AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1562436

ABSOLUTE VIDEO INC
LUIS GOMEZ
PO BOX 161135
MIAMI FL 33116-1135

PROTEST OF LIABILITY
DOCKET NO. 2009-108475L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as digital court monitors constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in May 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party and any others who worked under the same terms and conditions were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to those workers. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because

he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on October 27, 2009. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The president of SSMJ, Inc. testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II. The Joined Party did not participate in the hearing. The Special Deputy issued a Recommended Order on December 4, 2009.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation which was formed in 1993 to provide court reporters, stenographers, monitors, and transcribers to the courts. The Petitioner has entered into a written *Standard Agreement for Court Reporting Services* with the Eleventh Judicial Circuit of Florida. The Petitioner's president and the Petitioner's vice president are both active in the operation of the business. The president and the vice president are the Petitioner's only acknowledged employees. The Petitioner classifies the court reporters, stenographers, monitors, and transcribers who perform services for the Petitioner as independent contractors.
2. The *Standard Agreement for Court Reporting Services* provides that the Petitioner may not subcontract any portion of the services required by the agreement but provides that the Petitioner may utilize court reporters who are independent contractors to perform the court reporting services.
3. Beginning in 2000 the Eleventh Judicial Circuit has utilized a digital recording system. The digital recording system must be monitored by an individual to ensure that the recording system is recording properly and to enter notes in the computer to identify whose voice is being recorded. As a result the court reporters were replaced by digital court monitors.
4. The Petitioner utilizes the services of approximately twenty digital court monitors. Generally, the Petitioner hires court monitors through word of mouth. The Petitioner does not enter into any written agreement or contract with the court monitors.
5. The Eleventh Judicial circuit provides all of the recording equipment and all of the supplies needed to perform the work. The digital court monitors do not have any known expenses in connection with the work other than the expense of commuting to and from the courthouse locations. The Eleventh Judicial Circuit trains the digital court monitors concerning how to perform the work. The Petitioner does not reimburse the digital court monitors for any expenses including travel to the courthouses, does not provide any equipment or supplies, and does not provide any training.
6. The Joined Party began performing services for the Petitioner on or about September 15, 2006, as a digital court monitor. The Joined Party performed services for the Petitioner until approximately May 21, 2009, when a judge with the Eleventh Judicial Circuit complained that the Joined Party left the court and did not return when the jury delivered the verdict. As a result the Eleventh Judicial Circuit exercised its right under the contract with the Petitioner to reject any subcontractor or employee, agent or representative of the Petitioner whom the court deemed to be not qualified to perform the court reporting services. The Petitioner terminated the Joined Party effective May 21, 2009.

7. The Petitioner has created a calendar listing the various court sessions. Generally, separate court sessions are scheduled for the mornings and for the afternoons. The Petitioner offers the digital court monitors the opportunity to work the various court sessions and the digital court monitors have the right to accept or decline any work assignment.
8. The digital court monitors are free to work for other court reporting companies or to work for themselves. The digital court monitors are not required to personally perform the work. They may hire others to perform the work for them.
9. The Petitioner pays the digital court monitors per session. The Eleventh Judicial Circuit has recommended that a fee of $35 per session is a fair amount as payment for services performed by a digital court monitor. However, the Petitioner pays the digital court monitors an amount per session based on the experience of each court monitor. The Joined Party's rate of pay was $60 per session.
10. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner does not provide any fringe benefits to the digital court monitors such as health insurance or retirement benefits. At the end of each year the Petitioner reports the earnings of each digital court monitor on Form 1099-MISC as nonemployee compensation.

Based on these Findings of Fact, the Special Deputy recommended that the determination be reversed. The Joined Party's exceptions to the Recommended Order of the Special Deputy were received by fax dated December 21, 2009. The Petitioner's counter exceptions were received by fax dated December 29, 2009. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal

basis for the exception, or that does not include appropriate and specific citations to the record.

The Joined Party's exceptions and the Petitioner's counter exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The *Preliminary Response* of the Petitioner's counter exceptions argues that the Joined Party's exceptions should be disregarded because they do not comply with Agency rules regarding the representation of the Joined Party. Specifically, the Petitioner contends that Gary Costales is not an attorney of record, that there is no evidence that Mr. Costales completed Department of Revenue's Power of Attorney and Declaration of Representative form, *Form DR-835*, that the Joined Party failed to sign the Joined Party's exceptions, and that Mr. Costales did not properly indentify himself as the Joined Party's representative in the Joined Party's exceptions. Section 120.57(1)(b), Florida Statutes, provides that all parties have an opportunity to file exceptions to the recommended order and to be represented by counsel or other qualified representative. Section 120.57(1)(b), Florida Statutes, does not contain a requirement that representatives file a notice of appearance. Rule 60BB-2.032, Florida Administrative Code, also provides that an employing unit may authorize its representative to receive confidential tax records or information by submitting a power of attorney to the Department of Revenue, through the use of *Form DR-835*. A review of the record reveals that Mr. Costales submitted the exceptions on behalf of the Joined Party and signed the Joined Party's exceptions as the Joined Party's attorney. The record further reveals that the Joined Party was not required to complete *Form DR-835* because it is a form that applies only to the representation of employing units under rule 60BB-2.032, Florida Administrative Code. Due to the absence of a requirement that representatives file a notice of appearance under section 120.57(1)(b), Florida Statutes, there is no need to examine if Mr. Costales provided sufficient notice of his representation of the Joined Party beyond the notice provided in the Joined Party's exceptions. The Petitioner has not established a basis for depriving the Joined Party of his right to representation or his right to file exceptions to the recommended order. The Agency accepts the exceptions submitted by Mr. Costales on behalf of the Joined Party. The portion of the Petitioner's counter exceptions that argues that the Joined Party's exceptions should be disregarded because they do not comply with Agency rules regarding the representation of the Joined Party is respectfully rejected.

The *Preliminary Response* of the Petitioner's counter exceptions also argues that the Joined Party's exceptions are untimely and should not be accepted by the Agency. Rule 60BB-2.035(19)(c), Florida Administrative Code, allows parties to file exceptions within 15 days of the mailing date of the Recommended Order, and rule 60BB-2.023(1), Florida Administrative Code, provides that the postmark date affixed by the United States Postal Service and the date of receipt of a document faxed to the Agency are considered the filing dates of documents submitted to the Agency. Rule 60BB-2.022(5), Florida Administrative Code, also provides that, when determining the timeliness of a submission, calendar days are counted and that the date of issuance of an order is not counted when computing time. Rule 60BB-2.022(5), Florida Administrative Code, further provides that the last day of the time period will be counted when computing a time period unless it is a Saturday, Sunday, or holiday, and that in the event that the time period ends on a Saturday, Sunday, or holiday, the time period will run until the end of the next day that is not a Saturday, Sunday, or holiday. The record reflects that the Recommended Order was issued on December 4, 2009, and that the last day of the 15 day time period for filing exceptions fell on December 19, 2009, a Saturday. As a result, the time period for filing exceptions ran until Monday, December 21, 2009, the next day that was not a Saturday, Sunday, or holiday pursuant to rule 60BB-2.022(5), Florida Administrative Code. The record also reflects that the Joined Party's exceptions were received by mail postmarked December 21, 2009, and received by fax dated December 21, 2009. The Joined Party's exceptions are accepted as timely by the Agency pursuant to rule 60BB-2.022(5) and rule 60BB-2.023 of the Florida Administrative Code. The portion of the Petitioner's counter exceptions that argues that the Joined Party's exceptions are untimely and should not be accepted by the Agency is respectfully rejected.

The Joined Party's Exceptions #1, 3-8, and 10 and a portion of Exception #9 attempt to enter additional evidence and propose alternative findings of fact and conclusions of law. Section 120.57(1)(l), Florida Statutes, provides that the Agency may not reject or modify the Findings of Fact unless the Agency first determines that the findings of fact were not based upon competent substantial evidence in the record. Section 120.57(1)(l), Florida Statutes, also provides that the Agency may not reject or modify the Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As result, the Agency may not modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to Section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of evidence after the hearing is closed. The Joined Party's request for the consideration of

additional evidence is respectfully denied. Exceptions #1, 3-8, and 10 and the portion of Exception #9 that attempt to enter additional evidence and propose alternative findings of fact and conclusions of law are respectfully rejected.

The Joined Party's Exception #2 maintains that the Special Deputy ignored the E*mployee Rules and Regulations* memo and *Work Habits* memo submitted by the Joined Party in support of his claim. A review of the record shows that the Special Deputy took testimony regarding the documents during the hearing and included the documents in *Respondent's Exhibit #1*, evidence that the Special Deputy considered when writing the Recommended Order. The Special Deputy's Findings of Fact are based on competent substantial evidence in the record. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The Agency is not permitted to modify the Special Deputy's Findings of Fact and Conclusions of Law under Section 120.57(1)(l), Florida Statutes, and does not reject the Special Deputy's Findings of Fact and Conclusions of Law. Exception #2 is respectfully rejected.

A portion of Joined Party's Exception #9 contends that the Petitioner's witness, Mr. Gomez, provided impermissible hearsay testimony. Rule 60BB-2.053(15)(c), Florida Administrative Code, provides that hearsay evidence may be used to supplement or explain other evidence and will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule. A review of the record reflects that Mr. Gomez provided testimony based on both his own firsthand experience and hearsay statements made by others about events he did not personally witness. Mr. Gomez's hearsay testimony was permitted to supplement or explain other direct evidence under rule 60BB-2.053(15)(c), Florida Administrative Code. The portion of Exception #9 that argues that Petitioner provided impermissible hearsay testimony is respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's findings are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, the exceptions filed by the Joined Party, and the counter exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

Therefore, it is ORDERED that the determination dated June 29, 2009, is REVERSED.

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

_____
TOM CLENDENNING,
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

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

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

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 June 29, 2009.

After due notice to the parties, a telephone hearing was held on October 27, 2009. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The president of SSMJ Inc testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II.

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 received from the Petitioner.

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

Findings of Fact:

1. The Petitioner is a corporation which was formed in 1993 to provide court reporters, stenographers, monitors, and transcribers to the courts. The Petitioner has entered into a written *Standard Agreement for Court Reporting Services* with the Eleventh Judicial Circuit of Florida. The Petitioner's president and the Petitioner's vice president are both active in the operation of the business. The president and the vice president are the Petitioner's only acknowledged employees. The Petitioner classifies the court reporters, stenographers, monitors, and transcribers who perform services for the Petitioner as independent contractors.

2. The *Standard Agreement for Court Reporting Services* provides that the Petitioner may not subcontract any portion of the services required by the agreement but provides that the Petitioner may utilize court reporters who are independent contractors to perform the court reporting services.

3. Beginning in 2000 the Eleventh Judicial Circuit has utilized a digital recording system. The digital recording system must be monitored by an individual to ensure that the recording system is recording properly and to enter notes in the computer to identify whose voice is being recorded. As a result the court reporters were replaced by digital court monitors.

4. The Petitioner utilizes the services of approximately twenty digital court monitors. Generally, the Petitioner hires court monitors through word of mouth. The Petitioner does not enter into any written agreement or contract with the court monitors.

5. The Eleventh Judicial circuit provides all of the recording equipment and all of the supplies needed to perform the work. The digital court monitors do not have any known expenses in connection with the work other than the expense of commuting to and from the courthouse locations. The Eleventh Judicial Circuit trains the digital court monitors concerning how to perform the work. The Petitioner does not reimburse the digital court monitors for any expenses including travel to the courthouses, does not provide any equipment or supplies, and does not provide any training.

6. The Joined Party began performing services for the Petitioner on or about September 15, 2006, as a digital court monitor. The Joined Party performed services for the Petitioner until approximately May 21, 2009, when a judge with the Eleventh Judicial Circuit complained that the Joined Party left the court and did not return when the jury delivered the verdict. As a result the Eleventh Judicial Circuit exercised its right under the contract with the Petitioner to reject any subcontractor or employee, agent or representative of the Petitioner whom the court deemed to be not qualified to perform the court reporting services. The Petitioner terminated the Joined Party effective May 21, 2009.

7. The Petitioner has created a calendar listing the various court sessions. Generally, separate court sessions are scheduled for the mornings and for the afternoons. The Petitioner offers the digital court monitors the opportunity to work the various court sessions and the digital court monitors have the right to accept or decline any work assignment.

8. The digital court monitors are free to work for other court reporting companies or to work for themselves. The digital court monitors are not required to personally perform the work. They may hire others to perform the work for them.

9. The Petitioner pays the digital court monitors per session. The Eleventh Judicial Circuit has recommended that a fee of $35 per session is a fair amount as payment for services performed by a digital court monitor. However, the Petitioner pays the digital court monitors an amount per session based on the experience of each court monitor. The Joined Party's rate of pay was $60 per session.

10. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner does not provide any fringe benefits to the digital court monitors such as health insurance or retirement benefits. At the end of each year the Petitioner reports the earnings of each digital court monitor on Form 1099-MISC as nonemployee compensation.

Conclusions of Law:

11. 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.

12. 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).

13. 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); Mangarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So2d 1061 (Fla. 2d DCA 1987).

14. 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.

15. 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.

16. 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.

17. 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 can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.

18. The evidence presented in this case reveals that the Joined Party performed services for the Petitioner as a digital court monitor for a period of almost three years. The Joined Party worked under a verbal agreement that he would perform services as an independent contractor. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

19. The Joined Party was paid based on work production rather than by time worked. He was not entitled to fringe benefits normally associated with employment and the Petitioner did not withhold any payroll taxes from the pay. The Joined Party's earnings were reported to the Internal Revenue Service as nonemployee compensation.

20. The Joined Party was free to accept or decline any work assignment. In that manner the Joined Party controlled when he worked. The Petitioner did not provide any tools or equipment and did not reimburse the Joined Party for any expenses. The Petitioner did not provide any training and did not supervise the Joined Party. The Joined Party was not required to personally perform the work. The Petitioner did not exercise any control over what work was performed, when the work was performed, or how the work was performed.

21. The "extent of control" referred to in Restatement section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

22. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals working as digital court monitors do not constitute insured employment.

Recommendation: It is recommended that the determination dated June 29, 2009, be REVERSED.

Respectfully submitted on December 4, 2009.

R. O. SMITH, Special Deputy
Office of Appeals