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

PETITIONER:
Employer Account No. - 2935555
EXECUTIVE EXPRESS TRANSPORT INC
15448 SW 36TH TERR
MIAMI FL 33185-4815

PROTEST OF LIABILITY
DOCKET NO. 2010-33767L

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 January 13, 2010.

After due notice to the parties, a telephone hearing was held on October 19, 2010. A former vice president for the Petitioner appeared and testified at the hearing. The Joined Party appeared and testified on his 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in August 2007 for the purpose of running a worker's compensation transportation company.

2. The Joined Party provided services as a driver to the Petitioner from January 14, 2008, through October 23, 2009. A relative of one of the Petitioner's workers noted the Joined Party working for a competitor and referred the Joined Party to the Petitioner. The Joined Party contacted the

Petitioner to find work. The Joined Party signed an independent contractor agreement with the Petitioner.

3. The Petitioner would inform available drivers of work for the next day. The Petitioner would inform the drivers of who should be picked up, where they should be picked up, and where they should be dropped off. If a driver was not available to work the schedule, another driver would be selected.

4. The Joined Party was expected to submit an invoice to the Petitioner each week. The invoice would record dates, pickup locations, drop off locations, and mileage. The Joined Party was paid $.85 per mile. The rate of pay fluctuated with the price of gasoline. The Petitioner set the rate of pay.

5. The Joined Party provided his own vehicle for the work. The Joined Party was responsible for paying for fuel, maintenance, and insurance for the vehicle. The Joined Party was required to supply a cellular telephone. The Petitioner reimbursed the Joined Party for cellular phone calls.

6. The Joined Party was allowed to work for a competitor. The Joined Party provided services to a competitor while performing services for the Petitioner.

7. The Joined Party was free to select his own routes. The Petitioner was only concerned with seeing that the work was completed on time.

Conclusions of Law:

8. 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.

9. 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).

10. 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).

11. 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.

12. 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.

13. 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.

14. The evidence presented in this hearing reveals that the Petitioner did not exercise control over how the Joined Party performed the work. The Petitioner created a schedule, which the Joined Party was free to accept or refuse.

15. The Joined Party was responsible for providing his own vehicle and cellular telephone for the work. The Joined Party was responsible for the fuel, insurance, and maintenance of the vehicle. The Petitioner reimbursed the Joined Party for the use of the cellular telephone.

16. The Joined Party was allowed to and in fact did perform services for a competitor of the Petitioner while working for the Petitioner. The Joined Party was performing services for a competitor before beginning services for the Petitioner.

17. A preponderance of the evidence presented in this hearing reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated January 13, 2010, be REVERSED.

Respectfully submitted on December 29, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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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 13, 2010, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION