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

**PETITIONER:**
Employer Account No. - 2921843
DRAIN MASTERS USA, INC
ATTN: JUDY KAY JANNEY
1717 SW 1ST WAY STE 20
DEERFIELD BEACH FL 33441

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-146112L**

**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 September 13, 2010.

After due notice to the parties, a telephone hearing was held on December 9, 2010. The Petitioner, represented by the Petitioner's vice president, 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 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, Drain Masters USA Inc, is a plumbing and septic tank pumping business. The business was previously operated by Drain Master South Florida Inc. The Joined Party began employment working with Drain Masters South Florida Inc in approximately 2005 as a pump truck driver. The Petitioner took over the operation of the business from Drain Masters South Florida Inc approximately January 1, 2009. The Joined Party continued working for Drain Masters USA Inc but was classified as an independent contractor.
2. The Petitioner trained the Joined Party and told him how to perform the work. The Petitioner had policies which the Joined Party was required to follow.
3. The Petitioner provided the pump truck for the Joined Party to drive. The Petitioner was responsible for the fuel, maintenance, repairs, insurance, and other costs of operating the pump

truck. The pump truck bore the Petitioner's name and logo and was to be used only for the Petitioner's business purposes.

4. The Joined Party was required to call in by 8:15 AM each day to receive the daily work schedule. The Joined Party was required to call in when each job was completed and was required to turn in the invoices and money collected at the conclusion of day. The Petitioner determined when the work was to be performed. If the Joined Party needed to change the schedule he was required to notify the Petitioner. If the Joined Party wanted to take personal time off from work he was required to contact the vice president to request time off.
5. The Joined Party was not allowed to perform services for a competitor.
6. The Petitioner determined the amounts that were charged to the Petitioner's customers. The Petitioner paid the Joined Party 25% of the revenue generated by the Joined Party. The percentage paid to the Joined Party was determined by the Petitioner and no taxes were withheld from the pay. Prior to 2009 the Joined Party's earnings were reported on Form W-2. In 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
7. The Joined Party worked under the Petitioner's business liability insurance and under the Petitioner's occupational license. The Joined Party did not have a financial investment in a business, and did not advertise or offer services to the general public.
8. Either party had the right to terminate the relationship at any time. The Joined Party used the Petitioner's truck to pump septic tanks for cash without the Petitioner's knowledge. The Petitioner discharged the Joined Party on June 22, 2010, when the Joined Party was arrested for engaging in a contracting business without certification when it was discovered that the Joined Party was performing septic tank pumping on the side.
9. The Joined Party filed an initial claim for unemployment compensation benefits effective July 4, 2010. When the Joined Party did not receive credit for his earnings with the Petitioner 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.
10. On September 13, 2010, the Department of Revenue issued a determination holding that the services performed for the Petitioner by the Joined Party as a pump truck operator were performed as an employee retroactive to January 1, 2010. The Petitioner filed a timely protest by mail postmarked September 22, 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 Petitioner is in the business of pumping septic tanks. The Joined Party used the Petitioner's equipment to pump the septic tanks for the Petitioner's customers. 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.

19. The Petitioner provided the truck and all equipment that was needed to perform the work and was responsible for the fuel, maintenance, repairs, and other expenses of operation. The Joined Party did not have any investment in a business and was prohibited from performing services for a competitor. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

20. Although the Petitioner trained the Joined Party and instructed the Joined Party concerning how to perform the work, it was not shown that any skill or special knowledge is necessary to pump septic tanks. 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 a commission based on work completed rather than by time worked. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium

other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

22. Either the Petitioner or the Joined Party had the right to terminate the relationship at any time without incurring liability. The Joined Party worked for the Petitioner for over one year and was terminated when he was arrested for performing side work without a license. These facts reveal 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."

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 evidence presented in this case reveals that the Petitioner determined what work was to be performed, when it was performed, and how it was performed. Thus, it is concluded that the services performed for the Petitioner by the Joined Party as a pump truck operator constitute insured employment.

25. The determination of the Department of Revenue is retroactive to January 1, 2010. However, the evidence reveals that the Joined Party performed services for the Petitioner prior to 2010. In 2008 the Joined Party's earnings were reported on Form W-2 as an employee. In 2009 the Joined Party's earnings were reported by the Petitioner on Form 1099-MISC. Thus, the correct retroactive date of the determination is January 1, 2009.

**Recommendation:** It is recommended that the determination dated September 13, 2010, be MODIFIED to reflect a retroactive date of January 1, 2009. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on December 10, 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 September 13, 2010, is MODIFIED to reflect a retroactive date of January 1, 2009. It is further ORDERED that the determination is AFFIRMED as modified.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION