AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1549789
ELITE LIMO SERVICE OF SW FLORIDA INC
11910 PALOMINO LN
FORT MYERS FL 33912-1454

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

PROTEST OF LIABILITY
DOCKET NO. 2010-24071L

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 December 28, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 2010**.

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. - 1549789
ELITE LIMO SERVICE OF SW FLORIDA IN
SUE SCOTT
11910 PALOMINO LN
FORT MYERS FL 33912-1454

PROTEST OF LIABILITY
DOCKET NO. 2010-24071L

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 December 28, 2009.

After due notice to the parties, a telephone hearing was held on June 30, 2010. The owner/president and former president appeared and testified at the hearing. The Joined Party did not appear at the hearing. A tax auditor appeared and provided testimony on behalf of the Respondent.

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 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 subchapter S corporation, incorporated in 1995 for the purpose of running a transportation business.

2. The Petitioner provided limousine and transportation services to clients. The Joined Party provided services for the Petitioner as a driver from January 21, 2009, through March 27, 2009.

3. The Petitioner considered all of the company's drivers to be independent contractors. The Petitioner maintained 8 to 10 drivers at any given time.

4. The Joined Party was required to sign an *Independent Contractor Agreement*. The agreement indicated that the Joined Party was an independent contractor driver and was responsible for successfully completing driving services according to specifications. The document goes on to state that the Joined Party was required to submit weekly invoices and that the Joined Party was responsible for her own taxes. The agreement included a confidentiality clause and an agreement to indemnify the Petitioner in the event of any suit or claim.

5. The Petitioner provided services in Collier County. The county required chauffer drivers to maintain a hack license and required that drivers pass a background check. The Petitioner required all of its drivers to maintain a hack license and performed a background check on prospective drivers in compliance with the county requirements.

6. The Petitioner would wait for a call from a client. The client would request transportation. The Petitioner would contact drivers and assign the task to an available driver. The driver would then report to the worksite to receive instructions and pick up the vehicle specified by the Petitioner. The driver was allowed to select the route to pick up the client. The driver would then drive as directed by the client. The driver was required by the Petitioner to remain within two minutes of the client in the event that the driver was required to wait for the client at a stop. At the conclusion of the assignment, the client would sign a trip ticket for the driver. The driver would then return to the Petitioner's place of business to return the vehicle.

7. The driver was expected to inform the Petitioner in the event that a run was going to take longer than anticipated due to the client's demands.

8. The Joined Party was paid a commission for each run. The commission rate was determined by the Petitioner. The Petitioner suggested a standard tip to clients. The Joined Party's pay was not held by the Petitioner.

9. The Petitioner required its drivers to act and dress professionally. The Petitioner reserved the right to reprimand workers for failing to dress in a proper fashion. The Petitioner discharged one driver for failing to dress professionally. The Petitioner would not provide work for drivers that could not act in a professional manner.

10. The Petitioner would accompany new drivers on their initial runs to demonstrate how the Petitioner wanted the vehicles operated and the clients treated. The Petitioner provided additional training for those drivers who drove the stretch limousines.

11. The Petitioner determined how much the clients would be charged for the services provided.

12. The Petitioner owned all of the vehicles used for the transport business. The Petitioner provided insurance for the vehicles. Fuel and maintenance on the vehicles was paid for by the Petitioner. The Joined Party was not allowed to use the vehicles for personal errands without permission from the Petitioner.

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 at hearing revealed that the Petitioner exercised control over when and where the Joined Party provided services. The Petitioner contacted the Joined Party when work was available. If the Joined Party accepted the work, the Petitioner would then direct the Joined

Party in what vehicle they should use, what client they should pick up, and where that client should be picked up. The Petitioner controlled the manner of dress of the Joined Party.

20. The Petitioner provided the vehicle used by the Joined Party to perform services. The Petitioner provided the insurance, fuel, and maintenance for the vehicles. There was a written agreement between the parties. The agreement indicates an independent contractor relationship between the parties. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "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."
21. The Petitioner had the right to discharge the Joined Party without liability. The Petitioner discharged one driver due to violations of the dress policy. 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 Joined Party's services as a driver were a normal part of the daily business of the Petitioner's transportation company. The Petitioner's business is to provide a driver and vehicle to a client; the Joined Party is one of the drivers being provided to clients by the Petitioner.
23. A preponderance of the evidence presented in this case shows that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the Joined Party and the Petitioner.

Recommendation: It is recommended that the determination dated December 28, 2009, be AFFIRMED.

Respectfully submitted on August 3, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals