AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2924224
T & G INTL LLC
PO BOX 669243
MIAMI FL 33166-9430

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

PROTEST OF LIABILITY
DOCKET NO. 2009-173260L

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 Petitioner's protest is accepted as timely filed. It is also ORDERED that the determination dated October 22, 2009, is MODIFIED to reflect a retroactive date of January 1, 2009, and that the determination is AFFIRMED as modified.

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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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 22, 2009.

After due notice to the parties, a telephone hearing was held on March 25, 2010. The Petitioner, represented by its manager, appeared and testified. The Respondent, represented by a Department of Revenue Unemployment Tax Specialist, appeared and testified. The Joined Party 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 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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a single member LLC which was formed in November 2007. Initially, the LLC operated as a freight broker with all of the work performed by the Petitioner's owner/manager. On October 1, 2008 the Petitioner leased a truck to haul freight. The Petitioner hired the Joined Party to drive the truck.

2. There was no written agreement between the Parties. The verbal agreement was that the Joined Party would drive the truck and that the Petitioner would pay the Joined Party thirty-five cents per mile.

3. The Joined Party drove the truck which the Petitioner leased. The Petitioner was responsible for all expenses including, fuel, maintenance, repairs, insurance, and liability insurance on the freight. The Petitioner provided the Joined Party with an advance to pay for the fuel. If the advance did not cover all of the expenses the Petitioner reimbursed the Joined Party for any other expenses including tolls and the expense of having the trailer washed.

4. The Petitioner told the Joined Party when and where to pick up the freight and when and where to deliver the freight. The total miles were determined by a map program, not by the actual miles driven. The Joined Party was expected to drive the shortest route. If the Joined Party deviated from the shortest route it was expected that he would explain the reason for the deviation to the Petitioner.

5. The Joined Party was required to have a cell phone so that he could remain in contact with the Petitioner while he was on the road. The Joined Party was required to report to the Petitioner when Joined Party made each delivery.

6. The Joined Party was required to report any problems that he encountered, such as accidents or mechanical problems, while on the road. If the Joined Party had mechanical problems he was not authorized to have the truck repaired without the Petitioner's consent.

7. The Joined Party was required to personally drive the truck. He could not have riders in the truck and could not hire others to drive the truck for him. If the Petitioner felt that the Joined Party needed a co-driver, the Petitioner would have hired and paid the co-driver.

8. Generally, the Petitioner paid the Joined Party on a weekly basis for the work performed during the week. On some of the trips the Joined Party was required to make multiple stops to deliver a portion of the freight at different locations. On those occasions the Petitioner paid the Joined Party $15 per stop in addition to the mileage. On occasion the Joined Party chose to personally wash the trailer rather than paying a third party to wash the trailer. The Petitioner paid the Joined Party $50 for each time that the Joined Party personally washed the trailer.

9. During the fourth quarter 2008 the Petitioner paid the Joined Party gross earnings of $695.80. During the first quarter 2009 the Petitioner paid the Joined Party gross earnings of $2,034.76.

10. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits, such as paid holidays, vacations, health insurance, or retirement benefits, to the Joined Party or to any other workers. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC.

11. Either party had the right to terminate the relationship at any time without incurring liability.

12. In April 2009 the Petitioner lost the lease on the truck and purchased a truck for the Joined Party to drive. The working conditions remained the same as when the Joined Party drove the leased truck. In June 2009 the Petitioner was considering selling the truck which it had just purchased and terminated the Joined Party at that time. The Petitioner did not sell the truck and instead, purchased an additional truck in September 2009. The Petitioner has had three drivers in addition to the Joined Party.

13. The Joined Party filed a claim for unemployment compensation benefits effective September 13, 2009. The Petitioner was not registered for payment of unemployment compensation taxes and the Joined Party did not receive credit for his earnings with the Petitioner. The Joined Party filed a *Request for Reconsideration of Monetary Determination* and an investigation was issued to the Florida Department of Revenue to determine if the Joined Party was entitled to wage credits.

14. On October 22, 2009, an Unemployment Tax Specialist with the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as drivers were the Petitioner's employees effective February 1, 2008.

15. Among other things the determination states "This letter is official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days of the date of this letter. If your protest is filed by mail the postmark date will be considered the filing date of your protest."

16. The Petitioner filed a written protest by letter dated November 12, 2009. The letter of protest was date stamped as received by the Department of Revenue on November 16, 2009. The Department Revenue did not retain the envelope bearing the postmark date.

Conclusions of Law:

17. Section 443.141(2)(c), Florida Statutes, provides:

> (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

18. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:

> Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

19. Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:

> Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.

20. Rule 60BB-2.022(5), Florida Administrative Code provides:

> Computation of time: In computing any period of time prescribed, calendar days are counted; the date of issuance of a notice is not counted. The last day of the period is counted unless it is a Saturday, Sunday, or holiday; in which event the period will run until the end of the next day that is not a Saturday, Sunday, or holiday. Holidays are those dates designated by Section 110.117(1) and (2), F.S., and any other day that the offices of the United States Postal Service are closed.

21. The Department of Revenue determination was mailed to the Petitioner's correct mailing address on October 22, 2009, and was received. The twentieth day for filing an appeal was Wednesday, November 11, 2009. November 11, 2009, is Veterans Day, a day that is designated by Section 110.117(1) and (2), Florida Statutes as a holiday. Therefore, the last day for filing the appeal is extended to November 12, 2009.

22. The Petitioner's protest letter is dated November 12, 2009. However, the Department of Revenue did not retain the envelope bearing the postmark date. The letter was date stamped as received by the Department of Revenue on Monday, November 16, 2009. The evidence is sufficient to establish that the protest was timely filed.

23. 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.

24. 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).

25. 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).

26. 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.

27. 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.

28. 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.

29. 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.

30. The Petitioner's business as of October 1, 2008, is a trucking business to haul freight for the Petitioner's customers. The Joined Party hauled the freight in a truck that was leased or owned by the Petitioner. 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.

31. The Petitioner provided the truck for the Joined Party to drive and was responsible for all of the costs of operating the truck. If the Joined Party had any expenses in connection with the work, he was reimbursed for those expenses by the Petitioner. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

32. Although some skill is required to drive a truck, it was not shown that any significant skill or any special knowledge was required to perform the work. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

33. The Petitioner paid the Joined Party thirty-five cents per map mile, not by the actual miles driven. The trips were assigned to the Joined Party by the Petitioner based on the needs of the Petitioner's clients. The Petitioner was in control of the financial aspects of the relationship. Although the Petitioner chose not to withhold payroll taxes from the pay, that fact standing alone, does not establish an independent contractor relationship.

34. The Joined Party worked continuously for the Petitioner for a period of approximately nine months. Either party had the right to terminate the relationship at any time without incurring liability. The Petitioner terminated the relationship in June 2009 because the Petitioner was considering selling the truck. 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."

35. 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).

36. The evidence presented in this case reveals that the services performed for the Petitioner by the Joined Party and other individuals working as drivers constitute insured employment.

37. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:

1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

38. The Joined Party began performing services for the Petitioner on October 1, 2008, and received $695.80 in earnings during the fourth quarter 2008. There are only thirteen weeks in a calendar quarter. During the first quarter 2009 the Petitioner paid gross wages to the Joined Party in the amount of $2,034.76. The evidence does not show that the Petitioner paid wages of at least $1500 during a calendar quarter prior to the first quarter 2009 or that the Petitioner had at least one individual in employment for twenty weeks during a calendar year prior to 2009. Thus, the Petitioner established liability for payment of unemployment compensation taxes to the State of Florida during the first quarter 2009, effective January 1, 2009.

39. The determination of the Department of Revenue is retroactive to February 1, 2008. Since the Petitioner established liability effective January 1, 2009, the correct retroactive date is January 1, 2009.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated October 22, 2009, be MODIFIED to reflect a retroactive date of January 1, 2009. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on May 3, 2010.

R. O. SMITH, Special Deputy
Office of Appeals