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

PETITIONER:
Employer Account No. - 1143873
JARR INC
JAMES T FALZONE
5919 MAKI LN
NEW PORT RICHEY FL 34653-4339

PROTEST OF LIABILITY
DOCKET NO. 2010-49439L

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 26, 2010.

After due notice to the parties, a telephone hearing was held on October 1, 2010. An attorney appeared for the Petitioner. The Petitioner's two owners and two of the Petitioner's drivers appeared and testified as witnesses for the Petitioner. The Joined Party appeared and testified on his own behalf. A tax specialist 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 received from the Petitioner on October 15, 2010.

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, incorporated in 1983, for the purpose of running a taxi transport business. The Petitioner has approximately 40 drivers, all of which are considered independent contractors by the Petitioner.

2. Drivers can choose when to be on-call. The dispatch will call out when there is a customer. Drivers are then free to take or decline any given customer call. Drivers are sometimes requested by customers. The customers contact the drivers directly. The drivers then report the fare to the dispatch.

3. Drivers create flyers to advertise their services.

4. Drivers are allowed to work for a competitor or to operate their own competing company.

5. Drivers are required to cover all tolls and fuel expenses. Drivers make a co-payment each day to the Petitioner in order to cover vehicle maintenance. The drivers are responsible for their own personal injury insurance.

6. Drivers retain 50% of their fares each day. The remaining 50% is considered a rental fee for the vehicle by the Petitioner.

7. The Joined Party provided services as a taxi driver from June 10, 2009, through December 31, 2009. The Joined Party contacted the Petitioner to see if work was available. The Joined Party contacted the Petitioner in an attempt to find work.

8. The Joined Party signed an independent contractor agreement at the time of hire. The independent contractor agreement was a standard contract used by the Petitioner for all drivers. The agreement requires that the Petitioner report any traffic ticket within 48 hours. The agreement does not allow insurance coverage to the Joined Party if he carries non-paying customers. The agreement requires the Joined Party to maintain contact with the dispatch. The agreement includes a non-compete clause which disallows drivers from working for a competitor after leaving the Petitioner for a six month period. The Petitioner does not enforce the non-compete clause.

9. The Joined Party was informed by the Petitioner that the Joined Party was required to receive all passengers through the dispatcher. The Joined Party would be sent home for the day if the Joined Party did not follow the dispatcher's directions. The Joined Party was instructed to allow smoking by passengers in the taxi.

10. The Petitioner set the fees for rides. The Joined Party would contact the dispatch to receive permission to deviate from the set fees.

11. The Joined Party received mandatory training from the Petitioner.

12. The Joined Party was required to notify the dispatcher at anytime the Joined Party was leaving the vehicle. The Joined Party was required to follow the directions and instructions of the dispatcher. The Joined Party was verbally reprimanded for failing to inform the dispatcher that the Joined Party was leaving the vehicle.

13. The Petitioner provided the vehicle and radio for the work. The Joined Party covered fuel costs and the price of tolls and parking. The Joined Party did not have his own personal injury protection insurance.

Conclusions of Law:

14. 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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.

20. The evidence presented in this hearing reveals that the Petitioner does not exercise control over how, where, or when the class of taxi drivers performed their duties. The drivers are free to work when and where they please subject to local regulations. The drivers are free to accept or refuse passengers suggested by the dispatcher.

21. The drivers are responsible for providing all of their own tools or equipment with the exception of the vehicle itself. The drivers pay a co-payment towards the maintenance of the vehicle. The drivers are responsible for all fuel costs and tolls incurred.

22. The drivers sign an independent contractor agreement with the Petitioner. While such a document is not dispositive, it does demonstrate the intention of the parties to create an independent contractor relationship.

23. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the drivers as to create an employer-employee relationship between the drivers and the Petitioner.
24. The Joined Party was instructed by the Petitioner's dispatcher to follow the direction and instruction of the dispatcher. The Joined Party was required to report in to the dispatcher at any time when the Joined Party left the vehicle. The Joined Party was further required to accept fares indicated by the dispatcher.
25. The Joined Party was verbally reprimanded and sent home by the Petitioner's dispatcher.
26. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.
27. The Petitioner submitted Proposed Findings of Fact and/or Conclusions of Law on October 15, 2010. The Special Deputy considered these proposals and where such proposals comport with the record, they are incorporated into this recommended order. Where such proposals do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated February 26, 2010, be AFFIRMED with respect to the Joined Party ONLY. It is recommended that the determination dated February 26, 2010, be REVERSED with respect to the remainder of the class of taxi drivers.

Respectfully submitted on December 3, 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 26, 2010, is AFFIRMED with respect to only the Joined Party. It is also ORDERED that the determination is REVERSED with respect to the remainder of the class of taxi drivers.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION