AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2630614
R&M MOVING INC
9597 12ST STREET N
SEMINOLE FL 33772-2604

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

PROTEST OF LIABILITY
DOCKET NO. 2009-125312L

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 August 10, 2009, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
Employer Account No. - 2630614
R&M MOVING INC
ROSE BORNHAUSER
9597 12ST STREET N
SEMINOLE FL 33772-2604

PROTEST OF LIABILITY
DOCKET NO. 2009-125312L

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 August 10, 2009.

After due notice to the parties, a telephone hearing was held on December 23, 2009. The Petitioner's manager appeared and provided testimony. The Joined Party did not appear. A tax specialist appeared without providing testimony for the respondent.

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 mover-helpers 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 2004 as a moving company. The Petitioner had one corporate officer who was not considered an employee. The Petitioner engaged the services of mover helpers and has had 10-15 mover helpers since 2004.

2. The Joined Party contacted the Petitioner for work. The Joined Party performed services for the Petitioner from April 2008, through February 20, 2009 on an as needed basis. The Petitioner informed the Joined Party at the time of hire that the Joined Party would work as an independent contractor and would not have any taxes withheld from his pay.

3. The Petitioner would contact the Joined Party when work was available. The Joined Party had the right to accept or decline the offered work. The Joined Party declined work on several occasions. The Joined Party had the option of riding in the Petitioner's moving truck to and from the worksite. The Joined Party would carry items from the worksite to the moving van. The Joined Party was not allowed to load the items into the van itself. The Joined Party would then travel to the drop-off work site. The Joined Party would then carry items from the moving truck to the drop off-site. The Joined Party was not allowed to unload the van. The Joined Party was not allowed to perform work disassembling or reassembling items. The Joined Party was responsible for providing his own dolly.

4. The moving truck was owned and operated by the Petitioner. The Joined Party was not allowed to drive the truck. The Joined Party did not have any expenses connected with the work save the costs of travel if he elected to not ride in the moving truck.

5. The Joined Party was paid $10 per hour. The Petitioner kept track of the hours worked at the jobsite and issued a check to the Joined Party shortly after the work was performed. The Joined Party received no time off, insurance, or benefits from the Petitioner.

6. The Joined Party could quit at anytime without liability.

Conclusions of Law:

7. 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.

8. 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).

9. 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).

10. 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.

11. 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.

12. The evidence presented in this case reveals that the Petitioner controlled the time and place that the work was to be done. The Petitioner controlled the manner of the work in so far as the Joined Party was required to operate within the restrictive guidelines established by the Petitioner. The Joined Party was not allowed to load or unload the truck. The Joined Party was not allowed to assemble or disassemble items. The Joined Party was not allowed to drive the truck.

13. The work performed by the Joined Party for the Petitioner required no specialized skill or training. The work consisted solely of carrying objects from the client site to the Petitioner's truck. Unskilled labor indicates that an employer-employee relationship existed between the Joined Party and the Petitioner.

14. The Joined Party was paid by the hour rather than by the job. Hourly pay is consistent with an employer-employee relationship between the Petitioner and the Joined Party.

15. The relationship was an at will relationship. The Joined Party could end the relationship at anytime without liability. The Petitioner could discontinue the use of the Joined Party's services at any time without liability.

16. The preponderance of the evidence presented 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 August 10, 2009, be AFFIRMED.

Respectfully submitted on June 4, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals