AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2914430
INDEPENDENT MANOR INC
3607 HERSCHEL ST
JACKSONVILLE FL 32205-9019

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

PROTEST OF LIABILITY
DOCKET NO. 2009-155790L

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 4, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

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

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RESPONDENT:
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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 4, 2009.

After due notice to the parties, a telephone hearing was held on March 22, 2010. The Petitioner, represented by the Administrator, appeared and testified. The Administrator's son testified as a witness. A CNA testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

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 working as a Certified Nursing Assistant constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is an assisted living facility that has been in operation since 1993. It was previously operated as a sole proprietorship until July 2004 when it was incorporated as Independent Manor Inc. The Petitioner's Administrator lives on the premises. The assisted living facility has six residents for whom the Petitioner provides daily care. Generally, the Petitioner has three workers, including the Administrator, who provide care for the residents.
2. Over the years the Petitioner has probably had seventy-five different care givers. The care givers have the right to quit at any time and the Petitioner has the right to discharge a caregiver at any time without incurring liability.

3. In 2005 the Joined Party responded to a newspaper help wanted advertisement placed by the Petitioner. The Administrator interviewed the Joined Party. The Administrator liked the way the Joined Party's looks and hired the Joined Party as a caregiver. The Joined Party began work on June 6, 2005.

4. The Petitioner provided everything that was needed to perform the work. The Joined Party was required to complete twelve hours of continuing education per year. The Petitioner paid for the Joined Party's continuing education.

5. The Petitioner determined the days and hours of work. Generally, the Joined Party worked four week days and one weekend day each week. The Joined Party's hours of work were from 1 PM until 6 PM.

6. The Petitioner assigned specific tasks to the Joined Party to perform. The assigned tasks included providing personal care for the residents and performing regular Certified Nursing Assistant duties. The Joined Party was supervised by the Administrator. The Administrator is "picky" about how things are done and she instructed the Joined Party concerning how to perform the work. The Joined Party was required to report anything to the Administrator that occurred on the job that was out of the ordinary. The Joined Party was required to personally perform the work. She could not hire others to perform the work for her.

7. The Joined Party was required to sign in each day when she reported for work and was required to sign out at the end of the work shift. The Petitioner computed the number of hours worked by the Joined Party and paid the Joined Party on the first and fifteenth of each month.

8. The Petitioner paid the Joined Party by the hour at a pay rate determined by the Petitioner. The Petitioner withheld Social Security taxes and Medicare taxes from the pay. The Petitioner reported the Joined Party's earnings to the Internal Revenue Service and paid the matching employer portion of the Social Security taxes. At the end of the year the Petitioner reported the Joined Party's total earnings for the year to the Internal Revenue Service on Form W-2 as wages.

9. The care givers are not required to wear any specific uniform. The Joined Party usually wore hospital scrubs and the Petitioner paid the Joined Party a uniform allowance. The Petitioner provided merit bonuses and Christmas bonuses to the Joined Party. The Petitioner provided health insurance and paid the total insurance premium for the Joined Party. In addition, the Petitioner paid any co-pay or other amounts that were not covered by the health insurance policy.

10. The Joined Party worked for the Petitioner until February 21, 2009. The Joined Party filed a claim for unemployment compensation benefits effective May 31, 2009, and established a base period consisting of the calendar year 2008. The Petitioner had not registered with the Florida Department of Revenue for payment of unemployment compensation taxes and the Joined Party did not have any base period wages reported by the Petitioner. The Joined Party filed a *Request for Reconsideration of Monetary Determination* and the Agency for Workforce Innovation issued an investigation to the Department of Revenue to determine if the Joined Party was entitled to wage credits. On August 4, 2009, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to June 8, 2005. The Petitioner appealed by mail postmarked August 24, 2009.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. 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 can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.

18. The evidence presented in this case reveals that the Joined Party was hired as an employee to provide services for the Petitioner's residents, in the Petitioner's assisted living facility. The Petitioner determined what work was to be performed, where it was to be performed, when it was to be performed, and how it was to be performed. The work performed by the Joined Party was

not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

19. The Petitioner paid the Joined Party an hourly rate of pay and withheld employee taxes. The Petitioner paid the required matching Social Security employer taxes to the Internal Revenue Service and reported the Joined Party's wages on Form W-2. The Petitioner provided fringe benefits including health insurance. In addition to the factors enumerated in the Restatement of Law, *the* provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

20. The Joined Party worked for the Petitioner for a period of approximately four years. Either party could terminate the relationship at any time without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. 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."

21. 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.

22. It is concluded that the services performed for the Petitioner by the Joined Party working as a Certified Nursing Assistant constitute insured employment.

Recommendation: It is recommended that the determination dated August 4, 2009, be AFFIRMED.

Respectfully submitted on March 24, 2010.

R. O. SMITH, Special Deputy
Office of Appeals