercise its discretion to supplement this record under the facts of this case.

In the request for review, the Employer offers the following contention:

> Further, [the Employer] requests that RB's testimony be re-instated [sic]. [The Employer's] exhibit (1) will show that Ms. [C] lists an EIN. [The Employer] asks if this reason of a listed EIN excludes RB's testimony, then MS. [sic] [C's] testimony be [sic] should be stricken as well.

This contention has no merit. Irrespective of the fact that this passage includes information that was not presented at the Appeals Board hearing, and that is not a part of the evidence of record, we infer the Employer is referring to Employer witness "RB", who testified at the Appeals Board hearing, and to Editor "TC", who did not testify at the hearing. First, RB's testimony was never "excluded" from the record, so there is no need to "re-instate" RB's testimony. Second, Editor TC did not testify at the Appeals Board hearing. Therefore, there is no "testimony" from Editor TC to "strike" from the record.

Additionally, as explained in our prior decision, the Employer testified at the Appeals Board hearing 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). The Employer also admitted that no other payments for services were paid to companies, but instead were paid directly to individuals, which would include Editor TC (Tr. pp. 21, 22, 56, 57).

The Employer also offers the following contention regarding a purported "unnamed witness" at the Appeals Board hearing:

> The Departments [sic] Appeals Board Telephone hearing held on October 17, 2012, states that an unnamed witness testified for the Department against [the Employer]. This unnamed witness was unknown to [the Employer] during the hearing when this witness testified on page 12, item 1. ...
>
> [The Employer] now alleges that the Appeals Board violated [the Employer's] 6th, and 14th amendment rights when the Appeals Board failed to disclose the fact that an unnamed witness was present and testifying for the Department at the hearing. ...

The Board is at a loss to comprehend this contention. There was no "unnamed witness" at the Appeals Board hearing. The Department had one witness, "CC", testify at the hearing. CC was named, on the record, by the Administrative Law Judge in the opening seconds of the hearing (Tr. p. 1), was named again when the Administrative Law Judge identified the persons who were present at the hearing (Tr. p. 5), was named again when CC was sworn in along with the Employer (Tr. p. 13), was named again when CC was called to testify (Tr. p. 58), and was named yet again when the Administrative Law Judge asked the Employer if he had any questions for CC on cross-examination (Tr. p. 72). Finally, the Employer actually referred to CC *by name* when the Employer finished his attempted cross-examination of CC and stated: "So, uh, I have no more further questions for Mr. [CC]" (Tr. p. 73). This contention regarding an "unnamed witness" that was "unknown" to the Employer during the hearing has no merit.

The Employer does not cite any legal authorities in his request for review, other than a vague reference to "Supreme Court decisions on independent contractors". The Employer, however, does not actually cite any Supreme Court decisions, or any other legal authorities, to support any argument to reverse the Board's prior decision.

Furthermore, unlike the Board's prior decision, which is replete with specific, detailed citations to the record and legal arguments supporting the Board's decision, the Employer has not offered any citations to the record or any discernable legal arguments specifically contesting the Board's assessment of the applicable factors. Instead, in the few portions of the request for review that even appear to address the legal issues at hand, the Employer only offers a mélange of personal opinions, rhetorical questions, and information not included in the evidence of record.

The Employer has presented nothing of probative value in his request for review that would cause the Board to reconsider any portion of our prior decision. 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, Section R6-3-1723, and case law, to the facts in this case and found the services performed by individuals as Writers, Talent, and Editors 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, 2007 through December 31, 2008.

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 Writers, Talent, and Editors 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: 6/17/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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 the foregoing was mailed on 6/17/2014
to:

(x) Er: xx Acct. No: xx-000

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

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

By: _RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1351495-001-BR

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xx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
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Employer

Department

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.

DECISION
AFFIRMED UPON REVIEW

The **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on May 2, 2013, which affirmed the Department's Reconsidered Determination dated April 11, 2012, and held that the December 12, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES remains in full force and effect because the Employer filed a late request for reconsideration.

The request for review 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 e-mailed copy of the Determination of Liability for Employment or Wages does not constitute a valid determination which "triggered" the need for an appeal

within 15 days because the determination was not served on the Employer personally or by certified mail pursuant to A.R.S. § 23-724. The December 12, 2011 Determination of Liability for Employment or Wages was initially sent by certified mail, and, according to the records kept by the post office, the certified letter was delivered on December 21, 2011 (Bd. Exh. 2). However, the Employer never received the determination by mail (Tr. pp. 19, 27). Based on the testimony of the Employer witnesses, this Board determined that the December 12, 2011 Determination of Liability for Employment or Wages was not received by the Employer due to postal error. The Department re-mailed the determination on January 19, 2012, and unsuccessfully attempted to fax it to the Employer (Tr. pp. 76, 77). The Employer did not receive the re-mailed determination or the faxed copy.

Despite not receiving the Determination of Liability for Employment or Wages by mail, the Employer was aware that the determination was forthcoming because the Employer had been in contact with the Department employee, who conducted the audit, about the determination. Accordingly, the Employer was on notice that a Determination of Liability for Employment or Wages would be forthcoming. Because the Employer was having postal problems and never received the Determination of Liability for Employment or Wages by mail, the same Department employee, e-mailed a PDF file of the Determination of Liability for Employment or Wages to the Employer's acting general manager, Ms. L, on January 26, 2012 (Tr. pp. 77, 80, 81). The Department employee told Ms. L that the Employer needed to promptly file an appeal because it was already late (Tr. p. 77). Ms. L testified that she received the e-mail from the Department employee, and she sent the e-mail to the Employer's attorneys (Tr. p. 39). Accordingly, the Employer became aware of the December 12, 2011 Determination of Liability for Employment or Wages on January 26, 2012. As a result, we conclude that the e-mailed copy of the determination was a valid determination that "triggered" the need for an appeal, especially considering the Employer was aware that it was coming. The manner of delivery was modified due to postal problems the Employer claimed that it was experiencing.

In addition, the Employer's counsel has never provided a reason why an appeal was not filed until more than eight weeks after it was received by the Employer's counsel. Further, it is unclear why the Employer's counsel decided to file an appeal at all, if he believed that the e-mailed determination was not a valid determination that "triggered" the need for an appeal.

The Employer's counsel also contends that the e-mailed determination was not official because it was not signed. However, A.R.S § 23-724 does not require a determination to be signed in order to be valid or official.

The Employer's counsel further contends that the e-mailed copy of the Determination of Liability for Employment or Wages does not constitute a valid determination which "triggered" the need for an appeal within 15 days because

the Employer did not consent in writing to personal service by electronic transmission. In support of this contention, the Employer's counsel cites A.R.S. § 23-724(J), which states in pertinent part that a determination may be served by electronic means if the party being served consents in writing to service by electronic means. However, A.R.S. § 23-724(J), was not in effect during the time frame at issue, and is therefore, not applicable. A.R.S. § 23-724(J) did not become effective until March 2012. Further, the revised statute does not make mention of A.R.S. § 23-724(J) being retroactive.

The issue properly before the Board is whether the Employer's request for reconsideration was filed on time.

In its prior decision, the Appeals Board made its own findings of fact and used its own reasoning and conclusions of law. In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. § 23-724, and Arizona Administrative Code, Section R6-3-1404, to the facts in this case and found that the Employer did not file a timely request for reconsideration within the statutory time period allowed.

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 (Tr. p. 15; Bd. Exh. 1). The Employer never received the Determination of Liability for Employment or Wages by mail (Tr. pp. 19, 27). As noted in the Board's prior decision, the Employer did not receive the Determination of Liability for Employment or Wages by certified mail due to postal error.

On January 19, 2012, the Department re-mailed the Determination of Liability for Employment or Wages to the Employer's address of record, but the Employer again did not receive it due to postal error (Tr. pp. 76, 77). The Department employee, who conducted the investigation, also unsuccessfully attempted to fax the Determination of Liability for Employment or Wages to the Employer (Tr. p. 77). Finally, on January 26, 2012, the same Department employee e-mailed a PDF file of the Determination of Liability for Employment or Wages to the Employer's acting general manager, Ms. L (Tr. pp. 77, 80, 81). Ms. L testified that she received the e-mail from the Department employee, and she sent the e-mail to the Employer's attorneys (Tr. p. 39). Accordingly, the Employer had actual knowledge of the contents of the December 12, 2011 Determination of Liability for Employment or Wages on January 26, 2012.

The Determination of Liability for Employment or Wages contained appeal rights, which stated, "This determination becomes **FINAL** unless written request for reconsideration is filed with this Department at the above address within fifteen (15) days after the date of this determination as provided in A.R.S. §23-724" (Bd. Exhs. 1 & 3). In the Board's prior decision, it was determined that the Employer's appeal period began on January 26, 2012, the date the Employer

actually received the Determination of Liability for Employment or Wages. The Appeals Board made this decision because the Employer was experiencing several problems receiving its mail in December 2011 and January 2012.

The Employer, through counsel, filed its request for reconsideration on March 23, 2012 (Bd. Exh. 3). In accordance with the version of A.R.S. §23-724 in effect during December 2011 and January 2012, the Employer's request for reconsideration was due by February 10, 2012. Therefore, the Employer's request for reconsideration was not filed on time. In its request for reconsideration and petition for hearing, the Employer, through counsel, made several procedural arguments intended to invalidate the Determination of Liability for Employment or Wages because it was received by e-mail. The Employer's counsel, however, does not provide an explanation regarding why a request for reconsideration was not filed until more than eight weeks after the Employer's counsel received the Determination of Liability for Employment or Wages.

As noted in the Board's prior decision, 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. The Employer and its counsel received the Determination of Liability for Employment or Wages on January 26, 2012. However, no steps were taken to file a request for reconsideration until March 23, 2012. The Employer was also on notice that the determination was forthcoming because of previous conversations with the Department employee, and the Employer was told on January 26, 2013, that an appeal needed to be filed promptly.

Under Arizona Administrative Code, Section R6-3-1404(B)(3), we find that the Employer's more than eight-week delay from January 26, 2012 to March 23, 2012, was unreasonable. Therefore, the Employer's written request for reconsideration was not timely filed. Accordingly,

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

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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 the foregoing was mailed on
to:

(x) Er: xx Acct. No: xx-000

(x) ELI D GOLOB
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(x) LULU GUSS
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PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

3rd Quarter of Calendar Year 2014

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1399886-001-B

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xx

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
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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) 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.

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 *******

June 2, 2014 ***.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's reconsidered determination letter dated August 27, 2012, which affirmed the Department's Determination of Unemployment Insurance Liability issued October 12, 2011.

The Appeals Board has jurisdiction to consider the timeliness of the Employer's petition for a hearing pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was held on April 24, 2014, before Appeals Board Administrative Law Judge Morris L. Williams, III. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer filed a timely petition for a hearing before the Appeals Board.

On the scheduled date of the hearing, one Employer witness appeared in-person to testify. Counsel for the Department appeared in-person and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 5 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 August 27, 2012 reconsidered determination.

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. <u>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</u>

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:

* * *

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].

* * *

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

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.
>
> * * *

The record reveals that the Department's reconsidered determination letter was sent by certified mail on August 27, 2012, to the Employer's correct address of record at that time (Bd. Exh. 3). The petition to the Appeals Board, however, was filed on January 28, 2013, as indicated by the postmark on the envelope in which the petition was mailed (Bd. Exh. 4). The petition was filed more than 30 days from the mailing date of the reconsidered determination letter. The petition, therefore, was not filed within the statutory time.

In the petition, the Employer makes no arguments relating to the reason it did not file a timely petition for a hearing before the Appeals Board (Bd. Exh. 4). At the Appeals Board hearing, the Employer witness testified that he never

personally received the reconsidered determination letter dated August 27, 2012. The Employer witness also testified that he does not check the mail, and his step-mother or nephew could have received the reconsidered determination. The Employer witness also testified that the reconsidered determination could have been thrown out as junk mail. The Employer witness testified that the Employer has had problems receiving its mail in the past, and the Employer has complained to the USPS about the problems. The Employer witness, however, could not say with any certainty what happened to the reconsidered determination letter.

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 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 that the petition for a hearing was timely filed. Accordingly,

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

The reconsidered determination letter issued August 27, 2012, remains in effect.

DATED: 5/1/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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.

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

A copy of the foregoing was mailed on 5/1/2014 to:

(x) Er: xx Acct. No: xx-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
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(x) LULU GUSS, 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-1444774-001-B

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xx

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
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.

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 ***** June 9, 2014 *****.

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 May 6, 2014, the Employer requested to withdraw its petition for hearing while on the record during an Appeals Board hearing.

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: 5/8/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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.

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.

A copy of the foregoing was mailed on 5/8/2014 to:

(x) Er: xx Acct. No: xx-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
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By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1392473-001-BR

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xx

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Employer

Department

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RIGHT OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** July 17, 2014 *****.

DECISION
AFFIRMED UPON REVIEW

THE **DEPARTMENT**, through counsel, requests review of the Appeals Board decision issued on January 8, 2014, which held:

> 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.

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 Department requested a copy of the Appeals Board hearing transcript and an extension of time in which to file a supplemental memorandum to the request for review. A copy of the hearing transcript was sent to the Department on April 10, 2014, and the Department's request for an extension of time in which to file a supplemental memorandum to the request for review was granted through April 30, 2014. To date, no supplement has been filed with the Appeals Board, and the Department's request for review is devoid of any citations to the record.

In the request for review, the Department submits additional information and documents that were not presented at the Appeals Board hearing. On review, this Board confines itself to the record established at the Appeals Board hearing and elects not to allow the introduction of additional information, unless it can be shown that such information could not have been presented at the Appeals Board hearing with the exercise of due diligence, or unless the facts of the case establish some unusual circumstances that would justify supplementing the record and deciding the case on a new record. This record does not establish either ground. Here, the Department had sufficient notice of the issues to be addressed at the Appeals Board hearing to have previously produced the

information now submitted for inclusion in the record. The Appeals Board will not exercise its discretion to supplement this record under the facts of this case.

The Department also refers to a December 16, 2010 Decision of Appeal Tribunal (Bd. Exh. 10) regarding an unemployment insurance benefits claimant, "BW". That decision had nothing to do with the issue of the employment status of the fitness trainers. Regardless, that decision has no precedential value and has no relevance in this matter.

Additionally, the Department contends: "The workers at issue are fitness trainers who provided personal training services at [the Employer's] physical fitness facilities." The Department offers no citations to the record to support this contention, and there is no evidence in the record to support the Department's implication that the Employer actually owned any "physical fitness facilities".

The Department also offers the following sweeping contention:

> At the Board hearing in this matter, the Department presented evidence showing that the fitness trainers performed services for [the Employer] and "were subject to the direction, rule or control of" [the Employer] "as to both the method of performing or executing the services and the result to be effected or accomplished," as required by A.R.S. § 23-613.01 *et al*.

The Department repeats this bald allegation several times throughout the request for review. However, the Department once again fails to cite where any of this purported "evidence" appears in the record, and the Department did not even attempt to describe this purported "evidence". A review of the record reveals that there is no evidence in the record to support the Department's contention that the fitness trainers performed services *for* the Employer. Furthermore, the evidence of record does not even begin to establish the Department's contention that the fitness trainers "were subject to the direction, rule or control of" the Employer "as to both the method of performing or executing the services and the result to be effected or accomplished".

As explained in our prior decision, the only evidence presented by the Department regarding any relationship between the Employer and the fitness trainers was the undisputed fact that the Employer issued the checks to the fitness trainers during the relevant time period. All of the other evidence presented by the Department regarding the concepts of "direction, rule or control . . . as to both the method of performing or executing the services and the result to be effected or accomplished" specifically involves the relationship between the fitness trainers and xxx LLC (hereinafter xxx), a separate entity that the Department acknowledges is not a party to this matter.

In the request for review, the Department contends for the first time that "the Board should find that the fitness trainers were [the Employer's] employees pursuant to A.A.C. § R6-3-1723(G)." Arizona Administrative Code, Section R6-3-1723(G), states: "An individual is an employee if he performs services which are subject to the Federal Unemployment Tax Act or performs services which are required by federal law to be covered by state law." In a response to the Department's request for review, counsel for the Employer addressed the Department's contention regarding Arizona Administrative Code, Section R6-3-1723(G), as follows: "[Arizona Administrative Code, Section R6-3-1723(G)] does not speak to the issue of who an employer is, but addresses an entirely different matter, a criterion for determining employee status." [Emphasis in original] We agree. Code Section R6-3-1723(G) sets forth guidelines for determining whether "an individual is an employee". However, that Code Section is silent regarding what entity would be deemed the "employer" of such an "employee".

In our prior decision, the Board concluded 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 has not presented sufficient evidence or argument to refute the Board's conclusion.

The Department's only remaining contention involves the position the Department took at the Appeals Board hearing, wherein the Department clearly and unequivocally acknowledged that the only reason the Department determined that the Employer, rather than another entity such as xxx, was the purported "employer" of the fitness trainers was that the Employer had issued the checks to the fitness trainers (Tr. pp. 41, 50, 96-98, 200, 204). As counsel for the Department stated:

> 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).

In the request for review, the Department contends: "The Department believes that [the Employer] employed fitness trainers during the audit period because [the Employer] paid the fitness trainers' wages." In support of this contention, the Department now cites 26 U.S.C. § 3401(d)(1), from the Internal Revenue Code, which states:

> For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that –
>
> > (1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term "employer" (except for purposes of subsection (a)) means the person having control of the payment of such wages ...

Although the Department uses the term "wages" in the request for review, which implies the existence of a common law employer/employee relationship, the Department fails to mention that the provisions of 26 U.S.C. § 3401(a), which defines "Wages", and 26 U.S.C. § 3401(d), which defines "Employer", only apply when a common law employer/employee relationship has, in fact, been established between the worker and the entity for whom the worker performed services. There has been no such showing here.

It is undisputed that the fitness trainers performed services for xxx, not for the Employer. Therefore, before the exception set forth in 26 U.S.C. § 3401(d)(1) can even become relevant, it must be established that a common law employer/employee relationship existed between the fitness trainers and xxx. By the Department's own admissions, that has not been established by the evidence of record. First, xxx is not a party to this matter. Second, although the vast majority of the evidence presented by the Department involved the relationship between the fitness trainers and xxx, the Department went to great lengths to unambiguously state that the Department was not alleging that xxx was the employer of the fitness trainers. As counsel for the Department clearly acknowledged at the Appeals Board hearing: "[The Department is] not making any allegations as far as [xxx] as the employer" (Tr. p. 173) and "We're not dealing with [xxx] – [the Department is] not making any allegations as far as [xxx]" (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 [xxx]" (Tr. p. 72).

The Department failed to establish by the evidence of record that a common law employer/employee relationship existed between the fitness trainers and xxx during the relevant time period set forth in the April 30, 2010 Determination of Liability for Employment or Wages, primarily because the Department admitted that it was not alleging that such a relationship existed.

This alone causes the Department's contentions regarding the applicability of 26 U.S.C. § 3401(d)(1) to fail.

However, even if the Department had established that a common law employer/employee relationship existed between the fitness trainers and xxx during the relevant time period, the Department's contention that the provisions of 26 U.S.C. § 3401(d)(1) transform the Employer into the "employer" for unemployment insurance purposes fails. Here, there is no dispute that the Employer, and not xxx, issued the checks to the fitness trainers. The applicability of 26 U.S.C. § 3401(d)(1) hinges on the meaning of the phrase "control of the payment of the wages", which is open to any number of interpretations.

Just as the Department cited to the Code of Federal Regulations in its request for review, the Board will look to the Code of Federal Regulations to shed further light on the question of what constitutes "control of the payment of the wages" under 26 U.S.C. § 3401(d)(1). As set forth in the Code of Federal Regulations, 26 C.F.R. 31.3401(d)-1 states, in pertinent part:

> (a) The term "employer" means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person.
>
> * * *
>
> (f) If the person for whom the services are or were performed does not have legal control of the payment of the wages for such services, the term "employer" means (except for the purpose of the definition of "wages") the person having such control. For example, where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the "employer."
>
> * * *

It is undisputed that the fitness trainers performed services for xxx, not for the Employer. Therefore, in order for 26 U.S.C. § 3401(d)(1) to apply, the evidence of record must establish that xxx "does not have control of the payment of the wages for such services". There is no such evidence in the record.

At the Appeals Board hearing, Employer witness "WM" testified that the Employer was simply acting as a payroll company for xxx (Tr. pp. 43, 45, 207, 247, 258, 259). The Department presented no evidence to refute that testimony

and presented no evidence to establish that the Employer acted in any role other than simply as a "payroll company". Additionally, the Department presented no evidence to establish that xxx "[did] not have control of the payment of wages" to the fitness trainers. The mere fact that the Employer is the entity that issued the checks to the fitness trainers on behalf of xxx does not establish that xxx did not have "control" over those payments.

The provisions of 26 C.F.R. 31.3401(d)-1(f), which closely mirror the provisions of 26 U.S.C. § 3401(d)(1), are highly instructive on this issue. In 26 C.F.R. 31.3401(d)-1(f), the word "control" is further clarified as "legal control". Additionally, 26 C.F.R. 31.3401(d)-1(f) includes the following example of when the provisions of 26 U.S.C. § 3401(d)(1) would apply: "For example, where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the 'employer.'"

Similarly, the Department's reliance on *Otte v. U.S.*, 419 U.S. 43, 95 S.Ct. 247 (1974), which the Department described in its request for review as having "upheld the legality of 26 U.S.C.A. § 3401(d)", only serves to emphasize the concept of "legal control" set forth in 26 C.F.R. 31.3401(d)-1(f). The *Otte* decision involved a bankruptcy case wherein the debtor common law employer had lost legal control over the payment of wages to its employees to the bankruptcy trustee, which made the trustee the "employer" under 26 U.S.C. § 3401(d)(1).

It is clear that 26 U.S.C. § 3401(d)(1) was created to address the unusual situations when a common law employer, through some legal mechanism, has lost "legal control" over the payment of wages to its employees. The Department presented no evidence to show that xxx, the entity for whom the services were performed, ever lost "legal control" over the payments made to the fitness trainers, through bankruptcy or any other means. The Board finds that the Department's contention that 26 U.S.C. § 3401(d)(1) transformed the Employer, who simply issued checks to fitness trainers who performed services for xxx, into the "employer" of the fitness trainers lacks merit. To find otherwise would lead to the absurd result that any payroll company that simply issued checks on behalf of a common law employer would automatically become the "employer" of the common law employer's employees for unemployment insurance purposes, regardless of the viability or legal status of the common law employer. Such a position is untenable.

As explained in our prior decision, 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 xxx during that period. However, as the Department conceded at the Appeals Board hearing, xxx is not a party to this matter, and the

Department is "not making any allegations as far as [xxx] as the employer" (Tr. p. 173). The Department further acknowledged that the only factor it used to conclude that the Employer, rather than xxx or any other entity, was the purported "employer" in this matter, was the fact that the Employer had written the checks to the fitness trainers (Tr. pp. 41, 50, 96-98, 200, 204).

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 xxx, a separate corporate 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, and the Department failed to carry its burden of proving that the fitness trainers were employees of the Employer, as alleged in the April 30, 2010 Determination of Liability for Employment or Wages and the Department's December 18, 2012 Reconsidered Determination letter.

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 **DEPARTMENT** 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: 6/17/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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 the foregoing was mailed on 6/17/2014 to:

Er: xx Acct. No: xx-000

(x) Er Counsel: xx

(x) ELI D GOLOB
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(x) LULU GUSS, CHIEF OF TAX
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PHOENIX, AZ 85005-6028

By: ____RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1404273-001-BR

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Employer

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DECISION
DISMISSED

The **EMPLOYER** requests review of the Appeals Board decision issued on October 29, 2013, which affirmed the Department's decision letter dated March 6, 2013. The Department's March 6, 2013 decision letter held that because the Employer's petition for reassessment was filed late, the two Notices of Estimated Assessment issued by the Department on February 15, 2012, remain in full force and effect.

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case.

Arizona Revised Statutes § 23-672(F) states in pertinent part:

> A party dissatisfied with the decision under subsection E of this section may file a request for review within thirty days from the date of the decision, which shall be a written or electronic request and memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. On motion, and for good cause, the appeals board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal. ... [Emphasis added].

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

* * *

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].

Our previous decision included the following cautionary instructions:

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 NOV 29 2013.

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. ...

The record reveals that a copy of our previous decision was sent by mail on October 29, 2013, to the Employer's last known address of record. To be timely, a request for review of that decision had to be filed by November 29, 2013. Neither a request for review, nor a request for an extension of time to file the request for review, was filed by that date. The request for review was filed, on December 3, 2013, as indicated by the Department's date received stamp.

In the request for review, the Employer has offered no explanation for filing a late request for review. Instead, the Employer addresses the underlying issue regarding the Notices of Estimated Assessments for Delinquent Reports that were issued by the Department on February 15, 2012. The issues regarding the Notices of Estimated Assessments for Delinquent Reports are not properly before the Board because the Employer has not filed a timely request for review of our prior decision. The timely filing of a request for review is jurisdictional and is a prerequisite to further review of the underlying issue in this case.

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 request for review timely filed. Therefore, the Employer has failed to meet the statutory requirements for review. Accordingly,

THE APPEALS BOARD **DISMISSES** the request for review. The Appeals Board decision issued on October 29, 2013, remains in full force and effect.

DATED:

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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: xx
Acct. No: xx-000

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

(x) LULU B GUSS
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-1435160-001-B

---

xx

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
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.

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 ***** June 2, 2014 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on November 21, 2013, which held that the Determination of Liability for Employment or Wages dated September 11, 2013, is final because the Employer's request for reconsideration was not filed within the 60-day appeal period.

The Employer filed a timely petition for hearing to the Appeals Board. The Appeals Board has jurisdiction to consider this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **April 24, 2014**. 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 written request for reconsideration of the Determination of Liability for Employment or Wages dated September 11, 2013.
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, two Employer witnesses 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 the facts pertinent to the issue before us and necessary to our decision are:

1. On September 11, 2013, 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 determination was delivered to the Employer on September 13, 2013 (Bd. Exh. 2).
3. On November 14, 2013, the Employer mailed its request for reconsideration (Bd. Exh. 3). The request for reconsideration was filed more than 60 days after the September 11, 2013 Determination of Liability for Employment or Wages, because the Employer witness, Ms. H, was waiting for her husband to help her correct some errors on the determination. When her husband finished, the appeal deadline had already passed.
4. On November 21, 2013, 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 60 days, the

Determination of Liability for Employment or Wages dated September 11, 2013, had become final (Bd. Exh. 4).

5. The Employer filed a petition for hearing on December 11, 2013 (Bd. Exh. 5).

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 sixty 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:
>
> 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. <u>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.</u>
>
> 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 September 11, 2013, 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 determination was delivered to the Employer on September 13, 2013 (Bd. Exh. 2). The Employer witness, Ms. H, testified that the Employer's request for reconsideration was filed late because she was waiting for her husband to help her correct errors on the determination, and when her husband finished, the appeal deadline had already passed.

Under the provisions of Arizona Administrative Code, Section R6-3-1404(B), the only reasons that will allow this Board to consider the Employer's request for reconsideration as timely filed include: 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 reason provided by the Employer for its late request for reconsideration does not support a finding that the Employer's late request 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 the Employer to notify the Department of the address change. As a result, 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 November 21, 2013.

The Employer did not file a timely written request for reconsideration within the statutory time period allowed.

The Determination of Liability for Employment or Wages dated September 11, 2013, remains in full force and effect.

DATED: 5/2/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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

A copy of the foregoing was mailed on 5/2/2014
to:

(x) Er: xx Acct. No: xx-000

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

(x) LULU GOSS, 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-1413577-001-BR

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xx

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

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.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** June 30, 2014 *****.

DECISION
AFFIRMED UPON REVIEW

THE **EMPLOYER** requests review of the Appeals Board decision issued on September 30, 2013, which affirmed the Department's decision letter dated June 14, 2013, and held that, because the Employer's request for reconsideration was filed late, the Determination of Liability for Employment or Wages [hereinafter "the Determination"] dated December 7, 2012, remains in full force and effect.

The request for review 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 submits additional information that was not presented at the Appeals Board hearing. On review, this Board confines itself to the record established at the Appeals Board hearing and elects not to allow the introduction of additional information, unless it can be shown that such information could not have been presented at the Appeals Board hearing with the exercise of due diligence, or unless the facts of the case establish some unusual circumstances that would justify supplementing the record and deciding the case on a new record. This record does not establish either ground. Here, the Employer had sufficient notice of the issues to be addressed at the Appeals Board hearing to have previously produced the information now submitted for inclusion in the record. The Appeals Board will not exercise its discretion to supplement this record under the facts of this case.

Additionally, the Employer contends that it "is also adding a new witness", whom the Employer identifies as "AW". From this we infer an expectation on the part of the Employer that another hearing will be held to take additional testimony. The time to present evidence was at the August 16, 2013 Appeals Board hearing. AW did not appear at the Appeals Board hearing, and the Employer has offered no explanation for why it chose not to call AW as a witness at that hearing. On review, the Appeals Board elects to hold another hearing and supplement the record only when the record is incomplete. Our examination of the record shows the record is complete and another hearing is not justified.

In the request for review, the Employer does not rely upon, or cite to, the evidence of record. The Employer does not cite any legal authorities and does not ascribe any specific error to the Appeals Board. Instead, the Employer simply offers the following sentence, which generally reiterates the Employer's primary contention from the Appeals Board hearing, that the late filing of the Employer's request for reconsideration was caused because Department employee "DD" purportedly "misinformed" the Employer: "Evidence had been previously submitted that [DD] misinformed [the Employer's president, "BK"] of the dollar amount stating that the total dollar could be lowered to as little as $10,000.00 giving [BK] the impression that the state would work with [the Employer] in this matter."

As explained in detail in the Board's prior decision, the Employer failed to prove this contention by the evidence of record. In his July 2, 2013 petition for hearing, and in his testimony at the Appeals Board hearing, BK made various allegations regarding DD, and alleged that the late filing of the request for reconsideration was caused by "misinformation" provided to him by DD (Tr. pp. 40-43, 45; Bd. Exhs. 5A-C). At the Board hearing, DD credibly and consistently

denied BK's allegations, and testified that she did not give any misinformation to BK (Tr. pp. 16-18, 24, 25, 53-56). The Employer failed to bring forth sufficient credible evidence to refute DD's denials and to prove its allegations. As a result, the Employer has failed to prove this contention by the evidence of record.

The credible and probative evidence of record establishes that the Determination was mailed to the Employer's correct mailing address of record on December 7, 2012, and further establishes that the Employer received the Determination on December 10, 2012 (Tr. pp. 29, 30, 37, 38; Bd. Exhs. 1, 2). The Employer bears the burden of proving that the late filing of its request for reconsideration should be excused under Arizona Administrative Code, Section R6-3-1404(B). The Employer failed to prove that the late filing of its request for reconsideration was caused by Department error or misinformation, by delay or other action by the United States Postal Service, or by a change of address by the Employer at a time when there would have been no reason 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. As explained in detail in the Board's prior decision, the evidence shows that the Employer's actions alone were the sole and proximate cause of the late filing of the Employer's request for reconsideration.

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 request for reconsideration 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: 5/29/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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 the foregoing was mailed on 5/29/2014 to:

(x) Er: xx Acct. No: xx-000

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

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

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1426094-001-B

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xx

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 --- 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.

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

*****July 18, 2014*****.

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 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: 6/18/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

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.

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.

A copy of the foregoing was mailed on 6/18/2014 to:

(x) Er: xx Acct. No: xx-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
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(x) LULU B GUSS, 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-BR

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xx

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 --- 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 --- 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.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** July 17, 2014 *****.

DECISION
AFFIRMED UPON REVIEW

THE **EMPLOYER** requests review of the Appeals Board decision issued on June 11, 2013, which affirmed, but modified to remove any reference to services performed by Executive Producers, the Reconsidered Determination issued by the Department on May 11, 2012, and held:

> 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.

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

A majority of the Employer's request for review consists of information and documents that were not presented at the Appeals Board hearing. On review, this Board confines itself to the record established at the Appeals Board hearing and elects not to allow the introduction of additional information, unless it can be shown that such information could not have been presented at the Appeals Board hearing with the exercise of due diligence, or unless the facts of the case establish some unusual circumstances that would justify supplementing the record and deciding the case on a new record. This record does not establish either ground. Here, the Employer had sufficient notice of the issues to be addressed at the Appeals Board hearing to have previously produced the information now submitted for inclusion in the record. The Appeals Board will not exercise its discretion to supplement this record under the facts of this case.

In the request for review, the Employer offers the following contention:

> Further, [the Employer] requests that RB's testimony be re-instated [sic]. [The Employer's] exhibit (1) will show that Ms. [C] lists an EIN. [The Employer] asks if this reason of a listed EIN excludes RB's testimony, then MS. [sic] [C's] testimony be [sic] should be stricken as well.

This contention has no merit. Irrespective of the fact that this passage includes information that was not presented at the Appeals Board hearing, and that is not a part of the evidence of record, we infer the Employer is referring to Employer witness "RB", who testified at the Appeals Board hearing, and to Editor "TC", who did not testify at the hearing. First, RB's testimony was never "excluded" from the record, so there is no need to "re-instate" RB's testimony. Second, Editor TC did not testify at the Appeals Board hearing. Therefore, there is no "testimony" from Editor TC to "strike" from the record.

Additionally, as explained in our prior decision, the Employer testified at the Appeals Board hearing 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). The Employer also admitted that no other payments for services were paid to companies, but instead were paid directly to individuals, which would include Editor TC (Tr. pp. 21, 22, 56, 57).

The Employer also offers the following contention regarding a purported "unnamed witness" at the Appeals Board hearing:

> The Departments [sic] Appeals Board Telephone hearing held on October 17, 2012, states that an unnamed witness testified for the Department against [the Employer]. This unnamed witness was unknown to [the Employer] during the hearing when this witness testified on page 12, item 1. ...
>
> [The Employer] now alleges that the Appeals Board violated [the Employer's] 6th, and 14th amendment rights when the Appeals Board failed to disclose the fact that an unnamed witness was present and testifying for the Department at the hearing. ...

The Board is at a loss to comprehend this contention. There was no "unnamed witness" at the Appeals Board hearing. The Department had one witness, "CC", testify at the hearing. CC was named, on the record, by the Administrative Law Judge in the opening seconds of the hearing (Tr. p. 1), was named again when the Administrative Law Judge identified the persons who were present at the hearing (Tr. p. 5), was named again when CC was sworn in along with the Employer (Tr. p. 13), was named again when CC was called to testify (Tr. p. 58), and was named yet again when the Administrative Law Judge asked the Employer if he had any questions for CC on cross-examination (Tr. p. 72). Finally, the Employer actually referred to CC *by name* when the Employer finished his attempted cross-examination of CC and stated: "So, uh, I have no more further questions for Mr. [CC]" (Tr. p. 73). This contention regarding an "unnamed witness" that was "unknown" to the Employer during the hearing has no merit.

The Employer does not cite any legal authorities in his request for review, other than a vague reference to "Supreme Court decisions on independent contractors". The Employer, however, does not actually cite any Supreme Court decisions, or any other legal authorities, to support any argument to reverse the Board's prior decision.

Furthermore, unlike the Board's prior decision, which is replete with specific, detailed citations to the record and legal arguments supporting the Board's decision, the Employer has not offered any citations to the record or any discernable legal arguments specifically contesting the Board's assessment of the applicable factors. Instead, in the few portions of the request for review that even appear to address the legal issues at hand, the Employer only offers a mélange of personal opinions, rhetorical questions, and information not included in the evidence of record.

The Employer has presented nothing of probative value in his request for review that would cause the Board to reconsider any portion of our prior decision. 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, Section R6-3-1723, and case law, to the facts in this case and found the services performed by individuals as Writers, Talent, and Editors 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, 2007 through December 31, 2008.

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 Writers, Talent, and Editors 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: 6/17/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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 the foregoing was mailed on 6/17/2014
to:

(x) Er: xx Acct. No: xx-000

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

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

By: _RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1422116-001-B

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xx

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
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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) 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.

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 *******

July 7, 2014 ***.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on March 27, 2013, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued on May 5, 2011.

The Employer's petition was dated and filed on September 20, 2013. 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 May 13, 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 petition for a hearing from the Department's Reconsidered Determination letter dated March 27, 2013.

2. Whether the Department's March 27, 2013 Reconsidered Determination letter became final during the interim period before the Employer filed a written petition for a hearing.

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 8 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 March 27, 2013 Reconsidered Determination 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:

a. An employing unit constitutes an employer (A.R.S. § 23-724);

The record reveals that the Department's Reconsidered Determination was sent by certified mail on March 27, 2013, to the Employer's last known address of record (Bd. Exh. 4). The letter was returned to the Department's mailing address because the Employer's United Parcel Service (U.P.S.) postal box had been closed (Bd. Exh. 6A). The petition to the Appeals Board was filed on September 20, 2013 (Bd. Exh. 7), more than 30 days from the date of the Department's Reconsidered Determination. The petition, therefore, was not filed within the statutory time.

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.

On May 5, 2011, the Department issued a Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages to the Employer's address of record (Tr. pp. 12, 13; Bd. Exhs. 1, 2). The Employer timely appealed the determinations on May 13, 2011 (Tr. p. 14; Bd. Exhs. 3A, 3B).

On June 23, 2011, the Employer submitted a Report of Change form to the Department to change the business address from West Elm Street in Phoenix, Arizona, to an address on Indian School Road in Goodyear, Arizona (Tr. p. 15). The Department received the Employer's Report of Change form and properly updated the Employer's address of record.

On March 27, 2013, the Department issued its Reconsidered Determination which affirmed the May 5, 2011 Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages (Bd. Exhs. 4A-4F). The Reconsidered Determination was mailed to the Employer's address of record that was updated on June 23, 2011 (Bd. Exhs. 4A-4F). On April 1, 2013, the Reconsidered Determination was returned to the Department with a stamp from the post office which indicated that the mailbox was closed and that the item could not be forwarded (Tr. pp. 17, 23, 24; Bd. Exhs. 5, 6A). On September 20, 2013, the Employer appealed the March 27, 2013 Reconsidered Determination (Tr. pp. 18, 19; Bd. Exhs. 7A-7Q). The Employer's appeal listed a new address for the Employer on Bullard Avenue in Goodyear, Arizona (Bd. Exh. 7A).

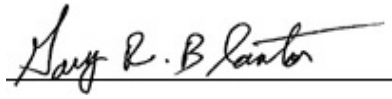
During the Appeals Board hearing, the Employer's witness testified that he opened the U.P.S. postal box in 2011 (Tr. p. 31). The Employer prepaid for the postal box and it remained open for one year (Tr. p. 31). Although the Employer's witness testified that he filed a subsequent Change of Address form with the Department, he did not provide evidence to substantiate his claim (Tr. pp. 32, 39). The Department's witness testified that the Department was not notified that the Employer changed its address from the postal box until the Department received the Employer's September 20, 2013 appeal (Tr. pp. 40, 41; Bd. Exh. 7).

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,

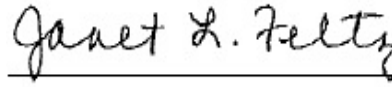
THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing. The Department's Reconsidered Determination issued March 27, 2013, remains in full force and effect.

DATED: 6/5/2014

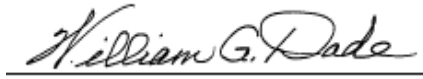
APPEALS BOARD



GARY R. BLANTON, Chairman



JANET L. FELTZ, Member



WILLIAM G. DADE, Member

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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.

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

A copy of the foregoing was mailed on 6/5/2014 to:

(x) Er: xx
Acct. No: xx-000

(x) ELI D GOLOB
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P O BOX 6028
PHOENIX, AZ 85005-6028
SITE CODE 911B

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1351495-001-BR

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xx

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
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Employer

Department

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.

DECISION
AFFIRMED UPON REVIEW

The **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on May 2, 2013, which affirmed the Department's Reconsidered Determination dated April 11, 2012, and held that the December 12, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES remains in full force and effect because the Employer filed a late request for reconsideration.

The request for review 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 e-mailed copy of the Determination of Liability for Employment or Wages does not constitute a valid determination which "triggered" the need for an appeal

within 15 days because the determination was not served on the Employer personally or by certified mail pursuant to A.R.S. § 23-724. The December 12, 2011 Determination of Liability for Employment or Wages was initially sent by certified mail, and, according to the records kept by the post office, the certified letter was delivered on December 21, 2011 (Bd. Exh. 2). However, the Employer never received the determination by mail (Tr. pp. 19, 27). Based on the testimony of the Employer witnesses, this Board determined that the December 12, 2011 Determination of Liability for Employment or Wages was not received by the Employer due to postal error. The Department re-mailed the determination on January 19, 2012, and unsuccessfully attempted to fax it to the Employer (Tr. pp. 76, 77). The Employer did not receive the re-mailed determination or the faxed copy.

Despite not receiving the Determination of Liability for Employment or Wages by mail, the Employer was aware that the determination was forthcoming because the Employer had been in contact with the Department employee, who conducted the audit, about the determination. Accordingly, the Employer was on notice that a Determination of Liability for Employment or Wages would be forthcoming. Because the Employer was having postal problems and never received the Determination of Liability for Employment or Wages by mail, the same Department employee, e-mailed a PDF file of the Determination of Liability for Employment or Wages to the Employer's acting general manager, Ms. L, on January 26, 2012 (Tr. pp. 77, 80, 81). The Department employee told Ms. L that the Employer needed to promptly file an appeal because it was already late (Tr. p. 77). Ms. L testified that she received the e-mail from the Department employee, and she sent the e-mail to the Employer's attorneys (Tr. p. 39). Accordingly, the Employer became aware of the December 12, 2011 Determination of Liability for Employment or Wages on January 26, 2012. As a result, we conclude that the e-mailed copy of the determination was a valid determination that "triggered" the need for an appeal, especially considering the Employer was aware that it was coming. The manner of delivery was modified due to postal problems the Employer claimed that it was experiencing.

In addition, the Employer's counsel has never provided a reason why an appeal was not filed until more than eight weeks after it was received by the Employer's counsel. Further, it is unclear why the Employer's counsel decided to file an appeal at all, if he believed that the e-mailed determination was not a valid determination that "triggered" the need for an appeal.

The Employer's counsel also contends that the e-mailed determination was not official because it was not signed. However, A.R.S § 23-724 does not require a determination to be signed in order to be valid or official.

The Employer's counsel further contends that the e-mailed copy of the Determination of Liability for Employment or Wages does not constitute a valid determination which "triggered" the need for an appeal within 15 days because

the Employer did not consent in writing to personal service by electronic transmission. In support of this contention, the Employer's counsel cites A.R.S. § 23-724(J), which states in pertinent part that a determination may be served by electronic means if the party being served consents in writing to service by electronic means. However, A.R.S. § 23-724(J), was not in effect during the time frame at issue, and is therefore, not applicable. A.R.S. § 23-724(J) did not become effective until March 2012. Further, the revised statute does not make mention of A.R.S. § 23-724(J) being retroactive.

The issue properly before the Board is whether the Employer's request for reconsideration was filed on time.

In its prior decision, the Appeals Board made its own findings of fact and used its own reasoning and conclusions of law. In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. § 23-724, and Arizona Administrative Code, Section R6-3-1404, to the facts in this case and found that the Employer did not file a timely request for reconsideration within the statutory time period allowed.

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 (Tr. p. 15; Bd. Exh. 1). The Employer never received the Determination of Liability for Employment or Wages by mail (Tr. pp. 19, 27). As noted in the Board's prior decision, the Employer did not receive the Determination of Liability for Employment or Wages by certified mail due to postal error.

On January 19, 2012, the Department re-mailed the Determination of Liability for Employment or Wages to the Employer's address of record, but the Employer again did not receive it due to postal error (Tr. pp. 76, 77). The Department employee, who conducted the investigation, also unsuccessfully attempted to fax the Determination of Liability for Employment or Wages to the Employer (Tr. p. 77). Finally, on January 26, 2012, the same Department employee e-mailed a PDF file of the Determination of Liability for Employment or Wages to the Employer's acting general manager, Ms. L (Tr. pp. 77, 80, 81). Ms. L testified that she received the e-mail from the Department employee, and she sent the e-mail to the Employer's attorneys (Tr. p. 39). Accordingly, the Employer had actual knowledge of the contents of the December 12, 2011 Determination of Liability for Employment or Wages on January 26, 2012.

The Determination of Liability for Employment or Wages contained appeal rights, which stated, "This determination becomes **FINAL** unless written request for reconsideration is filed with this Department at the above address within fifteen (15) days after the date of this determination as provided in A.R.S. §23-724" (Bd. Exhs. 1 & 3). In the Board's prior decision, it was determined that the Employer's appeal period began on January 26, 2012, the date the Employer

actually received the Determination of Liability for Employment or Wages. The Appeals Board made this decision because the Employer was experiencing several problems receiving its mail in December 2011 and January 2012.

The Employer, through counsel, filed its request for reconsideration on March 23, 2012 (Bd. Exh. 3). In accordance with the version of A.R.S. §23-724 in effect during December 2011 and January 2012, the Employer's request for reconsideration was due by February 10, 2012. Therefore, the Employer's request for reconsideration was not filed on time. In its request for reconsideration and petition for hearing, the Employer, through counsel, made several procedural arguments intended to invalidate the Determination of Liability for Employment or Wages because it was received by e-mail. The Employer's counsel, however, does not provide an explanation regarding why a request for reconsideration was not filed until more than eight weeks after the Employer's counsel received the Determination of Liability for Employment or Wages.

As noted in the Board's prior decision, 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. The Employer and its counsel received the Determination of Liability for Employment or Wages on January 26, 2012. However, no steps were taken to file a request for reconsideration until March 23, 2012. The Employer was also on notice that the determination was forthcoming because of previous conversations with the Department employee, and the Employer was told on January 26, 2013, that an appeal needed to be filed promptly.

Under Arizona Administrative Code, Section R6-3-1404(B)(3), we find that the Employer's more than eight-week delay from January 26, 2012 to March 23, 2012, was unreasonable. Therefore, the Employer's written request for reconsideration was not timely filed. Accordingly,

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

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

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 the foregoing was mailed on
to:

(x) Er: xx Acct. No: xx-000

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

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

By: _____
For The Appeals Board

4th QUARTER OF
CALENDAR YEAR 2014

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1401663-001-B

****	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
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.

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 ***** December 8, 2014 *****.

DECISION
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

THE **EMPLOYER,** through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on November 30, 2012, which held in part as follows:

> ... the services performed by the instructors were correctly determined to constitute employment and all remuneration paid for such services constitutes wages.
>
> Accordingly, this Reconsidered Determination affirms the Determination of Liability for Employment or Wages issued December 30, 2010 ...

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 proper notice to the parties, a telephone hearing was convened before **ROBERT T. NALL,** an Administrative Law Judge, on **December 12, 2013**. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination's affirmation of the December 30, 2010 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by specified individuals as "Instructors" constitute "employment", as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as "Instructors" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "Instructors" performed work that is exempt or is excluded from Arizona Unemployment Insurance 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 Unemployment Tax purposes.
5. Whether any of the individuals performing services as "Instructors" factually and legitimately were independent contractors for the quarters ending: March 31, 2009; June 30, 2009; September 30, 2009; or December 31, 2009.

Board Exhibits 1 through 10 were admitted into evidence. One witness testified for the Department, which was represented by counsel. Two witnesses testified for the Employer, which also was represented by counsel.

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

1. Since 1993, the Employer has operated its business from Arizona. The organization provides environmental and safety compliance training, much of which is mandated by government agencies. The curriculum subject matter is defined by the government agencies (Tr. pp. 50, 51, 58, 65, 70).
2. At the hearing, the Employer's owner and CEO acknowledged her company had eleven employees, including three full-time staff instructors and two part-time staff instructors. These staff instructors are subject-matter experts who develop their own materials. The Employer provides its staff instructors with

equipment such as cellphones and computers and projectors, plus classrooms, training, liability insurance, and auto insurance. The Employer establishes the schedules for staff instructors, from whom personal performance is required (Tr. pp. 51-53).

3. Since 2009, the Employer had occasional need for additional expert technical instructors in specific subject areas, including certain certifications for which staff instructors lacked credentials. The Employer developed "a pool of individuals with specialized areas of expertise". Three individuals taught client classes since 2009, on a project basis at rates of pay set by the individuals upon minimal negotiation with the Employer. Some of these non-staff instructors required expense reimbursement in their contracts, for which they submitted invoices. None of the three non-staff instructors received training or equipment from the Employer. Instead, each used their own computer or display materials (Tr. pp. 53-56, 60-62, 74; Bd. Exhs. 3, 4E).

4. The three non-staff instructors were allowed to reject an assignment opportunity without negative consequences, to provide substitutes, to set their own classroom schedules, to prepare their own curriculum and instructional aids, and to work elsewhere whenever they wished. Each had a separate consulting contract with the Employer, and each was allowed to cease their work at any time. (Tr. pp. 53-57, 66, 68, 77, 80-82; Bd. Exhs. 4, 6).

5. Among the three non-staff instructors, Mr. "E" is a retired Graduate Mine Engineer who also trained for other companies, and the Employer paid him $17,480 during 2009. Mr. "B" worked full-time for another company, and the Employer paid him $15,319 during 2009. Ms. "K" owned and operated her own separate business, and the Employer paid her $23,777 during 2009. Each of these instructors taught classes for the Employer in all four quarters of 2009 (Tr. p. 66; Bd. Exh. 3B).

6. One of the contracted non-staff instructors cancelled a class due to conflict of interest issues, without the penalty to which a staff instructor would have been subject (Tr. pp. 69, 75).

7. Following an audit process, the Department concluded that all instructors were employees and all remuneration paid was wages. The Department assessed wages for three contracted instructors named "E", "B", and "K". The Employer filed a timely request for reconsideration, and the Employer filed a timely petition for hearing following the Department's reconsidered determination.

The Employer contends that three of its instructors were independent contractors and not its employees, and that remuneration paid to these three workers was not wages. Their employment status, and whether their pay

constituted wages, remains in dispute in this case. However, the Employer expressly acknowledged that five other instructors are members of its staff, and have always been considered employees. We conclude that these staff instructors are not at issue because their employment is not contested.

Arizona Revised Statutes § 23-613.01(A) and (E) provide 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 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.
>
> 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.
>
> * * *
>
> E. 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 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.

   (b) The service is not localized in any state but some of the service is performed in this state and:

      (i) The individual's base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled is in this state, or

* * *

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. [Emphasis added].

We analyze the circumstances of the three individual "non-staff instructors", who served as substitutes or expert technical trainers for classes that the staff instructors could not conduct. Each had a contractual relationship with the Employer, which required payments on a project basis and called for payment after receipt of invoices to the Employer, in order to reimburse "Travel time and expenses". These individuals needed to submit an expense report plus receipts for travel or training expenses (Bd. Exh. 6). Regarding the three non-staff instructors, the Department's witness relied on the Employer's designation of class times and location, and a wage history (Tr. pp. 21, 22, 40). However, he had no particular rebuttal for the evidence, which included testimony by the owner and from one of the contracted instructors.

From the credible and probative evidence of record, we conclude that the instruction services do not qualify as "exempt employment" listed in A.R.S. § 23-613.01(E) and Arizona Administrative Code, Section R6-3-1723(C), largely because teaching certification classes was the business activity of the Employer and the involvement was too extensive to be considered "isolated or occasional transactions". We conclude from the evidence that these instruction services are not solely subject to a provision of law regulating the organization, trade or business as specified in Arizona Administrative Code, Section R6-3-1723(B)(2). The Employer's contentions, however, bring into issue whether the services of the three contracted instructors were excluded from the definition of "Employee" by qualifying as an "independent contractor" relationship, pursuant to A.R.S. § § 23-613.01(A)(1) and Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires consideration of the statutes cited above, plus the factors specified in Arizona Administrative Code, Section R6-3-1723(A), (D), and (E).

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 as: (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 for determining whether an individual may be an independent contractor are enumerated in Arizona Administrative Code, Section R6-3-1723(E), as follows: (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.

We apply the guidelines of Arizona Administrative Code, Section R6-3-1723(D)(2), by the following analysis:

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 by the non-staff instructors. However, no evidence was presented that any helpers were utilized by any of the non-staff instructors. 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 evidence establishes that the Employer neither sought nor exercised any right to instruct or direct “when, where, or how” the non-staff instructors did their work. The clients' needs dictated this aspect, and the non-staff instructors were asked whether proposed class dates fit their schedule. No evidence established that the Employer was responsible to the clients for satisfactory completion of the classroom work. The Employer did not control “when, where or how” the classes were conducted by the non-staff instructors, and did not monitor or control the content. This factor indicates an independent, contractual 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.

Nothing indicates that the non-staff instructors were required to submit any reports beyond an invoice with receipts to be reimbursed. The absence of any reporting requirement to the Employer is indicative of an independent contractor billing for vendor services. This factor shows absence of control, and indicates an independent contractor 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.

The evidence establishes that safety certification classes were conducted both at the Employer's facilities and at client premises. Nothing indicates that the Employer required a particular commercial location. This factor is neutral.

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.

Testimony established that the Employer did not tailor or pre-select any particular assignments. Curriculum was mandated by government agencies, and instructors were sought for their peculiar experience and expertise to fill a client request (Tr. pp. 55-57, 81-85). Further, the contract did not prohibit substitution (Tr. p. 79). This factor shows minimal control, and indicates an independent 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.

The Employer did not establish any work sequence. Non-staff instructors differed from staff instructors because their work was not monitored by the Employer. This freedom shows an absence of control, and indicates independence.

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.

We conclude the "Consulting Contract" expresses an intent to perform services "... on a requested and agreed upon basis", rather than to document substantial negotiations between the parties. No employee benefits such as paid leave, insurance, grievances, or medical coverage were provided. No penalty for early termination is stated (Bd. Exh. 6), which is more typical of employment. Overall, the silence regarding rights to terminate is neutral.

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 the right of an independent worker.

The non-staff instructors were allowed to accept or reject, or to reschedule, a particular class without further input from the Employer. No set hours were required. One non-staff instructor even cancelled a class at the scheduled time, without penalty. This factor shows an absence of control, and indicates independence.

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.

Nothing establishes that the Employer provided any training to the non-staff instructors, who already had extensive expertise in their fields. This factor shows an absence of control, and indicates independence.

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 Employer did not require any of the non-staff instructors to work full time. Rather, the Consulting Contract stated: "There will be no expectation of full time employment under this contract; all work will be scheduled based on client needs and your availability combined" (Bd. Exh. 6). This freedom indicates an independent contractor relationship.

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 Employer provided no course materials to the non-staff instructors, who were expected to use their own computers and materials such as photos and objects. Unless the facility had installed a projector, the non-staff instructors also had to bring a projector. The personal computer and personal experience or certifications clearly comprised the major investments in such enterprise. This factor shows freedom from control and substantial investment by the non-staff instructors, and indicates independence.

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.

Expense reimbursement was expressly contemplated, and the submission of an expense report and receipts for travel or training expenses was required before payment for services (Bd. Exh. 6). These arrangements are consistent with an independent vendor status. This factor shows an absence of control, and indicates independence.

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.

l. Availability to the Public

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

The three non-staff instructors held themselves out as industry experts, but did not necessarily advertise beyond asking for work at meetings and through associations, and carrying business cards (Tr. pp. 81, 83, 85). The Employer clearly expected each non-staff instructor to be working for other enterprises, and did not require the non-staff instructors to disclose such other employment or clientele. The Employer believed the non-staff instructors had other work assignments elsewhere, and the Department presented no evidence to contradict that assumption. Uncontradicted evidence demonstrates that the non-staff instructors had other customers. The arrangement establishes unrestricted freedom to work elsewhere, and indicates independence.

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.

The Employer paid the rates requested by the non-staff instructors, without substantial negotiation. This factor shows absence of control, and indicates an independent relationship.

3. Realization of Profit or Loss

An employee is generally 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 endeavors depends in large degree upon the relationship of income to expenditures.

The success or failure of each non-staff instructor depended upon their own control of time usage in relationship to the requested compensation, since expenses usually were reimbursed (Tr. pp. 80, 86). Meals, car rental, or personal training would cut into profits of a non-staff instructor (Tr. p. 87). None shared in the Employer's profit or loss. This factor shows freedom from control, and indicates an independent 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.

No early-termination penalty was presented. The non-staff instructor testified that he felt professionally obligated to complete each class for which he had contracted (Tr. pp. 85, 86). This lack of an early-termination penalty or a specific term of the agreement shows both lack of negotiations and implicit trust. This factor is essentially neutral because no penalty was negotiated.

5. Significant Investment.

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

As discussed in "k. Tools and Materials" above, each of the non-staff instructors invested in their own training, their own computer, and their class materials. These assets easily could be used by the non-staff instructors at any time for personal or for business purposes, and certainly could be used to work

for other clients. The Employer did not furnish any equipment, but would allow its facilities to be used for classes at the client's convenience. This factor establishes lack of control, and indicates an independent 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.

As discussed in "l. Availability to the Public" above, testimony established that each non-staff instructor was permitted and expected to work for others simultaneously, even in competition with the Employer. No evidence was presented to establish a restriction from working anywhere else. The Department's rationale that "... none of the instructors operated their own independent business" (Bd. Exh. 5F), is contradicted by the testimony and evidence. This factor indicates independence.

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 is the maintenance of their own credentials by each non-staff instructor. A witness testified that he might have to take a refresher course himself, although he was retired (Tr. p. 87). The Department did not address this issue throughout its analysis.

We conclude that no remuneration paid to the non-staff instructors constituted wages. Rather, the evidence establishes that all remuneration was for periodic, upon-request services, and reimbursement of travel or training expenses was contemplated (Bd. Exh. 6).

We cannot affirm the Reconsidered Determination of the Department because of the substantial evidence of an independent contractor relationship relating to the three non-staff instructors. However, the Employer acknowledged that it employed five staff instructors, and the original determination's reference that it "... includes the individuals and amounts shown on the attached Notice of Assessment Report(s) ..." is not expressly an exclusive list (Bd. Exh. 4). Therefore, we affirm in part regarding the staff instructors, who are not specifically identified, and we reverse in part regarding the three non-staff instructors who, during 2009, were independent contractors and not employees. We conclude that remuneration for services by staff instructors were wages by operation of A.R.S. § 23-622(A), but all remuneration to the three non-staff instructors did not constitute wages. We remand because the Department may need to revise its records. Accordingly,

THE APPEALS BOARD **AFFIRMS IN PART** the Reconsidered Determination dated November 30, 2012.

Services performed by staff instructors constitute employment by the Employer. The names included on the Notice of Assessment are not necessarily the only persons affected. Remuneration paid to the staff instructors constituted wages.

THE APPEALS BOARD **REVERSES IN PART** the Reconsidered Determination dated November 30, 2012.

Effective January 1, 2009, services performed by the three non-staff instructors did not constitute employment by the Employer, because the parties had an independent contractor relationship.

None of the remuneration paid to the three non-staff instructors constituted wages.

THE APPEALS BOARD **REMANDS** this matter for further action consistent with this decision.

DATED: 11/7/2014

APPEALS BOARD

Gary R. Blanton

GARY R. BLANTON, Chairman

Janet L. Feltz

JANET L. FELTZ, Member

William G. Dade

WILLIAM G. DADE, Member

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.

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

A copy of the foregoing was mailed on 11/7/2014
to:

Er: **** Acct. No: ****

(x) Er. Rep: ****

(x) Dept. Rep: ELI D GOLOB

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(x) CHIEF OF TAX - EMPLOYMENT ADMINISTRATION
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By: ____RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1392491-001-B

****

STATE OF ARIZONA E S A TAX UNIT
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Employer

Department

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

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 *******

December 15, 2014 ***.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Determination issued on December 4, 2012.

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

THE APPEALS BOARD scheduled a telephone hearing for November 6, 2014, before Appeals Board Administrative Law Judge Morris L. Williams, III. The issue set for the hearing was:

> 1. Whether the increase in the Employer's tax rates for the calendar years 2011 and 2012 were properly calculated.

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 was also present. Because the Employer did not appear at the scheduled Board hearing, a default was entered on the record.

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].

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. The Employer's default means that no evidence was presented to support reversing or modifying the Department's December 4, 2012 Determination. Accordingly,

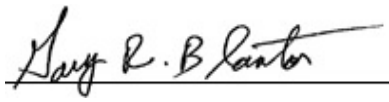
THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing.

The December 4, 2012 Determination remains in full force and effect.

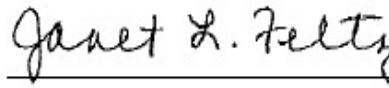
This decision does not affect any agreement entered into between the Employer and the Department.

DATED: 11/14/2014

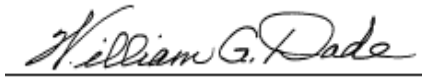
APPEALS BOARD



GARY R. BLANTON, Chairman



JANET L. FELTZ, Member



WILLIAM G. DADE, Member

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.

A copy of the foregoing was mailed on 11/14/2014
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) LULU GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1376182-001-B

****

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
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.

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 *******

January 20, 2015 ***.

DECISION
REVERSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination letter issued on August 6, 2012, which held in part as follows:

> ... we must conclude that [the Corporation] is not an organization operated primarily for religious purposes, as contemplated by A.R.S. § 23-615(6)(d)(i). Consequently, [the Corporation] is liable for Arizona Unemployment

> Insurance taxes as a non-profit 501(C)(3) organization which employed four or more employees. ...
>
> ... this Reconsidered Determination affirms the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued November 18, 2011 ... and will become final unless a written petition for hearing is filed ...

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

Prehearing conferences were conducted on October 10, 2013, and on April 29, 2014. Counsel for both parties attended both prehearing conferences, with witnesses or observers. No testimony was taken. **Board Exhibits 1 through 28** were admitted into evidence without objection. These Board Exhibits in evidence include memoranda submitted by both parties in response to specified questions relating to the hearing issues.

At the direction of the Appeals Board and following proper notice to all parties, a hearing was convened in Phoenix, Arizona before **ROBERT T. NALL,** an Administrative Law Judge on June 26, 2014. At that time, all parties were given an opportunity to present evidence regarding the following issues or contested points, as supplemented by the 12 questions listed in the prehearing conference notices:

1. Whether the August 6, 2012 Reconsidered Determination (Bd. Exh. 6) properly affirmed the November 18, 2011 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY (Bd. Exh. 2), and properly affirmed the November 18, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES (Bd. Exh. 3).
2. Whether a pre-secondary school in Arizona can be an organization operated primarily for religious purposes and, if so, whether the Corporation in this case operates its schools primarily for religious purposes.
3. Whether the Department's currently-applied analysis of the standards applicable to ascertaining whether an organization is operated primarily for religious purposes, is an abuse of discretion when applied, after 2007, to church-affiliated schools based primarily upon the students' grade levels or age.
4. Whether the Corporation is an organization operated primarily for religious purposes at any time from inception to the present, as contemplated by former A.R.S. § 23-615(6)(d)(i).

5. Whether the involvement of the Church in creation and subsequent operation of the school is sufficient to establish that the school is operated primarily for religious purposes.

6. Whether the services performed by individuals as "Teachers, Teacher Aides, Substitute Teachers, Director, IT Personnel and Administrative Assistant" (Bd. Exhs. 2, 3, 6) constitute non-exempt employment, as defined by A.R.S. § 23-615.

7. Whether remuneration the Corporation paid to individuals as "Teachers, Teacher Aides, Substitute Teachers, Director, IT Personnel and Administrative Assistant" constitutes "wages", as defined by A.R.S. § 23-622.

8. Whether any of the individuals performing services as "Teachers, Teacher Aides, Substitute Teachers, Director, IT Personnel and Administrative Assistant" performed work that is exempt or is excluded from Arizona Unemployment Insurance (UI) coverage under A.R.S. §§ 23-613.01, 23-615, or 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 Unemployment Tax purposes.

9. Impact upon exempt employment status of the 501(c)(3) tax exempt status granted to the Corporation by the Internal Revenue Service, and impact of applicable licensure, bonding, or insurance requirements.

10. Whether distinguishing between schools that serve preschool aged children, or K-6 children, from schools that serve junior high, high school, or secondary school students, can be a proper standard for whether workers in such a school can properly receive different treatment regarding exempt employment status of workers and wages paid.

11. Whether the Department's citation (Bd. Exh. 6) to "... exempt employment as provided for under Arizona Revised Statute (A.R.S) § 23-615(6)(d)(i)" is significantly impacted by replacement of that language enacted June 19, 2013, to become the current wording in A.R.S. § 23-615(A)(7) and A.R.S. § 23-615(B)(1).

12. Whether the schools operated by the Corporation include educational and child care services that include religious instruction, and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches as contemplated by A.R.S. § 23-615(b)(1). Further, whether the Corporation is an organization that is operated primarily for religious purposes.

Additional Board Exhibits 29 through 32 were admitted into evidence at the evidentiary hearing, without objection. Counsel for both parties appeared and presented arguments. Two witnesses for the Department testified, and ten witnesses testified on behalf of the Employer.

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

1. The Employer was incorporated in Arizona as a non-profit corporation on March 26, 2003. Its incorporators also were directors or officers of an incorporated Church in Surprise, Arizona, which is a member of a convention or association of churches. The Employer was started or founded by the Church pastor. The Employer is a wholly owned subsidiary of the Church, according to the April 3, 2003 Arizona Joint Tax Application (Tr. pp. 98, 131; Bd. Exhs. 7-9, Bd. Exh. 22/LLL).

2. When incorporated, the Business Type was "EDUCATIONAL" on the Employer's joint application. The Articles of Incorporation specified its purposes (Tr. pp. 132, 196; Bd. Exhs. 7-9, 22/SSS):

> This corporation is organized exclusively for charitable, religious, educational and scientific purposes ... The character of business which the corporation initially intends to conduct will be to provide child care and preschool educational services, including Christian curriculum, in a Christian environment.

3. Upon application by the Employer to be exempt from Form 990 filing requirements, the U.S. Internal Revenue Service issued its January 11, 2011 letter stating its ruling (Bd. Exhs. 5, 22/UUU):

> ... we have determined that you meet the requirements for classification as a school below college level associated with a church as described in section 1.6033-2(g)(1) of the Treasury Regulations. ... you continue to be classified as an organization exempt from Federal income tax under section 501(c)(3) of the Code and classified as a public charity under sections 509(a)(1) and 170(b)(1)(A)(ii) of the Code.

4. Since its inception, the Employer has shared premises with the Church as it operates a preschool and a kindergarten through sixth grade (K-6) elementary school known as a "Christian School". A pilot program for seventh grade was cancelled within one year. The Employer borrowed funds from the

Church to construct or to obtain additional structures adjoining the Church buildings. The classrooms surround the Church sanctuary, so the students can "get into the church" from almost every classroom. (Tr. pp. 85, 97, 111, 118; Bd. Exhs. 5, 6).

5. On August 30, 2012, a trustee who serves both for the Employer and for the Church formally requested an Appeals Board hearing regarding the November 18, 2011 Determination of Liability for Employment or Wages, and the August 6, 2012 Reconsidered Determination. The Employer disputed the Department's assertion that the Employer is not exempt because it is not operated primarily for religious purposes, and specifically disputed the retroactive determination of Unemployment Insurance (UI) tax liability to October 1, 2008 (Bd. Exh. 10).

6. As of September 19, 2003, an investigation by the Department led to its written conclusion "... that the employer is an exempt 6 [in apparent reference to the subsection formerly cited as A.R.S. § 23-615(6)] based upon the fact that it is a preschool solely owned and operated by the church for church members", and incorporated for liability reasons. The Department's reviewer or auditor cited a policy that a separately incorporated organization operated, supervised, controlled or principally supported by a church or convention or association of churches operating as a pre-school not associated with other schools is exempt. Because the Employer previously had reported wages and had paid taxes, the Department cancelled the wage report and refunded the taxes paid. The Employer never "opted in" to become a covered employer, nor to become liable for payments in lieu of taxes under the optional payment election (Tr. pp. 59-62; Bd. Exhs. 6, 22/MMM).

7. After a former worker filed a claim for UI benefits, the Department initiated another investigation regarding her wages as a cook. On November 18, 2011, the Arizona Department of Economic Security issued its Determination of Liability for Employment or Wages and its Determination of Unemployment Insurance Liability at a tax rate of 2.00% beginning October 1, 2008 for 2008, 2009, 2010, and 2011. The Department included Notice of Assessment Reports for "Services performed by individuals as Teachers, Teacher Aides, Substitute Teachers, Director, IT Personnel and Administrative Assistant ... for the quarters ending 08/4-11/3" (Bd. Exhs. 1-6).

8. The Department's November 18, 2011 rulings relied upon its findings that the Employer "... is a daycare provider to the general public" and that: "Based on the financial records, [the Employer] does not meet the support is principally from the

church" (Bd. Exh. 1). The Employer filed a timely request for reconsideration, and thereby disputed the reasons explained in conversations by Department officials regarding "... the position that unless 50% or more of the income of a tax exempt entity comes directly from the affiliated church, the entity cannot be exempt under ..." A.R.S. 23-615(6)(d)(i), because the Church must provide the principal support of the separate entity (Tr. p. 58; Bd. Exhs. 1-6).

9. In response to the Employer's request, the Department's Chief of Tax issued a Reconsidered Determination dated August 6, 2012, which affirmed the November 18, 2011 determinations. However, the only basis expressed in the Reconsidered Determination was a conclusion that the Employer "... is not an organization operated primarily for religious purposes, as contemplated by A.R.S. § 23-615(6)(d)(i) and, thus, is liable for Arizona UI taxes as a non-profit 501(c)(3) organization which employed four or more employees." The Reconsidered Determination stated (Bd. Exh. 6):

> ... we conclude that the mission of [the Christian School] must first and foremost be the educational instruction of the students of a degree sufficient to ensure continuation in the education process ... Despite the religious goals or motivations of [the Employer], it is the primary activities ... that must be considered in determining exempt status. Here, the facts present demonstrate that the services provided by [the Employer] are primarily that of child care and the teaching of secular studies. Therefore, the exemption does not apply.

10. All directors of the Employer must be Church members. All teachers must present a statement of faith that is acceptable to the Employer's administration. The school curriculum for all ages is published by "A-BEKA BOOK", with virtually every page containing religious references and scripture. Every subject is infused with religious thought, consistently including references to purposeful divine creation. Every classroom has a Christian flag, Bible verses, a Bible displayed, and Christian emblems or decor (Tr. pp. 133-136, 143, 161, 182-184, 189).

11. Prayer, evangelism, godly behavior, and gospel or Christian music and lyrics are encouraged and incorporated into daily teachings for all student ages and for all employees. Scripture memorization is incorporated, starting in early preschool. Each school day includes group worship, and recitation of a Christian pledge in addition to a pledge of allegiance to the government. Under law and public policy, no such emphasis

and none of these religion-infused activities is permitted in secular public schools. (Tr. pp. 74, 75, 147, 149, 189).

12. In the schools operated by the Employer, certain required subjects and class time are purely religious. Each school day has time set aside for "Bible time". Other traditional subjects expressly are not discussed in a "secular way" (Tr. pp. 147-149, 165, 171; Bd. Exh. 22/H).

13. The school web sites also link to the Church web sites. By pamphlets and on its web sites, the school refers to its A-BEKA curriculum and publishes a Mission Statement as follows:

> To glorify God by partnering with families in our community to provide quality Christian preschool, education and development opportunities that will honor our Lord and Savior, Jesus Christ, among all nations.

The school slogans are as follows:

> **Ignite** A Passion for God's Word
> **Infuse** Young Minds with Education
> **Impact** A Community for Jesus

The preschool also describes itself as a licensed facility that opened on April 28, 2003, and which is a ministry of the Church located on the grounds of the Church (Tr. pp. 133-136, 186-191; Bd. Exhs. 22/E, 22/H).

14. Teachers and administrators consider their school participation to be a "ministry" and their purpose to be "evangelism". Multiple parents have enrolled their children with the Employer based upon a "faith comes first" philosophy. By their choice of the Employer's "Christian environment" for their children, parents may reject the options of lower-cost secular or public education, or home schooling (Tr. pp. 88, 102, 108, 116, 120, 127, 132, 137, 151, 161, 187, 191).

15. A significant portion of the tuition paid for students is given by the Employer to the Church (Tr. p. 193-195).

The Employer contends that, since its inception as a non-profit corporation, all of its employees have been engaged in "exempt employment" and, due to its religious nature and its primary focus upon religion, the Employer is exempt from the requirement to make compulsory contributions to the Unemployment Insurance system. The employment status of "Teachers, Teacher Aides, Substitute Teachers, Director, IT Personnel and Administrative Assistant", and the status of wages paid to them by the Employer, remain disputed in this case (Bd. Exhs. 7, 9, 26).

According to the Department's counsel, the Department based its ruling that the Employer is not exempt from Unemployment Insurance (UI) tax upon the Department's analysis that workers are not in the employ of an organization that is operated primarily for religious purposes (Tr. p. 10). The Department's counsel specified that "... the only issue is whether this entity ...", by operating a K through 6 school and a child care program, operates primarily for religious purposes (Tr. p. 11). A witness for the Department acknowledged that the analysis applies regardless of whether the education involved K through 6, junior high, or secondary school, but the analysis might be different if the Employer taught students who were at a college level (Tr. pp. 212, 213).

In its rulings and in its Reconsidered Determination, the Department has treated the Employer corporation as a whole. Thus, the Department did not make a distinction between the Employer's K-6 school, and the child care program for younger children. We also consider the organization as a whole. One of the Department's witnesses explained the view and analysis applied by the Department to both age groups:

> ... that if you are teaching general education subjects, even though there may be some religion [as part of] the school curriculum, ... the purpose is not primarily to religious instruction, it is primarily to teach general education and admit those kids because it's – it's impossible to help them move on ... to the next level. ... commonly understood that if you're teaching general education, that's your primary purpose ... if the primary purpose were to be religion and you're teaching only that, then you wouldn't care how well they do to get on to the next level ... We haven't had to go to the second test because we believe that the first test has not been met (Tr. pp. 42-44).

As an example of the rare situation when a separate organization clearly is operated primarily for religious purposes, one of the Department's witnesses discussed a group of parents who got together and formed a school at which a rabbi came to teach a few hours on Saturday, and after the regular school day. They taught Jewish religion, culture, and Hebrew language. Because they did not teach general education and had nothing to do with general studies, the Department's witness presented this as an example of a school that was deemed to be primarily for religious purpose (Tr. p. 48). The witness expressed his view that: "... if they're teaching general education, that's your primary purpose and not religious" (Tr. p. 49). Further, the witness expressed the Department's view of the 2013 change by the Arizona Legislature in the language of A.R.S. § 23-615, is that it does nothing to change either one of the two conditions upon exclusion. Although the Department's witness referred to "primarily nonreligious instruction" as a requirement, we construe his statements as

generally explaining that the change in statutory wording did not provide new, definitive guidance in evaluating the "primarily religious purpose" of a school (Tr. pp. 50, 51).

CONCEDED AND NOT AT ISSUE: Through its counsel, the Department expressly has conceded that the Employer "... is operated, supervised, controlled or principally supported by a church or convention or association of churches" (Tr. p. 10). The Department decided not to dispute that the Employer operates the school and child care while supervised, controlled, or principally supported by a church or convention or association of churches. Although the original Determinations were based upon the Employer's allegedly insufficient funding source or financial support connections with the Church, the Department's counsel stipulated that the Employer met that "prong" of the statutory tests for exemption. The Department's witness confirmed that the Employer's connection to the Church suffices, and is not a contested issue (Tr. pp. 10, 11, 30, 44).

PERTINENT LAWS: Arizona Revised Statutes, § 23-615 currently defines "employment" as follows, in pertinent part:

> A. "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. ...
>
> * * *
>
> 2. Services covered by an election pursuant to section 23-725.
>
> * * *
>
> 4. Service performed by any officer of a corporation.
>
> * * *
>
> 7. Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational or other organization, but only if both of the following conditions are met:
>
> (a) The service is excluded from "employment" as defined in the federal unemployment tax act solely by reason of section 3306(c)(8) of that act.

(b) The organization had at least four individuals in employment for some portion of a day in each of twenty different weeks, whether or not the weeks were consecutive, within either the current or preceding calendar year, regardless of whether the individuals were employed simultaneously.

* * *

B. For purposes of subsection A, paragraphs 6, 7 and 8, the term "employment" does not apply to service performed for any of the following:

1. In the employ of a church or convention or association of churches, or an organization that is operated primarily for religious purposes, including educational and child care services that include religious instruction, and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

2. By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by the order. [Emphasis added].

* * *

From 1977 through September 13, 2013, similar provisions of Arizona Revised Statutes, § 23-615 were differently numbered and worded, in part as follows:

Employment

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

* * *

6(d) For purposes of this paragraph, the term "employment" does not apply to services performed:

(i) In the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or ...

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or ...

* * *

Title 23 of the Federal Unemployment Tax Act, at 26 USCS § 2306, provides in part as follows:

Definitions

* * *

(c) Employment. For purposes of this chapter [26 USCS §§ 3301 et seq.], the term "employment" means any service performed ..., except

* * *

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) [26 USCS § 501(c)(3)] which is exempt from income tax under section 501(a) [26 USCS § 501(a)]; ...

* * *

Federal law also provides in part as follows, at 26 USCS § 3309:

State law coverage of services performed for nonprofit organizations or governmental entities.

(a) State law requirements. For purposes of section 3304(a)(6) [26 USCS § 3304(a)(6)]--

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are--

(A) service excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c) [26 USCS § 3306(c)], and

(B) service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c) [26 USCS § 3306(c)]; and

* * *

(b) Section not to apply to certain service. This section shall not apply to service performed--

(1) in the employ of (A) a church or convention or association of churches, (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches, or (C) an elementary or secondary school which is operated primarily for religious purposes, which is described in section 501(c)(3) [26 USCS § 501(c)(3)], and which is exempt from tax under section 501(a) [26 USCS § 501(a)];

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

* * *

Arizona Revised Statutes § 23-613.01(A) provides 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. <u>An individual or class of individuals that the federal government has decided not to and</u>

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. [Emphasis added].

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

Wages

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.

When analyzing a different statutory exception applicable to legislative bodies, the Arizona Court of Appeals summarized the pertinent law. A.R.S. § 23-615 defines "employment", for UI purposes, as any service of whatever nature performed by an employee for the person employing him. Certain exceptions are enumerated within the statute. If a statute's language is clear and unambiguous, the appellate court applies it without resorting to other methods of statutory interpretation. If more than one plausible interpretation of a statute exists, tools of statutory construction include considering the statute's context, its language, subject matter and historical background, its effects and consequences, and its spirit and purpose. *Robbins v. ADES*, 232 Ariz. 21, 300 P.3d 556 (2013). Legislative history becomes particularly pertinent when the Arizona Legislature recently has amended the relevant statute. *University Physicians Inc. v. Pima County*, 2007 Ariz. Tax LEXIS 16 (Arizona Tax Court 2007).

Effective in 2013, Arizona's Legislature amended its listing of those entitled to exemption by specifying services performed for "... an organization that is operated primarily for religious purposes, including educational and child care services that include religious instruction ...". The Employer indisputably is an educational and child care service that includes religious instruction. We conclude that the 2013 amendments to A.R.S. § 23-615 specifically add pertinent nuance to the terms: "operated primarily for religious purposes". The statutory

amendment clearly shows an intent, by statutory wording, to express that qualifying excluded services could include educational and child care services that offer religious instruction. No inconsistency with federal law is apparent. We infer the argument that any educational and child care services cannot possibly qualify, regardless of including religious instruction, because children of young age need lessons in secular subjects and require a safe environment, already has been addressed by the Arizona legislature. The potential to qualify expressly exists. Whether the Employer qualifies for the exemption it seeks, therefore, is a "proof" problem to be supported by credible evidence.

Arizona has not expressly included in its statute the third potential exemption of federal law, specifically: "(C) an elementary or secondary school which is operated primarily for religious purposes". 26 USCS § 3309(b)(1)(C).

Arizona case law includes analysis of "religion" under a different subsection of A.R.S. § 23-615, the same statute that controls the exception in this case. At issue was whether the teaching of religious materials could be the exercise of a ministry. In *Arizona College of Bible v. Department of Economic Security*, 120 Ariz. 217, 585 P.2d 237 (May 31, 1978), the Arizona Supreme Court held that the educational institution was improperly required to make wage reports and contributions under the Employment Security Act of Arizona. Specifically, a minister teaching religious subjects was not an employee but was acting in the exercise of a ministry. Under the formerly worded A.R.S. § 23-615(6)(d)(ii), a minister teaching a religious subject in a religious school can also be acting in the exercise of his ministry even though he is not conducting sacerdotal functions. The Court wrote:

> It is not the fact that they are ministers that is controlling, but the fact that they are ministers teaching religious subjects. Teaching of the Bible and Christian doctrine is and has been an exercise of a person's ministry throughout antiquity. The great religious leaders of the world have been teachers as well as leaders in religious services. We believe that teaching at the Arizona College of the Bible is an exercise of one's ministry.
>
> A similar argument can be made on behalf of a minister who chooses to exercise his ministry in the apparently secular function of an administrator of a religious educational institution. Even though the content of the work is not of the same religious nature as that of the teacher, both share the same ultimate goal, the religious purpose specifically articulated by the institution. It is unreasonable to say that a minister can only contribute his talents to such an institution in the classroom. In this situation, an administrator is also acting in the exercise of his ministry. [Emphasis added].

The Court quoted the A.R.S. § 23-615(6)(d)(i) subsection (as previously worded before September 2013), but because the reported facts involved licensed ministers and its ruling applied a different subsection, the Court declined the College's request to consider whether it was exempted under that subsection. *Arizona College of the Bible, supra.* We conclude that the ruling importantly refused to state that teaching cannot be an integral part of a ministry. We give weight to the Court's reasoning, and conclude the Court ruled the crucial analysis under Arizona law shall be that "the religious purpose specifically articulated by the institution" must be considered. In this case, we conclude that the Department did not give adequate weight to the religious purpose specifically articulated by the Employer, when making its ruling that the Employer could not be exempt regardless of its stated and actual religious purposes because its primary purpose as a school "... must first and foremost be the educational instruction of the students of a degree sufficient to ensure continuation in the education process" (Bd. Exh. 6).

Arizona is not alone in providing that the religious purpose articulated by an employing organization shall be considered. The Ninth Circuit Court of Appeals has held that although a non-profit humanitarian organization was neither owned by nor affiliated with a formally religious entity in the traditional sense, this did not preclude the court's finding that it was a primarily religious organization and thus eligible for the 42 U.S.C.S. § 2000e-1 exemption. *Spencer v. World Vision, Inc.*, 633 F.3d 723 (2011), *US Supreme Court certiorari denied* 2011 U.S. LEXIS 6689 (U.S., Oct. 3, 2011). The Court's opinion noted that:

> Congress extended the exemption to any "religious corporation, association, ... or society." 42 U.S.C. §2000e-1(a). If Congress had intended to restrict the exemption to "[c]hurches, and entities similar to churches" it could have said so. Because Congress did not, some religious corporations, associations, and societies that are not churches must fall within the exemption. ...
>
> As the United States argues as amicus, interpreting the statute such that it requires an organization to be a "church" to qualify for the exemption would discriminate against religious institutions which "are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." ...
>
> Though our precedent provides us with the fundamental question—whether the general picture of World Vision is primarily religious—we must assess the manner in which we are to answer that question in the case at hand. Again, we are told that we must evaluate "[a]ll significant religious and secular characteristics." *EEOC v. Townley*, 859 F.2d 610 (9th Cir. 1988). ...

> In *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329 (U.S.1987), the Court found exactly this sort of inquiry problematic in the context of determining whether a particular employee's duties were religious or secular. There, the lower court had held that a "building engineer" at a church gymnasium performed a secular activity. 483 U.S. at 332. The Supreme Court reversed, explaining that to force an organization to "predict which of its activities a secular court will consider religious," would impose a "significant burden" and "might affect the way an organization carried out what it understood to be its religious mission." Id. at 336. As Justice Brennan wrote in concurrence,
>
> > ... determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. ...
>
> I believe the better approach can be summarized as follows: a nonprofit entity qualifies for the section 2000e-1 exemption if it establishes that it 1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious. ...

A concurring opinion discussed religious schools, and proposed a fourth pertinent test that may be useful regarding the "primarily religious" issue:

> ... This discussion does not cover educational institutions, and religious schools may charge market rates as tuition. But they have their own phrase in the exemption, "educational institution," so they do not have to fall within the harder to define phrases in the exemption for "religious corporation, association, educational institution, or society." The inclusion of educational institutions suggests a more sensible *noscitur a sociis* reading of the exemption for "religious corporation, association, educational institution, or society." What they all have in common is that they are means by which

> people engage in the free exercise of their religions. Many religions have as central requirements that their adherents teach the religions to their children. Religious schools are how they do it, but they are often too expensive to operate supported out of charitable contributions, and need substantial tuitions. For the others, to determine whether the associations are religious or not for purposes of the exemption, what they charge for their services is an appropriate and usable test. For that matter, even if some educational institutions might otherwise be viewed as too secular in what they actually teach to qualify for the exemption, they would nevertheless be allowed by Congress to discriminate in hiring and employment by the alternative provision for schools "in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society."
>
> Accordingly, I would reformulate Judge O'Scannlain's test as this: To determine whether an entity is a "religious corporation, association, or society," determine whether it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts. ...

We conclude that the Employer is "operated primarily for religious purposes", under the guidance provided by these essential aspects, which are both descriptive and indicative of religious nature. As evidence of its integration of faith and education, as well as its support from the Church, the Employer presented documents and testimony detailing its history, operations, and purpose. Exhibits included its mission statement, articles of incorporation, website, and curriculum. The Articles of Incorporation clearly express the Employer was organized "... exclusively for charitable, religious, educational and scientific purposes". These purposes were recognized by the Internal Revenue Service, which awarded the Employer 501(c)(3) status and an exemption from reporting, based upon its religious nature. The Employer's Mission Statement and slogan unequivocally express a thoroughly religious focus.

According to its counsel, the schools operated by the Employer unabashedly proselytize the children and their families. The Employer operates on premises occupied by the Church, and its directors must be Church members. Workers must present their Statements of Faith. Daily operations with children are pervasively religious in nature. The Employer's curriculum and class

operations are infused with religious faith and related statements of divine purpose, and secular context is avoided whenever possible. Clearly, the Employer was organized for religious purpose, is engaged thoroughly and primarily in carrying out that religious purpose, and holds itself out to the public as an entity for carrying out that religious purpose. The workers who testified considered themselves engaged in a ministry. The workers who testified willingly accept less-than-market wages in order to participate in the ministry. The parents who testified chose the Employer to educate their children for sincerely faith-based reasons, thereby eschewing readily available public, and secular schooling.

Although the Employer receives tuition, and student families may be eligible for educational tax credits, uncontradicted evidence established that the Employer shares with the Church a substantial portion of tuition, estimated at $6,000 to $7,000 per month. The Employer is wholly owned by the Church, which supports it financially and directs its operations. The Employer expressly is non-profit, and its incorporating documents mention nothing about generating income or any goal of maintaining net income. Although at least one former worker had cooking duties, nothing indicates that the Employer charges more than a nominal sum for hot lunches or any other items, including the "Spirit shirts" that are required for school functions. We conclude that the Employer is not engaged primarily in exchanging goods or services for money.

Regardless of the pervasively religious nature and purpose that the Employer has established through evidence, which includes calling itself a "Christian School", the Department repeatedly has contended that the teaching of secular subjects and the provision of a "safe environment" must be a school's primary purpose in light of the student ages. Obviously, any K-6 school is required by law to teach some of the same subjects addressed by a public or secular school education. The preschool is licensed by an Arizona agency and, therefore, must meet certain standards. However, the record is equally clear that a public or secular school is prohibited by law or by public policy from even mentioning many of the religion-based concepts that form the bedrock foundation of the Employer's daily emphasis and activities. Prayer, scripture, and pervasive references to divine purpose are not part of the public school structure, due to the Establishment clauses in the United States and Arizona Constitutions, the impacts of which were exhaustively discussed by the Courts in *Amos, supra* and in *Spencer v World Vision, supra*.

The legislature's taxing authority is very broad. Setting tax rates is a legislative function. Therefore, courts extend considerable deference and great latitude to the legislative creation of "classifications and distinctions in tax statutes." In holding that tuition credits are a legitimate legislative option even if benefits flow to private schools or sectarian schools, the Arizona Supreme Court discussed the Establishment Clause, constitutional interpretation, and the impact of Legislative action upon religious freedoms. *Kotterman v. Killian,* 193

Ariz. 273, 972 P.2d 606 (1999). The Court noted that Arizona's framers did not hesitate to extend tax-exempt status to churches. *See,* Ariz. Constitution Article IX §§ 2(2), 7, 10, and 12. In fact, the framers uniformly supported property tax exemptions for all "religious associations or institutions not used or held for profit." The Court added: "Clearly, these exemptions constitute benefits to religious organizations, suggesting either that the framers did not regard such tax-saving measures as direct grants of 'public money,' or that their intent in prohibiting aid to religious institutions was not as all-encompassing as petitioners would have us hold." The analysis included:

> In fact, as we review Arizona history and scan the present day horizon, it is apparent that religion has never been hermetically sealed off from other institutions in this state, or the nation. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997) ("Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally."). Arizona's motto, *Ditat Deus*, means "God enriches." *See*, Ariz. Const. art. XXII, § 20. And even though, as we have noted, the transcripts of our constitutional convention reveal almost nothing about the clauses in question, they clearly reflect religion as part of the proceedings. Each day's session was opened by a prayer from the convention chaplain, Rev. Seaborn Crutchfield. Indeed, to this day Arizona legislative sessions begin with a prayer delivered by the Chaplain of the Day. The constitutional delegates also negotiated over whether the preamble should refer to "Almighty God," the "Supreme Being," or "Almighty God for Liberty." Records, at 41, 77, 82-83. They ultimately agreed that the preamble should read, "We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution." *Id*. at 1399.
>
> In a more contemporary vein, tax codes, both state and federal, permit churches and other religious institutions to acquire tax-free status and allow deductions for contributions made directly to such entities. *See*, 26 U.S.C. §§ 501(a), (c)(3), 170(a), (c)(2)(B); A.R.S. §§ 43-1201, 43-1042. "The doctrine of separation of church and state does not include the doctrine of total nonrecognition of the church by the state and of the state by the church." *Community Council v. Jordan*, 102 Ariz. at 451, 432 P.2d at 463.
>
> Clearly, the state constitution forbids the creation of a state church or religion. It also guarantees freedom of worship and belief by demanding absolute neutrality in

> the treatment of religious groups. "The State is mandated by [article II, § 12] to be absolutely impartial when it comes to the question of religious preference, and public money or property may not be used to promote or favor any particular religious sect or denomination or religion generally." *Pratt v. Arizona Bd of Regents,* 110 Ariz. 466, 468, 520 P.2d 514, 516 (1974). There is no evidence, however, that the framers intended to divorce completely any hint of religion from all conceivably state-related functions, nor would such a goal be realistically attainable in today's world.

Based upon the credible and probative evidence of record, we concur whole-heartedly with the analysis of the "operated primarily for religious purposes" phrase, as discussed by the Court in *Unity Christian School of Fulton v. Rowell*, 2014 IL App (3d) 120799, 6 N.E.3d 845 (March 11, 2014). In that case, the Illinois Department of Economic Security Director had determined that the school was not entitled to an exemption, having found that the school was separately incorporated and autonomous. Furthermore, the official determined that "[t]he preponderance of the evidence is that [Unity's] curriculum is primarily secular in nature, although religious subjects are taught."

The Illinois court noted that the majority of cases interpreting section 211.3(A) of the Illinois Act or its federal counterpart section 3309(b)(1)(B), which the Illinois legislature adopted verbatim, have hinged upon a determination of what constitutes "operated, supervised, controlled or principally supported by a church," sidestepping any discussion about what Congress meant regarding operating "primarily for a religious purpose." The Illinois court cited several such cases in multiple jurisdictions, and also cited *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772, 783, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981), as analyzing the corresponding provisions of the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1976 & Supp. III).

In *Unity Christian School of Fulton, supra,* the Court addressed facts very similar to the findings in this case, including incorporation separate from any affiliate churches. The Court articulated its reasoning as follows regarding the "primarily for a religious purpose" issue:

> We decline at this point to expound an all-inclusive definition of what constitutes a religious purpose within the context of elementary and secondary religious schools. Yet, as it stands now, we cannot fathom a different primary purpose other than religion in Unity's case. ... The Department argues that "[w]ithout demonstrating that the majority of class time was spent on religious instruction as opposed to secular topics such as

> mathematics, grammar, or science, Unity could not possibly prove that it was operated primarily for a religious purpose." This argument defies reality. Under this construct, no separately organized parochial school would be subject to exemption.
>
> The Department's argument ignores the fact that a school that is not an institution of higher education is required to teach secular subjects. *See* 105 ILCS 5/27-1, 27-22 (West 2006). Only some types of preseminary or novitiate schools would likely qualify for exemption under the Department's strict and narrow reading of the Act. Why would the General Assembly incorporate an exception that is unobtainable? By the Department's reasoning, only grade or high schools devoting the majority of class time to religious instruction would be exempt from the state's unemployment system, but those schools would simultaneously be violating the law. If the parents of Unity's students wanted them to attend a school that did not incorporate the principles of their Christian faith, they would simply send them to public schools. Even according to its constitution, Unity's principal goal is to incorporate faith into the everyday life and education of its students. Under the current state of the law, this cannot be achieved in a public school. Religion is Unity's *raison d'être*.
>
> The Department's conclusion was based on a finding that Unity's "curriculum is primarily secular in nature." Well, of course it is. Just like the curricula in every other parochial school in the state. But the primary purpose of the school is to teach those secular subjects in a faith-based environment.
>
> We, therefore, find that Unity is operated for primarily religious purposes. The fact that secular subjects are necessarily taught makes that no less true. The Department's finding to the contrary is clearly erroneous. ... Yet, the Department's decision must be confirmed. As explained below, it is clear from the record that the school failed to prove that it was operated, supervised, controlled or principally supported by a church or convention or association of churches.

Both Congress and the Arizona Legislature enacted laws that made exemption possible for schools that include religious instruction. The mixed issue of fact and law in this case, therefore, is whether the Employer established that it is an organization that is operated primarily for religious purposes. The

other "prong" of the statutory exemption has been conceded by the Department, through counsel. Every witness presented by the Employer credibly testified that the primary purpose of its operations is religious in nature. Thus, the perspectives of the Church that organized and has controlled the Employer, parents who choose the school, the administration, and teachers were presented.

Inclusion of employers and workers in the Employment Security Law of Arizona carries both benefits and responsibilities. Many courts have recognized that the unemployment compensation system has value to individuals through compensating employees of church-related schools who lose their jobs. Courts also have recognized that the system treats all employers equally. *See, Ascension Lutheran Church v Employment Security Commission of North Carolina*, 501 F.Supp. 843, 846 (D.C.N.C. 1980).

However, the Employer seeks an exclusion to which it is entitled because its operations meet the exclusion criteria specified by statute. As the *Unity Christian School of Fulton* court so capably explained, denying the requested exclusion on the grounds that the school must include secular subjects and, therefore, its primary operating purpose cannot be religion, would make meaningless and unnecessary any existence of the statutory exceptions that have been enacted. We conclude that the exceptions must be given life, vitality, and meaning for:

- "an organization that is operated primarily for religious purposes, including educational and child care services that include religious instruction, and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches", under Arizona's recently modified and current law,
- "... or (C) an elementary or secondary school which is operated primarily for religious purposes", as provided by the federal law.

We conclude that the Employer presented evidence sufficient to establish that it is operated primarily for religious purposes. Having established that it operates an elementary or secondary school that includes religious instruction, which is operated primarily for religious purposes, and which is materially operated, supervised, controlled, or principally supported by a church, the Employer qualifies for the statutory exemption from "employment" status.

The "Teachers, Teacher Aides, Substitute Teachers, Director, IT Personnel and Administrative Assistant" (Bd. Exhs. 2, 3, 6) are engaged in exempt employment for the Employer, as defined by A.R.S. § 23-615. Any remuneration the Employer pays to individuals as "Teachers, Teacher Aides, Substitute Teachers, Director, IT Personnel and Administrative Assistant" does not constitute "wages", as defined by A.R.S. § 23-622. Accordingly,

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination dated August 6, 2012.

The term "non-exempt employment" does not apply to the Employer, which is a non-profit 501(c)(3) "... organization that is operated primarily for religious purposes, including educational and child care services that include religious instruction", as contemplated by A.R.S. § 23-615(A)(7) and 23-615(B)(1), formerly A.R.S. § 23-615(6)(d)(i).

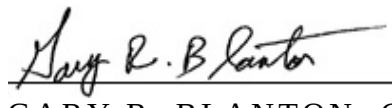
The Employer is an organization that is "... operated, supervised, controlled, or principally supported by a church or convention or association of churches", as contemplated by A.R.S. § 23-615(A)(7) and 23-615(B)(1), formerly A.R.S. § 23-615(6)(d)(i).

THE APPEALS BOARD **SETS ASIDE** the Department's Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued November 18, 2011.

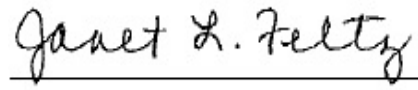
THE APPEALS BOARD **REMANDS** the matter to the Department's Unemployment Tax Section for further action consistent with this ruling.

DATED: 12/19/2014

APPEALS BOARD



GARY R. BLANTON, Chairman



JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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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.

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

A copy of the foregoing was mailed on
to:

Er: **** Acct. No: ****-000

(x) Er Rep (Co-counsel):

****

(x) Er Rep (Co-counsel):

****

(x) Department Rep:

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(x) LULU GUSS, 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-1461130-001-B

****

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
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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 *******

November 14, 2014 ***.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on July 17, 2014, which affirmed the March 25, 2014 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 pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for October 8, 2014, before Appeals Board Administrative Law Judge Eric T. Schwarz. The issues set for hearing were:

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 "2.0" percent for coverage beginning November 21, 2013.

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 was also present. Because the Employer did not appear at the scheduled Board hearing, a default was entered on the record.

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].

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. The Employer's default means that no evidence was presented to support reversing or modifying the Department's July 17, 2014 Reconsidered Determination. Accordingly,

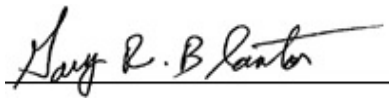
THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing.

The July 17, 2014 Reconsidered Determination remains in full force and effect.

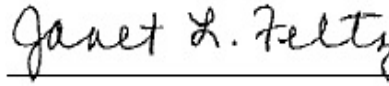
This decision does not affect any agreement entered into between the Employer and the Department.

DATED: 10/15/2014

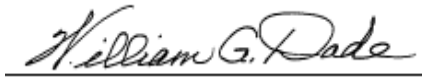
APPEALS BOARD



GARY R. BLANTON, Chairman



JANET L. FELTZ, Member



WILLIAM G. DADE, Member

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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

A copy of the foregoing was mailed on 10/15/2014 to:

(x) Er: **** Acct. No: ****

(x) ELI D GOLOB
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(x) LULU GUSS, CHIEF OF TAX
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PHOENIX, AZ 85005-6028

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1461127-001-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 ***** December 5, 2014 *****.

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 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:

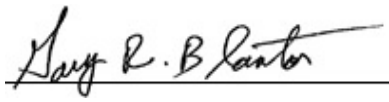
1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... [Emphasis added].

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

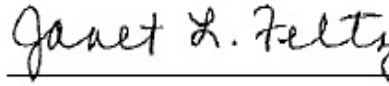
THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 11/5/2014

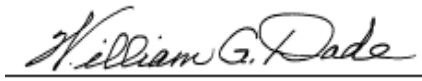
APPEALS BOARD



GARY R. BLANTON, Chairman



JANET L. FELTZ, Member



WILLIAM G. DADE, Member

Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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.

A copy of the foregoing was mailed on 11/5/2014
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) LULU B GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: ____RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1402204-001-BR

****

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 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.

RIGHT TO APPEAL TO THE COURT OF APPEALS

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** November 13, 2014 *****.

DECISION
AFFIRMED UPON REVIEW

The **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on June 2, 2014, which affirmed the Department's Reconsidered Determination issued on February 22, 2013. That Determination affirmed the Determination of Liability for Employment or Wages issued on March 17, 2010, and the Determination of Liability for Employment or Wages issued on August 16, 2012. 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 "workers at issue" were identified as Technicians and Corporate Officers in the March 17, 2010 Determination of Liability for Employment or Wages, and Area Managers in the August 16, 2012 Determination of Liability for Employment or Wages. The Employer conceded that the services performed by Corporate Officers constituted employment.

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's prior decision was in error because the Department failed to establish the existence of an Employer-Employee relationship between the Employer and Technicians, and the Employer and the Area Manager. In support of his contentions, the Employer's counsel makes arguments regarding 13 factors, pursuant to Arizona Administrative Code, Section R6-3-1723(D) & (E). We will consider each factor separately.

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's counsel contends that the Employer has no authority to control the Technicians' assistants and that the Employer never hires, appoints or pays assistants to the technicians, which strongly indicates an independent contractor relationship. The evidence of record, however, establishes that the Technicians were free to hire assistants, but those assistants were required to be certified with an active number by the Employer's client, a satellite service provider, hereinafter referred to as "SSP" (Tr. pp. 120, 121, 178). Under its contract with the SSP, the Employer agreed "that it shall not allow any unauthorized person or persons not employed by or affiliated with [Employer] or [SSP] to either drive or ride in any vehicle transporting [SSP] equipment or to accompany any [Employer] technician on the premises of any [SSP] customer(s) without the express written consent of [SSP]" (Bd. Exh. 16-1 at p. 25). Accordingly, the Technicians did not have the authority to independently hire their own assistants (Tr. pp. 21, 23). As noted in our prior decision, we find that this factor demonstrates a right to 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's counsel contends that the Technicians do not have to comply with any instructions from the Employer as to when and how to work. In support of this contention, counsel points out that the Technicians are able to accept or reject any assignment, and upon acceptance of an assignment, they have "great latitude" as to when they work within the time slots provided in the work order. Employer's counsel also argues that the Technicians make their own decisions as to how to install the satellite dishes, and they do not receive instructions from the Employer on how to do so.

In accordance with the Independent Contractor Agreement, the Technicians were required to report directly to a named "Operations Manager" (Bd. Exhs. 16-5, 16-6, 16-7, 16-8, 17-13). Also, pursuant to its contract with the SSP, the Employer agreed that it shall "be solely responsible for the methods, techniques, sequences, and procedures of [SSP] System installation and other Services, if any, and the timely completion of each Work Order" (Bd. Exh. 16-1 at p. 29). The Employer's contract with the SSP also sets forth standards for residential installation and customer service requirements (Bd. Exh. 16-1 at pp. 17-23). The Technicians also had to comply with the instructions contained in the work orders delivered by the SSP (Tr. pp. 25, 32). The Employer's witness credibly testified that the Employer "relay[ed]" the SSP instructions to Technicians (Tr. p. 188). Therefore, we find that this factor demonstrates a right to control, and indicates an employment 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 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's counsel contends that the Hearing Officer erred in determining that this factor was neutral as to the Technicians. Employer's counsel argues that there is a lack of control by the Employer as to this factor because the Technicians perform their job duties at the location of the SSP's customers, the Technicians do not report to the Employer's office, and most technicians work out of their homes. The evidence is undisputed that the technicians perform their duties at the locations requested by SSP's customers,

due to the nature of satellite installation work (Tr. pp. 40, 125, 179, 180). Assuming this factor does show a lack of control by the Employer, this fact alone is not dispositive of the issue of whether these facts establish independence. As the factor indicates, in some occupations the work has to be performed away from the premises of the employing unit. Therefore, this factor supports neither conclusion and is properly classified as neutral.

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 Employer's counsel contends that the personal performance factor supports an independent contractor relationship because a Technician can use a substitute Technician if the substitute Technician has a technician number assigned by the SSP. Accordingly, the installation does not have to be personally done by the Technician who originally accepted the assignment. In our prior decision, we acknowledged that Technicians did not need to personally perform installation assignments. However, the Technicians are required to notify the Employer of any substitutions, and the substituted technicians must be certified by the SSP and they must have passed a criminal background check and drug screening (Tr. pp. 42-45). Accordingly, the Technicians were not completely free to substitute other individuals, because of the requirements imposed by the Employer and the SSP. Therefore, we find that this factor demonstrates a right to 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.

The Employer's counsel contends that the Technicians determine their own work sequence because once a Technician accepts a work order, they are able to determine in what order the work will be completed. The Employer's counsel also argues that the Technician also determines the work sequence once he is at the job site. However, the Technicians did not have complete control over their time because they had specific time frames and certain places to be in accordance with the work orders (Tr. pp. 47-49).

As noted in our prior decision, the SSP uses a "Site Survey Check Sheet" with specific guidelines for the installation process (Bd. Exh. 16-2I). The SSP also uses an "Installation & Customer Service Manual" that provides instruction in a sequential work outline, including introduction to the customer, site survey procedure, satellite dish installation procedure, grounding and bonding, cable routing, telephone line installation, access cards, integration with the customer's equipment, and customer education (Bd. Exh. 16-2I). Based on the guidelines set out by the SSP and the Technicians having to follow the work order as to time and place, we find that this factor demonstrates a right to 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 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.

Counsel for the Employer contends that the Employer does not retain the right to discharge Technicians because technicians can choose to quit performing installation services, but they cannot quit before finishing an accepted assignment, and the Employer does not have a right to discharge until the Technician has completed the work order. However, pursuant to the Independent Contractor Agreement, either party could terminate their services without notice, and the Employer has sole discretion to terminate the agreement without cause (Tr. p. 50; Bd. Exhs. 16-5, 16-6, 16-7, 16-8, 16-9, 17-13). The credible evidence of record also establishes that the Employer had previously discharged a Technician when the SSP cancelled his identification number as a result of a customer complaint (Tr. pp. 53, 129). Accordingly, we find that this factor demonstrates a right to 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. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

The Employer's counsel contends that the Employer does not require any training of the Technicians, but rather the SSP required training of the

Technicians. The Technicians were required to pass a certification with the SSP in order to obtain a technician number provided by the SSP (Tr. p. 58). The Employer's contract with the SSP, required the Technicians to have successfully completed SBCA Certified Installer Training (or other [SSP]-approved training program) and have been otherwise properly trained to perform and provide the Services under the contract. Specifically, the Employer could only use those Technicians who had successfully completed "the applicable [SSP]-approved training program to perform those services which require a certain minimum level of training (i.e., Grades 1-3 [SSP] commercial installation certification" (Bd. Exh. 16-1 at p. 25). Further, the Employer's witness, a Technician with no previous experience installing satellite dishes, testified that he was trained by Mr. G, an employee of the Employer (Tr. pp. 192, 193). The Employer's witness also testified that Mr. G showed him training videos, and took him out in the field to train him on how to put up satellite equipment (Tr. p. 193). Accordingly, we find that this factor demonstrates a right to control, and indicates an employment 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's counsel contends that the Hearing Officer erred in determining that this factor was neutral as to the Technicians because the Employer had no control over the Technicians regarding tools and materials because the Technicians must provide their own tools, equipment and materials at their own expense. Once again, the facts are undisputed that the Technicians provided their own tools and materials, at their own expense (Tr. pp. 65, 132, 133). It is also undisputed that it is the customary standard of practice in the industry for Technicians to provide their own tools and materials (Tr. p. 174). This fact alone is not dispositive of the issue of whether control is exercised in this area, so the factor is neutral.

l. 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's counsel contends that Technicians should be considered independent contractors because they make themselves available to the public and they are not required to devote themselves solely to installing satellites for the Employer. In support of this contention, the Employer's counsel points out that many Technicians pick up other work from SSP customers, and they are allowed to advertise themselves to the public, if they so choose.

The Employer's contract with the SSP provided that the "Contractor warrants the quality and workmanship of all Ancillary Work for no less than the first twelve (12) months from the date of provision of such service, and shall repair or fix any defects in the Ancillary Work provided, or otherwise re-perform the services during the said time period at no additional charge to the customer" (Bd. Exh. 16-1 at p. 31). The Employer's counsel argues that "ancillary work" does not pertain to the side jobs the Technicians may obtain. We disagree. A plain reading of the Employer's contract with the SSP establishes that the SSP considers "ancillary work" as any work not specifically called for by the SSP in the work order (Bd Exh. 16-1 at p. 30). Based on this provision, it is apparent that the Employer maintained a certain level of control over the Technician's "ancillary work," even though the Employer did not profit from this "ancillary work." Therefore, we find that this factor demonstrates a right to 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 Employer's counsel contends that because Technicians are compensated on a per job basis, the Technicians should be considered independent contractors. The undisputed evidence establishes that the Technicians are paid on a job basis, and the rates paid are set by the Employer without negotiation with the Technicians (Tr. pp. 69, 70, 72, 73, 135, 136, 143, 171, 185; Bd. Exhs. 11A, 11B, 11H, 16-5, 16-6, 16-7, 16-8, 17-13). Also, pursuant to the Employer's contract with the SSP, the Technicians cannot charge the SSP customers more than "reasonable market rates for the Specific Service provided" as set forth by the SSP (Bd. Exh. 16-1 at p. 31). Accordingly, the Technicians were limited as to how much extra money they could make through "ancillary work." Therefore, we find that this factor demonstrates a right to control, and indicates an employment relationship.

4. Obligation

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

The Employer's counsel contends that the Hearing Officer erred in determining that the Technicians have the right to terminate the working relationship at any time without penalty, because the Technicians are obligated to complete each accepted assignment.

Once an assignment is accepted, the Employer expected that assignment to be completed (Tr. pp. 128, 129, 136, 137, 144). However, Technicians signed only one contract which established an ongoing working relationship (Bd. Exhs. 16-5, 16-6, 16-7, 16-8, 17-13). Further, if the Technician's work was unsatisfactory, he/she was subject to a charge back and the Employer sent another SSP certified Technician to complete the job (Tr. pp. 37, 72, 75, 166, 188, 189, 199). Accordingly, Technicians have the right to terminate the working relationship at any time without penalty (Tr. p. 51; Bd. Exhs. 9B, 16-5, 16-6, 16-7, 16-8, 17-13). Therefore, we find that this factor 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.

Counsel for the Employer contends that each Technician makes a significant investment in their installation business because they provide their own work vehicles, automobile insurance, and travel expenses, along with the tools and materials required for the job. The Employer's counsel also points out that the Employer only provides the satellite dishes, which are obtained from the SSP. The satellite dishes and accompanying equipment were the most significant equipment necessary for completion of the job. While the Technicians did provide their own vehicles for work, they also used their vehicles for personal

reasons (Tr. pp. 76, 171, 172, 184, 185). Accordingly, we find that this factor demonstrates a right to 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 Employer's counsel contends that the Technicians can have simultaneous contracts with other persons or entities, and they are not required to work only for the Employer. However, the Independent Contractor Agreement provides that the "Contractor is free to engage in other independent contracting activities, provided that Contractor does not engage in any such activities which are inconsistent with or in conflict with any provisions hereof, or that so occupy Contractor's attention as to interfere with the proper and efficient performance of Contractor's services there under" (Bd. Exhs. 16-5, 16-6, 16-7, 16-8, 16-9, 17-13). Based on this provision, the Technicians are limited in their performance of duties outside of their work for the Employer. Further, the evidence of record establishes that Technicians working for the Employer were not allowed to perform satellite installation work for the SSP's customers through any other business (Tr. p. 158). In addition, the Employer is licensed with the Registrar of Contractors to install satellite equipment, while the Technicians are not (Tr. pp. 79, 80; Bd. Exhs. 5I, 10). We find that this factor demonstrates a right to control, and indicates an employment relationship.

Counsel cites various cases in support of his overall contention that Technicians are independent contractors. However, none of the cases cited by the Employer's counsel is controlling as to the facts of this case. The facts of this case have been considered on their own merit, and the Board has applied the relevant law and administrative rules to these facts and determined that the Employer exhibited a sufficient amount of control over the Technicians to establish an employment relationship.

Lastly, the Employer's counsel contends that the Area Manager was an independent contractor based on all the factors identified previously. In our prior decision, we concluded that the credible evidence of record established that: (1) The Area Manager did not use assistants (Tr. p. 23); (2) Pursuant to the Independent Contractor Agreement, the Area Manager was required by the Employer to report to a supervisor (Bd Exh. 16-9); (3) The Area Manager's duties included generating weekly progress reports for the Employer (Tr. pp. 22, 29, 33, 34; Bd. Exhs. 11N, 11P); (4) The Area Manager worked full-time at the Employer's warehouse (Tr. p. 39; Bd. Exh. 11N); (5) The Area Manager personally rendered all services for the Employer (Tr. p. 41; Bd. Exh. 11N); (6)

The Area Manager's services were terminated when the Employer closed its Tucson warehouse (Tr. p. 50); (7) The Area Manager worked eight hour days, six days per week for the Employer (Tr. pp. 54, 55, 61, 148, 149; Bd. Exhs. 11N, 11P); (8) The Area Manager devoted his full-time efforts to the Employer (Tr. pp. 54, 55, 61; Bd. Exhs. 11N, 11P); (9) The Employer provided the Area Manager with a company cell phone, a desktop computer, an air card to use for his computer while working away from the warehouse, a printer and materials at its warehouse (Tr. pp. 63, 149; Bd. Exhs. 11N, 11P); (10) The Area Manager was reimbursed by the Employer for his mileage expenses (Tr. p. 63; Bd. Exhs. 11N); (11) The Area Manager conducted no advertising, and did not have his own business (Tr. p. 70; Bd. Exh. 11N); (12) The Area Manager was paid a fixed salary of $800 per week (Tr. pp. 29, 73; Bd. Exhs. 11N, 11P); (13) The Area Manager experienced no recurring liabilities that could expose him to a loss (Tr. pp. 70, 71); (14) The Area Manager bore no obligation for completion and his contract with the Employer established an ongoing relationship that he could terminate at any time without penalty (Tr. p. 74; Bd. Exh. 16-9); (15) The Area Manager made no significant investment in the facilities he used in performing his work for the Employer (Tr. p. 75; Bd. Exhs. 11N-P); and (16) The Area Manager performed no other work while working for the Employer (Tr. pp. 76, 77; Bd. Exhs. 11N-P). Based on the foregoing, we find that these factors establish a right of control by the Employer, and established an employment relationship as to the Area Manager.

Additionally, in our prior decision, we also considered the role of the Technicians within the Employer's business model, and we determined that the role of the Technicians was an integral part of the Employer's satellite installation business, despite the Employer's assertion that it was simply a "middleman" between the Technicians and the SSP. This determination is further supported by the fact that the Employer does not have installation contracts with any entities other than the SSP, and the services provided by the Technicians are the only service the Employer has contracted to provide to the SSP (Tr. p. 104).

The primary issue presented is whether the services of the Technicians and the Area Manager were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). To make such a determination, the relationship between the Technicians and Area Manager and the employing unit must be examined by applying the factors under Arizona Administrative Code, Section R6-3-1723(D)(2).

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.

We have thoroughly examined the factors established by the evidence in this case, and we have considered the evidence as it relates to the above factors set out in Arizona Administrative Code, Subsections R6-3-1723(D) and (E). We conclude that the Employer's business consists of sending Technicians, by work order, to a place designated by the SSP customers to install satellite dishes in accordance with a contract between the Employer and the SSP. The Technicians were required to wear a shirt with the logo of the SSP. The Employer pays the Technicians from its accounts using a non-negotiated rate established by the Employer. The Technicians were not allowed to have assistants or use substitute Technicians without the assistant or substitute Technician having a technician number provided by the SSP. The Technicians must comply with the instructions contained in the work order. Once the Technicians accepted a work order, the Technicians had certain time frames and specific places to be as set out in the work order. The Technicians could terminate their services without notice or liability. The Technicians were required to obtain a certification with the SSP, and the Employer provided training to inexperienced Technicians on how to install satellite equipment in some instances. The Technicians had limitations on performing "ancillary work" for SSP customers, and the amount they charged for this work. The Technicians were not allowed to perform satellite installation services for the SSP's customers through any other business. Lastly, the Employer is licensed with the Registrar of Contractors to install satellite equipment, while the Technicians are not.

Based on the foregoing, we find that the preponderance of the evidence supports a finding that the services provided by Technicians and the Area Manager constitute employment. Accordingly, we conclude from the evidence

that such remuneration to the Technicians and the Area Manager constitute wages, as provided by the applicable statutes and administrative rules.

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: 10/14/2014

APPEALS BOARD

Gary R. Blanton

GARY R. BLANTON, Chairman

Janet L. Feltz

JANET L. FELTZ, Member

William G. Dade

WILLIAM G. DADE, Member

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 the foregoing was mailed on 10/14/2014 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) LULU GUSS, CHIEF OF TAX

EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1449650-001-B

****

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
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.

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 ***** December 5, 2014 *****.

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 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:

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].

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: 11/5/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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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.

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.

A copy of the foregoing was mailed on 11/5/2014
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) LULU B GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
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PHOENIX, AZ 85005-6028

By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1394783-001-BR

****

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

Employer

Department

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.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** December 5, 2014 *****.

DECISION
AFFIRMED UPON REVIEW

THE **DEPARTMENT**, through counsel, requests review of that portion of the Appeals Board decision issued on August 22, 2013, which reversed the Reconsidered Determination issued on December 10, 2012, and held:

> 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.

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 Department, through counsel, requested a copy of the hearing transcript and an extension of time in order to file a supplement to the request for review after having an opportunity to review the transcript. Those requests were granted, and the Department filed a timely supplement containing citations to the transcript. We note that the Department's arguments in its supplement regarding several of the "factors" at issue in this case are inconsistent with the arguments the Department set forth in its more cursory request for review. For the purposes of this decision, the Board will treat the Department's supplement as the Department's final arguments and positions in this case. Therefore, this decision will address the contentions set forth in the Department's supplement to the request for review and will not specifically address the Department's request for review.

Additionally, we note that the Department's lone witness at the Appeals Board hearing was Unemployment Insurance Tax Analyst "MS". MS testified that she prepared the Department's December 10, 2012 Reconsidered Determination for Chief of Tax "JN" to review and sign, and that her only knowledge of the facts of this case was derived from speaking to Department Tax Auditor "GU" and reviewing documents prepared by others (Tr. pp. 15, 17, 18, 20-22, 28, 29, 41). MS admitted that she did not speak to any of the Tailors or Alterations Persons [hereinafter "the TAP"], and she made no allegations that she spoke to anyone from the Employer (Tr. pp. 37, 38). For reasons known only to the Department, the Department chose not to call GU, or a single TAP, to appear at the Appeals Board hearing to present first-hand testimony. As a result, all of the evidence presented by the Department at the Appeals Board hearing was hearsay.

The Employer's owner, "NY", testified at the Appeals Board hearing, and the Board found her testimony to be credible. Under the applicable rules of evidence, the credible testimony of any eyewitness must be given more weight than hearsay statements. Therefore, NY's testimony is likely to be accepted as fact over any of the hearsay statements presented by the Department. Furthermore, the evidence of record establishes that the Department made no attempt to challenge any of NY's testimony at the Appeals Board hearing. Although given the opportunity to do so, counsel for the Department chose not to

ask NY a single question on cross-examination and chose not to present any rebuttal evidence after the Employer had presented its case (Tr. p. 90; 2nd Tr. p. 13). The time to challenge the credibility of NY's testimony was at that Appeals Board hearing, and the Department failed to mount any such challenge.

In its supplement to the request for review, the Department disagrees with the Appeals Board's analysis of the following control factors listed in Arizona Administrative Code, Section R6-3-1723(D)(2):

b. Compliance with Instructions

The Department contends: "This factor weighs in favor of employment because Employer assigned workers piece work, gave them deadlines to complete work, and required them to inform Employer if they could not meet the deadlines. This indicates that the workers were required to comply with instructions about when, where or how to do the work." The Department offers no citations to the record to support these contentions.

The evidence of record does not establish that the Employer "assigned workers piece work". To the contrary, as set forth in the Board's prior decision, the evidence of record establishes that 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). Additionally, any "deadline" referred to by the Department was established through an agreement between the Employer and the Employer's customer, not the TAP. Informing the TAP of such a "deadline", and requesting that the TAP inform the Employer if they would not be able to meet a "deadline", is simply an act of customer service between the Employer and its customer and in no way translates into "instructions about when, where or how [the TAP are] to work".

The Department concedes that the TAP "are not given instruction 'because they are highly proficient in their line of work and can be trusted to work to the best of their abilities.'" Inexplicably, the Department then simply posits the following conclusion: "However, because the Employer retained the right to instruct or direct the workers, the control factor is present." The Department offers no citations to the record to support this conclusion that the Employer "retained the right to instruct or direct" the TAP, and the Board finds that it is not supported by the evidence of record.

The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an

absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

c. Oral or Written Reports

The Department does not contend that the TAP were required to submit any written reports. However, the Department offers a mélange of random passages from the Appeals Board hearing that it contends establish that the TAP were required to submit oral reports to the Employer. They establish no such thing.

In any working relationship, there certainly must be some level of discourse between the worker and the business. The passages cited by the Department involve such things as the TAP notifying the Employer if they are leaving and a garment is not completed, telling the Employer when they would like to use her equipment, and informing the Employer when they are taking garments home so that the Employer will be able to keep track of the physical whereabouts of her customers' garments. These things do not constitute "*regular oral* or written *reports* bearing upon the method in which the services are performed" [emphasis added]. By the Department's apparent reasoning, which the Board does not subscribe to, any time a worker spoke to a business regarding any aspect of their working relationship it would constitute a "regular" oral "report" "bearing upon the method in which the services are performed". Such a position is untenable.

The evidence of record establishes that the TAP submitted neither written nor oral reports to the Employer (Tr. p. 65; Bd. Exh. 10D). The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

d. Place of Work

The Department concedes that the TAP "enjoyed some flexibility" and were able to work either on or off the Employer's premises. The Department even quoted NY as follows: "Like everybody do in alterations, doesn't matter where you work" (Tr. p. 78). Inexplicably, the Department then simply declares that "this factor weighs in favor of employment." The Board is unclear about the Department's reasoning, or how the Department reached this conclusion.

The Department contends that the TAP "could not take alterations home unless they had the Employer's permission", but the Department offers no citations to the record to support this contention or the Department's use of the word "permission". The evidence of record does not establish that the TAP were required to get "permission" to take alterations home; they simply needed to

inform the Employer that they were taking alterations home so that the Employer could keep track of the locations of her customers' garments.

The evidence of record establishes that 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).

The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

e. Personal Performance

The Department contends that the fact that NY would sometimes complete a job herself if a TAP was unable to meet a deadline somehow tips the scale on this factor toward favoring an employment relationship. It does not. In fact, it actually emphasizes that the Employer's primary focus was always the result, i.e., keeping a client happy, and not the method for reaching that result.

NY testified credibly that the Employer was indifferent as to who completed any particular job and that the TAP were free to switch jobs among themselves or delegate work to others (Tr. pp. 69-71). NY succinctly summarized the Employer's position regarding who performed any particular task as follows: "For me, I don't care. For me, the result is more than [sic] important" (Tr. p. 70). The Department presented no credible evidence to refute NY's testimony.

The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

f. Establishment of Work Sequence

The Department concedes: "Due to the nature of the occupation, the workers were free to follow their own pattern of work." The Department then simply contends: "Nonetheless, Employer retained the right to control the worker's work sequence." The Department offers no citations to the record to support this contention, and this contention is not supported by the evidence of record.

The evidence of record establishes that 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). A preponderance of the evidence of record establishes that the TAP were free to establish their own work sequence.

The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

h. Set Hours of Work

The Department implies that the TAP were *required* by the Employer to work on the Employer's premises. This implication is incorrect. The evidence of record establishes that 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). While it is true that the TAP could only work on the Employer's premises during the times that the Employer was open for business, that simply reflects the reality that the Employer was not going to be on the premises 24 hours per day. It was up to the TAP whether or not they chose to go to the Employer's premises at all.

The following testimony from the Appeals Board hearing establishes that the TAP were free to set their own hours of work:

> ALJ: So, an individual, uh, [TAP] can set his own hours, uh, is that correct?
> NY: Yeah. When he wanna come, when he or she wanna leave.
> ALJ: Okay, and the individual per – the individual [TAP] would decide that and not – not you?
> NY: No, not me (Tr. p. 77).

The Department did not bring forth any credible evidence to refute that testimony.

The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

i. Training

The Department does not dispute the Board's finding that the TAP received no training from the Employer. However, the Department contends: "Consequently, because the Employer vetted the workers and hired only skilled workers, this factor is not applicable". The Board is unclear as to what the Department means by "not applicable", but we infer the Department contends that this factor should be found to be neutral.

The Department offers no discernable explanation for why it believes that the fact the Employer provides no training to the TAP should result in any other conclusion than a finding of lack of control indicative of an independent relationship. Arizona Administrative Code, Section R6-3-1723(D)(2)(i), states, in part: "An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services." The TAP were independent workers who used their own methods and received no training from the Employer, the purchaser of their services.

The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

j. <u>Amount of Time</u>

The Board is unable to determine precisely what the Department is contending regarding this factor, so we will simply reprint the Department's concluding paragraph and attempt to address its contents:

> Given the nature of the services at issue, the fact that piece work was done on an as-needed basis does not preclude a finding of an employer-employee relationship where, as in the instant case, the workers services were in furtherance of the Employer's course of business. This factor should be found neutral.

First, the Department fails to explain what the "nature of the services at issue" has to do with analyzing the "Amount of Time" factor. Second, the Department simply states a truism that "the fact that piece work was done on an as-needed basis does not preclude a finding of an employer-employee relationship". Conversely, it also does not mandate such a finding. Finally, the Department's inclusion of the passage "the workers services were in furtherance of the Employer's course of business" simply has no applicability in this analysis, as no such language appears in Arizona Administrative Code, Section R6-3-1723(D)(2)(j). The Department has offered no substantive basis for its conclusion that "[t]his factor should be found neutral."

Arizona Administrative Code, Section R6-3-1723(D)(2)(j), states, in part: "An independent worker . . . is free to work when and for whom he chooses." The evidence of record establishes that the TAP were not required to work any set number of hours or produce any minimum amount of work for the Employer, and that the TAP were free to manage their time to work elsewhere (Tr. pp. 78, 79; Bd. Exh. 10E). The evidence of record does not establish that the TAP were required to work full time for the Employer. While that is not dispositive of this factor, it tends to indicate that the Employer did not have control over the amount of time the TAP spent working and to indicate that the TAP were not restricted from doing other gainful work.

The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

k. Tools and Materials

The Department contends: "From the Employer's own testimony it is clear that the workers services are fully integrated into her business and not in further [sic] of their own independent business." This contention is contrary to the evidence of record and is anything but "clear". The Department fails to explain what it means by the phrase "fully integrated into" the Employer's business, and, more tellingly, the Department fails to explain the relevance of such a contention as it relates to this factor, as the provisions of Arizona Administrative Code, Section R6-3-1723(D)(2)(k), make no such reference. Additionally, the only credible evidence of record establishes that, in fact, the TAP pursued other business opportunities outside of the Employer in furtherance of their own business interests (Tr. pp. 55, 79, 83).

The evidence of record establishes that 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).

The Department contends "this factor is indicative of any employer-employee relationship." While we agree that there is some evidence in the record supporting a finding of any employment relationship, we do not agree that a preponderance of the evidence of record establishes such a relationship regarding this factor. However, upon further review, the Board concludes that the evidence regarding this factor is such that this factor is neutral. We note that the Board's modification from "independent relationship" to "neutral" regarding this single factor does alter the Board's prior decision that, as a

whole, the evidence of record establishes the existence of an independent relationship.

In its supplement to the request for review, the Department disagrees with the Appeals Board's analysis of the following control factors listed in Arizona Administrative Code, Section R6-3-1723(E):

1. Availability to the Public

and

6. Simultaneous Contracts

Because these two factors are so closely related, and the Department's contentions regarding these factors are virtually identical, the Board will address these factors simultaneously. In its cursory analysis of these two factors, the Department characterizes NY's testimony as "self-serving", and contends that these factors "should be found neutral" because "no probative evidence was proffered to corroborate" NY's testimony. The Department fails to note, however, that the Department presented no evidence to refute NY's testimony and that the Department made no attempt to challenge NY's testimony at the hearing.

At the Appeals Board hearing, NY testified that the Employer did not prohibit the TAP from working for others, and that the TAP had their own customers or worked for other businesses (Tr. pp. 55, 79, 82, 83). NY also testified that many of the TAP had their own websites and business cards to advertise their services (Tr. pp. 82, 83). After NY testified, counsel for the Department declined to ask NY any questions on cross-examination and declined to present any rebuttal evidence to dispute NY's testimony (Tr. p. 90; 2nd Tr. p. 13). As a result, NY's testimony is credible and unrefuted, and it is irrelevant whether any additional evidence was presented to "corroborate" NY's testimony.

The Board is not persuaded by the Department's arguments regarding these factors, and we conclude that the Board's prior decision that these factors show an absence of control, and indicate an independent relationship, are fully supported by the greater weight of the credible and probative evidence of record.

2. Compensation on Job Basis

The Department contends: "The Board found this factor weighed in favor of independence because the workers could negotiate their compensation." The Department then argues that this factor should "weigh toward employment" on the sole basis that "there is no evidence that the workers ever negotiated their rate of pay for piece work." The Board concedes that it erred in its prior decision when it stated that the TAP's compensation could be negotiated, as NY

clearly testified that the percentage of commission was non-negotiable (2nd Tr. p. 4). However, despite the Department's implication to the contrary, that was not the sole basis for the Board's prior decision regarding this factor. Furthermore, we note that whether compensation is negotiable is not even mentioned in Arizona Administrative Code, Section R6-3-1723(E)(2), as a factor to be considered.

At the Appeals Board hearing, NY testified credibly that, 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, and that these percentages are customary for the industry (Tr. pp. 48, 68; 2nd Tr. pp. 3-5). The Department presented no credible evidence to refute NY's testimony, and the evidence of record establishes that the TAP were paid on a job basis.

Arizona Administrative Code, Section R6-3-1723(E)(2), states, in part: "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 TAP were paid on a job basis, which tends to indicate an independent, not an employment, relationship. Arizona Administrative Code, Section R6-3-1723(E)(2), also states, in part: "The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship." There is no evidence in the record of any guarantee of a minimum salary or of the granting of a drawing account to the TAP.

The Board is not persuaded by the Department's arguments regarding this factor, and we conclude that the Board's prior decision that this factor shows an absence of control, and indicates an independent relationship, is fully supported by the greater weight of the credible and probative evidence of record.

The Department concludes its supplement to the request for review with a section entitled "FURTHER ANALYSIS", which includes three sub-sections. The Board is unable to glean any new or relevant contentions from the sub-sections entitled "Industry Custom" and "Other Authority". Regarding the sub-section entitled "Employer's Website", the Department contends that the "Employer's website serves as a marketing tool and characterizes the nature of her business". We agree. That is exactly what the website does. What it does not do, however, is show any evidence of control by the Employer over the TAP or support any argument that the TAP were employees of the Employer and not independent contractors.

As explained in the Board's prior decision, 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). The unrefuted evidence of record establishes that 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. The website specifically states that the "staff" will answer questions from the Employer's customers. The TAP do not speak to customers. Ergo, the TAP cannot be considered members of the "staff" to which the website refers. The Department failed to establish that the Employer's website contains any statements indicative of an employment relationship with the TAP, and the Board does not find the Employer's website marketing to demonstrate any indicia of control over the TAP.

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, Section R6-3-1723. 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), has thoroughly examined the factors established by the facts in this case, and has considered the relevant law and administrative rules as they are applicable to those facts.

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).

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 **DEPARTMENT** 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: 11/5/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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 the foregoing was mailed on 11/5/2014 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) LULU GUSS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1416765-001-B

****

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
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.

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 *******

December 26, 2014 ***.

DECISION
REVERSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination letter issued on July 25, 2013, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued on March 11, 2011. The Reconsidered Determination held that "services performed by an individual as an accountant constitute employment and all forms of 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 July 8, 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 services performed by an individual as an accountant constituted employment as defined in A.R.S. § 23-615.

2. Whether the services performed by an individual as an accountant 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 an individual for services as an accountant constitutes wages as defined in A.R.S. § 23-622.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and one witness testified for the Department. Board Exhibits 1 through 14 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 a company that provides accounting services to contracted clients.

2. On March 11, 2011, the Department issued a Determination of Unemployment Insurance Liability which held that the Employer has "been determined liable for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613" (Bd. Exh. 2). The Determination also stated: "THIS DETERMINATION SUPERSEDES DETERMINATION ISSUED 9/30/10. TO SHOW CORRECT START DATE." The previous determination issued on September 30, 2010, identified the coverage date beginning on July 1, 2010 (Tr. pp. 14, 55-57; Bd.

Exhs. 12A). The revised Determination issued March 11, 2011, identified the coverage date as beginning on January 1, 2010 (Tr. pp. 14, 55-57; Bd. Exh. 2).

3. On March 11, 2011, the Department also issued a Determination of Liability for Employment or Wages that held: "Services performed by individual as an accountant constitute employment. All forms of remuneration paid to these individuals constitute wages. This Determination included the individuals and amounts shown on the attached Notice of Assessment Report(s) for the quarters ending: 3/31/10-6/30/10" (Bd. Exh. 3).

4. The Department also issued a Notice of Adjustment which reflected the Employer's adjusted unemployment insurance tax liability for the third and fourth quarters of 2010 (Bd. Exh. 4). A Notice of Assessment was also issued with reflected the Employer's tax liability for the first and second quarters of 2010 (Bd. Exh. 5A). A Report of Wages Paid Each Employee was also issued that identified **** and her wages for the first and second quarter of 2010 (Bd. Exh. 5B).

5. On June 29, 2009, an Independent Contractor Agreement (hereinafter I.C.A.) was formulated and signed by the Employer and ****. (Tr. pp. 78, 79; Bd. Exhs. 8A-8H). The Employer contracted with ****. to provide certified public accountant (hereinafter C.P.A.) services as an independent contractor.

6. When a client requested services that the Employer could not provide, the Employer contacted **** to handle what he referred to as "overflow" work (Tr. p. 81). **** had the ability to either accept or decline the assignments offered by the Employer (Tr. pp. 90, 91, 97). Upon completion of the assignments, **** submitted invoices to the Employer that indicated her charges (Tr. p. 80; Bd. Exhs. 11G, 11H).

7. **** worked in her capacity as an independent contractor from June 29, 2009 through July 11, 2010 (Bd. Exh. 9A). She accepted a full-time position with the Employer effective July 12, 2010. Thereafter, she became an employee of the company with a set schedule and set hourly wage (Bd. Exh. 9A).

8. While working under the I.C.A., the Employer did not prohibit **** from hiring assistants (Tr. p. 100).

9. **** received no instructions from the Employer regarding when, where, or how to complete her assignments (Tr. p. 83). The I.C.A. that the Employer entered into with **** states, in part: “Company shall have no right to direct or control the details of the Contractor’s work (Bd. Exh. 8D).

10. **** provided the Employer with finalized written reports upon completion of her assignments (Tr. p. 90) The Employer did not require **** to provide verbal reports on a regular basis.

11. While **** was working under the I.C.A., the Employer rented a one-room office with one desk for his use (Tr. p. 84; Bd. Exh. 11C). **** performed her services from home or remotely from the client’s offices (Tr. pp. 84, 108, 109). After becoming an employee in July 2010, the Employer acquired additional office space for ****, and provided her with a desk, work computer, company software and office equipment (Tr. p. 84).

12. **** had the ability to hire assistants (Tr. p. 100). The Employer did not require her to personally complete the assignments.

13. The Employer gave no instruction to **** as to work sequence. She set her own schedule and was not required to work a set number of hours during the workday (Tr. pp. 91, 92). She was also free to work for other clients (Tr. p. 88).

14. The Employer and **** each had the right to terminate the relationship at any time with 30-days’ prior written notice (Tr. p. 113; Bd. Exh. 8D).

15. **** was skilled and proficient in her occupation, and she did not receive or require training from the Employer (Tr. p. 111).

16. The Employer did not provide **** with tools or materials to perform her duties (Tr. pp. 84, 112).

17. **** was not directly reimbursed by the Employer for any business or traveling expenses in the course of her work (Tr. p. 85). After becoming an employee, she was reimbursed for her C.P.A. renewal certification (Tr. p. 85).

18. While working under the I.C.A., **** was permitted to work for other entities unrelated to the Employer's business (Tr. p. 81). The "Covenant not to Compete" clause of the I.C.A. is limited to "clients" of the Employer, and says nothing about competitors of the Employer (Bd. Exh. 8E).

19. **** accepted assignments and then billed the Employer for her services (Tr. pp. 80, 98, 105; Bd. Exhs. 11G, 11H, 11J). After becoming an employee, **** could no longer decline assignments. She earned $10 an hour and worked 40 hours a week (Tr. pp. 80, 98).

20. **** realized a profit or loss during her time working under the I.C.A. (Tr. p. 80; Bd. Exh. 11G).

The Employer contends that **** was an independent contractor and not an employee from the period of January 1, 2010 through June 30, 2010. The issues in dispute in this case are the employment status of **** from the period of January 1, 2010 through June 30, 2010, and whether the pay earned during that period constituted wages.

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 primary issue in this case is whether the services that were provided by **** from January 1, 2010 through June 30, 2010, 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 provisions 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 ****. 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 ****'s use of assistants (Tr. p. 100). Whether she chose to use an assistant, was entirely up to her. 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.

**** received no instructions from the Employer regarding the manner of performing her work (Tr. p. 83; Bd. Exh. 8D). The scope of her duties required her to perform her services to the client's satisfaction. 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.

**** was not required to submit either written or oral reports to the Employer on a regular basis (Tr. pp. 89, 90). Her only requirement was to submit the final work product (Tr. pp. 107, 108). 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.

**** performed her services from home or remotely from the client's offices (Tr. pp. 84, 108, 109). The Employer did not provide office space for her. The Employer rented a one-room office with one desk for his use (Tr. p. 84; Bd. Exh. 11C). 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.

**** had the ability to hire a substitute without the Employer's knowledge or consent (Tr. pp. 100, 110). 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 gave **** no instruction as to the manner or sequence of performing her work (Tr. pp. 93, 94, 110). She had the ability to set her own schedule (Tr. pp. 80, 91, 92). The I.C.A. that the Employer entered into with her states, in part: "Company shall have no right to direct or control the details of the Contractor's work (Tr. p. 93; Bd. Exh. 8D). As **** was free to establish her 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 I.C.A. entered into by parties, states in part: "This Agreement may be terminated by either party upon thirty (30) days prior written notice, it being understood and agreed that the independent contractor relationship established hereunder is 'at will'" (Bd. Exh. 8D). The I.C.A. further states: "Contractor's services may be immediately terminated at the Company's election without notice to contractor (i) 'for cause'" (Bd. Exh. 8D). Although **** could be relieved from her responsibilities under the agreement with no notice, per the terms of the I.C.A. she could only be relieved with no notice, "for cause". 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 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.

**** was free to set her own hours and did not have any requirements regarding the number of hours that she must devote to her assignments (Tr. pp. 80, 91, 92). There is no evidence in the record to establish that the Employer had any control over when she performed her work. 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.

**** had previous experience working as a C.P.A., and did not receive training from the Employer (Tr. pp. 81, 111, 112). 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 evidence of record does not establish that **** was required to work any set number of hours by the Employer (Tr. pp. 80, 91, 92). She was free to work for other entities (Tr. pp. 81, 88). 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 did not furnish **** with tools or materials to perform her services (Tr. pp. 84, 112). She worked from her home with her own equipment. This factor shows an absence of control by the Employer, 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.

On one occasion, **** was reimbursed for her traveling expenses during the course of her work for a client (Tr. p. 85). The reimbursement was paid by the client per the client's contract with the Employer (Tr. p. 85). This factor shows an absence of control by the Employer, 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.

l. 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 **** from working for others, and believes that she, in fact, worked for others during the period that she was working under the I.C.A. (Tr. pp. 81, 88). The Employer provided evidence of an Internet advertisement that was posted by **** (Tr. pp. 81, 82; Bd. Exhs. 11D-11F). The Internet advertisement publicized her C.P.A. services to the public (Bd. Exhs. 11D-11F). A preponderance of the credible evidence of record establishes that **** made her services available to the general public on a continuing basis. 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.

During the Appeals Board hearing, the Employer credibly testified that **** was paid based on each specific job and not at an hourly rate (Tr. pp. 91, 92, 97, 112; Bd. Exh. 8H). The Employer provided evidence in the form of an e-mail from her dated February 2, 2010, which indicated that she performed a specific job for a flat rate of $25 (Tr. p. 91; Bd. Exh. 11G). In the e-mail, she suggests that she should have charged the Employer more money for the service that she provided (Bd. Exh. 11G). A preponderance of the credible evidence of record establishes that **** was paid "on a job basis" rather than simply on a flat hourly rate. 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.

A preponderance of the credible evidence of record establishes that ****'s success or failure was entirely dependent upon her own control of her time usage and her expenses (Tr. p. 112; Bd. Exh. 11G). Nothing establishes that she had any opportunity to share in the Employer's profit or loss. This factor shows an absence of control, and indicates an independent 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 I.C.A. entered into by the parties, states in part: "This Agreement may be terminated by either party upon thirty (30) days prior written notice, it being understood and agreed that the independent contractor relationship established hereunder is 'at will'" (Bd. Exh. 8D). **** was free to end the relationship with the Employer with 30 days written notice without incurring a penalty. 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.

**** performed her services from home or remotely from the client's offices (Tr. pp. 84, 108, 109). The Employer credibly testified that she "worked from home using her own computer, using her own software, providing all of her own – uh – tools and equipment" (Tr. p. 84). This factor establishes lack of control, and indicates an independent 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.

Insufficient evidence was presented to show that **** was restricted from working for other clients, and the credible evidence established that the Employer believed she worked for other clients at the same time that she provided her services to the Employer (Tr. pp. 81, 88). This factor establishes lack of control, and indicates an independent relationship.

The "Covenant Not to Compete" clause of the I.C.A. is not all-encompassing. It is limited to "clients" of the Employer, and says nothing about competitors of the Employer (Exh. 8E). While this certainly places at least some limitations on where **** could provide her services, there was insufficient evidence presented to establish that any such limitations rose to a level of control so as to create 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 Employment Security Law of Arizona, we conclude that the evidence of independent contractor status far outweighs the evidence of an employee status.

**** was not an employee of the Employer, from January 1, 2010 through June 30, 2010, but rather, she performed services pursuant to an independent contractor relationship. We conclude that all payments to **** for her services during that period did not constitute wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination letter dated July 25, 2013.

From January 1, 2010 through June 30, 2010, services performed by **** did not constitute employment, because the parties had an independent contractor relationship.

None of the remuneration paid to **** from January 1, 2010 through June 30, 2010, constituted wages.

DATED: 11/25/2014

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, 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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   1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
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   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.

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A copy of the foregoing was mailed on 11/25/2014 to:

(x) Er: ****
Acct. No: ****

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

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

By: _____RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1409152-001-B

****

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
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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 *******

December 22, 2014 ***.

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:

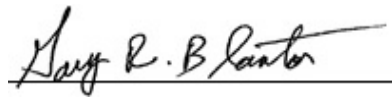
> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
>
> 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued;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

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

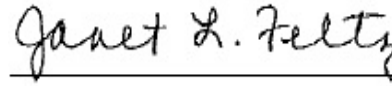
THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 11/20/2014

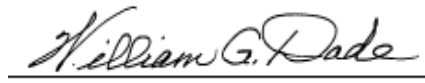
APPEALS BOARD



GARY R. BLANTON, Chairman



JANET L. FELTZ, Member



WILLIAM G. DADE, Member

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PHOENIX, AZ 85005-6028

By: _RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1402237-001-B

****

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 *******

January 20, 2015 ***.

DECISION
REVERSED

The **EMPLOYER**, through counsel, petitioned for a hearing from the Reconsidered Determination issued on February 22, 2013, which affirmed both the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued by the Department on October 3, 2011 (Bd. Exhs. 2, 3). The Reconsidered Determination held that:

> "...we find 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 the services performed by individuals as therapists and therapy assistants constitute employment and all forms of remuneration paid for such services constitutes wages"(Bd. Exh. 6, p. 4).

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 **September 26, 2013**. At the hearing, the parties were given an opportunity to present evidence on the following stipulated issues:

1. Whether the Employing Unit is a "temporary services employer" pursuant to A.R.S. § 23-614 with regard to services of the therapists and therapy assistants; and
2. Whether remuneration paid to individuals for such services constitutes "wages" as defined in A.R.S. § 23-622, which must be reported and on which State taxes for Unemployment Insurance are required to be paid.

On the scheduled date of the hearing, one Employer witness appeared by telephone to testify. The Employer's counsel appeared in-person. Counsel for the Department appeared in-person and a witness for the Department also appeared in-person to testify. Board Exhibits 1 through 13 were admitted into evidence. We have carefully reviewed the record.

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

1. The Employer provides therapists and therapy assistants (hereinafter "therapists") through the Division of Developmental Disabilities (DDD) to provide services to clients of the DDD. The therapists provide occupational, physical and speech therapy to DDD clients (Tr. p. 102). The Employer has a signed contract with the DDD, which is required for the Employer to provide services to DDD clients (Tr. pp. 32, 103).
2. The Employer has a pool of therapists that it has approved after reviewing resumes, interviewing them and conducting reference checks. (Tr. pp. 124, 125). The Employer locates these therapists through advertising on its website and by word of mouth (Tr. p. 107). All therapists are required to sign an independent contractor agreement (Tr. p. 105).

3. The DDD has a rate book that establishes how much the Employer receives for each service provided by the therapists it refers for DDD assignments (Ex. 8). The Employer is paid the difference between the agreed rate with the DDD, and the agreed rate between the Employer and the therapists (Tr. pp. 116-118). The therapists are paid from the Employer's business account (Tr. p. 55).

4. The Employer receives daily e-mails from the DDD, which describe certain services needed by disabled individuals (Tr. p. 114). The DDD also sends these e-mails to other qualified vendors, and the first vendor to respond to the e-mail has the first opportunity to provide the requested service.

5. After receiving the e-mails, the Employer determines which therapists in its pool meet the parameters of the requested services (Tr. p. 110). The Employer then contacts the therapists to make them aware of the opportunity to provide services to a DDD client (Tr. p. 109). When the therapists have decided they are interested in providing the services, they inform the Employer of their interest (Tr. pp. 109, 110). The therapists do not respond to the Employer if they are not interested in providing services (Tr. p. 39).

6. After the therapists inform the Employer of their interest, the Employer provides the name of the potential therapists to the DDD (Tr. p. 111). The therapists then independently contact the family of the potential client, and set up a meeting with the family to determine if they want to establish a therapist/client relationship (Tr. pp. 109, 110, 112). The potential client's family could decide that they do not want a particular therapist after meeting with that therapist. If the therapists and the client's family agree to form a therapist/client relationship, the DDD then authorizes the services and the Employer informs the therapists that the DDD has authorized their services (Tr. pp. 111-113). After the services are authorized, the therapists are allowed to begin providing the necessary services.

7. If the therapist does not enter into a therapist/client relationship, the Employer cannot just send another therapist to the client. Instead, the notification process from DDD starts anew.

The Employer, through counsel, contends that the Department's decision is in error and should be reversed because, in reaching the decision, the Department ignored the evidence presented, made errors in the findings of fact, or made improper legal conclusions. After thoroughly reviewing the entire record, we agree the Department's decision is in error.

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.

Arizona Revised Statute § 23-614(I)(2), provides 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 its Reconsidered Determination issued on February 22, 2013, the Department concluded that the Employer acted as a "temporary services employer" and, as such, employed the therapists and sent them to provide services for the DDD clients (Bd. Exh. 6). The Department based its conclusion on its determination that the Employer met all of the prerequisites of A.R.S. § 23-614(I)(2). Under the provisions of A.R.S. § 23-614(I)(2), an employer must meet all of the above-mentioned factors to be considered a "temporary services employer." Accordingly, the Department held that the Employer: (1) negotiates with the DDD to determine the time frame for the work, the place of work, the type of work, the working conditions, the quality of services and the price of services; (2) determines assignments or reassignments of therapists, even though the therapists retain the right of refusal; (3) retains the authority to reassign a therapist if the therapist is deemed unacceptable by a specific client; (4) assigns or reassigns the therapists to perform services for a client; (5) sets the rate of pay for the therapists; (6) pays the therapists from its bank account; and (7) retains the right to terminate the therapists (Bd. Exh. 6).

Based on the credible evidence of record, we find that the Department failed to establish that the Employer met all of the prerequisites of A.R.S. § 23-614(I)(2). Specifically, we find that the Department failed to establish that the Employer negotiates with the DDD to determine the time frame for the work, the

place of work, the type of work, the working conditions, the quality of services and the price of services. The Department also failed to establish that the Employer assigns or reassigns the therapists to perform services for the DDD clients.

During the hearing, the Department's witness testified that the Employer negotiates with the DDD 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, as evidenced by the signed contract between the Employer and the DDD/DES (Tr. pp. 19-32; Bd. Exh. 8). Specifically, the Department, citing the contract between the Employer and the DDD, concluded that: the time of work is specified in the individual ISP (Tr. p. 23); the place of work and the working conditions are in the "least restrictive environment" that is best for the DDD client (Tr. p. 23); the type of services being provided is in the contract (Tr. p. 25); and the Employer is required to ensure that services are provided by appropriately qualified and trained therapists (Tr. p. 27). The Department also concluded that the Employer "negotiated" the price of services because, even though the price of services is set in the DDD rate book, the Employer could have chosen not to accept the terms of the contract by not signing the contract (Tr. p. 32).

In this case, the Employer has a pool of approved therapists who provide occupational, physical and speech therapy to DDD clients (Tr. p. 102). The Employer requires the therapists to sign independent contractor agreements (Tr. p. 105). The Employer is required to sign a contract with the DDD in order to become an authorized, qualified vendor that is allowed to provide names of potential therapists for DDD clients (Tr. p. 103). The evidence of record established that the Employer receives about 30 e-mails daily from the DDD (Tr. pp. 114, 126). These e-mails inform the Employer about several different DDD clients who are in need of certain services (Tr. p. 114). We note that the daily e-mails sent by the DDD are also sent to several other companies that provide services for DDD clients, and the first to respond to the e-mail has the first opportunity to provide the requested therapists.

Once the Employer receives the e-mails from the DDD, the Employer determines which therapists from its pool meet the parameters of the requested services (Tr. p. 110). The Employer then contacts the therapists to make them aware of the opportunity to provide services (Tr. pp. 108-110). If a therapist is interested in providing services to a particular client, the therapist informs the Employer, and the Employer provides the therapist's name to the DDD (Tr. p. 111). The therapist then contacts the potential client's family, and sets up a meeting with the family to determine if the therapist will provide the services for the DDD client (Tr. pp. 109, 110, 112, 113). The potential client's family has the authority to reject the potential therapist if the family determines that it will not be a good fit.

If the therapist and the family of the potential client agree that the therapist will provide the services, the DDD authorizes the service and the Employer alerts the therapist that the authorization for services has been received (Tr. pp. 111-113). The therapist is paid a negotiated rate by the Employer for each service provided (Tr. p. 116). The DDD has a rate book that it uses for its qualified vendors, which sets forth a non-negotiated rate that the DDD will pay for certain services (Bd. Exh. 8). Any potential profit for the Employer is realized from the difference between the rate paid by the DDD and the negotiated rate between the Employer and the therapists (Tr. pp. 116-118).

Based on the above facts, we find that the Employer, in practice, does not negotiate with the DDD 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. In fact, the Employer has no input as to the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services when it comes to its therapists providing services to DDD clients.

The Department witness also testified that the Employer retains the right to assign or reassign therapists, based on its contract with the DDD (Tr. pp. 50, 51). In support of her conclusion, the witness quoted a paragraph contained in the contract, which states "**** shall identify the clients for whom the contractor may render services, and the contractor shall be responsible for scheduling and providing the services to **** clients." However, as noted earlier, the evidence of record establishes that the Employer receives about 30 e-mails daily from the DDD (Tr. pp. 114, 126). These e-mails inform the Employer about several different DDD clients who are in need of certain services (Tr. p. 114). The Employer then contacts the specific therapists who meet the parameters of the services set out in the e-mail (Tr. pp. 108-110). If a therapist is interested in providing services to a particular client, the therapist informs the Employer, and the Employer provides the therapist's name to the DDD (Tr. p. 111). Accordingly, the Employer does not, in practice, identify the DDD clients for whom the therapists may render services. The DDD client is identified in the e-mail, along with the requested services.

The contract also indicates that the therapists are responsible for scheduling and providing the services to clients. As a result, the Employer is not directly involved in the scheduling and providing of services. Further, should a DDD client's family determine that a therapist is not performing his/her job satisfactorily, that therapist is removed from performing services, and a new e-mail is sent out by the DDD to its list of qualified vendors (Tr. p. 130). The same procedure takes place if the therapist and the client never enter into an agreement for the provision of services. Accordingly, the Employer does not have the right to assign or reassign therapists to perform services for DDD clients. In addition, the Employer witness credibly testified that the Employer

did not assign therapists to DDD clients, but rather, it simply informs a therapist that a potential client exists (Tr. pp. 121, 129).

The Department witness also argued that the Employer assigns and reassigns therapists because the contract requires the Employer to have a back-up therapist in the event that the primary therapist is unable to provide the service (Tr. pp. 50, 51). The Employer witness credibly testified that the Employer has a pool of therapists as back-up, as long as the therapists meet the parameters of the service needed (Tr. p. 131). The fact that the vendor contract requires the Employer to have a qualified back-up does not, alone, lead one to conclude that the Employer assigns or reassigns therapists to perform services.

In conclusion, based on the credible and probative evidence, we find that the Department has failed to satisfy its burden of establishing that the Employer meets all of the prerequisites of A.R.S. § 23-614(I)(2).

THE APPEALS BOARD **REVERSES** the Reconsidered Determination issued on February 22, 2013.

The Employer is not a "temporary services employer" liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-614(I)(2). The services performed by therapists and therapy assistants do not constitute employment, and remuneration paid to individuals as therapists and therapy assistants does not constitute wages under A.R.S. § 23-622.

DATED: 12/18/2014

APPEALS BOARD

Gary R. Blanton

GARY R. BLANTON, Chairman

Janet L. Feltz

JANET L. FELTZ, Member

William G. Dade

WILLIAM G. DADE, Member

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By: __RR_____
For The Appeals Board