AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2483337
COLORCLAD PAINTING INC
17698 SW 11TH ST
PEMBROKE PNES FL 33029-4850

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

PROTEST OF LIABILITY
DOCKET NO. 2010-31388L

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 29, 2009, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 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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RESPONDENT:
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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 29, 2009.

After due notice to the parties, a telephone hearing was held on July 6, 2010. The Petitioner's president and vice-president appeared and testified at the hearing. A tax specialist I appeared and testified on behalf of the Respondent. The Joined Party did not appear 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 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 sub-chapter S corporation incorporated in 2003 for the purpose of running a painting business.

2. One of the Petitioner's officers worked with the Joined Party in another business. The Petitioner's officer asked the Joined Party if the Joined Party would perform work for the Petitioner.

3. The Joined Party performed services as a painter for the Petitioner from June 20, 2003, through November 12, 2009. The Joined Party signed an agreement at the time of hire. The agreement indicated that the Joined Party was an independent contractor.

4. The Petitioner would be hired by customers for painting jobs. The Petitioner would hire an outside company for large jobs. The Petitioner would offer small jobs to the Joined Party. Each job performed for the Petitioner by the Joined Party had its own separate verbal agreement.

5. The Joined Party supplied his own equipment and tools for the work. The Petitioner supplied the paint for use on the job in order to ensure the level of quality promised to the customer.

6. The Petitioner paid the Joined Party based upon the number of days the job was estimated to require. The Joined Party could negotiate on the time estimate. The Joined Party was paid $110 per day. The Joined Party was paid based on the estimate, regardless of whether the job actually took more or less time. The Joined Party's pay was held by the Petitioner until after the customer had paid the Petitioner for the work.

7. The Petitioner inspected the Joined Party's work at or near completion of the job. The Joined Party was required to correct any problems, for which the Joined Party was at fault, without additional pay.

8. The Joined Party was allowed to work for competitors of the Petitioner.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence presented at the hearing reveals that the Petitioner did not exercise control over the manner or time of the work. The Petitioner would establish the location of the work, which by its nature was required to be performed at the work site.

16. The parties shared control over the financial aspects of the relationship. The Joined Party could negotiate the estimated number of days required to complete the work. This estimate formed the basis by which the Joined Party's pay was calculated. The pay was by the job which tends to indicate an independent contractor relationship.

17. The Joined Party provided his own tools and equipment. The Petitioner supplied the paint so as to maintain the level of quality promised to the customers.

18. The Petitioner did not supervise the Joined Party's work. The Petitioner performed an inspection at the conclusion of the job but did not instruct the Joined Party in how the work itself should be performed.

19. The preponderance of the evidence presented at the hearing reveals that the Petitioner did not establish sufficient control as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated December 29, 2009, be REVERSED.

Respectfully submitted on August 11, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals