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

PETITIONER:
Employer Account No. - 2482181
PPA TRUCKING INC
PABLO RODRIGUEZ
102 STEVENAGE CT
LONGWOOD FL 32779-4557

PROTEST OF LIABILITY
DOCKET NO. 2010-46904L

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 10, 2010.

After due notice to the parties, a telephone hearing was held on September 20, 2010. The hearing was first held on June 17, 2010. The Petitioner's owner 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 hearing was reconvened for the admission of documents on September 20, 2010. An attorney appeared on behalf of the Petitioner. The Petitioner's owner was called as a witness. 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.

Findings of Fact:

1. The Petitioner is a corporation, incorporated in 2001 for the purpose of running a fuel delivery company.

2. The Petitioner provided fuel delivery services for a client company.

3. The Joined Party worked for another company when the Joined Party met the Petitioner. The Petitioner offered the Joined Party work in exchange for a 35% commission and no benefits. The Joined Party submitted an application to the client company. The client company application process included a work history and background check. The client company approved the Joined Party. The Joined Party provided services as a driver to the Petitioner from August 2007, through May 2009.

4. The Joined Party rode with the Petitioner for one week to learn the required paperwork and to meet with the customers at various fuel delivery points.

5. The Joined Party was expected to meet the Petitioner each night between 4 and 6 pm. The Petitioner would contact the Joined Party to let the Joined Party know when to meet. The Petitioner and the Joined Party shared the truck with the Petitioner driving days and the Joined Party driving nights. The Joined Party would drive the truck to the client's terminal and begin picking up loads and delivering them to their destinations. The Joined Party would continue picking up and dropping off fuel for the duration of his shift. The shift lasted no more than 14 hours due to federal rules.

6. The Petitioner paid the Joined Party weekly. The Joined Party was paid 35% of the amount paid by the client for each load that the Joined Party delivered.

7. The Petitioner owned the truck used by the Joined Party. The Petitioner paid the fuel and insurance costs for the vehicle. The Petitioner was reimbursed for fuel costs by the client. The client provided the trailers used to haul the fuel. The Joined Party was not allowed to use the truck for personal errands.

8. A commercial driver's license and a hazmat endorsement were required to perform the work. The Joined Party possessed a commercial driver's license and a hazmat endorsement before beginning the work.

9. The Petitioner provided worker's compensation insurance to the Joined Party due to client requirements.

10. The Petitioner would pay the Joined Party $50 for days the Joined Party was out sick. The Joined Party was required to apply to the client for time off for a vacation.

11. The Joined Party was not allowed to subcontract the work.

12. The Joined Party could quit at anytime without liability. The Joined Party was discharged by the client company.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

18. 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.

19. The evidence presented in this case reveals that the Petitioner controlled where and when the Joined Party performed work. The Petitioner controlled the time at which the Joined Party was to report to work as well as, through the client, the location the Joined Party had to report to in order to pick up loads and assignments.

20. The Joined Party provided services for the Petitioner for over a year and a half. Such a length of service is indicative of a permanent relationship rather than the temporary relationship implicit in an independent contractor relationship.

21. The Petitioner supplied and maintained the vehicle used by the Joined Party for the work. The Petitioner, through the client, supplied the trailer. The Joined Party provided no equipment or tools, nor did he maintain or fuel the vehicle he used.

22. The Joined Party was covered by the Petitioner's workmen's compensation policy. Worker's compensation insurance is traditionally an employee benefit.

23. The relationship was terminable at will. Either party could end the relationship at anytime, without liability. The Petitioner, through the client, in fact discharged the Joined Party. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

24. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control as to create an employer-employee relationship between the Petitioner and the Joined Party. While much of the control is a result of the demands of the client, such controls are administered by the Petitioner towards the Joined Party.

Recommendation: It is recommended that the determination dated February 10, 2010, be AFFIRMED.

Respectfully submitted on November 1, 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 February 10, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION