AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2949721
ALEX MARBLE & GRANITE INC
1025 HARBOR LAKE DR STE D
SAFETY HARBOR FL 34695-2321

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

PROTEST OF LIABILITY
DOCKET NO. 2010-59943L

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 18, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **November, 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. - 2949721
ALEX MARBLE & GRANITE INC
ALEXANDER LEON
1025 HARBOR LAKE DR STE D
SAFETY HARBOR FL 34695-2321

PROTEST OF LIABILITY
DOCKET NO. 2010-59943L

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 18, 2010.

After due notice to the parties, a telephone hearing was held on August 5, 2010. Two of the Petitioner's partners appeared and testified on behalf of the Petitioner. A tax specialist appeared and testified 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 not 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 C corporation, incorporated March 29, 2007, for the purpose of running a marble and granite installation business. The Petitioner has no workers that are considered employees.

2. The Joined Party performed services for the Petitioner as a tile and granite installer from 2008 through June 2009.

3. The Joined Party had his own business. The Joined Party was a relative of one of the Petitioner's corporate officers. The Petitioner offered the Joined Party work as an installer.

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

5. The Petitioner did not provide formal training but was available for advice in the event that the Joined Party needed assistance.

6. The Petitioner would contact the Joined Party when work was available. The Petitioner would make an offer to the Joined Party for the job. The Joined Party would begin the work upon acceptance of the offer.

7. The Petitioner would examine the work after completion. The Petitioner was available to assist the Joined Party at the Joined Party's request.

8. The Joined Party was paid at the conclusion of each assignment. The Joined Party was paid a 15-20% commission based upon the profit made on the job. The commission rate was determined by the Petitioner. The Petitioner held the Joined Party's pay until payment was received from the client.

9. The Joined Party provided his own tools. The Petitioner provided supplemental equipment and materials needed to perform the work.

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 exercised control over where work was performed by the Joined Party. The Petitioner would inform the Joined Party of where the work was to be performed and when it was expected to be completed.
17. The Petitioner approached the Joined Party to offer work.
18. The Joined Party was paid by the job and the Joined Party's pay was held until payment had been received from the client. This is indicative of an independent contractor relationship.
19. The Joined Party provided his own tools necessary for the performance of the work. The Petitioner made other tools available and provided the materials needed for the work.
20. The Petitioner did not monitor or supervise the Joined Party's work except to perform an inspection of the completed product before turning it over to the client. This indicates that the Petitioner was concerned with the final result and not with the means or manner in which the work was performed.
21. A preponderance of 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.

Recommendation: It is recommended that the determination dated March 18, 2010, be REVERSED.

Respectfully submitted on September 2, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals