AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2868216
BRIGHT STAR MOVERS INC
280 S MILITARY TRAIL
DEERFIELD BEACH FL 33442-3030

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

PROTEST OF LIABILITY
DOCKET NO. 2010-49440L

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 March 2, 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

PETITIONER:
Employer Account No. - 2868216
BRIGHT STAR MOVERS INC
BARBARA BRIETSTEIN
280 S MILITARY TRAIL
DEERFIELD BEACH FL 33442-3030

PROTEST OF LIABILITY
DOCKET NO. 2010-49440L

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 March 2, 2010.

After due notice to the parties, a telephone hearing was held on August 16, 2010. An attorney appeared for the Petitioner. The Petitioner's owner and former owner were called as witnesses. A tax specialist appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

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, incorporated in September 2007, for the purpose of running a moving company specialized in moving senior citizens.

2. The Joined Party performed services for the Petitioner as a crew leader from May 2008, through January 2010. The Joined Party was an experienced crew leader.

3. The Petitioner would contact the Joined Party when work was available. If the Joined Party accepted the work, the Joined Party would conduct an estimate for the job. The estimate would

include, how long the job should take, how many people should be used, and what the cost would be.

4. The Petitioner would offer pay based upon the estimate for the job. The Joined Party was paid an hourly rate based upon the number of hours estimated for the job.

5. The Joined Party would recruit and assemble sufficient workers to perform the work. The Joined Party would pick up the workers and bring them to the moving van. The Joined Party was responsible for coordinating and supervising the job. The Petitioner paid the workers brought in by the Joined Party.

6. The Petitioner was not involved with the moving job after the job was accepted by the Joined Party.

7. The Joined Party was responsible for any damages caused during the move.

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

9. The Petitioner supplied the moving vehicle. The Petitioner would rent a moving vehicle for the move.

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. The evidence presented in this case reveals that the Petitioner did not exercise control over the Joined Party in determining how the work was performed. The Petitioner offered work moving items from one location to another, within a certain timeframe. The Joined Party was free to accept or decline the work.

17. Both parties were involved in determining the Joined Party's pay. While the Petitioner may have set the hourly rate of pay, the Joined Party was responsible for making the estimate upon which the pay would be based. Because the Joined Party was paid a set amount for the job, the Joined Party was paid by the job which is indicative of an independent contractor relationship.

18. The Joined Party had a great deal of control over the work. In creating the initial estimate, the Joined Party could control how long the job would take and how many workers would be needed. The Joined Party had control over what workers would be used in a specific job.

19. The Petitioner hired the Joined Party as an experienced crew leader.

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

21. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on August 27, 2010. The Special Deputy considered the proposals. Where the proposals comport with the record, the proposals are incorporated into the recommended order. Where the proposals do not comport with the record, the proposals are respectfully rejected.

Recommendation: It is recommended that the determination dated March 2, 2010, be REVERSED.

Respectfully submitted on September 14, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals