AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2303732
KEY TRANSPORTATION SERVICE CORP
199 NW 79TH ST
MIAMI FL 33150-3054

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

PROTEST OF LIABILITY
DOCKET NO. 2009-112191L

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 **October, 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: Assistant Director
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 July 13, 2010. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent was represented by a Department of Revenue Service Center Manager. A Tax Specialist I testified as a witness. The Joined Party appeared and testified.

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 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 corporation which was formed in approximately 2000 to operate a business involved in the transportation of the Petitioner's customers in luxury sedans, limousines, luxury vans, fifteen passenger vans, and mini-buses. The Petitioner has a permit to operate the business in Dade County and the Petitioner owns all of the vehicles that are used to transport the Petitioner's customers. When the Petitioner books a passenger the trip is assigned to a driver to

transport the passenger in the Petitioner's vehicle. The Petitioner classifies all of the drivers as independent contractors.

2. The Joined Party was employed as a tour guide for another company in 2004. He did not own his own business, had never been self employed, and had never worked as an independent contractor. Work as a tour guide was slow and he began seeking other work. He believed that driving a limousine was a good way to make a living, although he had never worked as a driver, and was informed that in order to transport passengers in Dade County it was necessary for him to obtain a Dade County hack license. The cost of the hack license was $140 which included a one week course provided by Dade County. The Joined Party obtained the hack license and began seeking work. The Joined Party contacted the Petitioner and was interviewed. In the interview the Petitioner told the Joined Party that the Petitioner would issue a vehicle to the Joined Party and that the Petitioner would provide the Joined Party with work. The Joined Party began work with the Petitioner in January 2005 and during the first week another driver rode with the Joined Party to evaluate the Joined Party's performance. The Petitioner and the Joined Party did not enter into any written agreement or contract at that time.
3. The Petitioner operates its business seven days a week, twenty-four hours per day.
4. The Petitioner initially assigned the Joined Party to drive a luxury van; however, the van which the Joined Party drove was not always the same luxury van. On other occasions the Petitioner assigned the Joined Party to drive either a luxury sedan or a mini-bus.
5. The Petitioner told the Joined Party that whenever the Joined Party was in possession of the Petitioner's vehicle the Joined Party was required to be available to accept work assignments. If he was not available to accept work assignments he was required to return the vehicle to the Petitioner. The Joined Party believed that if he refused work assignments the Petitioner would not provide any more work for him.
6. At the end of each day the Petitioner faxed to the Joined Party a list of the Joined Party's work assignments for the following day. The Joined Party was required to contact the Petitioner to confirm receipt of the list and to confirm that the Joined Party was available to perform the work. During the course of the workday the Petitioner's dispatcher would add additional work assignments or delete some of the assignments from the list.
7. The Joined Party never refused any work assignments with the exception of those assignments that the Joined Party could not perform due to airport delays or assignments where there was insufficient time to drive to the pickup location in order to pick up the passenger at the designated time after dropping off the previous customer.
8. If the Joined Party was not able to work due to illness or other reasons he was required to notify the Petitioner and was required to return the vehicle to the Petitioner.
9. The Petitioner was responsible for providing the vehicle and for the repair and maintenance of the vehicle. The Petitioner was responsible for the licenses and insurance. The Joined Party was responsible for the fuel which he used. The Petitioner reimbursed the Joined Party for tolls and parking.
10. The Joined Party was initially required to provide a cell phone so that he could be in contact with the dispatcher. The Joined Party was required to notify the dispatcher when he left for his first pickup, when he picked up the customer, when he arrived at the customer's destination, and when he left to pick up the next passenger. The Joined Party was required to report any problems. Subsequently, the Petitioner provided the Joined Party with a two-way Nextel radio for communicating with the dispatcher. The Petitioner charged the Joined Party a rental fee for the Nextel radio.

11. The Petitioner provided the Joined Party with business cards bearing the Petitioner's business name. The Joined Party was allowed to write his name and telephone number on the business cards when he provided the cards to the Petitioner's customers.

12. The Joined Party was required to wear a dark suit, a white shirt, and a red tie. The red tie was provided to him by the Petitioner. The Joined Party was required to wear a name tag bearing the Petitioner's name and the Joined Party's name. The name tag was provided by the Petitioner. The Joined Party was required to be neat and clean.

13. The Joined Party was not allowed to eat or smoke in the Petitioner's vehicle. The Petitioner provided water and soft drinks for the passengers. The Petitioner allowed the Joined Party to drink some of the water and soft drinks.

14. The Petitioner told the Joined Party that the Joined Party was not allowed to use the Petitioner's vehicle for any purpose other than to transport the Petitioner's customers. The Joined Party never transported any customers other than the customers he was assigned to transport by the Petitioner. The Joined Party never worked for any other company as a driver.

15. At one point in time the Petitioner required the Joined Party to ride with a newly hired driver for a week to evaluate the new driver and to give the new driver pointers concerning how to perform the work of a driver for the Petitioner.

16. The Petitioner determined the amounts to be charged to the customers and collected those amounts from the customers. The amounts charged by the Petitioner included tips and the Joined Party was required to tell the customers that the charge which the customers had paid included the tip. The Petitioner told the Joined Party not to accept additional tips from passengers. On rare occasions customers would insist on giving the Joined Party an additional tip and the Joined Party accepted the additional tips. The Joined Party did not report the additional tips to the Petitioner.

17. The fees charged to the Petitioner's customers by the Petitioner were loosely based on the amount of time that the Petitioner estimated it would take to transport the customers. The fees were not based on the number of passengers to be transported and were not necessarily based on distance. The assignment sheets provided to the Joined Party by the Petitioner did not contain the amounts that the Petitioner would pay the Joined Party for each assignment. The Joined Party had a general idea of the amounts that he would be paid for certain trips.

18. The Petitioner paid the Joined Party a percentage of the amounts charged to the customers. From time to time the Petitioner changed the percentage paid to the Joined Party and the other drivers. At the end of each week the Joined Party was required to turn in paperwork showing the jobs which he had completed during the week. The Joined Party's paperwork was used by the Petitioner to confirm that the Joined Party had completed the work and that the Joined Party had earned the money shown on computer generated invoices prepared by the Petitioner's bookkeeper.

19. The drivers were paid weekly with the payday falling on Thursday. No taxes were withheld from the pay. The Petitioner did not provide any fringe benefits to the Joined Party such as health insurance, paid vacations, paid holidays or paid sick days. At the end of each year the Joined Party's earnings were reported to the Internal Revenue Service by the Petitioner on Form 1099-MISC.

20. In October 2007 the Petitioner created a *Luxury Vehicle Lease Agreement* and an *Independent Contractor Agreement* which the Joined Party was required to sign. The Joined Party signed the Agreements on or about October 11, 2007.

21. The *Luxury Vehicle Lease Agreement* provides that the Petitioner agrees to lease a luxury van to the Joined Party based on a ten hour day. The Agreement states that the Joined Party will pay the Petitioner forty percent of the daily contracted fares as the rental charges for use of the vehicle.

22. The *Independent Contractor Agreement* was for an initial term of one year and would be automatically renewed yearly unless the Agreement was terminated by either party.

23. The *Independent Contractor Agreement* provides that the Joined Party was under no obligation to accept assignments from the Petitioner but if he accepted assignments he was required to perform the work in a diligent and competent manner with the skill and care of other drivers with similar levels of experience.

24. The *Independent Contractor Agreement* requires the Joined Party to keep himself and the Petitioner's vehicle in a neat and clean condition. The Agreement specifies how the Joined Party is required to conduct himself and the Petitioner's vehicle. It requires the Joined Party to operate the Petitioner's vehicle reasonably, prudently, and courteously, in a careful manner in conformity with all federal, state, and local laws, ordinances, and regulations. The purpose of those requirements was to protect the Petitioner's goodwill, venue agreement, and contracts. The Agreement provides that the Joined Party will exercise complete discretion in the performance of his duties, including the operation of the vehicle.

25. The *Independent Contractor Agreement* provides that the Joined Party shall be free to provide services to any other company, whether or not for gain, profit or other pecuniary advantage.

26. The *Independent Contractor Agreement* requires the Joined Party to maintain appropriate records, as determined by the Petitioner, relating to all services provided by the Joined Party and requires the Joined Party to prepare, maintain and attend to all reports and claims which are determined by the Petitioner to be necessary or appropriate. The Agreement provides that all records whether stored in a paper, electronic or other format, concerning the Petitioner's business, belong to and shall remain the property of the Petitioner.

27. The *Independent Contractor Agreement* requires the Joined Party to disclose in writing within forty-eight hours of the Joined Party's knowledge, any criminal complaint, indictment, or criminal proceeding in which the Joined Party is named as a defendant and any investigation or proceeding, whether administrative, civil or criminal relating to an allegation against the Joined Party.

28. The *Independent Contractor Agreement* states that the Joined Party will be paid the mutually negotiated rate of compensation that is set forth in Schedule A. However, the Agreement does not contain a Schedule A and does not set forth the terms of compensation.

29. The *Independent Contractor Agreement* states that the parties acknowledge that the Joined Party is an independent contractor and that the Petitioner will not withhold Social Security taxes, FICA payments, payments relating to workers' compensation or any other taxes or charges.

30. The *Independent Contractor Agreement* provides that the Agreement may be terminated by the Petitioner if the Joined Party fails to perform the duties to the Petitioner's satisfaction, or for misconduct as determined in the sole discretion of the Petitioner. The Agreement states the Agreement may be terminated by the Joined Party only with cause upon written notice.

31. The *Independent Contractor Agreement* provides that the Joined Party may not assign the Joined Party's rights or duties without the prior written consent of the Petitioner. The Petitioner may assign the Agreement to any related, successor, or affiliated entity without the Joined Party's consent. The Agreement provides that nothing in the Agreement shall preclude the Petitioner from transferring all of its assets, including the *Independent Contractor Agreement*, to another organization without the Joined Party's consent, and upon such sale of assets the Agreement will continue in full force and effect.

32. On December 27, 2007, the Petitioner created a document titled *Liability Addendum.* The document states that the Joined Party agrees to not use the vehicle for personal use or to permit anyone else, other than customers, to drive, ride in, or enter the vehicle unless expressly and

previously authorized to do so by the Petitioner. The Joined Party signed that document on December 28, 2007.

33. After the Joined Party signed the Agreements and the *Liability Addendum* there were no changes in the terms and conditions under which the Joined Party performed services. The Petitioner continued to pay the Joined Party sixty percent of the fares until the Petitioner unilaterally changed the rate of pay.

34. During 2005, 2006, 2007, and 2008, the Joined Party worked on average over forty hours per week. If he wanted to take time off from work he had to request permission in advance.

35. Either party could terminate the relationship at any time without incurring a penalty for breach of contract. The Joined Party noticed that after he signed the Agreements his earnings began to decline. Economic conditions were bad and the Petitioner's business was declining. The Joined Party was not earning enough money to meet his needs and he sought other employment. The Joined Party terminated the relationship on March 15, 2009, to accept other employment.

Conclusions of Law:

36. 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.

37. 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).

38. 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).

39. 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.

40. 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.

41. 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.

42. 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.

43. The Joined Party began work for the Petitioner in January 2005. There was no written agreement between the parties. The evidence reveals that the verbal agreement was that the Petitioner would provide a vehicle for the Joined Party to drive and that the Petitioner would provide work for the Joined Party. It was not until October 2007 that the Petitioner provided the Joined Party with a written *Independent Contractor Agreement.* Although the written Agreement specifies that the Joined Party is an independent contractor, there were no changes in the actual conditions under which the Joined Party performed services. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that a driver was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

44. The Petitioner's business is transporting the Petitioner's customers in vehicles owned by the Petitioner. As a driver the Joined Party used the Petitioner's vehicle to transport the Petitioner's customers. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.

45. Other than the $140 fee to obtain a hack license, the Joined Party did not have any investment in a business. The Joined Party did not own the vehicle which was used to transport the customers. The Joined Party's only expense was the cost of the fuel which he used. The Petitioner provided the vehicle and was responsible for repair, maintenance, insurance, vehicle license, tolls, and parking. It was not shown that the Joined Party was at significant risk of suffering a financial loss from performing services.

46. It was not shown that any particular skill or special knowledge was required to perform the work. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

47. The Petitioner paid the Joined Party based on work performed rather than an hourly rate of pay. However, the Petitioner alone controlled the amounts that were charged to the customers, the amounts of tips charged to customers, and the percentage of the fees paid to the drivers. The Joined Party did not always know in advance how much he would be paid for completing the assigned work. The Petitioner unilaterally changed the percentage paid to the Joined Party and the other drivers from time to time. The Petitioner chose not to withhold payroll taxes from the pay and chose not to provide fringe benefits such as health insurance, paid vacations, paid holidays, or paid sick time. The fact that the Petitioner chose not to withhold payroll taxes and chose not to provide fringe benefits does not, standing alone, establish an independent contractor relationship.

48. The Agreement requires the Joined Party to work a ten hour day. If the Joined Party was not available to accept a work assignment within the ten hour day, he was required to return the vehicle to the Petitioner. The Joined Party was not allowed to use the Petitioner's vehicle for personal use. The Joined Party was prohibited from allowing anyone other than the Petitioner's customers to ride in or even enter the Petitioner's vehicle. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him. If he needed time off from work he was required to request the time off in advance. He was required to dress in a manner specified by the Petitioner and he was required to conduct himself in a manner specified by the Petitioner. The Joined Party was prohibited from smoking or eating in the Petitioner's vehicle. The Petitioner required the Joined Party to train a newly hired driver. These facts reveal that the Petitioner controlled how the work was preformed.

49. The Joined Party worked exclusively for the Petitioner on a full time basis for a period of time in excess of four years. The Petitioner had the right, in the sole discretion of the Petitioner, to terminate the relationship at any time. The Joined Party also had the right to terminate the relationship at any time. These facts reveal the existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

50. The Petitioner controlled the financial aspects of the relationship. The Petitioner controlled which vehicle the Joined Party was assigned to drive, which customers the Joined Party was assigned to transport, and when the Joined Party was assigned to work. The Petitioner controlled to a significant degree how the work was to be performed. The Petitioner had a legitimate business interest in controlling how the work was performed by the drivers. It was the Petitioner's desire to protect the Petitioner's goodwill, venue agreements, and contracts. However, the type of control exercised by the Petitioner is precisely what distinguishes an employee from an independent contractor. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

51. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as drivers constitute insured employment.

52. In reaching the above conclusion the special deputy resolved conflicting testimony and evidence regarding material issues of fact. Factors which may be considered in resolving evidentiary conflicts include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. In this case the testimony of the Petitioner's president that the Joined Party was free to use the vehicle for personal use and to transport his own customers in the Petitioner's vehicle is contradicted by the Petitioner's documentary evidence and by the Joined Party's testimony. The *Liability Addendum* expressly provides the Joined Party was not to use the vehicle for personal use and that no one, other than the Petitioner's customers, was allowed to enter the Petitioner's vehicle. The special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

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

Respectfully submitted on September 2, 2010.

R. O. SMITH, Special Deputy
Office of Appeals