AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1605586
CHARLIE L STOKES
437 BOYD COWART RD
WAUCHULA FL 33873-5400

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

PROTEST OF LIABILITY
DOCKET NO. 2009-166880L

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 October 20, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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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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 October 20, 2009.

After due notice to the parties, a telephone hearing was held on April 19, 2010. The Petitioner's wife appeared and testified in behalf of the Petitioner. 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 and other individuals working as truck drivers 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 an individual who operates a produce trucking company as a sole proprietor. Generally, the Petitioner hauls produce between Miami and New York. The Petitioner owns five trucks which are used to haul the produce. All of the trucks bear the Petitioner's name, address, and DOT number.
2. Beginning in 2008 The Petitioner hired truck drivers to drive the trucks. The Petitioner classified the drivers as independent contractors. The Joined Party began driving the Petitioner's truck on August 17, 2008, and was classified by the Petitioner as an independent contractor.
3. The Petitioner provided the truck for the Joined Party to drive and provided all of the fuel, maintenance, repairs, and insurance that were necessary.

4. The Petitioner paid the Joined Party on a per trip basis. The Petitioner determined the amount of the pay for each trip and the pay amounts varied from trip to trip. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance or retirement benefits.

5. The Petitioner reported the Joined Party's earnings for 2008 on Form 1099-MISC as nonemployee compensation.

6. Either party had the right to terminate the relationship which was classified by the Petitioner as an independent contractor relationship. The Petitioner heard from other trucking companies that they had encountered problems by classifying drivers as independent contractors. The Petitioner did not want to encounter the same problems and decided to classify all of the drivers as employees effective January 1, 2009.

7. After January 1, 2009, the only change in the working relationship was that the Petitioner began withholding payroll taxes from the pay. The Joined Party continued to drive the Petitioner's truck under the same terms and conditions. The Petitioner continued to be responsible for all of the expenses of operating the truck.

8. The Joined Party was involved in an accident with the Petitioner's truck. The Petitioner's insurance carrier notified the Petitioner that the Joined Party was no longer eligible to drive the Petitioner's truck under the tractor-trailer insurance policy. As a result the Petitioner terminated the Joined Party on July 21, 2009.

9. The Joined Party filed an initial claim for unemployment compensation benefits effective July 19, 2009. His filing on that date established a base period from April 1, 2008, through March 31, 2009. The Joined Party received credit for work performed for the Petitioner during the first calendar quarter 2009 but did not receive credit for work performed during 2008. As a result an investigation was issued to the Department of Revenue to determine if the Joined Party was entitled to additional wage credits.

10. Following an investigation the Department of Revenue issued a determination dated October 20, 2009, holding that the persons performing services for the Petitioner as truck drivers were the Petitioner's employees retroactive to August 17, 2008. The Petitioner filed a timely protest.

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 cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

18. The Petitioner is a trucking company which hauls produce between Miami and New York. The Joined Party was hired by the Petitioner on August 17, 2008, to haul the produce between Miami and New York. 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 business.

19. The Petitioner provided the truck for the Joined Party to drive and was responsible for all expenses of operation including fuel, maintenance, repair, and insurance. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services.

20. The Petitioner determined the method and rate of pay. The fact that the Petitioner chose not to withhold payroll taxes does not, standing alone, establish an independent contractor relationship.

21. The testimony of the Petitioner's wife reveals that the Petitioner told the Joined Party in August 2008 that the Joined Party would perform services as an independent contractor. However, 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), the Florida Supreme Court addressed a similar factual situation involving the relationship between a truck driver and a trucking company. In that case the parties entered into a written independent contractor agreement which specified that the driver was not to be considered the employee of the trucking company at any time, under any circumstances, or for any purpose. In its decision the 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." The Court found that the driver owned his own truck and leased the trailer from the trucking company. The trailer was to be used by the driver exclusively for hauling freight for the trucking company. The trucking company told the driver where to pick up the freight and where to deliver the freight. The driver had the right to refuse any dispatch. The trucking company paid the driver a percentage of the freight charge for the shipment. Either party could terminate the relationship without cause upon thirty days written notice to the other. The Court concluded, based on these facts, that the driver was an employee of the trucking company.

22. The "extent of control" referred to in Restatement section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

23. The Joined Party worked under substantially the same terms and conditions during the time the Petitioner classified the Joined Party as an independent contractor as during the time the Petitioner classified the Joined Party as an employee. It was not shown that there was any change in the amount of control exercised by the Petitioner or in the Petitioner's right of control.

24. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

25. The Petitioner has failed to satisfy the necessary burden to show that the determination issued by the Department of Revenue is in error. Thus, it is concluded that the serivces performed for the Petitoner by the Joined Party and other individuals working as truck drivers constitute insured employment.

Recommendation: It is recommended that the determination dated October 20, 2009, be AFFIRMED.

Respectfully submitted on April 20, 2010.

R. O. SMITH, Special Deputy
Office of Appeals