AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2601042
MR COOL WATERS INC
12009 SW 129TH CT UNIT 5
MIAMI FL 33186-6918

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

PROTEST OF LIABILITY
DOCKET NO. 2010-62438L

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 24, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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. - 2601042
MR COOL WATERS INC
CO FABIANA PAVESE
12009 SW 129TH CT UNIT 5
MIAMI FL 33186-6918

PROTEST OF LIABILITY
DOCKET NO. 2010-62438L

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 24, 2010.

After due notice to the parties, a telephone hearing was held on December 7, 2010.
The Petitioner's founder/officer appeared and testified at the hearing. The Joined Party appeared and provided testimony in his own behalf. A tax specialist II appeared and provided testimony for 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 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 S corporation, incorporated on August 11, 2003, for the purpose of running a water and coffee company. The Petitioner began as a water delivery and sales business that later branched out into coffee delivery and sales.

2. The Joined Party worked for another water delivery and sales company prior to providing services for the Petitioner. The Petitioner acquired the water delivery and sales company that the Joined

Party worked for. The Petitioner retained the Joined Party. The Petitioner considered the Joined Party to be an independent contractor. The Joined Party provided services for the Petitioner from February 2008, through January 17, 2010.

3. The Joined Party signed an independent contractor agreement and a covenant not to compete at the time of hire. The Joined Party was not allowed to work for a competitor. The Joined Party could not compete with the Petitioner for a two year period.

4. The Joined Party would report to the Petitioner's warehouse and clock in at 8:30am each morning. The Joined Party would be given his routes. The Joined Party would load the truck in accordance with the requirements of the assigned routes. The Joined Party would make deliveries as indicated by his routes. The Joined Party would return the truck to the warehouse upon completion of deliveries. If there were time left in the work day, the Joined Party would be directed to work in the warehouse or water plant. The Joined Party would clock out at 4:30 or 5:30pm. The Petitioner required that the Joined Party take a one hour lunch. The Joined Party would at times leave early in lieu of taking a lunch break.

5. The trucks used in the performance of the work were owned by the Petitioner. The trucks were stored at the Petitioner's warehouse when not in use. The Petitioner covered fuel, maintenance, insurance, and any tolls incurred by the trucks. The Petitioner provided a uniform shirt for identification purposes. The Petitioner provided a hand cart for the work.

6. The Joined Party was not allowed to subcontract the work.

7. The Petitioner fired the Joined Party on more than one occasion after being informed that the Joined Party had brought the truck to the Joined Party's house during the work day.

Conclusions of Law:

8. Florida Statute 443.1216(3)(a) states that an individual working as an "agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry-cleaning services for his or her principal" will be deemed an employee.

9. Florida Statute 445.1216(4) goes on to indicate that the prior section will apply only if:

a. The contract of service contemplates that substantially all of the services are to be performed personally by the individual;

b. The individual does not have a substantial investment in facilities used in connection with the services, other than facilities used for transportation; and

c. The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

10. The evidence presented in this hearing revealed that the Joined Party provided services as a driver engaged in the delivery of water and coffee on the behalf of the Petitioner. The Joined Party was not allowed to sub-contract the work and was thus expected to perform substantially all of the services personally.

11. The Joined Party did not own or provide any of the vehicles, tools, or materials involved in the work. The Joined Party did not have a substantial investment in facilities used in connection with the services.

12. The Joined Party performed services from February 2008, through January 17, 2010. The relationship between the parties was of a continuing nature and not confined to a single transaction.

13. A preponderance of the evidence presented in this case reveals that the Joined Party is a statutory employee of the Petitioner and therefore the services performed by the Joined Party for the Petitioner are considered insured work.

Recommendation: It is recommended that the determination dated March 24, 2010, be AFFIRMED.

Respectfully submitted on February 2, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals