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

PETITIONER:
Employer Account No. - 2699847
JAMES ADCOCK TRANSPORT INC
DEBRA CANERO
38108 15TH AVE
ZEPHYRHILLS FL 33542

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

PROTEST OF LIABILITY
DOCKET NO. 2010-20456L

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, 2009.

After due notice to the parties, a telephone hearing was held on November 8, 2010. A senior tax specialist represented the Respondent at the hearing. A tax auditor and a tax auditor supervisor were called as witnesses on behalf of the Respondent. The Petitioner's owner appeared and testified at the hearing.

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 constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. A tax auditor conducted a compliance audit for unemployment tax on October 7, 2009. The audit was conducted at the Petitioner's accountant's office.

2. The audit found that those workers in the class of drivers were the Petitioner's employees. One driver was found to be an independent contractor.

3. An informal conference was held with the Petitioner at the Petitioner's request on November 4, 2009. The auditor did not change her determination as a result of the conference.

4. The Petitioner is a subchapter S corporation, incorporated March 19, 2004, for the purpose of running a trucking business.

5. The Petitioner retained approximately two employee drivers and 4 or 5 drivers that were considered independent contractors. The independent contractor drivers were required to sign a statement acknowledging their independent contractor status and tax responsibilities.

6. The independent contractor drivers would either call or stop in to see what work was available. The independent contractor drivers were free to accept or reject loads at their own discretion. Loads not taken by the independent contractor drivers would be assigned to employee drivers. The independent contractor drivers were not required to inform the Petitioner if they were not working at any given time.

7. The independent contractor drivers were required to have had a commercial driver's license, class A, for at least five years. The Petitioner would have an employee driver ride with an independent contractor driver initially to show where loads were picked up and delivered and to determine if the independent contractor driver were sufficiently skilled.

8. The independent contractor drivers were required to carry their own workmen's compensation insurance. The Petitioner did not require proof of insurance.

9. The independent contractor drivers would pick up a delivery ticket upon delivering each load. The delivery tickets were turned in to the Petitioner. The independent contractor drivers were paid a percentage of the load based upon the delivery tickets turned in to the Petitioner. The Petitioner determined the percentage paid to the drivers.

10. The Petitioner provided the trucks required to perform the work. The trucks bore the Petitioner's company logo. The Petitioner covered the maintenance and insurance for the trucks. The independent contractor drivers would pick up a truck from a storage yard rented by the Petitioner at the start of any day they were working and drop the truck back off at the conclusion of the work. The drivers could not use the Petitioner's vehicle for personal use.

11. The Petitioner provided medical insurance coverage for the independent contractor drivers.

12. The independent contractor drivers were allowed to work for a competitor.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

18. 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. 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.

19. The evidence presented in this case reflects that the Petitioner did not exercise control over when, where, or how the work was conducted. The drivers were free to contact the Petitioner at their own convenience for work. The drivers were free to accept or reject loads without penalty. The drivers were allowed to choose their own routes and were not supervised in the performance of the work.

20. There are some factors which tend to indicate an employer-employee relationship. The Petitioner provided medical insurance for the drivers. Providing insurance is not typical in an independent contractor relationship.

21. The Petitioner owned the trucks used in the performance of the work. The drivers had no expenses in conjunction with the vehicles or the work.

22. A preponderance of the evidence presented in this case reveals that, despite some factors to the contrary, the Petitioner did not establish sufficient control over the drivers as to create an employer-employee relationship between the Petitioner and the drivers.

23. The Petitioner submitted additional documents on November 16, 2010. The Special Deputy is not allowed to accept any new evidence after the conclusion of the hearing. Therefore, the documents are respectfully rejected.

Recommendation: It is recommended that the determination dated November 18, 2009, be REVERSED.

Respectfully submitted on January 4, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
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 18, 2009, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION