AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1245769
RECONSTRUCTIVE DENTISTRY INC
2470 SUNSET POINT ROAD
CLEARWATER FL 33765-1515

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

PROTEST OF LIABILITY
DOCKET NO. 2010-31391L

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 22, 2009, is MODIFIED to be retroactive to October 1, 2005. It is further ORDERED that the determination is AFFIRMED as modified.

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

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. - 1245769
RECONSTRUCTIVE DENTISTRY INC
R C PRATT
2470 SUNSET POINT ROAD
CLEARWATER FL 33765-1515

PROTEST OF LIABILITY
DOCKET NO. 2010-31391L

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 22, 2009.

After due notice to the parties, a telephone hearing was held on December 16, 2010. An owner/manager appeared and testified on behalf of the Petitioner. The Joined Party appeared and testified on her own behalf. A tax specialist II appeared and testified 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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter C corporation, incorporated in 1986, for the purpose of running a dental office.

2. The Petitioner considers all of the dental hygienists performing services to be independent contractors.

3. The Joined Party performed services for the Petitioner as a dental hygienist from October 2005 through November 2009.

4. The Joined Party began performing services for the Petitioner through a temporary agency. The Joined Party later worked for the Petitioner directly. There was no written agreement.

5. The Joined Party was a registered dental hygienist.

6. The Joined Party worked two days each week. The exact schedule varied depending upon the Joined Party's school schedule. The Joined Party was required to work from 8:10-5pm, the Petitioner's hours of business. If no work was available, the Petitioner would instruct the Joined Party not to come in to work.

7. The Petitioner required a morning meeting. The Petitioner would inform the Joined Party of her schedule and what procedures should be done at the morning meeting. The Petitioner scheduled approximately one patient per hour.

8. The Petitioner required that the Joined Party remain busy throughout the work day.

9. The Joined Party was not covered under the Petitioner's workmen's compensation policy.

10. The Joined Party was paid $29 per hour. The rate was established by the Petitioner based upon a 30% commission rate. The Petitioner was required to clock in each day. The Petitioner paid the Joined Party bonuses based upon profits earned over goals. The Petitioner paid the Joined Party weekly.

11. The Petitioner provided all of the tools and equipment necessary to perform the work. The Petitioner provided an employee manual to the Joined Party. The Joined Party was required to follow the instructions and rules in the manual. The manual included information on when the Joined Party should report to work, how patients should be treated, when lunch breaks could be taken, and procedures for informing the Petitioner in the event of an absence.

12. The Joined Party worked as a dental assistant at times for the Petitioner. The Joined Party was considered an employee while performing work as a dental assistant. The Joined Party worked approximately 16 hours as a dental assistant during her period of service with the Petitioner. There were no substantial differences in the work conditions between work as a dental assistant and dental hygienist.

13. The Petitioner issued write ups and verbal warnings to the Joined Party. The Joined Party was written up for coming to work too early. The Joined Party was written up for questioning her schedule.

14. The Joined Party could refuse to see a patient. The Petitioner would not allow the Joined Party to refuse to see more than two or three patients.

15. The Petitioner set all prices charged to patients.

16. The Petitioner required the Joined Party to wear a jacket to cover tattoos.

17. Either party could end the relationship at anytime and without liability.

Conclusions of Law:

18. 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.

19. 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).

20. 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).

21. 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.

22. 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.

23. 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.

24. The evidence presented in this hearing reveals that the Petitioner controlled where, when, and what work the Joined Party would perform. All work was performed at the Petitioner's place of business and during the Petitioner's hours of operation. The Petitioner created the Joined Party's

schedule and controlled whether or not the Joined Party would work on any given day. The Petitioner had the ultimate authority as to what procedures would be performed by the Joined Party.

25. The Petitioner controlled the financial aspects of the relationship. The Joined Party was paid an hourly rate. The hours the Joined Party was allowed to work were controlled by the Petitioner. The Rate of pay was unilaterally determined by the Petitioner.
26. The Petitioner provided the workspace, tools, and equipment needed to perform the work.
27. The Petitioner required the Joined Party to follow all of the rules and procedures established in the employee manual. The Petitioner also exercised control in the form of written and verbal warnings to the Joined Party. The Petitioner required the Joined Party to clock in and out.
28. The Joined Party performed work for the Petitioner which was considered employment by the Petitioner. The level of supervision and conditions of work were substantially similar to those in effect when the Joined Party performed services considered independent by the Petitioner.
29. The Joined Party's work was not separate and distinct from the Petitioner's business. The Joined Party's work was an integral part of the day to day operations of the Petitioner.
30. A preponderance of the evidence reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.
31. The undisputed testimony of all parties indicated that the Joined Party began providing services for the Petitioner in October 2005. The effective date of the determination is MODIFIED to reflect that start date.

Recommendation: It is recommended that the determination dated December 22, 2009, be MODIFIED to be retroactive to October 1, 2005; as MODIFIED, it is recommended that the determination be AFFIRMED

Respectfully submitted on February 24, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals