AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2218965
WINES DEMOLITION INC
3495 S CLYDE MORRIS BLVD
DAYTONA BEACH FL 32119-2313

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

PROTEST OF LIABILITY
DOCKET NO. 2009-113042L

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 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.

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.

Exceptions to the Recommended Order were not received from any party.

Upon review of the record, it was determined that a portion of Finding of Fact #2 must be modified to reflect the correct starting date for the Joined Party. The record reflects that the Petitioner testified that the Joined Party began work in 2004, and that all documents contained in the Respondent's Exhibit that list the Joined Party's start date list the date as February 1, 2004, instead of February 2, 2004. Finding of Fact #2 of the Recommended Order is amended to say:

The Joined Party performed services for the Petitioner, primarily as a dump truck driver. The Joined Party performed services for the Petitioner from February 1, 2004, through May 1, 2009.

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 amended herein. 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 27, 2009, is AFFIRMED.

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
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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 27, 2009.

After due notice to the parties, a telephone hearing was held on October 29, 2009. The Petitioner's President appeared and provided testimony. A Representative and a Tax Specialist appeared on behalf of the Respondent. The Tax Specialist provided testimony. The Joined Party did not appear.

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 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 for the purpose of demolitions and land clearing. The Petitioner is hired by clients to remove trash and debris from work sites.

2. The Joined Party performed services for the Petitioner, primarily as a dump truck driver. The Joined Party performed services for the Petitioner from February 2, 2004, through May 1, 2009.

3. The Joined Party and Petitioner had a prior relationship before the Joined Party began performing services for the Petitioner. The Joined Party requested to work as an independent contractor. The Petitioner agreed to hire the Joined Party as an independent contractor.

4. The Joined Party's responsibilities varied depending upon the needs of the Petitioner. The Joined Party drove a dump truck and performed mechanic services as directed by the Petitioner.

5. The Joined Party's hours of work were from 7 a.m. until 4 p.m., Monday through Friday. The hours of operation were determined by the Petitioner. The Petitioner would call the Joined Party the day before if there was work available.

6. The Petitioner directed the Joined Party to a client site to pick up trash. The Joined Party would bring the trash to the garbage dump and then return to the worksite for additional loads. Upon completion of the day, the Joined Party would return to the Petitioner's work site. The Joined Party was free to select his own routes.

7. The Petitioner owned the dump truck provided to the Joined Party. The Petitioner provided insurance, fuel, and maintenance for the dump truck provided to the Joined Party. The Joined Party normally brought his own tools for performing mechanic work in the Petitioner's repair workshop.

8. The Joined Party was paid approximately $120 per day in the form of a $600 per week weekly salary. The Petitioner kept track of the time the Joined Party worked. The paychecks from the Petitioner were made out to the Joined Party personally. The Joined Party was paid $15,550 by the Petitioner in 2008. The Joined Party's 2008 1099 form issued by the Petitioner was made out to the Joined Party personally.

9. The Joined Party was allowed to perform services for a competitor.

10. The Joined Party was required to have a commercial driver's license.

11. The Joined Party was not covered under the Petitioner's workers' compensation insurance.

12. The Joined Party did not receive any benefits from the Petitioner.

13. Both parties could end the relationship at anytime without liability.

Conclusions of Law:

1. 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.
2. 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).
3. 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).

4. 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.

   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.

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

6. The evidence presented in this case reveals that the Petitioner had unilateral control over the time, place, and nature of the work performed by the Joined Party. The Petitioner determined what days the Petitioner could work, what hours, where the work was to be performed, and what type of work would be performed.

7. The evidence presented demonstrates the Petitioner had control over the equipment necessary to perform the primary duties of the Joined Party. The Petitioner owned the dump truck used by the Joined Party in the performance of his work. The Petitioner supplied the truck to the Joined Party, as well as providing fuel, maintenance, and insurance for the truck.

8. The Joined Party worked for the Petitioner for a period of over five years. The length of time worked demonstrates a permanent relationship rather than an occasional relationship and as such is indicative of an employer-employee relationship.

9. The relationship was an at-will relationship. Either party could terminate the relationship at anytime without incurring liability. 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."

10. The Petitioner's business was created in part for the purpose of land clearing. The services provided by the Joined Party, both as a dump truck driver and as a mechanic, were an integral part of the daily course of business for the Petitioner.

11. While there was a verbal agreement between the parties that the relationship would be an independent contractor relationship, such an agreement is not in itself dispositive of the matter. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "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."

12. Evidence was presented that the Joined Party had his own business. The Petitioner made out the Joined Party's paychecks and submitted the Joined Party's 1099 form in the Joined Party's name rather than that of a business of the Joined Party. This is indicative that despite any business the Joined Party may have, in this case the Joined Party was hired as an individual and an employee.

13. 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 Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated July 27, 2009, be AFFIRMED.

Respectfully submitted on April 9, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals