AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2984131
PAY QUICK MEDICAL BILLING INC
50 NW 14TH STREET
HOMESTEAD FL 33030

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

PROTEST OF LIABILITY
DOCKET NO. 2010-162694L

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 Petitioner's response to the *Order to Show Cause* is accepted as timely filed. It is also ORDERED that the Petitioner's protest is accepted as timely filed. It is further ORDERED that the determination dated October 5, 2010, is MODIFIED to reflect a retroactive date of August 1, 2008. It is ORDERED that the determination is AFFIRMED as modified.

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

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. - 2984131
PAY QUICK MEDICAL BILLING, INC
ATTN: ROXANNE JEGHERS
50 NW 14TH STREET
HOMESTEAD FL 33030

PROTEST OF LIABILITY
DOCKET NO. 2010-162694L

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 October 5, 2010.

After due notice to the parties, a telephone hearing was held on April 19, 2011. The Petitioner, represented by its vice 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:

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).

Whether services performed for the Petitioner by the Joined Party and other individuals 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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which was has operated a medical billing business since August 2008. Both the president and the vice president are active in the business, however, they do not perform the actual medical billing. Since inception of the business the medical billing has been performed by individuals classified by the Petitioner as independent contractors. In early 2009 the Petitioner was attempting to obtain a new client account and agreed to go through the records of the medical service provider to verify whether or not payments had been received by the provider. At the time the Petitioner had two individuals performing full time services as medical billers, however, the Petitioner needed to hire an additional person to perform the work for the new client.
2. The Joined Party, a friend of the Petitioner's president, had a history of employment in a pharmacy. In early 2009 the Joined Party was seeking employment but she did not have any experience doing medical billing. The Petitioner's president and vice president interviewed the Joined Party for the position. The president and the vice president told the Joined Party that the position was for 16 hours a week, four hours a day for four days during each week, and that the rate of pay was $8.00 per hour. No other information was provided to the Joined Party. The Joined Party accepted what she believed was the Petitioner's offer of employment and began work on or about April 27, 2009.
3. Initially, the Joined Party was informed that she was scheduled to work Monday through Thursday from 9:30 AM until 1:30 PM. She worked at the Petitioner's office location and the Petitioner provided everything that was needed to perform the work, including a computer. The Joined Party was not required to provide anything to perform the work and the Joined Party did not have any expenses in connection with the work.
4. Another worker in the office trained the Joined Party how to perform the work. The Joined Party was trained concerning what to do and how to do it. Each morning the other worker told the Joined Party what to do during the day.
5. After approximately two months the Petitioner told the Joined Party that the Joined Party's work schedule was changed in order to cover for the lunch breaks of the other workers. The Joined Party's hours of work were changed to 10 AM until 2 PM.
6. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her. The Joined Party believed that she was not allowed to perform similar work for a competitor.
7. The Petitioner paid the Joined Party on a regularly established payday, Friday of each week. On Thursday of each week the Joined Party wrote her beginning and ending times of work for each day of the week on a note pad and turned it in to the Petitioner. No taxes were withheld from the Joined Party's pay and the Joined Party was not entitled to any fringe benefits such as paid holidays, paid vacations, or health insurance. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
8. The Petitioner oversaw the work performed by the Joined Party. The Joined Party's work was considered to be satisfactory and no warnings were issued to the Joined Party. If the Joined Party made an error the Petitioner would have paid the Joined Party for the additional time necessary to correct the error.
9. While performing services for the Petitioner the Joined Party did not have any investment in a business, did not have an occupational license, did not have business liability insurance, did not advertise her services to the general public, and did not perform services for others.
10. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. In August 2010 the Petitioner terminated the relationship due to lack of work.

11. The Joined Party filed an initial claim for unemployment compensation benefits effective July 25, 2010. Her filing on that date established a base period from April 1, 2009, through March 31, 2010. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed 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.

12. The Petitioner relocated its office in approximately August 2010. On October 5, 2010, the Department of Revenue issued a determination holding that persons performing services for the Petitioner as medical billers are the Petitioner's employees retroactive to June 26, 2009. However, the determination was mailed to the Petitioner's former address by mail postmarked October 27, 2010, and was received by the Petitioner on November 12, 2010. The Petitioner contacted the Department of Revenue and requested that the mailing address be changed to the Petitioner's current address. Although the Department of Revenue entered the new address in the Department of Revenue computer, the Department did not change the mailing address as requested.

13. The Petitioner filed a letter of protest on November 18, 2010. The Petitioner listed the Petitioner's current mailing address on the letter of protest.

14. On December 14, 2010, the Office of Appeals mailed an *Order to Show Cause* to the Petitioner directing the Petitioner to show cause why the protest should not be dismissed due to lack of jurisdiction. The *Order to Show Cause* was not mailed to the Petitioner's correct address as communicated to the Department of Revenue but was mailed to the Petitioner's former address. The Petitioner responded to the *Order to Show Cause* by mail postmarked December 22, 2010, and by fax on January 10, 2011.

Conclusions of Law:

15. Section 443.141(2)(c), Florida Statutes, provides:
    (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

16. Rule 60BB-2.035(5), Florida Administrative Code, provides:
    (5) Timely Protest.
    (a)1. Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
    2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
    (b) If a protest appears to have been filed untimely, the Agency may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.

17. The *Order to Show Cause* was mailed to the Petitioner on December 14, 2010. The Petitioner responded by mail postmarked December 22, 2010, and by fax on January 10, 2011. The response

by mail postmarked December 22, 2010, was filed within 15 days after the mailing of the *Order to Show Cause.* Thus, the Petitioner's response to the *Order to Show Cause* was timely filed.

18. The determination issued by the Department of Revenue is dated October 5, 2010; however, the Petitioner's testimony establishes that it was sent by mail postmarked October 27, 2010. The determination was not received by the Petitioner until November 12, 2010, because it was not sent to the Petitioner's correct mailing address. The Petitioner filed a protest on November 18, 2010, within 20 days of receipt. Since the determination was not sent to the Petitioner's correct address of record the protest is accepted as timely filed.

19. 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.

20. 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).

21. 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).

22. 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.

23. 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.

24. 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.

25. 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.

26. No evidence was presented to show the existence of any agreement or contract specifying whether the Joined Party was engaged to perform services for the Petitioner as an employee or as an independent contractor. 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." That analysis follows.

27. The Petitioner's business is medical billing. The Joined Party performed services as a medical biller going through the records of a new client of the Petitioner to make sure that the payments had been received by the client. 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. The Petitioner provided everything that was needed to perform the work and the Joined Party did not have any investment in a business and did not have any business expenses. The Joined Party was not at risk of suffering a financial loss from services performed.

28. The Petitioner trained the Joined Party how to perform the work. It was not shown that any skill or special knowledge was required to perform the work. 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)

29. The Joined Party performed services for the Petitioner for a period of over a year. Either party had the right to terminate the relationship at anytime without incurring liability for breach of contract. 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."

30. The Petitioner determined and controlled the rate of pay, the method of pay, and the hours of work. The Petitioner controlled the financial aspects of the relationship. The Petitioner paid the Joined Party by time worked rather than by the job or based on production, which is typical of an employment relationship. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

31. The Petitioner controlled what work was performed, when it was performed, where it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

32. The evidence reveals that the Petitioner exercised significant control over the means and manner of performing the work. Thus, it is concluded that the services performed for the Petitioner by the Joined Party and other similarly situated individuals constitute insured employment.

33. The determination of the Department of Revenue holds the Petitioner liable for payment of unemployment compensation taxes effective June 26, 2009. The Petitioner's testimony reveals that the Joined Party began performing services for the Petitioner on April 27, 2009, and that at least two other medical billers performed services for the Petitioner since the inception of the business in August 2008. Based on that evidence the correct retroactive date of liability is August 2008.

Recommendation: It is recommended that the Petitioner's response to the *Order to Show Cause* be accepted as timely filed. It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated October 5, 2010, be MODIFIED to reflect a retroactive date of August 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on April 22, 2011.

R. O. SMITH, Special Deputy
Office of Appeals