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

PETITIONER:
Employer Account No. - 2478617
GRAMLING TRANSPORT INC
MELANIE K GRAMLING
PO BOX 1785
PORT RICHEY FL 34673-1785

PROTEST OF LIABILITY
DOCKET NO. 2010-26430L

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 2, 2009.

After due notice to the parties, a telephone hearing was held on October 21, 2010. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as 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.

Findings of Fact:

1. The Petitioner is a corporation which was formed in July 2003 to operate a transportation business. Generally, the Petitioner hauls construction debris, sand, gravel, and other related materials.
2. The Joined Party has a Class A drivers license. In early 2008 the Joined Party was employed by a trucking company but was not getting enough hours. The Joined Party was informed by another driver that the Petitioner was hiring drivers. The Joined Party contacted the Petitioner and was interviewed by the Petitioner's Fleet Manager. The Fleet Manager went on a test drive with the Joined Party and informed the Joined Party that he did not believe that the Joined Party would be able to do the job. In spite of that fact he offered the Joined Party a job as a driver at a pay rate of

$13 per hour. The Joined Party accepted and began work in May 2008. At the time there was no written agreement or contract. The Joined Party drove the Petitioner's truck and the Petitioner was responsible for all expenses.

3. In July 2008 the Fleet Manager presented the Joined Party with a document entitled *Independent Contractor Operating and Equipment Lease Agreement* for the Joined Party's signature. The Fleet Manager told the Joined Party that if he did not sign the Agreement the Joined Party would no longer have a job. The Joined Party signed the Agreement. After the Joined Party signed the Agreement the Joined Party continued to drive the same truck which was owned by the Petitioner. He continued to work under the same terms and conditions but he was paid a percentage of the revenue which the Petitioner received from the Petitioner's customers for the materials which the Joined Party hauled.

4. The *Independent Contractor Operating and Equipment Lease Agreement* provides that the Joined Party is an independent contractor rather than an employee of the Petitioner. The Agreement states that the Petitioner will not establish set hours of work, means or methods for performance of the services, and that the Petitioner will not provide tools, materials, or other equipment to the Joined Party. The Agreement provides that the Joined Party agrees to accept the dispatches of lading tendered to the Joined Party as long as the Joined Party's equipment is in good mechanical condition unless prior arrangements have been made to forego a dispatch. The Agreement provides that the Joined Party is required to properly clean the inside of the trailer both before and after the movement of freight.

5. The *Independent Contractor Operating and Equipment Lease Agreement* states that the Petitioner will furnish, provide and/or pay all costs, including but not limited to, fuel, road taxes, mileage taxes, fuel taxes, oil, tires, equipment, accessories and devices, all maintenance costs, repairs, tolls, all fines and penalties arising out of the use of the equipment unless the Petitioner determines that the fines or penalties are the result of driver negligence, physical damage insurance, bobtail and deadhead insurance, public liability insurance, property damage insurance, and cargo insurance. The Agreement provides that the Joined Party may elect to be covered under the Petitioner's workers' compensation insurance policy and that the premiums for the Joined Party's workers' compensation coverage would be deducted from the monies owed by the Petitioner to the Joined Party.

6. The *Independent Contractor Operating and Equipment Lease Agreement* provides that the Joined Party must immediately notify the Petitioner of any accidents, breakdowns, delays and emergencies by satellite communication system or telephone. The Agreement provides that if the Joined Party does not immediately notify the Petitioner the Joined Party will assume all liability for the accident or other situation.

7. The *Independent Contractor Operating and Equipment Lease Agreement* provides the Petitioner will pay the Joined Party 20% of 90% of the revenue earned by the truck driven by the Joined Party. The remaining 10% of the 100% is considered to be earned by the Petitioner's trailer and not by the truck that is used to pull the trailer.

8. The term of the *Independent Contractor Operating and Equipment Lease Agreement* was for 146 weeks beginning July 1, 2008. The Agreement was subject to termination be either party with thirty days written notice and was subject to immediate termination by the Petitioner if the Petitioner had reason to believe that the Joined Party was dishonest, reckless, incompetent, or if the Joined Party carried unauthorized passengers or cargo.

9. Some of the work assignments provided to the Joined Party involved hauling materials within the local area. If the Joined Party was assigned to perform local hauling, the Joined Party was required to return the Petitioner's truck to the Petitioner's yard at the end of the work day. On a few occasions the Joined Party was granted permission to park the truck at a different location. Some of the work assignments were out of the local area and required overnight travel. On those

occasions the Petitioner paid the Joined Party $25 per day to cover meals. If the Joined Party stayed in a motel, the motel reservations were made for the Joined Party and the motel bills were paid for the Joined Party. The Joined Party did not have any expenses in connection with the work.

10. When work assignments were provided to the Joined Party, the Joined Party was told what time he was required to leave the Petitioner's yard. Generally, the Joined Party determined the routes to drive from one location to another. One of the local area work assignments was to haul construction debris from MacDill Air Force Base. One of the routes to MacDill Air Force Base involved driving on a toll road. The Petitioner refused to reimburse the Joined Party for the tolls. Therefore, the Joined Party chose another route that did not require payment of a toll. Usually, the Joined Party chose the fastest routes.

11. Prior to July 2008 payroll taxes were withheld from the Joined Party's pay. Beginning in July 2008 payroll taxes were not withheld. The Petitioner did not provide any fringe benefits either before July 2008 or after July 2008. At the end of 2008 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

12. The *Independent Contractor Operating and Equipment Lease Agreement* was terminated in September 2009. The Joined Party filed a claim for unemployment compensation benefits effective October 11, 2009. His filing on that date established a base period from July 1, 2008, through June 30, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. On December 2, 2009, the Department of Revenue issued a determination holding that the persons performing services for the Petitioner as drivers are the Petitioner's employees retroactive to January 6, 2008. The Petitioner filed a timely protest.

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.

19. 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.

20. The Petitioner operates a trucking company. The Joined Party was engaged to drive the Petitioner's truck to haul the freight that the Petitioner contracted to haul. 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 business.

21. The Petitioner provided the truck for the Joined Party to drive and was responsible for all of the operating expenses. The Joined Party did not have any investment in a business and did not have expenses in connection with the work. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services.

22. It was not shown that any particular skill or special knowledge is required to drive a truck other than that of an ordinary truck driver employed by a carrier in the trucking business. 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)

23. When the Joined Party was hired in May 2008 he was paid by the hour. There was no written agreement. It was not until July 1, 2008, when the Petitioner presented the Joined Party with the *Independent Contractor Operating and Equipment Lease Agreement*. The Fleet Manager told the Joined Party that the Joined Party could not continue working for the Petitioner unless he signed the Agreement. The Joined Party needed work and signed the Agreement. All of the terms and conditions of the Agreement were established by the Petitioner. The Agreement provides that the Joined Party would be paid based on a percentage of the revenue produced by the Petitioner's truck but not based on a percentage of the revenue which the Petitioner concluded was based on

the use of the Petitioner's trailer which was hauled by the truck driven by the Joined Party. The Petitioner controlled the hauling fees charged to the Petitioner's customers and controlled the work assignments which the Petitioner provided to the Joined Party. The Petitioner controlled the financial aspects of the relationship. The fact that the Petitioner chose not to withhold payroll taxes from the earnings does not, standing alone, establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.

24. The *Independent Contractor Operating and Equipment Lease Agreement* provides that the Joined Party agrees to accept the work assignments unless the truck assigned to the Joined Party by the Petitioner is not in good working condition or unless prior arrangements have been made to allow the Joined Party to be off from work. The Joined Party was told what time he was required to leave the Petitioner's yard for each assignment. These facts reveal that the Petitioner controlled what work was performed, where it was performed, and when it was performed.

25. The initial verbal agreement under which the Joined Party was hired did not have a specific term. The written *Independent Contractor Operating and Equipment Lease Agreement* was for the term of 146 weeks, however, was subject to immediate termination by the Petitioner if the Petitioner determined that the Joined Party was incompetent, or if the Petitioner had reason to believe that the Joined Party may have had an unauthorized passenger in the truck or may have transported unauthorized cargo. These facts reveal that the relationship was one of relative permanence but was one that was subject to immediate termination by the Petitioner. 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."

26. The *Independent Contractor Operating and Equipment Lease Agreement* states that the Joined Party is an independent contractor and not an employee of the Petitioner. The Agreement states that the Petitioner will not provide any tools, materials, or equipment to the Joined Party. In fact, the Petitioner provided the truck, the trailer, and was responsible for paying all costs of operation. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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."

27. The Petitioner argues that this case is on point with the facts addressed by the court in the case of Hilldrup Transfer & Storage, Inc, v. State Dept of Labor and Employment Security, 447 So2d 414 (Fla. 5th DCA 1984). However, there are significant differences between the drivers in Hilldrup and the Petitioner's drivers. The drivers in Hilldrup were responsible for payment of all expenses connected with the operation and ownership of the trucks including fuel, insurance, repairs, maintenance, parking, licenses, applicable taxes, and road and bridge tolls. In the instant case the Petitioner was responsible for furnishing, providing and/or paying all costs, including but not limited to, fuel, road taxes, mileage taxes, fuel taxes, oil, tires, equipment, accessories and devices, all maintenance costs, repairs, tolls, all fines and penalties arising out of the use of the equipment unless the Petitioner determines that the fines or penalties are the result of driver negligence, physical damage insurance, bobtail and deadhead insurance, public liability insurance, property damage insurance, and cargo insurance. The drivers in Hilldrup had the freedom to choose which

assignments to accept. In the instant case the Joined Party was required to accept assignments as long as the Petitioner's truck was in good working condition unless prior arrangements had been made with the Petitioner.

28. 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. 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 not an independent contractor but was an employee of the trucking company.

29. In the case of Richard T. Adams v. Department of Labor and Employment Security, 458 So. 2d 1161 (Fla. 1st DCA 1984), the Court determined the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. No evidence was adduced showing any difference between the employment conditions of the applicant and the other workers. The Court noted that Section 443.171(1), Florida Statutes, authorizes the Agency to administer the chapter; including the power and authority to require reports, make investigations, and take other action deemed necessary or suitable to that end.

30. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as drivers constitute insured employment. The Joined Party began performing services for the Petitioner in May 2008. No competent evidence was presented concerning services performed by other drivers prior to May 2008. Therefore the retroactive date contained in the determination, January 6, 2008, is not supported by competent evidence.

Recommendation: It is recommended that the determination dated December 2, 2009, be MODIFIED to reflect a retroactive date of May 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on November 17, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2478617

GRAMLING TRANSPORT INC
MELANIE K GRAMLING
PO BOX 1785
PORT RICHEY FL 34673-1785

PROTEST OF LIABILITY
DOCKET NO. 2010-26430L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals working as drivers constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Joined Party filed an unemployment compensation claim in October 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any other workers who performed services under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue (the Department) determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party and any other drivers who performed services under the same terms and conditions as the Joined Party. The Petitioner filed a timely protest of the

determination. The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on October 21, 2010. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Special Deputy issued a Recommended Order on November 17, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation which was formed in July 2003 to operate a transportation business. Generally, the Petitioner hauls construction debris, sand, gravel, and other related materials.
2. The Joined Party has a Class A drivers license. In early 2008 the Joined Party was employed by a trucking company but was not getting enough hours. The Joined Party was informed by another driver that the Petitioner was hiring drivers. The Joined Party contacted the Petitioner and was interviewed by the Petitioner's Fleet Manager. The Fleet Manager went on a test drive with the Joined Party and informed the Joined Party that he did not believe that the Joined Party would be able to do the job. In spite of that fact he offered the Joined Party a job as a driver at a pay rate of $13 per hour. The Joined Party accepted and began work in May 2008. At the time there was no written agreement or contract. The Joined Party drove the Petitioner's truck and the Petitioner was responsible for all expenses.
3. In July 2008 the Fleet Manager presented the Joined Party with a document entitled *Independent Contractor Operating and Equipment Lease Agreement* for the Joined Party's signature. The Fleet Manager told the Joined Party that if he did not sign the Agreement the Joined Party would no longer have a job. The Joined Party signed the Agreement. After the Joined Party signed the Agreement the Joined Party continued to drive the same truck which was owned by the Petitioner. He continued to work under the same terms and conditions but he was paid a percentage of the revenue which the Petitioner received from the Petitioner's customers for the materials which the Joined Party hauled.
4. The *Independent Contractor Operating and Equipment Lease Agreement* provides that the Joined Party is an independent contractor rather than an employee of the Petitioner. The Agreement states that the Petitioner will not establish set hours of work, means or methods for performance of the services, and that the Petitioner will not provide tools, materials, or other equipment to the Joined Party. The Agreement provides that the Joined Party agrees to accept the dispatches of lading tendered to the Joined Party as long as the Joined Party's equipment is in good mechanical condition unless prior arrangements have been made to forego a dispatch. The Agreement provides that the Joined Party is required to properly clean the inside of the trailer both before and after the movement of freight.
5. The *Independent Contractor Operating and Equipment Lease Agreement* states that the Petitioner will furnish, provide and/or pay all costs, including but not limited to, fuel, road taxes, mileage taxes, fuel taxes, oil, tires, equipment, accessories and devices, all maintenance costs, repairs, tolls, all fines and penalties arising out of the use of the equipment unless the Petitioner determines that the fines or penalties are the result of driver negligence, physical damage insurance, bobtail and deadhead insurance, public liability insurance, property damage insurance, and cargo insurance. The Agreement provides that the Joined Party may elect to be covered under the Petitioner's workers' compensation insurance policy and that the premiums

for the Joined Party's workers' compensation coverage would be deducted from the monies owed by the Petitioner to the Joined Party.

6. The *Independent Contractor Operating and Equipment Lease Agreement* provides that the Joined Party must immediately notify the Petitioner of any accidents, breakdowns, delays and emergencies by satellite communication system or telephone. The Agreement provides that if the Joined Party does not immediately notify the Petitioner the Joined Party will assume all liability for the accident or other situation.
7. The *Independent Contractor Operating and Equipment Lease Agreement* provides the Petitioner will pay the Joined Party 20% of 90% of the revenue earned by the truck driven by the Joined Party. The remaining 10% of the 100% is considered to be earned by the Petitioner's trailer and not by the truck that is used to pull the trailer.
8. The term of the *Independent Contractor Operating and Equipment Lease Agreement* was for 146 weeks beginning July 1, 2008. The Agreement was subject to termination be either party with thirty days written notice and was subject to immediate termination by the Petitioner if the Petitioner had reason to believe that the Joined Party was dishonest, reckless, incompetent, or if the Joined Party carried unauthorized passengers or cargo.
9. Some of the work assignments provided to the Joined Party involved hauling materials within the local area. If the Joined Party was assigned to perform local hauling, the Joined Party was required to return the Petitioner's truck to the Petitioner's yard at the end of the work day. On a few occasions the Joined Party was granted permission to park the truck at a different location. Some of the work assignments were out of the local area and required overnight travel. On those occasions the Petitioner paid the Joined Party $25 per day to cover meals. If the Joined Party stayed in a motel, the motel reservations were made for the Joined Party and the motel bills were paid for the Joined Party. The Joined Party did not have any expenses in connection with the work.
10. When work assignments were provided to the Joined Party, the Joined Party was told what time he was required to leave the Petitioner's yard. Generally, the Joined Party determined the routes to drive from one location to another. One of the local area work assignments was to haul construction debris from MacDill Air Force Base. One of the routes to MacDill Air Force Base involved driving on a toll road. The Petitioner refused to reimburse the Joined Party for the tolls. Therefore, the Joined Party chose another route that did not require payment of a toll. Usually, the Joined Party chose the fastest routes.
11. Prior to July 2008 payroll taxes were withheld from the Joined Party's pay. Beginning in July 2008 payroll taxes were not withheld. The Petitioner did not provide any fringe benefits either before July 2008 or after July 2008. At the end of 2008 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
12. The *Independent Contractor Operating and Equipment Lease Agreement* was terminated in September 2009. The Joined Party filed a claim for unemployment compensation benefits effective October 11, 2009. His filing on that date established a base period from July 1, 2008, through June 30, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. On December 2, 2009, the Department of Revenue issued a determination holding that the persons performing services for the Petitioner as drivers are the Petitioner's employees retroactive to January 6, 2008. The Petitioner filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination be modified to reflect a retroactive date of May 1, 2008. The Special Deputy also recommended that the

determination be affirmed as modified. The Petitioner's exceptions to the Recommended Order were received by mail postmarked December 2, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In the exceptions to Findings of Fact #2-3 and 9-11, the Petitioner's *Omitted Findings* a.-c., the exceptions to Conclusions of Law #21-25 and 30, portions of the exceptions to Conclusions of Law #26-29, and the exception to the Special Deputy's Recommendation, the Petitioner proposes findings of fact in accord with the Special Deputy's Findings of Fact, proposes alternative findings of fact, or proposes alternative conclusions of law. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that

the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. The Petitioner's exceptions are respectfully rejected.

Also in the exception to Conclusion of Law #26, the Petitioner argues that, while a statement in an agreement that the existing relationship is an independent contractor relationship is not dispositive of the issue, it is nevertheless evidence of the intent of the parties as to the relationship between them. In *Keith v. News & Sun Sentinel Co.*, 667 So.2d 167 (Fla. 1995), the Florida Supreme Court provided guidance on how to approach an analysis of employment status. The court held that the lack of an express agreement or clear evidence of the intent of the parties requires "a fact-specific analysis under the Restatement based on the actual practice of the parties." *Id.* at 71. However, when an agreement does exist between the parties, the court held that the courts should first look to the agreement and honor it "unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status." *Id.* As a result, the analysis in this case would not stop at an examination of the written agreement between the parties.

A complete analysis would examine whether the agreement and the other provisions of the agreement were consistent with the actual practice of the parties. If a conflict is present, *Keith* provides further guidance. *Id.* In *Keith*, the court concluded that the actual practice and relationship of the parties should control when the "other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties." *Id.* For example, in *Justice v. Belford Trucking Co.*, 272 So.2d 131, 136 (Fla. 1972), the Florida Supreme Court held that the Judge of Industrial Claims erred when relying solely on the language of a contract instead of considering all aspects of the parties' working relationship. In doing so, the court found that the judge "did not recognize the employment relationship that actually existed." *Id.* Therefore, the mere existence of an independent contractor agreement and the specific terms of such an agreement would not be conclusive regarding the issue of the Joined Party's status. Although the Special Deputy found in Finding of Fact #3 that the Joined Party signed an independent contractor agreement, the working relationship as described by the Special Deputy in the Findings of Fact would still merit the conclusion that an employer/employee relationship existed. Contrary to the result in *Keith*, the Special Deputy did not find that the behavior of the parties was consistent with an independent contractor status and did not find the Petitioner's right to control the Joined Party was limited

to merely a right to control the results of the Joined Party's work. Instead, the Special Deputy concluded in Conclusion of Law #24 that "the Petitioner controlled what work was performed, where it was performed, and when it was performed." Competent substantial evidence in the record supports the Special Deputy's ultimate conclusion that the Petitioner controlled the way the Joined Party performed his services in a manner consistent with an employment relationship. Thus, the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are not rejected by the Agency. The portion of the exception to Conclusion of Law #26 that argues that the independent contractor agreement is evidence of the parties' intent is respectfully rejected.

In the exceptions to Conclusion of Law #26 and 28, the Petitioner distinguishes the *Justice* case. 272 So.2d at 131. The Petitioner contends that *Justice* is distinguishable from the instant case because the employer in *Justice* issued a W-2 form, withheld taxes and social security, and covered the employee on the employer's workers' compensation coverage. The Petitioner further contends that the case is distinguishable in that the employee in *Justice* was subject to termination at the will of the employer. The record reflects that the Special Deputy concluded in Conclusion of Law #28 that the *Justice* case involved a "similar factual situation" to the current case. The Special Deputy found the cases were similar because the court in *Justice* determined that a truck driver was an employee of a trucking company after considering that the parties entered into a written agreement that specified that the driver was not to be considered an employee, the driver owned his own truck, and the driver leased a trailer from the trucking company to be used exclusively for hauling freight for the trucking company. Also in Conclusion of Law #28, the Special Deputy concluded that the *Justice* case was similar because the court, when deciding that the driver was an employee, considered that the trucking company told the driver where and when to pick up the freight, the driver had the right to refuse a dispatch, the driver was paid a percentage of the freight charge for each shipment, and the parties could terminate the relationship without cause upon thirty days written notice. Conclusions of Law #26 and #28 are supported by competent substantial evidence in the record and reflect a reasonable application of the law to the facts. Thus, the Agency may not modify or reject Conclusions of Law #26 and #28. The Petitioner's exceptions to Conclusions of Law #26 and #28 are respectfully rejected.

The Petitioner takes exception to Conclusion of Law #27 because the Petitioner argues that *Hilldrup Transfer & Storage, Inc. v. State, Dep't of Labor & Employment Secur., Div. of Employment*, 447 So. 2d 414 (Fla. 5th DCA 1984), is on point because the claimant had the option to lease a vehicle from the Petitioner, lease a vehicle from a third party, or provide his own vehicle. An examination of the record shows that the Special Deputy distinguished the *Hilldrup* case from the instant case in Conclusion of Law #27. In Conclusion of Law #27, the Special Deputy found that the drivers in *Hilldrup* were responsible for

the payment of all expenses connected with operation and ownership of trucks while the Joined Party had no responsibility to pay such expenses. Also in Conclusion of Law #27, the Special Deputy found that the drivers in *Hilldrup* had the freedom to choose when to accept assignments while the Joined was required to accept assignments as long as the Petitioner's truck was in good working condition unless prior arrangements had been made with Petitioner. Conclusion of Law #27 is supported by competent substantial evidence in the record and reflects a reasonable application of the law to the facts. Accordingly, the Agency accepts Conclusion of Law #27 without modification. The Petitioner's exception to Conclusion of Law #27 is respectfully rejected.

In the exception to Conclusion of Law #29, the Petitioner also argues that the determination made by the Department should not be applicable in this case because the Department has previously made a conflicting determination after an examination of an independent contractor agreement identical to the agreement present in this case. The Petitioner further contends that the application of the Department's determination would be manifestly unjust due to the existence of the conflicting determinations. Rule 60BB-2.035(7), Florida Administrative Code, provides that the Petitioner has the burden to "establish by preponderance of the evidence that the determination was in error." A review of the record establishes that the Petitioner's president testified that the Department had previously ruled that Emilio Diaz was an independent contractor and that Emilio Diaz had the same contract and occupational license as the Joined Party. A review of the record also establishes that the Special Deputy ultimately concluded that the Joined Party and other workers who performed services as drivers worked as employees based on evidence in the hearing record. The record further reflects that the proceedings on which the findings were based complied with the essential requirements of law. Since the Special Deputy's conclusion that the Petitioner did not meet its burden to show that the determination was in error is supported by competent substantial evidence in the record and reflects a reasonable application of the law to the facts, the Petitioner has not provided a basis permitted under section 120.57(1)(l), Florida Statutes, for the rejection of the Special Deputy's conclusion or the adoption of an alternative result by the Agency. The exception to Conclusion of Law #29 is respectfully rejected.

A review of the record reveals that the Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as contained in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated December 2, 2009, is MODIFIED to reflect a retroactive date of May 1, 2008. It is also ORDERED that the determination is AFFIRMED as modified.

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

_____
TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION