AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2676730

CAPITAL CARGO INTERNATIONAL
CO ALLEN MCANALLY
7100 TPC DR STE 200
ORLANDO FL 32822-5125

PROTEST OF LIABILITY
DOCKET NO. 2009-145232L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as mechanics constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in July 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any other workers who worked under the same terms and condition. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and the other workers. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on the wages it paid to the Joined Party and any other mechanics who worked under the same terms and conditions. The Petitioner filed a timely protest of the determination.

The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on February 11, 2010. Due to an error with the recording system, the hearing was not recorded in its entirety. Another hearing was held on April 27, 2010. An attorney represented the Petitioner at the hearing. A former payroll worker, a station representative, a mechanic, and a director appeared and provided testimony for the Petitioner at the hearing. A Tax Specialist II appeared on behalf of the Respondent. The Joined Party did not appear at the hearing. The Special Deputy issued a Recommended Order on June 15, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a subchapter C corporation incorporated April 24, 1996, for the purpose of operating a supplemental cargo carrier business.

2. The Joined Party provided services for the Petitioner as a Mechanic from 2006, through June 2009. The Joined Party was on a list of mechanics maintained by the Petitioner for use in times of high demand or for special projects.

3. The Joined Party was licensed as an airframe and power-plant mechanic. The Joined Party was required to submit to a drug test by the Petitioner.

4. The Petitioner would contact mechanics from the list when there was a need for additional workers to supplement the employee mechanics the Petitioner employed. The contacted mechanic could accept or decline the work. If the work was declined, the Petitioner would call another mechanic on the list.

5. The Petitioner retained mechanics that were considered employees. The employee mechanics had a set work schedule, received benefits and health insurance from the Petitioner. The employee mechanics were required to wear uniforms and received workers' compensation insurance.

6. If the Joined Party accepted the work, the Joined Party would report to work as directed and be given a list of tasks by the Petitioner. The Petitioner's supervisors would patrol the worksite to make certain that all workers were doing the work they were supposed to be doing. The Joined Party's work would be inspected by the Petitioner when required by the Federal Aviation Administration. The supervision received by the Joined Party and other mechanics considered independent was identical to the supervision received by those mechanics considered to be employees by the Petitioner.

7. The Joined Party was paid $25 per hour by the Petitioner. The Joined Party did not receive insurance or other benefits from the Petitioner.

8. The Joined Party provided his own hand tools. The Petitioner provided other tools and the workspace needed.

9. The Petitioner provided training to the Joined Party. The training covered information from the Petitioner's company manuals. The manuals provided guidelines the mechanics were required to abide by in addition to those required by Federal Aviation Administration Rules.

10. The Joined Party was not allowed to subcontract the work.

11. The Petitioner had the right to send the Joined Party home in the middle of a job and remove the Joined Party from the call list without liability. The Joined Party had the right to quit work at anytime without liability.

Based on these Findings of Fact, the Special Deputy recommended the determination dated September 9, 2009, be affirmed. The Petitioner's exceptions to the Recommended Order were received by fax dated June 29, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were

supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In the *INTRODUCTION* section, *Omitted Findings of Fact* #1-13, *Inaccurate/Incomplete Findings of Fact* #1-3, section 2. *CONCLUSIONS OF LAW*, *Inaccurate Conclusion of Law* #1, a portion of *Inaccurate Conclusion of Law* #2, and section 3. *EXCEPTION TO THE RECOMMENDATION AFFIRIMING THE DETERMINATION DATED SEPTEMBER 9, 2009*, the Petitioner proposes findings of fact in accord with the Special Deputy's findings of fact, proposes alternative findings of fact and conclusions of law, or attempts to enter additional evidence. Section 120.57(1)(l), Florida Statutes, provides that the Agency may not reject or modify the Findings of Fact unless the Agency first determines that the findings of fact were not based upon competent substantial evidence in the record. Section 120.57(1)(l), Florida Statutes, also provides that the Agency may not reject or modify the Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's exceptions that propose findings of fact in accord with the Special Deputy's findings of fact, propose alternative findings of fact and conclusions of law, or attempt to enter additional evidence are respectfully rejected.

In the remaining portion of *Inaccurate Conclusion of Law* #2, the Petitioner cites *Hilldrup Transfer & Storage, Inc. v. State, Dep't of Labor & Employment Secur., Div. of Employment*, 447 So.2d 414 (Fla. 5th DCA 1983), in support of the conclusion that the amount and extent of supervision over the Joined Party in this case is not sufficient to establish an employer/employee relationship. In *Hilldrup*, the court held that an independent contractor relationship existed between operators and a moving company. *Id*. at 418. The *Hilldrup* case is distinguishable from the case at hand because the workers were paid by a percentage of each haul and could hire helpers. *Id*. at 416. *Hilldrup* is also distinguishable in that the moving company was prohibited from controlling the manner or method in which the workers completed the work by written agreement and only had an "interest in the end result as opposed to the details of the operator's work." *Id*. at 416-17. A review of the record reveals that the Special Deputy found that the

Joined Party was paid by the hour and could not subcontract the work in Findings of Fact #7 and 10 and Conclusion of Law #8. A review of the record further reveals that the Special Deputy ultimately concluded that the Petitioner had an interest in the details of the Joined Party's work and had a right to control the Joined Party's means of completing the work beyond a mere right to control the results of the Joined Party's work. While some testimony was provided during the hearing that indicated that the Petitioner's right to control the Joined Party's work was limited to a right to control the results of his work, other testimony indicated that the supervision of both independent contractors and employees was identical and went beyond the requirements of the Federal Aviation Administration. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Agency may not reject or modify the Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the Findings of Fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Competent substantial evidence in the record supports the Special Deputy's Findings of Fact; thus, the Special Deputy's Findings of Fact are not rejected. The Special Deputy's Conclusions of Law also reflect a reasonable application of the law to the facts and are accepted without modification by the Agency. The remaining portion of *Inaccurate Conclusion of Law* #2 is respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's findings are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated September 9, 2009, is AFFIRMED.

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
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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 September 9, 2009.

After due notice to the parties, a telephone hearing was held on April 27, 2010. An attorney represented the Petitioner at the hearing. A former payroll worker, a station representative, a mechanic, and a director appeared and provided testimony for the Petitioner at the hearing. A tax specialist II appeared 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 received. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on May 12, 2010.

Issue:

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).

Whether services performed for the Petitioner by the Joined Party and other individuals as mechanics 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.

Jurisdictional Issue: TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).

The determination was mailed by the Department of Revenue on September 9, 2009. The Petitioner received the determination September 24, 2009. The Petitioner mailed a protest letter September 29, 2009. The protest was timely filed.

Findings of Fact:

1. The Petitioner is a subchapter C corporation incorporated April 24, 1996, for the purpose of operating a supplemental cargo carrier business.

2. The Joined Party provided services for the Petitioner as a Mechanic from 2006, through June 2009. The Joined Party was on a list of mechanics maintained by the Petitioner for use in times of high demand or for special projects.

3. The Joined Party was licensed as an airframe and power-plant mechanic. The Joined Party was required to submit to a drug test by the Petitioner.

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6. If the Joined Party accepted the work, the Joined Party would report to work as directed and be given a list of tasks by the Petitioner. The Petitioner's supervisors would patrol the worksite to make certain that all workers were doing the work they were supposed to be doing. The Joined Party's work would be inspected by the Petitioner when required by the Federal Aviation Administration. The supervision received by the Joined Party and other mechanics considered independent was identical to the supervision received by those mechanics considered to be employees by the Petitioner.

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10. The Joined Party was not allowed to subcontract the work.

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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 record reflects that the Petitioner had the Joined Party perform services on an as needed basis. The Joined Party performed work identical to that performed by the employee mechanics under similar working conditions. While the schedules varied and the Joined Party was not required to wear a uniform, the level of supervision was the same for employee and non-employee mechanics. The Petitioner determined when and where the work was to be performed.

8. The record reflects that the Petitioner was paid by time worked. This is indicative of an employee relationship.

9. The Joined Party worked for the Petitioner for a period of two to three years. The length of time worked demonstrates a permanent relationship rather than an occasional relationship and as such is indicative of an employer-employee relationship.

10. The relationship was an at-will relationship. Either party could terminate the relationship at anytime without incurring liability. 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."

11. 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 Petitioner and the Joined Party.

12. The Petitioner submitted a Proposed Findings of Fact and Conclusions of Law on May 12, 2010. The Special Deputy considered the proposed findings and where those findings are reflected by the record, they are incorporated into this Recommended Order. Those proposals not supported by the record are respectfully rejected.

Recommendation: It is recommended that the determination dated September 9, 2009, be AFFIRMED.

Respectfully submitted on June 15, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals