AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2934729
NEW STAR EXPRESS INC
10042 AIRETOP AVE
DADE CITY FL 33525-0712

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

PROTEST OF LIABILITY
DOCKET NO. 2010-31387L

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 January 7, 2010, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
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. - 2934729
NEW STAR EXPRESS INC
KENNETH J MAZEROLLE
10042 AIRETOP AVE
DADE CITY FL 33525-0712

PROTEST OF LIABILITY
DOCKET NO. 2010-31387L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 7, 2010.

After due notice to the parties, a telephone hearing was held on April 22, 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 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 not received. A post hearing submission was received from the Petitioner and is discussed in the conclusions of law section of this recommended order.

Issue:

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

Findings of Fact:

1. The Petitioner is a corporation which was formed on September 12, 2005, to operate an interstate trucking business.

2. The Joined Party is an individual who has been employed as a truck driver beginning in April 1990. For several years the Joined Party was employed by a trucking company that was owned by the Joined Party's father. His father's company was going bankrupt and the Joined Party was considering relocating to Florida to seek employment as a truck driver. The Joined Party's father and the Petitioner's president had worked together many years ago and the Joined Party's father suggested that the Joined Party contact the Petitioner's president to see if work was available.

3. The Joined Party contacted the Petitioner's president in early 2008. The Joined Party explained that he was relocating to Florida and was looking for work as a truck driver. The president told the Joined Party that the Petitioner paid the drivers 42 cents per mile. The Joined Party replied that 42 cents per mile was a very good pay rate. The president then explained that the Petitioner was able to pay 42 cents per mile because the drivers paid their own taxes. The Petitioner did not have a truck for the Joined Party to drive but the president offered to purchase a truck for the Joined Party to drive. Sometime after the initial conversation the president contacted the Joined Party and informed the Joined Party that the Petitioner had purchased a truck for the Joined Party to drive. The Joined Party relocated to Florida and began driving for the Petitioner on July 16, 2008.

4. The Petitioner provided the Joined Party with a fleet card to be used for purchase of fuel and for payment of other expenses of operating the truck. The Petitioner provided the insurance and paid for licenses and highway taxes. A decal bearing the Petitioner's name was placed on the truck.

5. The Petitioner assigned the loads to the Joined Party. The Petitioner told the Joined Party where to pick up the loads, when to pick up the loads, where to deliver the loads and told the Joined Party the delivery times. While on the road the Joined Party was required to call in every day to let the Petitioner know where he was at.

6. The Joined Party was required to personally drive the truck when transporting the freight. He could not hire others to drive the truck for him. He was not allowed to have any passengers in the truck. The Joined Party was prohibited from driving for another trucking company.

7. The Joined Party determined what the best route to drive was. Although the Petitioner paid the Joined Party based on miles, the Joined Party was not paid for the actual miles which he drove. The Petitioner computed the point-to-point map miles and paid the Joined Party accordingly.

8. The Petitioner has a safety program which the drivers are required to follow. The Petitioner has training manuals and conducts periodic training meetings and training banquets. Sometimes the Petitioner has one-on-one meetings with the drivers at which time the Petitioner discusses the drivers' driving records. The Petitioner has a policy and procedure manual which explains the six month probationary period and sets forth the dress code which encourages the drivers to wear comfortable, appropriate, professional clothing in good condition.

9. The first six months of the Joined Party's work for the Petitioner was considered by the Petitioner to be a probationary period. After approximately five months of work the president told the Joined Party that the Joined Party had done such a good job of driving that the Petitioner had already paid off the truck. The president told the Joined Party that the Petitioner had paid $17,000 for the truck. The Joined Party offered to purchase the truck but the president declined to sell the truck to the Joined Party.

10. The title to the truck was in the Petitioner's name and the Petitioner considered the Joined Party as leasing or renting the truck from the Petitioner. The Joined Party was not aware that the Petitioner had set up an escrow account for accounting purposes and for computing the Joined Party's earnings. Seventy-five percent of the revenue generated by the truck was credited to the account from which the Petitioner deducted all of the fuel, repairs, and other expenses of

operating the truck. Initially the Petitioner paid the Joined Party a "draw" of 42 cents a mile from the account. Subsequently the Petitioner reduced the payment to 32 cents per mile because the Petitioner was experiencing financial problems. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. Any balance remaining in the account was considered by the Petitioner to be the Joined Party's payment toward the purchase of the truck. If the balance in the account reached $27,000 the Petitioner planned to transfer the title to the Joined Party. However, due to the amount of the operating expenses and the amount paid to the Joined Party as a draw, the account had a negative balance.

11. The Petitioner did not provide any fringe benefits, such as health insurance or paid vacations, to the Joined Party. On one occasion the Joined Party requested permission to take a one week unpaid vacation. The Petitioner informed the Joined Party that he could take a week off at Christmas because work was slow at Christmas.

12. At the end of 2008 the Petitioner provided the Joined Party with Form 1099-MISC reporting the amount of $66,364 as the Joined Party's earnings. The Joined Party knew that he had not received earnings of $66,364 and he confronted the Petitioner. The Petitioner informed the Joined Party that the amount included deductions of $40,318 for fuel and $1,542 for rental maintenance. The Petitioner told the Joined Party that the Joined Party's tax preparer would know how to report the Joined Party's income.

13. Either party had the right to terminate the relationship at any time without incurring liability. If there was a positive balance in the escrow account at termination, those funds would not be applied toward the purchase of the truck. The Petitioner considered any such funds as the driver's payment for the rental of the Petitioner's truck and the funds would be retained by the Petitioner.

14. In 2009 the Petitioner's accountant told the Petitioner to discontinue using escrow accounts to allow drivers to purchase the trucks through lease/purchase arrangements because the drivers never accrued sufficient balances in the accounts to purchase the trucks. In August 2009 the president informed the Joined Party that the Joined Party could purchase the truck from the Petitioner for $32,000. The Joined Party declined the offer. The Petitioner did not give the Joined Party any additional driving assignments and on August 26, 2009, the Petitioner told the Joined Party to clean out the truck because the Petitioner had sold the truck to someone else.

15. During the time that the Joined Party worked for the Petitioner he believed that he was the Petitioner's employee because the Petitioner controlled what work was done, when it was done, where it was done, and how it was done.

Conclusions of Law:

16. 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. In this case the Petitioner testified that the Joined Party signed a lease/purchase agreement and signed a statement to the effect that the Joined Party was the owner of the truck and was self employed. The Joined Party denied signing the agreements. Although the documents were submitted in evidence the Joined Party testified that the signature on the documents was not his signature. The Petitioner's testimony reveals that the Petitioner did not witness the Joined Party sign the documents. However, resolution of the conflict is not necessary for disposition of this case. 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. The Petitioner is a trucking company. The Joined Party was assigned to drive a truck owned by the Petitioner. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business.

25. The Joined Party drove the Petitioner's truck for a period of over one year. Either party could terminate the relationship at any time without incurring any liability for breach of contract. The Petitioner terminated the Joined Party when the Petitioner sold the truck which the Petitioner assigned the Joined Party to drive. 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. Based on the evidence presented in this case it is concluded that the services performed for the Petitioner by the Joined Party and other individuals as over-the-road truck drivers constitute insured employment.

27. The Petitioner did not submit Proposed Findings of Fact and Conclusions of Law. However, the Petitioner submitted a letter from the Petitioner's accountant which states that the Petitioner does not dispute finding that the Joined Party was an employee of the Petitioner but does not agree that "leased owner/operators" are employees of the Petitioner. In support of that argument the Petitioner submitted additional documentary evidence.

28. Rule 60BB-2.035(19)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing is closed.

29. The additional evidence submitted by the Petitioner is rejected and has not been considered.

30. At the hearing the Petitioner asserted that the Joined Party was a "leased owner/operator." No evidence was submitted to show that the Joined Party worked under conditions that were in any way different from the conditions under which the other drivers worked. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984) the Court held "We do not find that the Department was without authority to make its determination applicable, not only to the worker whose unemployment benefit application initiated the investigation, but to all of Adams' similarly situated workers. No evidence was adduced showing any difference between the employment conditions of the applicant and the other workers. More importantly, Section 443.171(1), Florida Statutes, provides: 'It shall be the duty

of the division to administer this chapter; and it shall have power and authority to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable to that end.' (Emphasis supplied)."

Recommendation: It is recommended that the determination dated January 7, 2010, be AFFIRMED.

Respectfully submitted on May 24, 2010.

R. O. SMITH, Special Deputy
Office of Appeals