AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2948461
ROYAL THERAPY CENTER INC
2740 BAYSHORE DR STE 17
NAPLES FL 34112-5896

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

PROTEST OF LIABILITY
DOCKET NO. 2010-56821L

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 10, 2010, is AFFIRMED.

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. - 2948461
ROYAL THERAPY CENTER INC
NORMA VALDEZ
2740 BAYSHORE DR STE 17
NAPLES FL 34112-5896

PROTEST OF LIABILITY
DOCKET NO. 2010-56821L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
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 10, 2010.

After due notice to the parties, a telephone hearing was held on June 24, 2010. An office manager appeared and provided testimony for the Petitioner. The Joined Party appeared and testified 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 from the Petitioner.

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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation incorporated in April 2009 for the purpose of running a chiropractic and massage therapy business.
2. The Joined Party performed services as a massage therapist from May 14, 2009, through January 18, 2010. Both parties considered the Joined Party to be an independent contractor.
3. The Joined Party and the Petitioner knew each other prior to the beginning of the work relationship. The Joined Party began assisting a more experienced massage therapist. Once the Joined Party obtained his massage therapy license, he began working as a full massage therapist rather than as an assistant.
4. The Petitioner would schedule patients. The Petitioner would then contact the Joined Party and inform the Joined Party of the schedule for the week. The Petitioner would inform the Joined Party of what therapy needed to be performed for each patient. The Joined Party had the right to refuse work assignments. The Petitioner had the right to discharge the Joined Party if the Joined Party refused too many work assignments.
5. The Joined Party was paid a flat weekly rate for any week worked. The rate was not dependent upon the number of patients seen that week or in the number of assignments refused by the Joined Party that week. If there were no patients in a given week, the Petitioner would not schedule the Joined Party for that week and the Joined Party would not receive pay for that week. The Joined Party was paid $500 per week as an assistant massage therapist and $800 per week as a licensed massage therapist. The Joined Party was paid $19,300 by the Petitioner in 2009. The Joined Party was paid $2100 by the Petitioner in the second quarter of 2009. The Joined Party was paid $6,800 by the Petitioner in the third quarter of 2009. The Joined Party was paid $10,400 by the Petitioner in the fourth quarter of 2009.
6. The Joined Party provided his own gloves, lotions, and massage oils. The Petitioner provided the work space, massage tables, and towels. The Petitioner provided a company identification card.
7. The Joined Party was required to work during the Petitioner's normal business hours and at the Petitioner's place of business.
8. Either party had the right to end the relationship at anytime, without liability.

Conclusions of Law:

9. 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.
10. 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).
11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence presented at the hearing reveals that the Petitioner directed how, when, and where the work was performed by the Joined party. The Petitioner informed the Joined Party of his schedule including what patients would be seen and what date and time the work would be performed. The Petitioner specified what treatments would be given to each patient. The Petitioner specified the location at which the work would be performed by requiring it be done at the place of business.

16. Both parties considered the Joined Party to be an independent contractor. While in this case, there was no written agreement, the Florida Supreme Court made relevant comments in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

17. The relationship was terminable at will. Either party had the right to end the relationship at anytime, without liability. The Petitioner retained the right to discharge the Joined Party should he refuse work in excess of what the Petitioner believed to be appropriate. 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."

18. The Petitioner was paid a flat weekly amount for any week he was scheduled to work, regardless of the amount of work done. This type of payment is consistent with an employer-employee relationship.

19. The work performed by the Joined Party as a massage therapist is not an occupation or business that is separate and distinct from the Petitioner's chiropractic and massage therapy business. The Joined Party's assigned duties were an integral part of the business.

20. A preponderance of the evidence presented in this case reveals that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

21. Section 443.036(21), Florida Statutes, provides:

    "Employment" means a service subject to this chapter under s. 443.1216, which is performed by an employee for the person employing him or her.

22. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:

    The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

    (1) An officer of a corporation.

    (2) An individual who, under the usual common law rules applicable in determining the employer- employee relationship is an employee.

23. Section 443.036(20)(c), Florida Statutes, provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

24. Section 443.1215, Florida States, provides:

    Each of the following employing units is an employer subject to this chapter:

    An employing unit that:

    a) In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or

    b) For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

25. The evidence presented in this case reveals that the Joined Party was paid in excess of $1,500 during three calendar quarters in 2009. The Joined Party was an employee performing services for the Petitioner. Therefore, the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective, May 14, 2009.
26. The Petitioner submitted a typed proposed finding of fact on June 28, 2010. Where the proposed finding is supported by the record it is incorporated into this recommended order. Where the proposal is not supported by the record, it is respectfully rejected.

Recommendation: It is recommended that the determination dated March 10, 2010, be AFFIRMED.

Respectfully submitted on July 22, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals