AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2572578
WEAVER AGGREGATE TRANSPORT INC
PO BOX 39
SUMTERVILLE FL 33585-0039

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

PROTEST OF LIABILITY
DOCKET NO. 2010-56818L

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 19, 2010, is REVERSED.

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

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. - 2572578
WEAVER AGGREGATE TRANSPORT INC
TAMARA WEAVER
PO BOX 39
SUMTERVILLE FL 33585-0039

PROTEST OF LIABILITY
DOCKET NO. 2010-56818L

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 19, 2010.

After due notice to the parties, a telephone hearing was held on April 5, 2011. An attorney appeared on behalf of the Petitioner and called the Petitioner's owner and the Petitioner's office manager as witnesses. The Joined Party appeared on his own behalf. A tax specialist II 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. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on April 5, 2011.

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 in December 2002 for the purpose of running a material transport business.

2. The Joined Party performed services for the Petitioner as a truck driver from on or about May 12, 2005 through December 19, 2009.

3. The Petitioner retains two classes of truck drivers. The Petitioner considers company drivers to be employees of the Petitioner. The Petitioner regards the owner-operator drivers as independent contractors.

4. The Joined Party signed a *Transportation Agreement* with the Petitioner at the time of hire. The agreement indicated that an independent contractor relationship would exist between the parties.

5. The Joined Party filed Federal Income Taxes as being a sole proprietor and in business for himself. The Joined Party reported himself for self employment tax.

6. The Joined Party would contact the dispatch each day to see what work was available. The Joined Party could chose not to call in to the dispatch if he did not wish to work on a given day. The dispatch would inform the Joined Party of the available jobs and their particulars. The Joined Party could accept or reject individual jobs.

7. The Joined Party could determine his own route. The Joined Party determined the time of the delivery of the load in most instances.

8. The Joined Party was paid approximately 80-88% of the load rate for each job performed. The Petitioner required the Joined Party to turn in a ticket signed by the customer to keep track of jobs performed. The rate of pay was set by the Petitioner.

9. The Joined Party provided his own vehicle. The Joined Party initially leased and subsequently purchased his trailer from the Petitioner. The Joined Party was responsible for insurance and maintenance of the vehicle and trailer. The Joined Party was responsible for all fuel costs, tolls, and other expenses in conjunction with the work.

10. The Joined Party was allowed to subcontract the work.

11. Owner-operator drivers were allowed to perform services for a competitor of the Petitioner. If the driver purchased insurance from the Petitioner, that insurance would not be in effect for services performed for a competitor.

12. The Joined Party did not receive any benefits. The Joined Party was not covered by the Petitioner's insurance except where the Joined Party chose to purchase insurance from the Petitioner. The Joined Party purchased an occupational accident policy from the Petitioner.

13. A class A commercial drivers license was required to perform the work.

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 reflects that the Petitioner did not exercise control over where, when, or how the work was performed. The Joined Party determined what days he would call in to see if work was available and determined what work, of that available, he would accept.

21. The Joined Party chose his own route in the performance of the work.

22. The Joined Party considered himself to be in business for himself.

23. The Joined Party supplied all of the tools and equipment needed to perform the work. The Joined Party was responsible for all of the maintenance and expenses involved with the work. The Joined Party's ownership of the truck and purchase of the trailer represent a significant investment in the business.

24. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party and other owner-operator truck drivers, as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated February 19, 2010, be REVERSED.

Respectfully submitted on June 8, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals