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

PETITIONER:
Employer Account No. - 2930115
VMV TRUCKING INC
VICTOR M VELIZ
9050 NW 145TH LANE
HIALEAH FL 33018-7326

PROTEST OF LIABILITY
DOCKET NO. 2010-18530L

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 23, 2009.

After due notice to the parties a telephone hearing was held on October 6, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent was represented by a Department of Revenue Service Center Manager. A Tax Specialist I was present. Due to a technical problem the Respondent was disconnected from the conference call. A copy of the recorded hearing was provided to the Respondent and after due notice to the parties a telephone hearing was held on November 8, 2010. The Petitioner, represented by the Petitioner's president, appeared. The Respondent was represented by a Department of Revenue Service Center Manager. A Tax Specialist I testified as a witness.

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 truck drivers 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 Petitioners corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a corporation which has operated a trucking company since 2005. The Petitioner's president is active in the operation of the business. The president's primary activity in the business is to obtain the loads for the drivers to deliver and to give orders to the drivers concerning how and when the drivers are to perform the work. The president is a salaried employee of the Petitioner. The Petitioner does not provide any fringe benefits for the president or other acknowledged employees.
2. In 2008 the Petitioner owned two trucks which were used to transport the loads. In approximately 2009 the Petitioner purchased a third truck. The trucks are driven by individuals who are classified by the Petitioner as independent contractors.
3. The Joined Party performed services for the Petitioner as a truck driver from approximately June 23, 2008, until approximately June 23, 2009.
4. The Joined Party drove the Petitioner's truck. The Petitioner told the Joined Party where and when to pick up the loads and where and when to deliver the loads. The Petitioner determined the routes that were to be driven. The Petitioner paid the Joined Party at the rate of thirty-four cents per mile. The Petitioner did not provide any fringe benefits to the Joined Party.
5. The Petitioner provided the Joined Party with a credit card that was to be used for the purchase of fuel. If any maintenance or repairs were needed the Joined Party was required to contact the Petitioner to obtain permission to use the credit card for the repairs to make sure that there was enough money on the card to cover the repairs. The Petitioner was responsible for providing the licenses and the insurance.
6. The Joined Party was not allowed to perform services for others because if the Joined Party performed services for others the Petitioner's truck would be idle. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him.
7. At the end of 2008 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
8. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On approximately June 23, 2009, the Joined Party informed the Petitioner that he was leaving to accept work with another trucking company.

Conclusions of Law:

9. 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.
10. 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).
11. 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).

12. 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.

13. 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.

14. 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.

15. 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.

16. No competent evidence was presented concerning the existence of any agreement or contract between the parties. During the course of the investigation conducted by the Department of Revenue, the Petitioner completed two forms entitled *Independent Contractor Analysis.* Although the forms are similar, the forms are not identical. The one form contains the question "Was there a written contract between the employing unit and the worker? (If yes, provide a copy)." The Petitioner answered "no." The second form states "Attach copies of any written agreements, billing statements, or contracts between the firm and the worker." The Petitioner did not provide any copies of contracts, agreements, or billing statements. At the hearing the Petitioner testified that there was a written agreement. The Petitioner's testimony is not sufficient to establish the existence of a written agreement or the contents of the agreement. Section 90.952, Florida Statutes, provides that, "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph."

17. 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."

18. The Petitioner operates a trucking company which transports loads from one location to another. The Joined Party drove the Petitioner's truck to transport the loads. 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 the truck and was responsible for the expense 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.

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

20. The Petitioner paid the Joined Party by the mile at a pay rate that was determined by the Petitioner based on an industry standard. The Petitioner determined the miles driven by controlling where the loads originated, where the loads terminated, and the routes to be driven. Although the Joined Party was paid based on production the Petitioner controlled the financial aspects of the relationship.

21. Although the Petitioner's testimony was inconsistent concerning the dates of work and was in conflict with the Petitioner's prehearing evidence, the evidence establishes that the Joined Party worked for the Petitioner for one year. It was a continuing relationship which was subject to termination by either party at any time. 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."

22. The evidence reveals that the Joined Party worked under the Petitioner's direction and control. The Joined Party was required to personally perform the work and the Joined Party was prohibited from working for a competitor. The Petitioner determined what was to be done, where it was to be done, when it was to be done, and how it was to be done. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

23. In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), the Florida Supreme Court addressed a similar factual situation involving the relationship between a truck driver and a trucking company. In that case the parties entered into a written independent contractor agreement which specified that the driver was not to be considered the employee of the trucking company at any time, under any circumstances, or for any purpose. In its decision the 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." The Court found that the driver owned his own truck and leased the trailer from the trucking company. The trailer was to be used by the driver exclusively for hauling freight for the trucking company. The trucking company told the driver

where to pick up the freight and where to deliver the freight. The driver had the right to refuse any dispatch. The trucking company paid the driver a percentage of the freight charge for the shipment. Either party could terminate the relationship without cause upon thirty days written notice to the other. The Court concluded, based on these facts, that the driver was an employee of the trucking company.

24. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as truck drivers constitute insured employment.

25. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
    1. An officer of a corporation.
    2. An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.

26. 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.

27. The Petitioner's president is a statutory employee of the corporation. The Petitioner is required to report the president's wages and pay unemployment compensation tax on the wages.

Recommendation: It is recommended that the determination dated November 23, 2009, be AFFIRMED.

Respectfully submitted on November 9, 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 November 23, 2009, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION