AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1444852
PHILLIPS WHOLESALE
PO BOX 11119
JACKSONVILLE FL 32239-1119

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

PROTEST OF LIABILITY
DOCKET NO. 2010-45090L

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 27, 2010, is REVERSED.

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

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

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RESPONDENT:
State of Florida
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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 January 27, 2010.

After due notice to the parties, a telephone hearing was held on August 13, 2010. An attorney appeared on behalf of the Petitioner. The Petitioner's owner/president, regional sales manager, and a driver were all called as witnesses for the Petitioner. The Joined Party appeared and testified on her own behalf. A tax specialist II 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.

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 corporation founded for the purpose of running an automobile parts delivery business.

2. The Petitioner hired the Joined Party as an independent contractor. The Joined Party performed services for the Petitioner as a delivery person from February 2008, through December 15, 2008.

3. The Joined Party was tasked with picking up automobile parts and delivering them to various locations. The Joined Party would pick up the parts to be delivered for the day as well as drop off any payments from customers for the Petitioner. The Joined Party was free to select the order and route for the deliveries.

4. The Joined Party was required to contact the employer in the event that parts were missing, or if they were involved in an automobile accident while carrying parts for the Petitioner.

5. The Joined Party was allowed to work for a competitor.

6. The Joined Party could and did subcontract the work.

7. The Joined Party provided her own vehicle. During the period of service, the Joined Party purchased a larger vehicle in order to carry larger cargos. The Joined Party was responsible for all vehicle maintenance, repair, and fuel costs. The Petitioner provided hand scanners for use in scanning packages upon receipt and delivery. The Joined Party provided her own cellular telephone.

8. The Petitioner paid the Joined Party $172.73 per daily load. The Joined Party was not paid for days not worked. The Joined Party was not paid if work was not available.

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 in this case reveals that the Petitioner did not exercise control over the manner or sequence of work of the Joined Party. The Petitioner provided the Joined Party with a cargo and a list of delivery locations. The Joined Party used their own discretion in determining the best route and order in which the deliveries were to be made.

16. The Joined Party owned and operated a truck. The Joined Party was responsible for the maintenance, fuel, and repair costs for the trucks used in the work. The Petitioner did at times provide a pay boost to help compensate for higher fuel costs. The Petitioner provided hand scanners so that the cargo could be scanned upon delivery. The Joined Party purchased a new vehicle in order to be able to better carry large loads of cargo for the Petitioner.

17. The Joined Party was paid a daily rate for each day worked. This is best described as being paid by the job, with a flat fee for each load of cargo.

18. The Petitioner was not concerned with who was actually making the deliveries so long as the deliveries were being made.

19. A preponderance of the evidence presented in this case 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 27, 2010, be REVERSED.

Respectfully submitted on September 14, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals