AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 1323769
SOUTH FLORIDA CARDIOLOGY
ASSOCIATES PA
1601 N PALM AVENUE STE 211
MIAMI BEACH FL 33026-3204

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

PROTEST OF LIABILITY
DOCKET NO. 2010-80840L

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 May 5, 2010.

After due notice to the parties, a telephone hearing was held on November 12, 2010. The Petitioner's office manager and administrative assistant appeared and provided testimony at the hearing. A tax specialist II 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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in 1992, for the purpose of running a medical practice.

2. The Petitioner maintains a staff of medical assistants which are considered employees by the Petitioner.

3. The Joined Party submitted an application and interviewed with the Petitioner. The Joined Party performed services for the Petitioner as a Medical Assistant from May 22, 2006, through February 3, 2010. The Joined Party requested that she be treated as an independent contractor.

4. The Joined Party was treated the same as the employee medical assistants with the exceptions of, no medical insurance being provided, taxes not being withheld by the Petitioner, and a 1099 for being issued by the Petitioner.

5. The Joined Party's duties were to check patient vitals and assist the doctor with medical procedures.

6. The Petitioner expected the Joined Party to be present at the Petitioner's place of business during the Petitioner's office hours.

7. The Petitioner supervised and directed the Joined Party as needed during the course of the work day.

8. The Petitioner provided most of the equipment and materials needed to perform the work. The Joined Party provided her own stethoscope.

9. The Petitioner issued verbal warnings to the Joined Party for tardiness.

10. The Joined Party was paid an hourly rate determined by the Petitioner and based upon the Joined Party's experience.

11. The Joined Party received paid time off due to pregnancy.

12. Either party could terminate the relationship at anytime and without liability.

13. The Joined Party was covered under the Petitioner's worker's compensation insurance.

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 where, when, and how the work was performed. The Joined Party worked on a schedule set by the Petitioner and was expected to report to the Petitioner's place of business each day. The Joined Party was directed and supervised by the Petitioner during the work day.

21. The Petitioner had other workers in the class that were considered employees. The work conditions of the employees were the same as those for the Joined Party for the most part. The Joined Party did not receive medical insurance, did not have taxes withheld, and was issued a 1099 form. Apart from these exceptions, the Joined Party's work conditions were identical to those of the employees in the class.

22. The Joined Party's work as a medical assistant was a part of the normal course of business for the Petitioner's medical practice.

23. The relationship was terminable at will. Either party could end the relationship at anytime and without liability.

24. The Petitioner had unilateral control over the Joined Party's pay. The Petitioner set the rate of pay and determined the hours that the Joined Party could work.

25. All evidence indicates that the Joined Party was treated as a regular part of the medical office staff, just as any of the other medical assistants.
26. A preponderance of the evidence reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated May 5, 2010, be AFFIRMED.

Respectfully submitted on January 5, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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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 May 5, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION