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

PETITIONER:
Employer Account No. - 1213843
PARK TAXI INC
D/B/A/ PARK LIMOUSINE SERVICE
139 N COUNTY RD STE 23
PALM BEACH FL 33480

PROTEST OF LIABILITY
DOCKET NO. 2010-51463L

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 23, 2010.

After due notice to the parties, a telephone hearing was held on November 23, 2010. An attorney appeared on behalf of the Petitioner. One of the Petitioner's corporate officers/dispatchers was called as a witness. A tax specialist II appeared and testified on behalf of the Respondent. The Joined Party elected not to participate in 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 from the Petitioner December 9, 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 Florida corporation, incorporated for the purpose of running a transportation/limousine business. The Petitioner has been in business for 15 or 20 years.

2. The Joined Party encountered the Petitioner in the course of work with a prior employer. When the Joined Party's employment ended, the Joined Party approached the Petitioner to see if work was available.

3. The Joined Party performed services for the Petitioner as a limousine driver from on or about December 10, 2007, through on or about May 13, 2009.

4. The Joined Party signed an independent contractor agreement with the Petitioner at the time of hire. The agreement was a standard agreement provided by the Petitioner. The Petitioner did not enforce most of the provisions of the agreement.

5. The Joined Party would inform the Petitioner of his availability. When the Petitioner had jobs they would be offered to available drivers. The drivers could refuse the job without penalty. The drivers could take 'walk up' or taxi type jobs from customers directly.

6. The Petitioner provided the vehicles used for the work. The Petitioner covered fuel costs for the vehicles. The drivers would split the cost of washing the vehicles. The drivers were allowed to take the vehicles home with them in certain instances. Parking fees and tolls were reimbursed to the drivers and charged back to the customers. The drivers could supply their own cellular telephone or pager if they chose to.

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

8. The work required a chauffer's license. The Petitioner possessed a chauffeur license prior to beginning work with the Petitioner. The Petitioner was not involved in the Joined Party's acquisition of the chauffer license.

9. The drivers kept track of their work on forms provided by the Petitioner. These forms were turned in to the Petitioner and used to calculate the driver's pay. The Joined Party was paid a 25% commission plus tips. The Petitioner's portion of the fee was considered a rental fee for the vehicle.

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 control where, when, or how the work was performed by the Joined Party. The Joined Party was free to create his own schedule and hours. The Joined Party was free to decline any work offered by the Petitioner with no adverse repercussions.

17. The Joined Party used the Petitioner's vehicle to perform the work. The Joined Party was paid a percentage of the value of the ride. The remainder of the value of the ride went to the Petitioner and constituted, in part, a fee for the use of the Petitioner's vehicle.

18. 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.

19. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on December 9, 2010. Where the Proposals are consistent with the record, they are incorporated in this recommended order. Where the Proposals do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated February 23, 2010, be REVERSED.

Respectfully submitted on January 14, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
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 23, 2010, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION