AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2965384

QUICK DELIVERY INC
LON HOEHNE
PO BOX 23537
FT LAUDERDALE FL 33307-3537

PROTEST OF LIABILITY
DOCKET NO. 2010-100204L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Joined Party filed an unemployment compensation claim in July 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a

direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on September 10, 2010. The Petitioner appeared and testified. The Petitioner's Owner and the Owner's wife testified as witnesses for the Petitioner. The Joined Party appeared and testified on his own behalf. The Joined Party's wife's coworker and an employee of the Petitioner's client testified as witnesses on behalf of the Joined Party. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Special Deputy issued a Recommended Order on October 4, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is sub-chapter S corporation incorporated in 1985 for the purpose of running a local deliver, courier, and storage distribution business. The Petitioner's clerical staff consists of employees.

2. The Joined Party provided services to the Petitioner from August 2002, through March 19, 2010. The Joined Party responded to an advertisement for an experienced driver. The Joined Party began performing services for the Petitioner as a courier driver in August 2002. On or about August 4, 2009, the Joined Party began performing services for the Petitioner as a sales specialist. The Joined Party performed services for the Petitioner as a sales specialist for on or about two months, whereupon the Joined Party ceased performing services as a sales specialist and began performing services as a courier driver. The Joined Party performed occasional driver jobs while performing services as a sales specialist.

3. The Joined Party had certain regular deliveries to be made. The Petitioner would offer other deliveries which the Joined Party could accept or reject. The Petitioner would specify in some cases that a particular delivery was to be made in the morning or in the afternoon. The Petitioner might also specify that a delivery was a 'rush' job. The Joined Party was free to select his own route for deliveries.

4. The Petitioner would call in another driver or handle deliveries personally in the event that the Joined Party was not available.

5. The Joined Party would pick up packages for delivery at the Petitioner's place of business.

6. The Joined Party provided his own automobile for the work. The Joined Party was responsible for fuel expenses. The Joined Party was responsible for paying the Petitioner for a radio for use in the work.

7. The Joined Party was paid a 60% commission for deliveries made. The Petitioner would increase the pay to 61% during times when fuel costs were excessively high. The commission was determined by the Petitioner.

8. The Joined Party was allowed to work for a competitor as a courier driver.

9. The Joined Party was trained in the operation of the business when the Joined Party began work as a sales specialist. The Joined Party was expected to report to the Petitioner's place of business from 9am to 3pm. The Joined Party's duties consisted of dispatching, office paperwork, assisting in the warehouse, answering telephones, and soliciting new business for the Petitioner.

10. The Joined Party was paid $90 per day in addition to a 5% commission on new business brought in for the Petitioner. The Joined Party received $.25 per mile reimbursement for driving done for the work.

11. The Petitioner provided the Joined Party with a workspace, telephone, and computer. The Petitioner provided the Joined Party with a company email address and business cards.

12. The Joined Party was supervised by the Petitioner while performing work as a sales specialist.

13. Either party was able to end the relationship at any time without liability.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated June 9, 2010, be affirmed for the period of employment in which the Joined Party worked as a sales specialist. The Special Deputy also recommended that the determination be reversed for the period when the Joined Party worked as a courier driver. The Joined Party's exceptions to the Recommended Order were received by mail postmarked October 16, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal

basis for the exception, or that does not include appropriate and specific citations to the record.

The Joined Party's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The exceptions to Findings of Fact #1, 3, 6, 8-10, and 12 and the exceptions to Conclusions of Law #14 and 18-29 propose findings of fact in accord with the Special Deputy's Findings of Fact, propose alternative findings of fact or conclusions of law, or attempt to enter additional evidence not presented during the hearing. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. Further review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. The Joined Party's exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Joined Party, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as contained in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated June 9, 2010, is AFFIRMED for the period of employment in which the Joined Party worked as a sales specialist. It is also ORDERED that the determination is REVERSED for the time the Joined Party performed services as a courier driver.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 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. - 2965384
QUICK DELIVERY INC
LON HOEHNE
PO BOX 23537
FT LAUDERDALE FL 33307-3537

PROTEST OF LIABILITY
DOCKET NO. 2010-100204L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 9, 2010.

After due notice to the parties, a telephone hearing was held on September 10, 2010. The Petitioner's owner appeared and provided testimony at the hearing. The Joined Party appeared and testified on his own behalf. The Joined Party called as witness a co-worker of the Joined Party's wife and a worker for a client of the Petitioner. A tax specialist II appeared and testified on behalf of the Respondent.

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 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 sub-chapter S corporation incorporated in 1985 for the purpose of running a local deliver, courier, and storage distribution business. The Petitioner's clerical staff consists of employees.

2. The Joined Party provided services to the Petitioner from August 2002, through March 19, 2010. The Joined Party responded to an advertisement for an experienced driver. The Joined Party

began performing services for the Petitioner as a courier driver in August 2002. On or about August 4, 2009, the Joined Party began performing services for the Petitioner as a sales specialist. The Joined Party performed services for the Petitioner as a sales specialist for on or about two months, whereupon the Joined Party ceased performing services as a sales specialist and began performing services as a courier driver. The Joined Party performed occasional driver jobs while performing services as a sales specialist.

3. The Joined Party had certain regular deliveries to be made. The Petitioner would offer other deliveries which the Joined Party could accept or reject. The Petitioner would specify in some cases that a particular delivery was to be made in the morning or in the afternoon. The Petitioner might also specify that a delivery was a 'rush' job. The Joined Party was free to select his own route for deliveries.

4. The Petitioner would call in another driver or handle deliveries personally in the event that the Joined Party was not available.

5. The Joined Party would pick up packages for delivery at the Petitioner's place of business.

6. The Joined Party provided his own automobile for the work. The Joined Party was responsible for fuel expenses. The Joined Party was responsible for paying the Petitioner for a radio for use in the work.

7. The Joined Party was paid a 60% commission for deliveries made. The Petitioner would increase the pay to 61% during times when fuel costs were excessively high. The commission was determined by the Petitioner.

8. The Joined Party was allowed to work for a competitor as a courier driver.

9. The Joined Party was trained in the operation of the business when the Joined Party began work as a sales specialist. The Joined Party was expected to report to the Petitioner's place of business from 9am to 3pm. The Joined Party's duties consisted of dispatching, office paperwork, assisting in the warehouse, answering telephones, and soliciting new business for the Petitioner.

10. The Joined Party was paid $90 per day in addition to a 5% commission on new business brought in for the Petitioner. The Joined Party received $.25 per mile reimbursement for driving done for the work.

11. The Petitioner provided the Joined Party with a workspace, telephone, and computer. The Petitioner provided the Joined Party with a company email address and business cards.

12. The Joined Party was supervised by the Petitioner while performing work as a sales specialist.

13. Either party was able to end the relationship at any time without liability.

Conclusions of Law:

14. 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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. 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.

20. The evidence presented in this case reveals that the Joined Party had two separate and unique jobs with the Petitioner. The Joined Party provided services first as a courier driver, then as a sales specialist, and finally as a courier driver.

21. The evidence presented that the Petitioner did not exercise control over the methods by which the Joined Party performed his work as a courier driver. The Joined Party did have regular work but was not controlled in terms of how the routes were selected or the deliveries organized.

22. The Joined Party provided his own vehicle while working as a courier driver. The Joined Party was responsible for the fuel and maintenance of the vehicle.

23. The Joined Party was allowed to work for a competitor while providing services as a courier driver.
24. The evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship in the performance of work as a courier driver.
25. The Joined Party was required to report to work at the Petitioner's place of business from 9am to 3pm while providing services as a sales specialist.
26. The Petitioner supervised and provided guidance to the Joined Party as a sales specialist.
27. The Petitioner provided a workspace, computer, telephone, and business cards to the Joined Party. The Joined Party was also provided with a company email address.
28. The Petitioner reimbursed the Joined Party $.25 per mile for driving expenses. While not in and of itself dispositive, such reimbursement is indicative of an employer-employee relationship.
29. The evidence presented at this hearing reveals that the Petitioner established sufficient control over the Joined Party as to establish an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated June 9, 2010, be AFFIRMED for that period of employment in which the Joined Party worked as a sales specialist. It is recommended that the determination dated June 9, 2010, be REVERSED for that time the Joined Party performed services as a courier driver for the Petitioner.

Respectfully submitted on October 4, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals