AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2916592
POOLSURE OF FLORIDA
2017 WILSON STREET
HOLLYWOOD FL 33020-2729

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

PROTEST OF LIABILITY
DOCKET NO. 2009-142055L

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 determinations dated August 25, 2009, are MODIFIED to reflect a retroactive date of April 1, 2005. It is also ORDERED that the determinations are AFFIRMED as modified.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2916592
POOLSURE OF FLORDIA
MICHAEL LEVINE
2017 WILSON STREET
HOLLYWOOD FL 33020-2729

PROTEST OF LIABILITY
DOCKET NO. 2009-142055L

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 25, 2009.

After due notice to the parties, a telephone hearing was held on May 6, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's vice president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. Joined Party Felipe Garrido appeared and testified. Joined Party Chris Tennant 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 from any party. A post hearing submission was received from the Petitioner which is addressed in the conclusions of law section of the recommended order.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as pool cleaners 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 on April 1, 2005, to operate a business involving the distribution of swimming pool chemicals and the servicing and repair of commercial swimming pools. Both the Petitioner's president and vice president have been active in the

business since inception. The Petitioner's president is involved in the sales and marketing portion of the business and the vice president is involved in the bookkeeping and accounting portion of the business.

2. Initially, the Petitioner hired employees to perform the pool maintenance for the Petitioner's clients. During approximately the latter part of 2005 or the early part of 2006 the Petitioner replaced the employees with workers who were classified by the Petitioner as independent contractors.

3. The Joined Party was employed as a valet parking attendant in 2005. His brother worked for the Petitioner as a pool service technician. The Joined Party did not have prior experience as a pool cleaner or pool service technician but his brother referred the Joined Party to the Petitioner for the position of pool cleaner. The Petitioner agreed to hire the Joined Party and agreed to pay the Joined Party $700 per week plus $400 per month for vehicle expenses. The Joined Party accepted the offer and began work on January 23, 2006.

4. The Joined Party's brother trained the Joined Party how to clean pools for the Petitioner. After the training period the Petitioner assigned the Joined Party to a pool cleaning route. The Petitioner provided the Joined Party with the pool vacuum, pool brushes, a test kit, and any chemicals and supplies that were needed to perform the work. The Petitioner provided the Joined Party with a magnetic sign bearing the Petitioner's name which the Joined Party was to put on his own personal vehicle. The purpose of the sign was to increase the Petitioner's business. The Petitioner provided the Joined Party with uniform shirts bearing the Petitioner's name. The Petitioner provided shirts to the pool cleaners because clothing is often bleached by the pool chemicals and the Petitioner wanted the pool cleaners to look neat and clean.

5. Originally, the Joined Party worked Monday through Friday. He was required to report to the Petitioner's warehouse each morning to pick up chemicals and supplies. The Joined Party was provided with a key to the warehouse and on some days the Joined Party was responsible for opening the warehouse in the morning or closing the warehouse at the end of the day. He was required to attend regularly scheduled meetings for the pool cleaners. His duties included cleaning and sweeping the Petitioner's warehouse.

6. Approximately six months to a year after the Joined Party began performing services for the Petitioner, the Petitioner hired a General Manager to operate the business. At that time the General Manager told the Joined Party that the Petitioner was paying the Joined Party too much money for the work which the Joined Party performed. The General Manager informed the Joined Party that the Joined Party was now required to work Monday through Saturday. The General Manager eliminated the weekly salary and informed the Joined Party that the Joined Party would be paid an amount per pool and that the amount would be determined by the Petitioner. The Petitioner eliminated the $400 per month payment for vehicle expenses. The change in the method of pay resulted in a reduction in the Joined Party's pay. The Joined Party was no longer required to report to the warehouse or to attend mandatory meetings.

7. As the Petitioner obtained new customers the Petitioner assigned additional pools to the Joined Party to clean. On one occasion the Joined Party refused to accept a pool to clean because of the distance from his home and because of the low amount of pay that the Petitioner established for cleaning the pool. The Petitioner told the Joined Party that if he refused to perform work he could leave. The Joined Party felt that he was going to be discharged because he refused the pool and he never refused any other pools assigned to him by the Petitioner. However, on other occasions the Joined Party attempted to negotiate the amount of pay for an assigned pool. The Petitioner refused to negotiate and advised the Joined Party that if he did not accept the pool at the price offered, the Joined Party should leave.

8. The Joined Party generally worked over sixty hours per week. The Joined Party was never absent from work for any reason, however, his father passed away out of the country and the Joined Party requested one week off from work. The General Manager denied the Joined Party's request for time off and advised the Joined Party that if the Joined Party took the time off from work he would be discharged.

9. When the Joined Party was hired in January 2006, the Joined Party was not directly supervised. Subsequently, the Joined Party was assigned to work under a supervisor. The Joined Party was required to contact the supervisor if there were any problems with a pool and the supervisor would tell the Joined Party what to do. The supervisor inspected the pools and notified the Joined Party if there were any customer complaints.

10. The Joined Party did not perform services for any other pool service company and did not have his own personal pool cleaning customers. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him. The Joined Party did not have an occupational license or business license. He did not have any investment in a business and did not advertise or offer services to the general public. The Joined Party did not have liability insurance. He was informed by the Petitioner that he was covered under the Petitioner's liability insurance for any damage that the Joined Party might cause.

11. The Joined Party was paid by direct deposit on a regularly scheduled payday. No taxes were withheld from the pay and the Petitioner did not provide any fringe benefits such as health insurance, retirement benefits, paid holidays, or paid vacations. The Petitioner paid a $100 bonus to the Joined Party for doing a good job on one occasion and gave the Joined Party $40 gift cards to restaurants on two occasions because the Petitioner had not received any customer complaints. The Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

12. Either party had the right to terminate the relationship at any time without incurring liability. In July 2009 the Petitioner terminated Joined Party Felipe Garrido. No reason for the termination was provided to the Joined Party.

13. Joined Party Chris Tennant was hired by the Petitioner as a pool cleaner on or about April 4, 2009. The Petitioner and Chris Tennant entered into a written agreement titled *Instructions and Checklist Swimming Pool Service Agreement* which required Chris Tennant to perform services for the Petitioner's customers including doing chemical analysis, vacuuming, brushing pool/spa tile, cleaning baskets, backwashing filters, cleaning and replacing filters, fixing and replacing worn out parts, maintaining and repairing pipes and plumbing, and notifying the pool owner of any problems. The Agreement states that the Petitioner will provide the pool vacuum, vacuum supplies, poles, leaf rakes, and reagents. The Agreement specifies that the Petitioner will pay Chris Tennant a weekly flat rate of $577, to be paid on a bi-weekly basis every other Friday. The Agreement provides that the Petitioner will reimburse Chris Tennant for the use of his vehicle at the rate of $200 per month. The Agreement states that Chris Tennant is an independent contractor and not an employee of the Petitioner. Chris Tennant performed services for the Petitioner until on or about May 13, 2009.

14. Chris Tennant filed a claim for unemployment compensation benefits effective June 1, 2009. He filed a *Request for Reconsideration of Monetary Determination* when he did not receive credit for his earnings from the Petitioner. An investigation was assigned to the Department of Revenue to determine if Chris Tennant performed services for the Petitioner as an employee or whether he performed services as an independent contractor. On August 25, 2009, the Department of Revenue issued a determination holding that persons performing services for the Petitioner as pool cleaners are the Petitioner's employees retroactive to January 23, 2006. The Petitioner filed a protest by mail postmarked September 14, 2009.

15. Joined Party Felipe Garrido filed an initial claim for unemployment compensation benefits effective July 19, 2009. He filed a *Request for Reconsideration of Monetary Determination* when he did not receive credit for his earnings from the Petitioner. An investigation was assigned to the Department of Revenue to determine if Felipe Garrido performed services for the Petitioner as an employee or whether he performed services as an independent contractor. On September 15, 2009, the Department of Revenue issued a determination holding that Felipe Garrido was the Petitioner's employee retroactive to January 23, 2006.

Conclusions of Law:

16. 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. The Petitioner's business is the distribution of swimming pool chemicals and the maintenance and repair of commercial swimming pools. The Petitioner's pool cleaners perform the maintenance of the pools for the Petitioner's customers. The work performed for the Petitioner by the pool cleaners is not separate and distinct from the Petitioner's business but is an integral and necessary part of the Petitioner's business.

24. The Petitioner provides the tools, equipment, and supplies which are needed to perform the work. The Petitioner pays the pool cleaners an amount each month for reimbursement of vehicle expenses. It was not shown that the pool cleaners have any investment in a business or have significant expenses. It was not shown that the pool cleaners are at risk of suffering a financial loss from performing services.

25. It was not shown that the work performed by the pool cleaners requires any special skill or knowledge. Joined Party Felipe Garrido had no prior experience cleaning pools when he began working for the Petitioner. Felipe Garrido received on-the-job training which was provided by another pool cleaner who performed services for the Petitioner. 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)

26. Initially, the Petitioner paid Joined Party Felipe Garrido a flat weekly amount plus a flat amount as reimbursement for vehicle expenses. The Petitioner unilaterally changed the method and rate of pay to a specified amount for each pool. The Petitioner determined the pay amount per pool and it was not subject to negotiation. The Petitioner paid Joined Party Chris Tennant a flat weekly amount plus a flat amount for reimbursement of vehicle expenses. These facts show that the Petitioner was in control of the financial aspects of the relationship. The fact that the Petitioner chose not to withhold payroll taxes, standing alone, does not establish an independent contractor relationship.

27. Joined Party Felipe Garrido performed services for the Petitioner for a period of three and one-half years. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner discharged Felipe Garrido without explanation. 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."

28. Joined Party Chris Tennant and the Petitioner entered into a written *Instructions and Checklist Swimming Pool Service Agreement,* which specifies that Chris Tennant is an independent

contractor and not an employee of the Petitioner. 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 the worker 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."

29. 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.
30. The evidence presented in this case reveals that the Petitioner exercised significant control over the means and manner in which the work was performed. Thus, it is concluded that the services performed for the Petitioner by Felipe Garrido, Chris Tennant, and other individuals as pool cleaners constitute insured employment.
31. The Petitioner's post hearing submission is an argument based on the Workers' Compensation Law, Chapter 440, Florida Statutes. The issue in this case is whether or not the pool cleaners are the Petitioner's employees for purposes of the Unemployment Compensation Law. The Workers' Compensation Law is specific only to the workers' compensation program. The Petitioner's post hearing submission is respectfully rejected.

Recommendation: It is recommended that the determinations dated August 25, 2009, be MODIFIED to reflect a retroactive date of April 1, 2005. As modified it is recommended that the determinations be AFFIRMED.

Respectfully submitted on June 4, 2010.

R. O. SMITH, Special Deputy
Office of Appeals