AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2838633
CARBON SOLUTIONS AMERICA LLC
10 FAIRWAY DRIVE SUITE 114
DEERFIELD BEACH FL 33441-1827

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

PROTEST OF LIABILITY
DOCKET NO. 2010-167046L

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 November 18, 2010, is AFFIRMED.

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. - 2838633
CARBON SOLUTIONS AMERICA LLC
ATTN: ALEX HERNANDEZ
10 FAIRWAY DRIVE SUITE 114
DEERFIELD BEACH FL 33441-1827

PROTEST OF LIABILITY
DOCKET NO. 2010-167046L

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 November 18, 2010.

After due notice to the parties, a telephone hearing was held on May 11, 2011. The Petitioner, represented by the managing partner, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, 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 and other individuals working as sales and marketing associates 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.

Findings of Fact:

1. The Petitioner is a limited liability company which was formed in 2006 to operate a climate change consulting and project management firm.
2. The Joined Party is an individual with an employment history in sales. In 2008 the Joined Party was seeking employment and responded to a help wanted advertisement placed by the Petitioner for a sales position. The Petitioner interviewed the Joined Party and, although the Joined Party did not have any experience in the environmental consulting field, the Petitioner offered the position to the Joined Party. On or about October 27, 2008, the parties entered into a *Consulting Agreement.*

3. The *Consulting Agreement* provides that the Joined Party agrees to serve as a sales consultant for the Petitioner, that the Joined Party will market the Petitioner to prospective clients, and that the Petitioner will track all referral sources. The term of the Agreement was for one year with the Agreement automatically renewing for five additional one year terms. Either party could terminate the Agreement at any time by giving five days written notice. The Petitioner had the right to terminate the Agreement immediately if, among other circumstances, the Joined Party willfully failed or refused to carry out services requested by the Petitioner. The Agreement prohibits the Joined Party from engaging in any business in competition with the Petitioner or the Petitioner's affiliates for a period of two years after termination of the Agreement.

4. The *Consulting Agreement* provides that the Petitioner will pay the Joined Party fifteen dollars per hour on a bi-weekly basis and that the Petitioner will pay the Joined Party a quarterly bonus in the amount of twenty percent of the net revenue recognized by the Petitioner from business obtained by the Joined Party. The Agreement provides that the Petitioner will reimburse the Joined Party for reasonable and authorized expenses.

5. The *Consulting Agreement* provides that the Agreement does not constitute an undertaking of the Petitioner to hire the Joined Party as an employee and that the Joined Party acknowledges that at all times the relationship is that of independent contractor.

6. The Petitioner provided the Joined Party with workspace in the Petitioner's office and everything that was needed to perform the work including a computer and telephone. The Petitioner provided the Joined Party with business cards bearing the Petitioner's name. If the Joined Party was required to travel in connection with the work the Petitioner made the hotel reservations and paid for the room. If the Joined Party had to rent a car the Petitioner reimbursed the Joined Party for the car rental.

7. The Joined Party was informed that his work schedule in the office was Monday through Friday from 9 AM until 5 PM. The Joined Party was allowed to take a one hour unpaid lunch break. On occasion the Joined Party was late reporting to the office and was confronted concerning the tardiness. If the Joined Party was not able to work due to illness or other reason he was required to call in to report his absence.

8. During the Joined Party's first three months of work the Petitioner provided training concerning the business of environmental consulting. During the training period the Joined Party was not able to contact prospective clients. The training included how to obtain sales leads and what to say when contacting the prospective clients.

9. The Joined Party was required to complete a timesheet showing the days and hours of work. After the Joined Party completed the training he was allowed to perform services after 5 PM from his home or other location. The Joined Party requested permission to work from home between the hours of 9 AM and 5 PM but his request was denied. Generally, the Joined Party worked between forty and fifty hours per week.

10. The only earnings paid to the Joined Party by the Petitioner were based on the hourly rate of pay. The Petitioner did not recognize any net revenue from the Joined Party's marketing efforts and the Petitioner did not pay any bonus or finder's fees to the Joined Party. The Petitioner did not withhold any payroll taxes from the pay. The Petitioner did not provide any fringe benefits to the Joined Party. At the end of 2008 and 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

11. The Petitioner provided work assignments and instructions to the Joined Party. The Joined Party did not refuse any work assignments and he believed that if he refused to perform a task as instructed he would be discharged. The Joined Party was required to report the progress of his

work including who he contacted and the results of the contacts. The Petitioner held weekly meetings with the Joined Party to discuss the progress of the work.

12. While performing services for the Petitioner the Joined Party did not have any financial investment in a business, did not have any occupational or business license, did not have business liability insurance, did not advertise or offer services to the general public, did not perform services for others, and did not hire others to perform the work for him. Although the Joined Party signed the Consulting Agreement he always believed that he was an employee of the Petitioner.

13. During the latter part of 2009 the Petitioner decided to convert the Joined Party to an employee. The parties entered into an Employment Agreement effective January 1, 2010. The Joined Party performed services for the Petitioner as an employee until the end of September 2010 at which time the Petitioner terminated the Joined Party.

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.

20. 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.

21. 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). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

22. The Petitioner's business is environmental consulting. The Petitioner hired the Joined Party to market the Petitioner's environmental consulting services. The work performed by the Joined Party for the Petitioner 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 reimbursed the Joined Party for expenses in connection with the work.

23. At the time of hire the Joined Party had prior experience in sales but he did not have any prior skill or knowledge concerning environmental consulting. The Petitioner provided extensive training before the Joined Party was able contact prospective clients. Training is a method of control because it specifies how a task is to be performed. 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)

24. The Joined Party performed services exclusively for the Petitioner under the *Consulting Agreement* for a period of approximately fourteen months. The Agreement specifies that it is for a one year period of time but that it will automatically renew for an additional period of five years. These facts reveal that the relationship was one of relative permanence. The Agreement also provides that it may be terminated by either party at any time without cause with five days notice and that it may be terminated by the Petitioner immediately for cause. 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."

25. The Joined Party was paid by time worked rather than based on production or by the job. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

26. 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).
27. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. The Petitioner told the Joined Party what to do and how to do it. The Joined Party did not have the right to refuse to perform any task as instructed by the Petitioner. As set forth in the *Consulting Agreement* the Petitioner had the right to immediately terminate the Agreement if the Joined Party refused to perform any task. These facts reveal that the Petitioner exercised significant control over the means and manner that the work was performed. Thus, the services performed for the Petitioner by the Joined Party during 2008 and 2009 constitute insured employment.

Recommendation: It is recommended that the determination dated November 18, 2010, be AFFIRMED.

Respectfully submitted on May 12, 2011.

R. O. SMITH, Special Deputy
Office of Appeals