AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2919182
ANTHONY SOSTENUTO LLC
1113 N BLACK ACRE CT
WINTER SPRINGS FL 32708

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

PROTEST OF LIABILITY
DOCKET NO. 2009-142057L

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 September 15, 2009, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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Unemployment Compensation Appeals
MSC 345 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 September 15, 2009.

After due notice to the parties, a telephone hearing was held on May 4, 2010. The Petitioner's owner appeared and provided testimony at the hearing. 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 in route sales and delivery driving constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a sole proprietorship established in 1997 for the purpose of running a wholesale bread delivery business. The Petitioner made deliveries for a client company and was responsible for several accounts of the client company.

2. The Joined Party had prior experience in the wholesale delivery business. The Petitioner offered the Joined Party the routes within a specific geographic area.

3. The Joined Party provided services to the Petitioner in route sales and delivery from March 2006 through June 2009. The Petitioner and the Joined Party had a verbal agreement which stipulated that the Joined Party was an independent contractor.

4. The Joined Party previously owned his own delivery vehicle but had lost possession of the vehicle. The Petitioner loaned a delivery truck to the Joined Party. The Petitioner retained ownership of the truck and continued to pay the insurance on the truck. The Joined Party was responsible for routine maintenance and fuel for the vehicle. The Joined Party was allowed to take the delivery truck home or to use it for tasks not connected to the Petitioner's business.

5. The Joined Party would report to work each day at 3:30 a.m. at the client company's warehouse. The Joined Party would check the computer for orders, load his truck, and proceed to deliver the orders within his allotted area. The Joined Party was free to create his own route and schedule within the parameters set by the times that the customers accepted orders.

6. The Joined Party was paid an 11% commission on items delivered. The Joined Party's pay was held until the client company submitted payment to the Petitioner. The Petitioner typically paid the Joined Party with a weekly check. The amount of each check was determined by a review of the client company's computer records.

7. The Joined Party was allowed to subcontract the work. The Joined Party was responsible for paying any subcontracted workers.

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.

5. 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.
6. 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.

7. The evidence presented in this case demonstrates that the Petitioner contracted with the Joined Party because the Joined Party was experienced in route sales and delivery driving. The Joined Party and the Petitioner both considered the relationship to be an independent contractor relationship. The evidence reveals that the Petitioner provided a geographic area with pre-existing routes to the Joined Party but otherwise did not exercise control over the day to day work performed by the Joined Party. The degree of control exercised by a business over a worker is the principal consideration in determining employment status. If the business is only concerned with the results and exerts no control over the manner of doing the work, then the worker is an independent contractor. United States Telephone Company v. Department of Labor and Employment Security, 410 So.2d 1002 (Fla. 3rd DCA 1982); Cosmo Personnel Agency of Ft. Lauderdale, Inc. v. Department of Labor and Employment Security, 407 So.2d 249 (Fla. 4th DCA 1981).

8. The record shows the Petitioner provided a vehicle for the Joined Party to use. The Petitioner provided the insurance and maintenance for the vehicle. The Joined Party was free to use the vehicle for personal projects and was not limited to using the vehicle for work purposes.

9. The Joined Party was paid by commission. The Joined Party's pay was held until the Petitioner had been paid by the client.

10. The Joined Party was allowed to subcontract the work.

11. Section 443.1216(3)(a), Florida Statutes, states, in part, that a commission driver engaged in distributing bakery products is to be considered an employee. Section 443.1216(4)(a), Florida Statutes, requires that the contract of service contemplate that substantially all of the services are to be performed personally by the individual in order for the exception laid out in Section 443.1216(3)(a), Florida Statutes, to apply. In this case, the Joined Party was allowed to subcontract the work and thus was not required to perform the services personally. Therefore, the exception set forth in Section 443.1216(3)(a), Florida Statutes does not apply.

Recommendation: It is recommended that the determination dated September 15, 2009, be REVERSED.

Respectfully submitted on June 15, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals