AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2946337
AFFORDABLE ENTERPRISE LLC
MICHAEL MONETTE SR
3894 SUNSET COVE DRIVE
PORT ORANGE FL 32129-1916

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

PROTEST OF LIABILITY
DOCKET NO. 2010-109907L

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 July 13, 2010.

After due notice to the parties, a telephone hearing was held on October 15, 2010. The Petitioner, represented by its president, 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 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a Florida limited liability company which was formed July 5, 2006, to operate a trucking business involved in the hauling of asphalt, rock, and dirt in dump trucks. The Petitioner has elected to be treated as a corporation for federal income tax purposes. The Petitioner's president has been active in the operation of the business since inception. The President drives a dump truck for the Petitioner and is compensated for his services by the Petitioner.

2. The Joined Party began working for the Petitioner as a dump truck driver in May 2007. There was no written agreement or contract. The verbal agreement was that the Joined Party would drive the Petitioner's dump truck and that the Petitioner would pay the Joined Party $12 per hour.

3. The Petitioner provided the truck, fuel, truck maintenance and repairs, insurance, and license. The Joined Party was not required to provide anything to perform the work. The Joined Party did not have any expenses in connection with the work.

4. The Petitioner paid the Joined Party in cash on a weekly basis. Payday was Friday of each week. The Joined Party only received $10 per hour. The Petitioner explained to the Joined Party that $2.00 per hour was withheld from the pay for Social Security tax.

5. In 2008 the Joined Party applied for a bank loan and needed to provide proof of his earnings to the bank. The Petitioner provided the Joined Party with pay slips showing the number of hours worked for each day during a five week period of time, the hourly rate of pay, the gross pay, and the amount of tax withheld for income tax, Medicare, and Social Security.

6. The Petitioner did not provide any fringe benefits to the Joined Party such as health insurance or paid time off. The Petitioner did not report the Joined Party's earnings to the Internal Revenue Service on either Form W-2 or Form 1099-MISC. The Petitioner did not register with the Florida Department of Revenue for payment of unemployment tax.

7. The Joined Party believed that the Petitioner had the right to discharge him at any time. In February 2009 the Petitioner informed the Joined Party that there was no further work available.

8. The Joined Party filed an initial claim for unemployment compensation benefits effective April 5, 2009. When the Joined Party did not receive credit for his earnings a Request for Reconsideration of Monetary Determination was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

9. During the course of the investigation the Department of Revenue mailed forms to be completed by the Petitioner. The forms were mailed to the Petitioner's mailing address but were returned by the post office marked "attempted-not known unable to forward." On March 4, 2010, the Department of Revenue issued a determination holding the Petitioner liable for payment of unemployment tax effective January 1, 2008. The determination was mailed to the address of the Petitioner as shown on the records of the Florida Department of State, Division of Corporations. The determination was not received by the Petitioner and on or about July 6, 2010, the Petitioner's president contacted the Department of Revenue concerning a tax lien that had been filed by the Department. A copy of the March 4, 2010, determination was faxed to the Petitioner.

10. On July 13, 2010, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee. The Petitioner filed a timely protest by letter dated July 15, 2010.

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 evidence reveals that the only agreement between the parties was that the Joined Party would drive a dump truck for the Petitioner and that the Petitioner would pay the Joined Party $12 per hour. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

19. The Petitioner operates a trucking company. The work performed by the Joined Party, driving the Petitioner's truck, was not separate and distinct from the Petitioner's business but was an integral

and necessary part of the Petitioner's business. The Petitioner provided the truck and was responsible for all costs of operating the truck. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

20. It was not shown that any special skill or knowledge is required to drive a dump truck. 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)

21. The Petitioner paid the Joined Party by time worked rather than by production or by the job. The Petitioner paid the Joined Party in cash and represented to the Joined Party that payroll taxes were being withheld. The Petitioner did not report the Joined Party's earnings to the Internal Revenue Service as either an employee or as an independent contractor.

22. The Joined Party worked for the Petitioner for a period of almost two years until the Joined Party was terminated by the Petitioner. These facts reveal a relationship of relative permanence. The fact that the Joined Party believed that the Petitioner had the right to terminate the relationship at any time and that the Petitioner terminated the Joined Party in February 2009 also indicates employment. 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."

23. 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).

24. The special deputy was presented with conflicting testimony regarding whether the Joined Party performed services for the Petitioner as an employee. The Petitioner testified that the Joined Party never performed services for the Petitioner either as an employee or as an independent contractor. Factors considered in resolving evidentiary conflicts include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

25. The Petitioner's president testified that the LLC has elected to be classified as a corporation for federal income tax purposes. The president also testified that he derives an income from performing services for the Petitioner but that the Petitioner has never registered with the Florida Department of Revenue for payment of unemployment taxes on the earnings of the president or other workers.

26. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

27. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

28. 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.

29. The Petitioner's president has been active in the business since inception on July 5, 2006. Thus, the Petitioner had at least one employee performing services for the Petitioner in each of twenty different calendar weeks during 2006. The Petitioner is liable for payment of unemployment tax on the president's earnings and the earnings of other employees retroactive to July 5, 2006.

Recommendation: It is recommended that the determination dated July 13, 2010, be MODIFIED to reflect a retroactive date of liability of July 5, 2006. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on November 16, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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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 July 13, 2010, is MODIFIED to reflect a retroactive date of liability of July 5, 2006. It is also ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **February, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION