

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2314121
SIBONEY TRANSPORT CO
1000 SOUTHERN BLVD STE 300
WEST PALM BEACH FL 33405-2439

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-38013L**

ORDER

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 February 1, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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. - 2314121
SIBONEY TRANSPORT CO
JUANITA GONZALEZ
1000 SOUTHERN BLVD STE 300
WEST PALM BEACH FL 33405-2439



**PROTEST OF LIABILITY
DOCKET NO. 2010-38013L**

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 February 1, 2010.

After due notice to the parties, a telephone hearing was held on December 9, 2010. The Petitioner's accountant appeared and testified at the hearing. A representative appeared 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 received from the Petitioner on December 14, 2010.

Issue:

Whether services performed for the petitioner constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (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.

Whether the Petitioners corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Findings of Fact:

1. An audit was held by the Respondent with the Petitioner on November 9, 2009.
2. The auditor found that the Petitioner's president and two dispatchers were covered employees.
3. The Petitioner is a subchapter S corporation incorporated for the purpose of running a transportation broker business. The Petitioner obtained trucking jobs for independent contractor truck drivers.
4. Enrique A Tomeo is an officer of the Petitioner. Tomeo is the president of the company. Tomeo is a shareholder of the Petitioner.
5. The Petitioner's president (Tomeo) oversees the operations of the Siboney group of corporations, including the Petitioner. The Petitioner would contact the Petitioner's president in the event of a problem.
6. The Petitioner's president received a salary for his oversight of the corporate group. The Petitioner's president was paid by Siboney contracting. The Petitioner's president was paid for his services to all of the companies in the Siboney group, including the Petitioner. The Petitioner's president received dividends from the Petitioner.
7. Siboney contracting acts as a common paymaster for the entire Siboney group of corporations, including the Petitioner.
8. The dispatchers were considered independent contractors by the Petitioner.
9. The dispatchers were required to sign an independent contractor agreement.

Conclusions of Law:

10. 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.
11. 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).
12. 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).
13. 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.

14. 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.
15. 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.
16. Florida Statute section 443.1216(1)(a)5 states: The common paymaster also has the primary responsibility for remitting contributions due under this chapter for the wages it disburses as the common paymaster. The common paymaster must report these contributions as though it were the sole employer of the concurrently employed individuals. If a common paymaster fails to timely remit these contributions or reports, in whole or in part, the common paymaster remains liable for the full amount of the unpaid portion of these contributions. In addition, each of the other related corporations using the common paymaster is jointly and severally liable for its appropriate share of these contributions.
17. The Petitioner presented primarily hearsay evidence at the hearing. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. See Section 120.57, Florida Statutes; Rule 60BB-2.035(15)(c), Florida Administrative Code. Because the Petitioner failed to present a preponderance of competent, substantial evidence, the determination of the auditor shall remain undisturbed.
18. The Petitioner provided proposed findings of fact on December 14, 2010. Where the findings comport with the record, they are incorporated into this Recommended Order. Where the findings do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated February 1, 2010, be AFFIRMED.

Respectfully submitted on February 14, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals