AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2262274
NEW PRIME INC
PO BOX 4208
SPRINGFIELD MO 65808-4208

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

PROTEST OF LIABILITY
DOCKET NO. 2009-174810L

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 29, 2009, is REVERSED.

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
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 October 29, 2009.

After due notice to the parties, a telephone hearing was held on May 24, 2010. The Petitioner, represented by its General Counsel, appeared and testified. 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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party working as a truck driver 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 a Nebraska corporation which was formed in 1984 to operate a trucking company.
2. The Petitioner has two terminals located in Florida. The Petitioner established liability for payment of unemployment compensation tax to Florida in 2000.
3. Basically, the Petitioner utilizes two types of drivers to haul freight, company drivers who are employees of the Petitioner and drivers who either own their own trucks or lease trucks.

4. The Joined Party began working for the Petitioner in August 2007 as a company driver. Company drivers are paid based on the miles driven; however, the Joined Party was in training and was paid a weekly salary of $400. The Joined Party was classified as an employee and payroll taxes were withheld from his pay.

5. The Joined Party determined from conversations with other drivers that he could make more money if he hauled the freight for the Petitioner using a truck that he owned or leased. When the Joined Party completed his training in November 2007 he chose to lease a truck from Success Leasing, a company that leases trucks to drivers. On November 15, 2007, The Joined Party and the Petitioner entered into an *Independent Contractor Operating Agreement.* The Joined Party could have continued working as a company driver but voluntarily chose to lease the truck. The Joined Party understood that he was classified as an independent contractor.

6. The *Independent Contractor Operating Agreement* provides that it is the intent of the Agreement to establish an independent contractor relationship at all times. The Agreement provides that the Joined Party was responsible for all operating and maintenance expenses including but not limited to fuel, fuel taxes, Federal Highway Use Taxes, tolls, ferries, detention accessorial services, tractor repairs, and a portion of the agent or brokerage fees. The Agreement provides that the Joined Party was free to either personally drive the truck or hire others to drive the truck for him. Either party had the right to terminate the agreement with thirty days written notice.

7. The Petitioner's company drivers are paid by the mile. Payroll taxes are withheld from the pay and at the end of the year the income is reported to the Internal Revenue Service as wages on Form W-2. The Petitioner provides fringe benefits to the company drivers including health insurance, dental insurance, life insurance, paid vacations, and retirement benefits. The Petitioner pays a portion of the insurance premiums. Company drivers work under a forced dispatch and do not have the right to decline any loads. The Petitioner is responsible for the cost of operating the truck including fuel, maintenance, repair, insurance, and licenses.

8. Truck drivers who own or lease the trucks are paid a percentage of the load. The Joined Party was responsible for all of the expenses of operating the truck which he leased. He was dispatched under a dispatch system that was separate from the system used to dispatch company drivers and the Joined Party had the right to obtain his own loads. He was notified in advance how much each load would pay and he had the right to choose or decline any load. No taxes were withheld from the Joined Party's pay and at the end of the year the total gross earnings were reported on Form 1099-MISC as nonemployee compensation. The Joined Party was not entitled to any fringe benefits such as health insurance, dental insurance, life insurance, paid time off, or retirement benefits. The Petitioner did make health insurance available to the Joined Party but the Joined Party was required to pay the entire premium. Like company drivers the Joined Party was required to adhere to the Department of Transportation rules and regulations as well as the laws of each state in which the Joined Party drove.

9. In April 2009 the Joined Party's truck lease terminated and the Joined Party did not have the funds available to exercise the option to purchase the truck. In August 2009 the Joined Party entered into a new lease agreement with Success Leasing and has been applying for work with trucking companies including the Petitioner.

10. The Joined Party's gross earnings from the Petitioner during 2008 were $208,496.00. When the Joined Party filed his 2008 Individual Income Tax Return he attached Schedule C, Profit or Loss From Business. After deducting the costs of operating the truck the Joined Party had a net business income of $38,269.

11. The Joined Party filed an initial claim for unemployment compensation benefits effective June 28, 2009. His filing on that date established a base period consisting of the calendar year 2008. When the Joined Party did not receive credit for his earnings an investigation was assigned

to the Department of Revenue to determine whether the Joined Party performed services as an employee or as an independent contractor. On October 29, 2009, the Department of Revenue issued a determination holding that the Joined Party was an employee of the Petitioner retroactive to January 1, 2008.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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.

18. 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.

19. The evidence reveals significant differences between the way the Joined Party performed services as a company driver and the way the Joined Party performed services under the *Independent Contractor Operating Agreement.* Under the Agreement the Joined Party determined when to work and what loads to haul. He was not required to personally drive the truck and was free to hire others to drive the truck for him. The Joined Party had an investment in a business and had significant business expenses. The Agreement states that it is the intent of the parties to establish an independent contractor relationship and the Joined Party understood that he was entering into an independent contractor relationship. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

20. As a company driver the Joined Party was paid a weekly salary while in training. After training the Joined Party would have been paid by the mile and the Petitioner would have been responsible for all expenses. Taxes were withheld from the pay and the Joined Party would have been eligible for fringe benefits. The Joined Party's wages were reported on Form W-2. Since the Petitioner was responsible for the expenses of operating the truck, including the Joined Party's wages, the Petitioner was at risk of suffering a financial loss from the services performed by the Joined Party. When the Joined Party chose to lease a truck the Joined Party became responsible for the expenses of operation and, because of the significant operating expenses, the Joined Party exposed himself to the risk of suffering a financial loss from performing services. The Joined Party had the right to increase his profits by choosing which loads to haul.

21. Whether the Joined Party worked as a company driver or a driver operating his own truck, the Joined Party was subject to the control of government regulation. Regulation imposed by governmental authorities does not evidence control by the employer. NLRB v. Associated Diamond Cabs, Inc.,702 F.2d 912, 922 (11th Cir. 1983).

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 evidence reveals that the services performed for the Petitioner by the Joined Party as a truck driver operating a leased truck retroactive to January 1, 2008, do not constitute insured employment.

Recommendation: It is recommended that the determination dated October 29, 2009, be REVERSED.

Respectfully submitted on June 17, 2010.

R. O. SMITH, Special Deputy
Office of Appeals