AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2921835
FARELI GROUP INC
8877 A FONTAINEBLEAU BLVD APT 104
MIAMI FL 33172-4484

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

PROTEST OF LIABILITY
DOCKET NO. 2009-173266L

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 November 9, 2009, is AFFIRMED.

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. - 2921835
FARELI GROUP INC
ROBERTO ARGUELLO
8877 A FONTAINEBLEAU BLVD APT 104
MIAMI FL 33172-4484

PROTEST OF LIABILITY
DOCKET NO. 2009-173266L

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 November 9, 2009.

After due notice to the parties, a telephone hearing was held on April 21, 2010. The Petitioner, represented by an employer's agent, appeared and testified. The Petitioner's president and a helper testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as construction operators/installers 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 a corporation which was formed in 2003 to operate a tile installation business in Dade County, Florida. Dade County requires flooring contractors to pass an examination and obtain a flooring license before doing business. The Petitioner obtained the required flooring license.

2. Prior to creating the Petitioner's corporation the Petitioner's president worked for a large tile contractor as an installer. The Joined Party also worked for that company as an installer. After the Petitioner's president left to start his own business the Joined Party continued in his employment with the large tile contractor. Although the Joined Party was an employee of the tile contractor, the Joined Party always provided his own work tools. The Joined Party did not have a flooring license.

3. In approximately January 2008 the Joined Party was separated from his employment due to lack of work. He contacted the Petitioner to see if the Petitioner had work available. The Petitioner's president knew that the Joined Party was a good tile installer and he advised the Joined Party that the Petitioner had jobs available.

4. The Petitioner and the Joined Party did not enter into any written agreement or contract.

5. The Petitioner bid the jobs and if the bid was accepted the Petitioner's president would contact the Joined Party and tell the Joined Party what time the Joined Party should meet the president at either a job site or at a vendor's location. Many times the Joined Party did not know how much the Petitioner would pay him to install the tile. However, the Joined Party was aware that there was a standard within the industry concerning a daily rate of pay for tile installers.

6. Tile installers usually need helpers to complete the installation of the tile. Initially, the Petitioner did not provide helpers for the Joined Party. The Joined Party would give cash to his brother-in-law or give cash to other installers when they helped the Joined Party. After January 2008 the Petitioner usually provided the helpers and paid the helpers.

7. The Joined Party provided all of the tools just as he had done during his previous period of employment. The Joined Party provided his own transportation to the job sites and was not reimbursed for any expenses. The Joined Party did not provide any of the materials or supplies.

8. The Petitioner did not train the Joined Party. The president was aware of the Joined Party's ability to install tile from the time that they had previously worked together. The president knew that it was not necessary for the president to supervise the Joined Party or to oversee the Joined Party's work. However, the president would visit the Joined Party while the Joined Party was working. On those occasions the Petitioner gave the Joined Party instructions about how to distribute the work to other workers.

9. The Joined Party's work schedule was established according to the time that he was instructed to meet the president at the jobsite or at a vendor's location to pick up the materials and supplies. Basically, the Joined Party's work schedule was 8 AM until 4 PM. If there was more than one job to be done the Petitioner determined the sequence that the jobs were to be performed.

10. If the Joined Party was not able to work on a scheduled day he always notified the Petitioner and/or the customer. The Joined Party believed that he was required to notify the Petitioner of his absences. The Joined Party was required to report any problems that occurred on the job to the Petitioner and was required to report when the job was complete.

11. The Petitioner determined the amount of the Joined Party's pay. Sometimes the Petitioner told the Joined Party in advance how much the Petitioner would pay the Joined Party for the job. On one occasion the Joined Party disagreed with the amount of pay because the job was located 125 miles away. On that one occasion the Petitioner agreed to pay more money to the Joined Party.

12. Initially, the Petitioner did not withhold any payroll taxes from the Joined Party's pay. After working for the Petitioner for approximately six months the president advised the Joined Party that the Petitioner was going to begin withholding payroll taxes from the pay. The Joined Party always considered himself to be the Petitioner's employee and he was excited that the Petitioner was going to withhold the payroll taxes. The Petitioner made the decision to withhold Social Security and federal income taxes in order to obtain a large contract with a condominium project.

13. The Petitioner withheld payroll taxes from the Joined Party's pay for a period of approximately three months or more. The Joined Party was disappointed when the Petitioner stopped withholding payroll taxes. During the period of time when the Petitioner withheld payroll taxes there was no change in the way that the work was performed.

14. At the end of 2008 the Petitioner gave the Joined Party a Form 1099-MISC reporting all of the Joined Party's income as nonemployee compensation. The form did not show the amount of taxes that had been withheld from the Joined Party's pay. The Joined Party complained to the Petitioner and the Petitioner took the Joined Party to see the Petitioner's accountant. The accountant prepared a Form W-2 on the accountant's computer and changed the amount reported on the Form 1099. The amount of wages shown on Form W-2 was $6,580. Since the form was prepared on the accountant's computer neither the Joined Party nor the Petitioner's president knew if the withheld taxes were remitted to the Internal Revenue Service as required, whether the accountant filed a copy of the Form W-2 with the government, or whether the amounts on the form were accurate.

15. The Petitioner did not register with the Florida Department of Revenue for payment of unemployment compensation tax and did not file the required quarterly reports.

16. The Joined Party did not have any type of flooring license or occupational license. The Joined Party was aware that he was required to have a flooring license to work as a self employed independent contractor. The Joined Party did not offer tile installation services to the general public, did not do side jobs, and did not work for any other company during the time that he worked for the Petitioner. The Joined Party did not have business liability insurance. The Joined Party was covered under the Petitioner's business liability insurance policy.

17. Either party had the right to terminate the relationship at any time without incurring liability. In approximately August 2009 the Petitioner was having family medical problems and he criticized the Joined Party for work which the Joined Party had completed. The work had already been accepted by the customer. The Petitioner and the Joined Party argued about the completed work. The Petitioner lost trust in the Joined Party's ability to do the work. The Petitioner redid the work at the Petitioner's expense and terminated the relationship with the Joined Party.

18. The Joined Party filed an initial claim for unemployment compensation benefits effective August 23, 2009. The Joined Party's filing on that date established a base period from April 1, 2008, through March 31, 2009. The Joined Party did not receive credit for his earnings with the Petitioner because the Petitioner had never registered with the Florida Department of Revenue and had never paid unemployment compensation taxes. The Joined Party filed a *Request for Reconsideration of Monetary Determination* and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

19. On October 7, 2009, the Department of Revenue issued a determination holding that the Joined Party was an employee of the Petitioner and also held that corporate officers are the Petitioner's employees. The determination advised that the determination would be conclusive and binding unless a written application was filed to protest the determination within twenty days. By letter dated October 30, 2009, an employer's agent engaged by the Petitioner requested an extension of the time to file the written application to protest the determination. By mail dated November 4, 2009, the employer's agent submitted additional evidence. On November 9, 2009, the Department of Revenue issued a second determination labeled as an "affirmation" of the October 7, 2009, determination. However, the Department of Revenue extended the original determination to include individuals other than the Joined Party who performed services for the Petitioner as construction operators/installers. The Petitioner appealed by letter dated November 23, 2009.

Conclusions of Law:

20. 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.

21. 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).

22. 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).

23. 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.

24. 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.

25. 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.

26. 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.

27. The Petitioner is a tile installation contractor. The Joined Party performed services for the Petitioner as a tile installer. 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.

28. There was no agreement at the time of hire, either verbal or in writing, that the Joined Party would perform services as a self employed independent contractor. The Joined Party did not have a Dade County flooring license and the Petitioner was aware that a license was required to work as a self employed contractor. There was no agreement concerning the method or rate of pay. On most jobs the Joined Party did not know the amount of pay and the Joined Party trusted the Petitioner to apply what was considered to be an industry standard daily rate of pay. On one occasion the Joined Party negotiated a higher rate of pay because the jobsite was 125 miles away. These facts reveal that the Petitioner controlled the method and rate of pay. The fact that the Petitioner chose not to withhold payroll taxes during certain periods of time does not, standing alone establish an independent contractor relationship.

29. The Joined Party provided his own tools and transportation. The Joined Party was previously employed as an installer and also provided his own tools during his prior employment. Sometimes, particularly during the first month of performing services for the Petitioner, the Joined Party provided his own helpers. However, most of the time the Petitioner provided and paid the helpers. The Petitioner controlled whether or not helpers were provided.

30. The Joined Party is a skilled tradesman. The Petitioner was aware of the Joined Party's level of skill and was aware that training or supervision was not necessary. The Petitioner did provide instructions to the Joined Party concerning how the Joined Party should distribute the work to other workers. In Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958) the court stated that the humblest labor can be independently contracted and the most highly trained artisan can be an employee.

31. The Joined Party performed services exclusively for the Petitioner from January 2008 until August 2009, a period in excess of one and one-half years. Either party had the right to terminate the relationship at any time without incurring liability. The relationship was terminated by the Petitioner due to a dispute with the Joined Party concerning how the work was performed. 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."

32. During the time the Petitioner classified the Joined Party as an independent contractor and during the period of time the Petitioner classified the Joined Party as an employee, the Joined Party worked under precisely the same terms and conditions. It was the belief of the Joined Party at all times that he was an employee of the Petitioner. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), that while the obvious purpose to be accomplished by an agreement is 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.

33. 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.

34. The facts of this case support the determination of the Department of Revenue that the Joined Party performed services for the Petitioner under covered employment. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984) the Court held "We do not find that the Department was without authority to make its determination applicable, not only to the worker whose unemployment benefit application initiated the investigation, but to all of Adams' similarly situated workers. No evidence was adduced showing any difference between the employment conditions of the applicant and the other workers. More importantly, Section 443.171(1), Florida Statutes, provides: 'It shall be the duty of the division to administer this chapter; and it shall have power and authority to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable to that end.' (Emphasis supplied)."

35. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals working as construction operators/installers constitute insured employment.

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

Respectfully submitted on June 16, 2010.

R. O. SMITH, Special Deputy
Office of Appeals