AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1386551

DAYCON INVESTORS ASSOCIATES INC
JOSEPH P D'ANGELO
400 POINCIANA DRIVE
HALLANDALE FL 33009-6538

PROTEST OF LIABILITY
DOCKET NO. 2010-51464L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as maintenance workers constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Joined Party Raul Del Valle filed an unemployment compensation claim in January 2010. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a

direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on July 7, 2010. The case was heard as a consolidated hearing along with the case with the Docket Number 2009-166881L. The Petitioner, represented by its president, appeared and testified. The Petitioner was assisted by the Petitioner's attorney. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Specialist testified as a witness. Joined Parties Danilo Reyes and Raul Del Valle appeared. Following the testimony of the Petitioner's president, the hearing was continued for medical reasons.

The hearing was rescheduled for August 2, 2010. The Petitioner was represented by its president and was assisted by the Petitioner's attorney. Joined Party Raul Del Valle appeared and testified. Joined Party Danilo Reyes appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. A Tax Specialist testified as a witness. The Special Deputy issued a Recommended Order on August 20, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation which operates a medical research business. The Petitioner established liability for payment of unemployment compensation tax in 1992.

2. The Petitioner's business location was severely damaged in a hurricane and it was the Petitioner's intent to repair the building. An individual who worked in the home of the Petitioner's president was a friend of Joined Party Raul Del Valle and the friend asked the president to give employment to Joined Party Raul Del Valle. The friend informed Raul Del Valle that the Petitioner was looking for a maintenance man. The wife of the Petitioner's president interviewed Raul Del Valle in March 2007 and asked him if he was able to do construction and maintenance work including plumbing and electrical work. The president's wife asked Raul Del Valle if he had his own tools. The president's wife then offered work to Raul Del Valle. The president's wife informed Raul Del Valle that the position entailed doing repair work on the Petitioner's building, that the hours of work were Monday through Friday from 8:30 AM until 5 PM for a total of forty hours per week, that the rate of pay was $14.50 per hour, and that the Petitioner would pay the full amount to the Joined Party without withholding any taxes from the pay. Raul Del Valle objected to taxes not being withheld and requested that taxes be withheld from the pay. The request was denied. Raul Del Valle accepted the offer of work.

3. The Petitioner and Raul Del Valle did not enter into any written contract or agreement.

4. Raul Del Valle did not have a contractor's license, a business license, an occupational license, and did not have business liability insurance. He did not advertise or offer services to the general public.

5. Raul Del Valle reported to the Petitioner's business location on his first day of work. During the day the Joined Party filled out paperwork provided to him by the Petitioner. The Petitioner showed him the building and the work that needed to be done. The Joined Party did not perform any work on the first day but the Petitioner's president gave the Joined Party his work assignment for the following day.

6. Raul Del Valle was required to clock in and out each day on the Petitioner's computerized time clock. He was required to clock in each morning and to clock out at the end of the day. He was allowed to take a thirty minute lunch break each day and was supposed to clock out and back in for the lunch break. He was not paid for the lunch break and was required to eat in a designated area. He was responsible for cleaning up after himself. If he needed more than thirty minutes for lunch he was required to communicate that fact to the Petitioner. The Joined Party did not always clock out for lunch and he was informed that if he took longer than thirty minutes his pay would be reduced. The Joined Party was not allowed to smoke in the building, was informed that he was required to be obedient, and informed that if he did not cooperate he would be terminated. The president informed Raul Del Valle that he could perform outside work as long as he notified the Petitioner of the other work.

7. Raul Del Valle provided his own hand tools to perform the work. When Raul Del Valle needed materials or supplies he gave the Petitioner a list of what was needed. Sometimes the Petitioner would purchase the materials and supplies and give them to the Joined Party. On other occasions the Joined Party would meet the Petitioner at a Home Depot store in the morning so that the Petitioner could purchase the materials and supplies. On a few occasions the Joined Party purchased the materials and supplies and was reimbursed by the Petitioner.

8. The Petitioner paid Raul Del Valle on a weekly basis with the regularly established payday on Friday. The Petitioner held back one week's pay. No taxes were withheld from the pay and no fringe benefits were provided. On two occasions after Raul Del Valle was hired he spoke to the president's wife and requested that taxes be withheld from the pay. On each occasion the Petitioner denied the request.

9. On or about August 8, 2007, the Petitioner hired Joined Party Danilo Reyes as a helper for Raul Del Valle. The Petitioner's president interviewed Danilo Reyes and asked if he knew how to do tile work and other repairs at the building. He asked Danilo Reyes what experience he had doing that type of work. Danilo Reyes replied that he had always worked as a maintenance man and that he had experience doing minor repairs. He advised the Petitioner that he did not own any tools. The Petitioner offered work to Danilo Reyes at the rate of $12 per hour. The president advised Danilo Reyes that the hours of work were from 8:30 AM until 5 PM, Monday through Friday, for a total of forty hours per week. The president did not mention whether fringe benefits would be provided and did not discuss whether or not taxes would be withheld from the pay.

10. Danilo Reyes did not have a contractor's license or an occupational license. He did not have business liability insurance, did not advertise, and did not offer services to the general public.

11. On his first day of work Danilo Reyes spoke to the president's wife and he learned that the Petitioner was not going to withhold taxes from the pay. He requested that the Petitioner withhold taxes from the pay, however, the request was denied.

12. Danilo Reyes worked under the exact same terms and conditions as Raul Del Valle. Although the Petitioner provided the daily work assignments to both workers the Petitioner did not tell the workers how to perform the work. The workers knew how to perform the work based on prior experience.

13. The Petitioner's president was in the process of remodeling his personal home. On some days the president assigned Raul Del Valle and Danilo Reyes to work at his home. The Petitioner paid both workers for the work performed at the president's home from the bank account of Daycon Investors Associates Inc.

14. At the end of each calendar year the Petitioner reported the earnings of Raul Del Valle and Danilo Reyes on Form 1099-MISC as nonemployee compensation.

15. Either the Petitioner or either Joined Party had the right to terminate the relationship at any time without incurring liability. On or about July 21, 2009, the Petitioner terminated Danilo Reyes due to lack of work. On or about August 15, 2009, the Petitioner terminated Raul Del Valle due to lack of work.

16. Danilo Reyes filed an initial claim for unemployment compensation benefits effective August 16, 2009. When Danilo Reyes did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if Danilo Reyes performed services as an employee or as an independent contractor.

17. On October 7, 2009, Gordon Herget, a Tax Specialist with the Department of Revenue personally mailed the determination to the Petitioner's correct official address of record. The Petitioner's official address of record is the home address of the Petitioner's president. The Petitioner's president received the determination in the mail. The president did not open the envelope and delivered the unopened envelope to the Petitioner's attorney on October 19, 2009. The Petitioner's attorney filed a written protest on November 6, 2009.

18. The October 7, 2009, determination states that the persons performing services for the Petitioner as maintenance workers are the Petitioner's employees retroactive to August 8, 2007. The determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."

19. Raul Del Valle filed an initial claim for unemployment compensation benefits effective January 3, 2010. When Raul Del Valle did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if Raul Del Valle performed services as an employee or as an independent contractor. The investigation was conducted by Tax Auditor Papni Bhargava. On February 23, 2010, the Tax Auditor issued a determination holding that Raul Del Valle performed services for the Petitioner as an employee of the Petitioner, retroactive to January 1, 2008. The Petitioner filed an appeal on March 5, 2010.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated February 23, 2010, be modified to reflect a retroactive date of March 20, 2007. The Special Deputy also

recommended that the determination be affirmed as modified. The Petitioner's exceptions to the Recommended Order were received by fax dated September 1, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The Petitioner's exceptions propose alternative findings of fact and conclusions of law. The Petitioner's exceptions also allege that the Petitioner's proposed findings of fact and conclusions of law were ignored by the Special Deputy. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of

law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy resolved conflicts in evidence in favor of the Joined Party based on the hearing record. A review of the record also reveals that the Special Deputy acknowledged receipt of the Petitioner's proposed findings of fact and conclusions of law in the second paragraph from the bottom of the first page of the Recommended Order. The record further reflects that the Special Deputy issued a recommended order with a result unfavorable to the Petitioner after considering the Petitioner's proposed findings of fact and conclusions of law. The Agency does not reject the Special Deputy's Findings of Fact because the findings of fact are supported by competent substantial evidence in the record. Further review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Thus, the Agency may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. The Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated February 23, 2010, is MODIFIED to reflect a retroactive date of March 20, 2007. It is also ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 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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PROTEST OF LIABILITY
DOCKET NO. 2010-51464L

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 July 7, 2010. The Petitioner, represented by its president, appeared and testified. The Petitioner was assisted by the Petitioner's attorney. The respondent was represented by a Department of Revenue Tax Specialist II. A Tax Specialist testified as a witness. Joined Parties Danilo Reyes and Raul Del Valle appeared. Following the testimony of the Petitioner's president the hearing was continued for medical reasons. After due notice to the parties the hearing was rescheduled for August 2, 2010. The Petitioner was represented by its president who was assisted by the Petitioner's attorney. Joined Party Raul Del Valle appeared and testified. Joined Party Danilo Reyes appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. A Tax Specialist testified as a witness.

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.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as maintenance workers 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 which operates a medical research business. The Petitioner established liability for payment of unemployment compensation tax in 1992.
2. The Petitioner's business location was severely damaged in a hurricane and it was the Petitioner's intent to repair the building. An individual who worked in the home of the Petitioner's president was a friend of Joined Party Raul Del Valle and the friend asked the president to give employment to Joined Party Raul Del Valle. The friend informed Raul Del Valle that the Petitioner was looking for a maintenance man. The wife of the Petitioner's president interviewed Raul Del Valle in March 2007 and asked him if he was able to do construction and maintenance work including plumbing and electrical work. The president's wife asked Raul Del Valle if he had his own tools. The president's wife then offered work to Raul Del Valle. The president's wife informed Raul Del Valle that the position entailed doing repair work on the Petitioner's building, that the hours of work were Monday through Friday from 8:30 AM until 5 PM for a total of forty hours per week, that the rate of pay was $14.50 per hour, and that the Petitioner would pay the full amount to the Joined Party without withholding any taxes from the pay. Raul Del Valle objected to taxes not being withheld and requested that taxes be withheld from the pay. The request was denied. Raul Del Valle accepted the offer of work.
3. The Petitioner and Raul Del Valle did not enter into any written contract or agreement.
4. Raul Del Valle did not have a contractor's license, a business license, an occupational license, and did not have business liability insurance. He did not advertise or offer services to the general public.
5. Raul Del Valle reported to the Petitioner's business location on his first day of work. During the day the Joined Party filled out paperwork provided to him by the Petitioner. The Petitioner showed him the building and the work that needed to be done. The Joined Party did not perform any work on the first day but the Petitioner's president gave the Joined Party his work assignment for the following day.
6. Raul Del Valle was required to clock in and out each day on the Petitioner's computerized time clock. He was required to clock in each morning and to clock out at the end of the day. He was allowed to take a thirty minute lunch break each day and was supposed to clock out and back in for the lunch break. He was not paid for the lunch break and was required to eat in a designated area. He was responsible for cleaning up after himself. If he needed more than thirty minutes for lunch he was required to communicate that fact to the Petitioner. The Joined Party did not always clock out for lunch and he was informed that if he took longer than thirty minutes his pay would be reduced. The Joined Party was not allowed to smoke in the building, was informed that he was required to be obedient, and informed that if he did not cooperate he would be terminated. The president informed Raul Del Valle that he could perform outside work as long as he notified the Petitioner of the other work.
7. Raul Del Valle provided his own hand tools to perform the work. When Raul Del Valle needed materials or supplies he gave the Petitioner a list of what was needed. Sometimes the Petitioner would purchase the materials and supplies and give them to the Joined Party. On other occasions the Joined Party would meet the Petitioner at a Home Depot store in the morning so that the Petitioner could purchase the materials and supplies. On a few occasions the Joined Party purchased the materials and supplies and was reimbursed by the Petitioner.
8. The Petitioner paid Raul Del Valle on a weekly basis with the regularly established payday on Friday. The Petitioner held back one week's pay. No taxes were withheld from the pay and no fringe benefits were provided. On two occasions after Raul Del Valle was hired he spoke to the

president's wife and requested that taxes be withheld from the pay. On each occasion the Petitioner denied the request.

9. On or about August 8, 2007, the Petitioner hired Joined Party Danilo Reyes as a helper for Raul Del Valle. The Petitioner's president interviewed Danilo Reyes and asked if he knew how to do tile work and other repairs at the building. He asked Danilo Reyes what experience he had doing that type of work. Danilo Reyes replied that he had always worked as a maintenance man and that he had experience doing minor repairs. He advised the Petitioner that he did not own any tools. The Petitioner offered work to Danilo Reyes at the rate of $12 per hour. The president advised Danilo Reyes that the hours of work were from 8:30 AM until 5 PM, Monday through Friday, for a total of forty hours per week. The president did not mention whether fringe benefits would be provided and did not discuss whether or not taxes would be withheld from the pay.

10. Danilo Reyes did not have a contractor's license or an occupational license. He did not have business liability insurance, did not advertise, and did not offer services to the general public.

11. On his first day of work Danilo Reyes spoke to the president's wife and he learned that the Petitioner was not going to withhold taxes from the pay. He requested that the Petitioner withhold taxes from the pay, however, the request was denied.

12. Danilo Reyes worked under the exact same terms and conditions as Raul Del Valle. Although the Petitioner provided the daily work assignments to both workers the Petitioner did not tell the workers how to perform the work. The workers knew how to perform the work based on prior experience.

13. The Petitioner's president was in the process of remodeling his personal home. On some days the president assigned Raul Del Valle and Danilo Reyes to work at his home. The Petitioner paid both workers for the work performed at the president's home from the bank account of Daycon Investors Associates Inc.

14. At the end of each calendar year the Petitioner reported the earnings of Raul Del Valle and Danilo Reyes on Form 1099-MISC as nonemployee compensation.

15. Either the Petitioner or either Joined Party had the right to terminate the relationship at any time without incurring liability. On or about July 21, 2009, the Petitioner terminated Danilo Reyes due to lack of work. On or about August 15, 2009, the Petitioner terminated Raul Del Valle due to lack of work.

16. Danilo Reyes filed an initial claim for unemployment compensation benefits effective August 16, 2009. When Danilo Reyes did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if Danilo Reyes performed services as an employee or as an independent contractor.

17. On October 7, 2009, Gordon Herget, a Tax Specialist with the Department of Revenue personally mailed the determination to the Petitioner's correct official address of record. The Petitioner's official address of record is the home address of the Petitioner's president. The Petitioner's president received the determination in the mail. The president did not open the envelope and delivered the unopened envelope to the Petitioner's attorney on October 19, 2009. The Petitioner's attorney filed a written protest on November 6, 2009.

18. The October 7, 2009, determination states that the persons performing services for the Petitioner as maintenance workers are the Petitioner's employees retroactive to August 8, 2007. The determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."

19. Raul Del Valle filed an initial claim for unemployment compensation benefits effective January 3, 2010. When Raul Del Valle did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if Raul Del Valle performed services as an employee or as an independent contractor. The investigation was conducted by Tax Auditor Papni Bhargava. On February 23, 2010, the Tax Auditor issued a determination holding that Raul Del Valle performed services for the Petitioner as an employee of the Petitioner, retroactive to January 1, 2008. The Petitioner filed an appeal on March 5, 2010.

Conclusions of Law:

20. 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.

21. 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).

22. 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).

23. 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.

24. 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.

25. 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.

26. 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.

27. The only agreement between Joined Party Raul Del Valle and the Petitioner was a verbal agreement that the Joined Party would perform maintenance and construction work on the Petitioner's building as directed by the Petitioner and that the Petitioner would pay the Joined Party by the hour. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

28. Joined Party Raul Del Valle did not have any type of license or certification, did not have liability insurance, and did not advertise or offer services to the general public. The Petitioner provided all materials and supplies and also provided a helper, Joined Party Danilo Reyes. Although Joined Party Raul Del Valle provided his own hand tools it was not shown that the hand tools represent a significant investment in a business. Although the work performed by the Joined Party was not a regular part of the Petitioner's business it was not shown that the Joined Party operated a business that was separate and distinct from the Petitioner's business.

29. The Petitioner determined the days and the hours that the Joined Party worked. The Petitioner required the Joined Party to log in and out on a computerized time clock. The Petitioner controlled the amount of time that the Joined Party could take for a lunch break. The Petitioner determined the method and rate of pay. The Petitioner paid the Joined Party by time worked rather than by the job or by production. All of these facts point to an employer/employee relationship.

30. The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship. The fact that the Joined Party requested that the Petitioner withhold payroll taxes from the pay establishes that it was the intent of the Joined Party to work for the Petitioner as an employee and not as a self employed independent contractor.

31. Joined Party Raul Del Valle worked exclusively for the Petitioner for a period of approximately two and one-half years. Either party had the right to terminate the relationship at any time without incurring a penalty for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. 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."

32. The Petitioner controlled what work was performed, where it was performed, and when it was performed. The Petitioner hired the Joined Party because the Joined Party had the skill, knowledge, and ability to perform minor construction work. The Petitioner's president did not have the skill or knowledge to tell the Joined Party how to perform the work. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.
33. The facts of this case establish that the Petitioner exercised significant control over the means used to perform the work and the manner in which the work was performed.
34. It is concluded that the services performed for the Petitioner by Joined Party Raul Del Valle and other individuals as maintenance workers constitute insured employment. However, the determination of February 23, 2010, is only retroactive to January 1, 2008. Joined Party Raul Del Valle began performing services for the Petitioner on March 20, 2007. Thus, the correct retroactive date is March 20, 2007.

Recommendation: It is recommended that the determination dated February 23, 2010, be MODIFIED to reflect a retroactive date of March 20, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 20, 2010.

R. O. SMITH, Special Deputy
Office of Appeals