AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2903271
ROCK N' MASSAGE INC
1281 94TH STREET
BAY HARBOR ISLANDS FL 33154-1901

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

PROTEST OF LIABILITY
DOCKET NO. 2010-56091L

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 4, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 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. - 2903271
ROCK N' MASSAGE INC
CAROLYN BILLIE
1281 94TH STREET
BAY HARBOR ISLANDS FL 33154-1901

PROTEST OF LIABILITY
DOCKET NO. 2010-56091L

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 4, 2010.

After due notice to the parties, a telephone hearing was held on June 28, 2010. The Petitioner's president appeared and testified at the hearing. A tax specialist II appeared and provided testimony 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 subchapter S corporation, incorporated March 15, 2008, for the purpose of running a massage service business.

2. The Petitioner has contracted with a client casino to provide workers to the client for the purpose of conducting chair massages for the client's customers.

3. The Petitioner has approximately 20 chair massage workers. All of the chair massage workers are considered independent contractors by the Petitioner. All of the chair massage workers operate under essentially similar terms as all of the other chair massage workers.

4. The Joined Party provided services as a chair massage worker for the Petitioner from April 2008, through June 2009.

5. The Petitioner contacted the chair massage workers each week to determine their availability and create a schedule that would satisfy the Petitioner's contract with the client casino. If one worker was not available, the Petitioner would contact workers on the list until the hours could be filled.

6. The Joined Party was expected to work the agreed upon schedule. The Joined Party was required to report to the client casino and move about the gaming floor in search of customers. The Joined Party was required to maintain a log of massages conducted and note the number of minutes the massage lasted. The Joined Party would collect payment from the customer at the completion of the massage. The payment could be in the form of cash or casino gaming chips. The Joined Party was required to turn in the payments and logbook at the end of each shift.

7. The Petitioner's contract with the client casino specified certain rules of conduct which were passed down by the Petitioner to the Joined Party. The rules included requiring the use of a vest with logo for identification purposes and requiring the workers to wander the casino floor rather than remaining in one set area.

8. The Petitioner maintained a shift manager, either at the work site or available by telephone. The shift manager was to act as a liaison between the client casino and the massage chair workers.

9. The Joined Party was paid a 40% commission. The commission was based upon the minutes recorded in the daily log. The Joined Party would take a loss in the event that a customer lost all of his funds before a massage was completed. The Joined Party provided her own lotions. The client casino provided vests with a logo for purposes of identification. The Petitioner provided the daily log book for the Joined Party.

10. The Joined Party was required to be licensed by the State of Florida.

11. The Joined Party was required to provide and maintain her own liability insurance.

12. The Joined Party was allowed to work for a competitor of the Petitioner.

13. Either party could terminate the relationship at anytime, without liability.

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 exercised control over the Joined Party primarily through the rules and procedures established by the client casino. While such rules may be at the request of a third party, they still represent control by the Petitioner over the Joined Party.

21. The Petitioner did not supervise the Joined Party while she worked beyond having a shift manager available to act as a liaison between the Joined Party and the client casino. The Joined Party was left to her own discretion with regards to soliciting and caring for customers within the casino.

22. The relationship between the Petitioner and the Joined Party was terminable at will. Either party could end the relationship, at anytime, without liability. This factor tends to indicate an employer-employee relationship.

23. A preponderance of the evidence 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 Petitioner and the Joined Party.

24. The Petitioner submitted a Proposed Recommended Order of Special Deputy on July 13, 2010. This proposed order included Proposed Findings of Fact and Proposed Conclusions of Law. Where these proposals are supported by the record, they have been incorporated into this recommended order. Where these proposals are not supported by the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated March 4, 2010, be REVERSED.

Respectfully submitted on July 22, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals