AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2465898
K & L THERAPY SERVICES, INC
308 CASA MARINA PLACE
SANFORD FL 32771-5228

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

PROTEST OF LIABILITY
DOCKET NO. 2010-26409L

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 protest is accepted as timely filed. It is also ORDERED that the determination dated November 12, 2009, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

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K & L THERAPY SERVICES INC
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308 CASA MARINA PLACE
SANFORD FL 32771-5228

PROTEST OF LIABILITY
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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 12, 2009.

After due notice to the parties, a telephone hearing was held on September 7, 2010. The Petitioner, represented by its vice president, appeared and testified. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 occupational therapists 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 corporation which was formed in October 2002 to operate a business which provides occupational therapy, speech therapy, and physical therapy services to pediatric clients.

2. The Joined Party began providing occupational therapy services to the Petitioner's clients on July 28, 2006. On that date the Petitioner and the Joined Party entered into a written *Contractors Agreement.*

3. The *Contractors Agreement* provides that the Joined Party is not limited to performing services just for the Petitioner and that the Joined Party is free to work for other organizations or entities. The Agreement provides that the Joined Party is free to determine which days and hours to work without any required minimum or maximum number of hours. The Agreement requires the Joined Party to bill the Petitioner for services performed and provides that the rate of pay is $7.50 per fifteen minute unit but not to exceed the amount of time authorized by the care plan. The Agreement provides that the Joined Party is not entitled to any benefits with the exception of health insurance which the Petitioner provides for full time workers. The Agreement will renew automatically each year unless either party terminates the Agreement with thirty calendar days written notice.

4. The Joined Party performed most of the occupational therapy services at the homes of the clients or at the locations of schools or day care centers. However, the Joined Party performed occupational therapy services for one of the clients at the Petitioner's office. The Joined Party was responsible for providing any equipment or supplies and the Petitioner did not reimburse the Joined Party for any expenses, including automobile expenses.

5. The Petitioner did not provide any training to the Joined Party. The Petitioner did not tell the Joined Party how to perform the work or when to perform the work. The Petitioner did not directly supervise the Joined Party.

6. No taxes were withheld from the Joined Party's pay. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

7. The Petitioner has a group health insurance plan for the Petitioner's employees. The insurance carrier allows the individuals who perform services as independent contractors to also participate in the group plan. The Petitioner pays one-half of the insurance premiums for the employees. As an incentive for the occupational therapists to work for the Petitioner on a full time basis, the Petitioner pays one-half of the premiums for the full time occupational therapists. The Petitioner paid one-half of the Joined Party's health insurance premiums. The Petitioner does not provide any other fringe benefits for employees or contractors.

8. In September 2008 the Joined Party submitted a letter of resignation effective December 18, 2008.

9. The Joined Party filed a combined wage claim for unemployment compensation benefits with the State of New York. The base period of the claim is from April 1, 2008, through March 31, 2009. New York filed an *Interstate Request for Reconsideration of Monetary Determination/Wage Credits* and requested that Florida determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. The investigation was assigned to the Florida Department of Revenue.

10. On October 30, 2009, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as occupational therapists are the Petitioner's employees retroactive to January 1, 2008. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."

11. The Petitioner filed a written protest on or about November 9, 2009. The Petitioner's letter states, among other things, "We wish to protest the determination." Upon receipt of the protest letter the Department of Revenue mailed a duplicate determination to the Petitioner on November 12, 2009,

marked as an "affirmation" of the October 30, 2009, determination. The Petitioner filed another written letter of protest by certified mail on November 24, 2009. The Petitioner's November 24, 2009, determination is date stamped as received on December 31, 2009.

Conclusions of Law:

12. Rule 60BB-2.026(4), Florida Administrative Code, provides that the Department of Revenue will issue determinations to notify employers regarding whether services performed by individuals or classes of workers were in statutorily covered employment, were exempt from unemployment insurance coverage, were performed by employees, or were performed by independent contractors.

13. Rule 60BB-2.035(1), Florida Administrative Code, provides that protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, the Department will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in the Agency for Workforce Innovation for resolution.

14. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides that 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.

15. It is undisputed that the Petitioner filed a written protest of the October 30, 2009, determination within the twenty day time limit. The protest letter was received by the Department of Revenue on or about November 9, 2009. The Department of Revenue did not forward the protest to the Office of Appeals and did not issue a redetermination. The Department of Revenue issued a duplicate determination marked as an "affirmation" of the October 30, 2009, determination.

16. Upon receipt of the Petitioner's November 9, 2009, protest letter the Department of Revenue did not change or "reconsider" the October 30, 2009, determination and notified the Petitioner that the Department had not changed the determination. Since the Department did not reconsider the October 30, 2009, determination the Petitioner's letter of November 9, 2009, is a timely protest.

17. 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.

18. 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).

19. 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).

20. 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.

21. 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.

22. 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.

23. 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.

24. 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).

25. In this case the Agreement specifies that the Joined Party performed services for the Petitioner as a contractor. The evidence reveals that the Petitioner did not exercise any control over when the work was performed or how the work was performed. The Joined Party was free to perform occupational therapy services for other companies. The Joined Party was responsible for providing his own equipment and supplies and was responsible for all of his expenses. No taxes were withheld from the pay and the earnings were reported to the Internal Revenue Service as nonemployee compensation.

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. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

27. Although some factors in this case point to an employer/employee relationship the overall weight of the evidence supports a conclusion that the services performed by the Joined Party as an occupational therapist do not constitute insured employment.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated November 12, 2009, be REVERSED.

Respectfully submitted on September 15, 2010.

R. O. SMITH, Special Deputy
Office of Appeals