AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2866011
J & M ELECTRICAL CONTRACTORS INC
PO BOX 545947
SURFSIDE FL 33154-5947

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

PROTEST OF LIABILITY
DOCKET NO. 2009-127983L

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 20, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
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 August 20, 2009.

After due notice to the parties, a telephone hearing was held on November 5, 2009. The Petitioner's Owner/President appeared and testified. The Joined Party appeared and testified on his own behalf. A Tax Specialist II appeared and testified on behalf of 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 electricians 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 incorporated in 2004 for the purpose of running an electrical contracting business. The Petitioner has two corporate officers.

2. The Petitioner has independent contractors and employees that hold the position of electrician. Both types of workers do the same type of work. The employees are required to respond to emergency service calls and have a fixed schedule. The workers considered independent contractors were not required to respond to after-hours emergency calls. The Petitioner generally had five or six electricians that were considered independent contractors.

3. The Joined Party provided services to the Petitioner as an electrician from October 2008, through June 26, 2009. The Joined Party performed electrical work, including wiring, for the Petitioner.

4. The Joined Party began performing services for the Petitioner when the Petitioner took over a project that involved the Joined Party. The Petitioner retained the Joined Party for the duration of the project. The parties agreed that the Joined Party would be an independent contractor for the duration of the project. The Joined Party asked for additional work at the conclusion of the project in November 2008. The parties agreed to continue their relationship. The Joined Party filled out an application with the Petitioner when the agreement to continue the relationship was made.

5. The Joined Party was assigned projects by the Petitioner. The Joined Party would work on the project until it was concluded. The general contractor hiring the Petitioner would occasionally set parameters or deadlines for the project which would be passed from the Petitioner to the Joined Party.

6. The Joined Party's work hours varied from project to project. Work on condos would follow a 9 a.m. to 5 p.m. schedule, while an emergency project might require working a 16 hour day. The hours were based upon the requirements of the worksite or the contingencies of the work itself. The employee workers had a 7 a.m. to 3:30 p.m. schedule. The employee workers would be required to work past their scheduled stop time if the circumstances warranted it.

7. The Joined Party was sent out to respond to emergency calls during normal hours.

8. The Joined Party was allowed to perform services for a competitor. The Joined Party was not allowed to subcontract his services.

9. The Joined Party was covered under the Petitioner's workers' compensation policy.

10. The Joined Party was paid $15 per hour by the Petitioner. The amount was based upon the pay the Joined Party received from the prior employing unit. The employee electricians are paid between $12 and $16 per hour based upon their experience. The Joined Party's pay rate was determined by the Petitioner. The Joined Party was paid every two weeks. The Joined Party's pay was not held contingent upon payment from the customers. The Joined Party would submit a list of hours to the Petitioner initially. The Joined Party began using a time card in November 2008, after the initial project was concluded and the parties elected to continue their relationship. The Joined Party was paid $8,944 in 2008.

11. The Joined Party was required to report to a safety orientation meeting every Monday. The safety orientation was required for all workers performing services for the Petitioner.

12. The Joined Party was required to keep the Petitioner informed of the progress of the work. The Joined Party was required to maintain a daily log and record everything the Joined Party did each day. The Petitioner required this to allow for scheduling of other workers and materials.

13. The Petitioner would determine what workers were needed for any given project.

14. The Petitioner would write up employee workers in the event that disciplinary actions were required.

15. The Joined Party performed his electrician services for the Petitioner using the Petitioner's license. The Joined Party did not have an occupational or professional license. The Joined Party did not have his own business.

16. The Joined Party provided his own hand tools. The Petitioner provided power tools when needed. The Petitioner provided a work van to the Joined Party. The Petitioner paid for the fuel and maintenance on the work van. The Joined Party was expected to wear a shirt with the Petitioner's name and logo. The uniform shirt was provided by the Petitioner as a means of ensuring convenient access to the work site.

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 cannot 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 and location of the work. The Petitioner informed the Joined Party of where work was to be performed as well as what times the work was to be performed. The Petitioner assigned projects for the Joined Party as well as dispatching the Joined Party to deal with emergency calls. The Joined Party was required to attend weekly safety orientation meetings by the Petitioner. The Joined Party was required to submit a daily log in order to keep the Petitioner informed of the progress of the work.
7. The evidence reflects that the Petitioner controlled the financial aspects of the relationship. The Petitioner determined the method and rate of pay. The Joined Party was paid by time worked rather than by the job. The Joined Party was covered under the Petitioner's workers' compensation insurance. The Petitioner provided power tools, a van, and uniform shirts to the Joined Party. The Petitioner paid for the fuel and maintenance of the van.
8. The services provided by the Joined Party as an electrician were a regular and integral part of the day to day business of the Petitioner's electrical contracting business.
9. 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 August 20, 2009, be AFFIRMED.

Respectfully submitted on April 9, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals