AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2895621
AMERICA'S LANDSCAPING CREW INC
PO BOX 11001
SPRING HILL FL 34610-0001

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

PROTEST OF LIABILITY
DOCKET NO. 2009-145231L

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 April 23, 2009, is REVERSED.

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 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2895621
AMERICA'S LANDSCAPING CREW INC
STEPHANIE LASCOLA
PO BOX 11001
SPRING HILL FL 34610-0001

PROTEST OF LIABILITY
DOCKET NO. 2009-145231L

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 April 23, 2009.

After due notice to the parties, a telephone hearing was held on February 10, 2010. The Petitioner's secretary appeared and provided testimony at the hearing. A tax specialist II appeared and provided testimony on behalf of the respondent. The Joined Party did not appear at the hearing.

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 landscaping crew 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 was a corporation incorporated April 2006 for the purpose of running a landscaping business. The corporation was dissolved in 2009 for business reasons.

2. The Petitioner contacted the Joined Party after hearing that the Joined Party had no work. The Petitioner offered the Joined Party work as an independent contractor. The Joined Party provided services for the Petitioner in 2007 and 2008.

3. The Petitioner would contact the Joined Party when work was available. The Joined Party would be informed of where and what the work entailed. The Joined Party would be given approximately one week to complete the assignment and was free to select his own hours of work within that time period.

4. The Joined Party worked alone at the job site. The Petitioner would review the Joined Party's work at the conclusion of the assignment. The Joined Party was required to redo any improperly done work without additional pay.

5. The Joined Party was paid by the job. The Joined Party's pay was held until the Petitioner received payment from the client.

6. The Joined Party provided his own tools. If the Joined Party did not have tools needed for the work, the Petitioner would supply them.

7. The Joined Party was allowed to work for competitors and was allowed to subcontract the work.

Conclusions of Law:

8. 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.

9. 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).

10. 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).

11. 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.

12. 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.

13. 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.

14. The evidence presented in this case reveals that the Petitioner offered work to the Joined Party on an independent contractor basis. The evidence reflects that the Petitioner did not exert supervision over the Joined Party beyond general assignment of a task and a review of the finished work.

15. The record reflects that the Joined Party was paid by the job. The record reflects that the Joined Party's pay was held until the Petitioner had been paid by the client. These are factors consistent with an independent contractor relationship.

16. The Joined Party was free to subcontract the work assigned by the Petitioner. The Joined Party could work for a competitor of the Petitioner. These factors are indicative of an independent contractor relationship.

17. A preponderance of the evidence in this case reveals that the Petitioner did not establish sufficient control over the means and manner of performing the work as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated April 23, 2009, be REVERSED.

Respectfully submitted on June 4, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals