AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2908061
CRUZ TRUCKING INC
10531 BRONSON RD
CLERMONT FL 34711-9105

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2009-106884L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated July 9, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 2010**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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Unemployment Compensation Appeals
MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated July 9, 2009.

After due notice to the parties, a telephone hearing was held on October 28, 2009. The Petitioner's Owner appeared and provided testimony at the hearing. The Joined Party appeared and provided testimony. A Tax Specialist appeared on behalf of the Respondent without providing testimony.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as truck drivers constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a subchapter S corporation incorporated in 2000 for the purpose of hauling materials to job sites. The Petitioner reported only corporate officers as employees to the Florida Department of Revenue.

2. The Joined Party provided services as a truck driver for the Petitioner from 9/9/08 through 5/12/2009. The Petitioner did not consider the Joined Party to be an employee. The Petitioner had four or five individuals performing services as drivers at any given time.

3. The Petitioner was informed by a friend of the Joined Party that the Joined Party needed work. The Petitioner contacted the Joined Party to see if he wanted work.

4. The Joined Party was given training to familiarize him with the trucks used by the Petitioner.

5. The Petitioner would call the Joined Party and inform him of the work available. The Joined Party could refuse the work. If the Joined Party was not available for the work, the Petitioner would call the next driver on the list. After accepting the work, the Joined Party would be told where to pick up the truck and where to deliver the truck and its cargo.

6. The Joined Party was required to begin deliveries and leave the Petitioner's place of business by 6 a.m. The Petitioner's clients had specified times that they expected to have materials picked up by. The client's requirements were passed on to the Joined Party by the Petitioner.

7. The Petitioner instructed the Joined Party to avoid certain toll roads. The Petitioner told the Joined Party he might be liable for any tolls incurred on the prohibited routes.

8. The Petitioner provided a truck to the Joined Party. The Petitioner owned the truck. The truck had the Petitioner's name and logo on the side of the vehicle. The Petitioner provided insurance for the truck. The Petitioner paid for fuel and maintenance for the truck. The Petitioner paid tolls incurred by the drivers in the course of performing their work with the exception of those roads the driver was told to avoid. The trucks were stored at the Petitioner's place of business when not in use. The Petitioner owns five trucks. The Joined Party was not allowed to use the truck for personal business.

9. The work required a commercial driver's license.

10. The Joined Party was not covered by the Petitioner's workers' compensation insurance.

11. The Joined Party was paid 25% of what the client company paid to the Petitioner for the load. The Petitioner determined the rate of pay based upon local industry standards. The Joined Party would submit an invoice to the Petitioner each week showing the tonnage and type of material hauled by the Joined Party for that week. The Petitioner paid the Joined Party $6,008.32 in 2008.

12. The Joined Party was allowed to work for a competitor. The Joined Party was not allowed to use the Petitioner's truck while working for a competitor.

13. The Joined Party was not in business for himself. The Joined Party believed he was an employee of the Petitioner.

14. The Joined Party did not receive any benefits or insurance from the Petitioner.

Conclusions of Law:

15. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter

includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

16. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

17. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

18. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

19. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
    (2) The following matters of fact, among others, are to be considered:
        (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
        (b) whether or not the one employed is engaged in a distinct occupation or business;
        (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
        (d) the skill required in the particular occupation;
        (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
        (f) the length of time for which the person is employed;
        (g) the method of payment, whether by the time or by the job;
        (h) whether or not the work is a part of the regular business of the employer;
        (i) whether or not the parties believe they are creating the relation of master and servant;
        (j) whether the principal is or is not in business.

20. Comments in the Restatement explain that the word “servant” does not exclusively connote manual labor, and the word “employee” has largely replaced “servant” in statutes dealing with various aspects of the working relationship between two parties. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.

21. The evidence presented in this case reveals that the Petitioner controlled the time, place, and means of the work. The Petitioner would determined what time the Joined Party had to report to work, what materials were to be carried, and where those materials would be carried. The Petitioner controlled the route of the Joined Party to the extent that the Joined Party was instructed to avoid certain toll roads for fear of financial penalty.

22. The evidence reveals that the Petitioner had unilateral control over the financial details of the relationship. The Joined Party was paid a percentage of the value of the materials hauled. The percentage was determined by the Petitioner and based upon local industry standards.
23. The Petitioner provided a truck with the Petitioner's logo to the Joined Party for use in hauling materials. The Petitioner owned the truck used by the Joined Party. The Petitioner provided insurance, fuel, and maintenance for the truck. The Petitioner also paid tolls with the exception of certain toll routes that the Joined Party was told to avoid. The Joined Party was not allowed to use the truck for personal business. The truck was stored at the Petitioner's place of business when not in use.
24. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the Joined Party and the Petitioner.

Recommendation: It is recommended that the determination dated July 9, 2009, be AFFIRMED.

Respectfully submitted on June 3, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals