AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2253988

PHASE 4 TREE SPECIALIST INC
DAVID BERRIOS
1016 LEISURE AVENUE
TAMPA FL 33613-1722

PROTEST OF LIABILITY
DOCKET NO. 2010-80843L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Joined Party filed an unemployment compensation claim in January 2010. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a

direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on September 1, 2010. The Petitioner was represented by its attorney. The Petitioner's president and a contract laborer testified as witnesses for the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Special Deputy issued a Recommended Order on September 22, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation which was formed in approximately 1998 to operate a tree trimming business. The Petitioner's president is active in the operation of the business. The Petitioner registered for payment of unemployment compensation tax effective January 1, 2000, based on the wages paid to the Petitioner's president. The Petitioner has classified the tree trimmers and the laborers who perform the work as independent contractors.
2. The Joined Party is the older brother of the Petitioner's president. The Joined Party was previously employed in construction. When his employment ended he performed handyman work as a sole proprietor and used the trade name of Sunset Handyman. The Joined Party bid the handyman jobs. If the customers accepted the bids the Joined Party determined when to perform the work and how to perform the work. The Joined Party provided his own tools for his handyman business.
3. In approximately 2005 the Joined Party began working for the Petitioner because he was not getting enough work as a handyman. The work which the Joined Party performed for the Petitioner was not performed as part of Sunset Handyman. The Petitioner assigned the Joined Party to work on a crew of two or three workers as a groundman. A groundman is the individual who is responsible for cutting up the limbs and grinding them up in the chipper after the limbs have been cut down by the tree trimmer.
4. Initially, the Petitioner paid the Joined Party $15 per hour, an amount that was determined by the Petitioner. In 2009 the Petitioner unilaterally changed the method of pay. In 2009 the Petitioner began paying 40% of the amount which the Petitioner received from the Petitioner's customers to the work crew. Each crew member was not paid the same amount and the Petitioner determined the amount that was to be paid to each member of the work crew. The tree trimmers were paid a larger share of the money than what was paid to the groundmen.
5. The Petitioner parks its trucks at a lot and keeps its tools in a tool shed at the same location. The Petitioner and the members of the crew meet each morning at the lot between 8 AM and 8:30 AM. The crew loads the tools onto the truck and the Petitioner tells the crew the address of the first work site. The crew then drives the Petitioner's truck to the work site, towing the Petitioner's chipper. The Petitioner's president drives to the worksite in a different vehicle. At the worksite the Petitioner's president tells the crew what needs to be done based on the Petitioner's agreement with the customer. The Petitioner's president then leaves to bid on other jobs.
6. When the crew finishes the first job a crew member notifies the Petitioner by telephone. The Petitioner gives the crew the location of the next job. The crew drives to the second job location and the Petitioner meets them at that location to provide instructions about what needs to be done on that job.

7. If the crew receives a request from another homeowner to trim that homeowner's trees or to provide a bid to trim trees, the crew is required to contact the Petitioner so that the Petitioner can provide the bid. The crew is not allowed to perform any work without the Petitioner's permission.
8. The Joined Party was occasionally required to be the driver of the Petitioner's truck. However, the Joined Party usually chose to drive his own vehicle to the worksites. The Petitioner provided the tools and equipment including the chipper, chainsaws and rakes. The Petitioner's chainsaws did not always work and the Joined Party chose to purchase a used chainsaw from a pawn shop for approximately $100 so that he would always have a saw to use. The Joined Party also chose to purchase a hand rake for the same reason.
9. The Petitioner's truck is identified by a sign listing the Petitioner's company name. The Petitioner provided the members of the work crew with T-shirts also bearing the name of the Petitioner's company. The crew members were not required to wear the shirts.
10. On some days the Joined Party and other members of the work crew were required to pass out flyers advertising the Petitioner's business. The Petitioner paid the Joined Party $10 per hour to pass out the flyers. On the first day that the Joined Party was instructed to pass out the Petitioner's flyers the Joined Party decided to also pass out flyers for his business, Sunset Handyman. When the Petitioner learned that the Joined Party had also passed out Sunset Handyman flyers the Petitioner told the Joined Party that he was never to pass out his own flyers again because it was a conflict of interest.
11. The Joined Party was rarely late arriving at the lot in the morning. However, on the occasions that the Joined Party was running late he was required to contact the Petitioner. The Petitioner would give the Joined Party the work location and the Joined Party would drive his own vehicle directly to the work site. If the Joined Party was not able to work he was required to notify the Petitioner.
12. The Petitioner usually paid the Joined Party and the other members of the work crew at the end of each day. The Joined Party was usually paid by check with a notation on the check that it was for contract labor. Sometimes the Petitioner paid the Joined Party in cash. No taxes were withheld from the pay. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
13. The Joined Party repeatedly objected to being classified as an independent contractor, however, the Petitioner would not reconsider. The Joined Party needed the work and continued working for the Petitioner.
14. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party worked until approximately January 22, 2010. The Joined Party and the Petitioner had a disagreement and the two individuals mutually agreed that the Joined Party would no longer work for the Petitioner.
15. The Joined Party filed an initial claim for unemployment compensation benefits effective January 31, 2010. His filing on that date established a base period from October 1, 2008, through September 30, 2010. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
16. On April 1, 2010, the Department of Revenue issued a determination holding that the Joined Party performed services as the Petitioner's employee retroactive to October 1, 2008.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated April 1, 2010, be modified to reflect a retroactive date of January 1, 2005. The Special Deputy also recommended that the determination be affirmed as modified. The Petitioner's exceptions to the

Recommended Order were received by mail postmarked September 22, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

A review of the record reveals that portions of Findings of Fact #15 and 16 must be modified because the findings are not supported by testimony or any other evidence in the record. Section 443.036(7), Florida Statutes, defines a base period as "the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year." The record shows that the Special Deputy found that the Joined Party's base period ran from October 1, 2008, through September 30, 2010, in Finding of Fact #15. Competent substantial evidence in the record supports the conclusion that the Joined Party's base period ran from October 1, 2008, through September 30, 2009, since the Joined Party filed an initial claim effective January 31, 2010, as found by the Special Deputy in Finding of Fact #15.

Also, the determination dated April 1, 2010, states that the determination is retroactive to January 1, 2008, and not October 1, 2008, as found by the Special Deputy in Finding of Fact #16. As a result, Finding of Fact #15 is amended to say:

> The Joined Party filed an initial claim for unemployment compensation benefits effective January 31, 2010. His filing on that date established a base period from October 1, 2008, through September 30, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.

Finding of Fact #16 is also amended to say:

> On April 1, 2010, the Department of Revenue issued a determination holding that the Joined Party performed services as the Petitioner's employee retroactive to January 1, 2008.

In Exception #1 to Conclusion of Law #32, Exception #2 to Conclusion of Law #33, and Exception #3 to Conclusion of Law #34, the Petitioner proposes alternative findings of fact and conclusions of law. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact as amended herein are supported by competent substantial evidence in the record. Further review of the record also reveals that the Special Deputy's Conclusions of Law, including Conclusions of Law #32-34, reflect a reasonable application of the law to the facts. As a result, the Agency may not further modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as amended herein. The portions of Exception #1-3 that propose alternative findings of fact or conclusions of law are respectfully rejected.

Also in Exception #1, the Petitioner cites *Kane Furniture Corp. v. Miranda*, 506 So.2d 1061 (Fla. 2d DCA 1987), in support of the conclusion that the Petitioner's control over the Joined Party is the deciding factor in this case. In *Kane*, the court held that carpet installers were independent contractors

because they performed their services with "unbridled discretion" and were free from "supervision or other involvement." *Id.* at 1064-65. In contrast, the Special Deputy in the instant case ruled in Conclusion of Law #33 that the Petitioner determined what work was performed by the Joined Party, determined when the Joined Party performed his services, controlled the financial aspects of the parties' relationship, and had the right to direct and control how the work was performed. Although the Petitioner contends otherwise, competent substantial evidence in the record supports the Special Deputy's ultimate conclusion that the Joined Party worked as an employee of the Petitioner due to the extent of the control exercised by the Petitioner over the Joined Party. The Special Deputy's conclusion reflects a reasonable application of the law to the facts. The Petitioner has not provided a basis for modifying the Recommended Order permitted under section 120.57(1)(l), Florida Statutes. The remaining portion of Exception #1 is respectfully rejected.

In Exception #3, the Petitioner cites again to *Kane Furniture Corp. v. Miranda*, 506 So.2d 1061 (Fla. 2d DCA 1987), in support of its contention that the Joined Party was free to exercise his discretion in the performance of his services. The Petitioner also cites *4139 Mgmt., Inc. v. DOL & Empl.*, 763 So.2d 514 (Fla. 5th DCA 2000), and *Farmers and Merchants Bank v. Vocelle*, 106 So.2d 92 (Fla. 1st DCA 1958), in support of its contention that the Joined Party was not subject to instruction, direction, and control in a manner sufficient to establish an employer/employee relationship. In *Kane*, the court held that carpet installers performed their services with "unbridled discretion" and were free from "supervision or other involvement." 506 So.2d at 1064-65. In *4139 Management*, the court concluded that housekeeper/maids were independent contractors despite being required to participate in an orientation, having their work subject to inspection, and being provided a list of tasks to be completed. 763 So.2d at 517-18. The court ultimately determined that "the evidence simply did not suggest an employer/employee relationship," and that there was not "sufficient exercise of control over the details of the work" as to establish an employer/employee relationship. *Id.* Similarly, in *Farmers and Merchants Bank*, when discussing the employment status of a cleaning person working for a bank, the court concluded that, "There is no positive evidence that the bank retained the right of control over the means of performance, and no such right can be inferred from the circumstances except the menial nature of the job." 106 So.2d at 95. The court further concluded that the menial nature of the worker's job was not conclusive "when other inferences from the circumstances are more logical and consistent with a relationship of independent contractor" as was the case in *Farmers and Merchants Bank*. *Id.* In all three cases, the courts held that the workers were not subject to control over the details of the work as is characteristic of an employment relationship. The Special Deputy did not make the same conclusion about the Joined Party in the current case.

In the case at hand, the Special Deputy concluded that the Joined Party worked as an employee and was subject to the Petitioner's control. In Conclusion of Law #33, the Special Deputy concluded that the Petitioner determined what work was performed by the Joined Party, determined when the Joined Party performed his services, controlled the financial aspects of the parties' relationship, and had the right to direct and control how the work was performed. Thus, the cases cited by the Petitioner are distinguishable from the instant case. Since the Special Deputy's Conclusions of Law, including Conclusion of Law #33, reflect a reasonable application of the law to the facts and the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record, the Agency may not reject the Special Deputy's Conclusions of Law or Findings of Fact. The remaining portion of Exception #3 is respectfully rejected.

All of the amended Findings of Fact and Conclusions of Law support the Special Deputy's ultimate conclusion that an employer/employee relationship existed between the Petitioner and the Joined Party. The Special Deputy's conclusion that the factors of control in this case are consistent with an employer/employee relationship is supported by competent substantial evidence in the record. The Special Deputy's conclusion reflects a reasonable application of the law to the facts and is adopted by the Agency. The Petitioner's request for the adoption of the alternative conclusion that the Joined Party worked as an independent contractor is respectfully denied.

A review of the record reveals that the amended Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's amended Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as amended herein.

In consideration thereof, it is ORDERED that the determination dated April 1, 2010, is MODIFIED to reflect a retroactive date of January 1, 2005. It is also ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **November, 2010.**

_____
TOM CLENDENNING,
Director, Unemployment Compensation Services
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. - 2253988
PHASE 4 TREE SPECIALIST INC
DAVID BERRIOS
1016 LEISURE AVENUE
TAMPA FL 33613-1722

PROTEST OF LIABILITY
DOCKET NO. 2010-80843L

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 April 1, 2010.

After due notice to the parties, a telephone hearing was held on September 1, 2010. The Petitioner was represented by its attorney. The Petitioner's president and a contract laborer testified as witnesses for the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

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 corporation which was formed in approximately 1998 to operate a tree trimming business. The Petitioner's president is active in the operation of the business. The Petitioner registered for payment of unemployment compensation tax effective January 1, 2000, based on the wages paid to the Petitioner's president. The Petitioner has classified the tree trimmers and the laborers who perform the work as independent contractors.

2. The Joined Party is the older brother of the Petitioner's president. The Joined Party was previously employed in construction. When his employment ended he performed handyman work as a sole proprietor and used the trade name of Sunset Handyman. The Joined Party bid the handyman jobs. If the customers accepted the bids the Joined Party determined when to perform the work and how to perform the work. The Joined Party provided his own tools for his handyman business.

3. In approximately 2005 the Joined Party began working for the Petitioner because he was not getting enough work as a handyman. The work which the Joined Party performed for the Petitioner was not performed as part of Sunset Handyman. The Petitioner assigned the Joined Party to work on a crew of two or three workers as a groundman. A groundman is the individual who is responsible for cutting up the limbs and grinding them up in the chipper after the limbs have been cut down by the tree trimmer.

4. Initially, the Petitioner paid the Joined Party $15 per hour, an amount that was determined by the Petitioner. In 2009 the Petitioner unilaterally changed the method of pay. In 2009 the Petitioner began paying 40% of the amount which the Petitioner received from the Petitioner's customers to the work crew. Each crew member was not paid the same amount and the Petitioner determined the amount that was to be paid to each member of the work crew. The tree trimmers were paid a larger share of the money than what was paid to the groundmen.

5. The Petitioner parks its trucks at a lot and keeps its tools in a tool shed at the same location. The Petitioner and the members of the crew meet each morning at the lot between 8 AM and 8:30 AM. The crew loads the tools onto the truck and the Petitioner tells the crew the address of the first work site. The crew then drives the Petitioner's truck to the work site, towing the Petitioner's chipper. The Petitioner's president drives to the worksite in a different vehicle. At the worksite the Petitioner's president tells the crew what needs to be done based on the Petitioner’s agreement with the customer. The Petitioner's president then leaves to bid on other jobs.

6. When the crew finishes the first job a crew member notifies the Petitioner by telephone. The Petitioner gives the crew the location of the next job. The crew drives to the second job location and the Petitioner meets them at that location to provide instructions about what needs to be done on that job.

7. If the crew receives a request from another homeowner to trim that homeowner’s trees or to provide a bid to trim trees, the crew is required to contact the Petitioner so that the Petitioner can provide the bid. The crew is not allowed to perform any work without the Petitioner's permission.

8. The Joined Party was occasionally required to be the driver of the Petitioner's truck. However, the Joined Party usually chose to drive his own vehicle to the worksites. The Petitioner provided the tools and equipment including the chipper, chainsaws and rakes. The Petitioner's chainsaws did not always work and the Joined Party chose to purchase a used chainsaw from a pawn shop for approximately $100 so that he would always have a saw to use. The Joined Party also chose to purchase a hand rake for the same reason.

9. The Petitioner's truck is identified by a sign listing the Petitioner’s company name. The Petitioner provided the members of the work crew with T-shirts also bearing the name of the Petitioner's company. The crew members were not required to wear the shirts.

10. On some days the Joined Party and other members of the work crew were required to pass out flyers advertising the Petitioner's business. The Petitioner paid the Joined Party $10 per hour to pass out the flyers. On the first day that the Joined Party was instructed to pass out the Petitioner's flyers the Joined Party decided to also pass out flyers for his business, Sunset Handyman. When the Petitioner learned that the Joined Party had also passed out Sunset Handyman flyers the

Petitioner told the Joined Party that he was never to pass out his own flyers again because it was a conflict of interest.

11. The Joined Party was rarely late arriving at the lot in the morning. However, on the occasions that the Joined Party was running late he was required to contact the Petitioner. The Petitioner would give the Joined Party the work location and the Joined Party would drive his own vehicle directly to the work site. If the Joined Party was not able to work he was required to notify the Petitioner.
12. The Petitioner usually paid the Joined Party and the other members of the work crew at the end of each day. The Joined Party was usually paid by check with a notation on the check that it was for contract labor. Sometimes the Petitioner paid the Joined Party in cash. No taxes were withheld from the pay. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
13. The Joined Party repeatedly objected to being classified as an independent contractor, however, the Petitioner would not reconsider. The Joined Party needed the work and continued working for the Petitioner.
14. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party worked until approximately January 22, 2010. The Joined Party and the Petitioner had a disagreement and the two individuals mutually agreed that the Joined Party would no longer work for the Petitioner.
15. The Joined Party filed an initial claim for unemployment compensation benefits effective January 31, 2010. His filing on that date established a base period from October 1, 2008, through September 30, 2010. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
16. On April 1, 2010, the Department of Revenue issued a determination holding that the Joined Party performed services as the Petitioner's employee retroactive to October 1, 2008.

Conclusions of Law:

17. 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.
18. 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).
19. 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).
20. 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.

21. 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.

22. 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.

23. 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.

24. There was no written agreement between the Petitioner and the Joined Party. The only agreement between the Petitioner and the Joined Party was verbal and the Petitioner unilaterally amended the agreement from time to time regarding the method and rate of pay. The Petitioner declared the Joined Party to be an independent contractor over the Joined Party's objections. Although the Joined Party objected to being classified as an independent contractor the Joined Party performed the work for the Petitioner because the Joined Party needed the money. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

25. The Joined Party had his own business, Sunset Handyman. Sunset Handyman was clearly separate and distinct from the Petitioner's business. However, the Joined Party did not perform services for the Petitioner through Sunset Handyman.

26. The Petitioner's business is the trimming of trees which includes the removal of the limbs. The Joined Party's assigned responsibility was to remove the limbs after they were trimmed from the trees and to grind the limbs in the Petitioner's chipper. The work which the Joined Party performed for the Petitioner was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

27. The Petitioner provided the major equipment including the truck and the chipper. The Petitioner also provided all of the saws and hand tools that were needed to perform the work. Although the Joined Party usually chose to drive his own vehicle to the job sites, on some occasions he was required to drive the Petitioner's truck. Toward the latter part of the relationship the Joined Party chose to provide his own saw and hand rake. The purchase of the saw and the hand rake do not represent a significant investment.

28. The work performed by the Joined Party was unskilled labor which did not require any training or special knowledge. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

29. The Petitioner determined both the method of pay and the rate of pay. Initially, the Petitioner paid the Joined Party by the hour at a rate of pay determined by the Petitioner, $15 per hour. However, when the Petitioner assigned the Joined Party to hand out flyers advertising the Petitioner's business the Petitioner only paid the Joined Party $10 per hour. In 2009 the Petitioner unilaterally changed the method of pay. The Petitioner paid the crew a total of 40% of the amount paid to the Petitioner by the Petitioner's customers. However, the Petitioner determined the amounts that were paid to each individual crew member. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

30. The Joined Party worked for the Petitioner for a period of approximately five years. This fact reveals that the relationship was one of relative permanence.

31. The Petitioner declared the Joined Party to be an independent contractor. However, the Joined Party contested that classification and always considered himself to be the Petitioner's employee. It was clearly not the unified intent of both parties to establish an independent contractor relationship. In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "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."

32. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant.

33. The Petitioner determined what work was performed and when it was performed. The Petitioner provided everything that was needed to perform the work. The Petitioner controlled the financial

aspects of the relationship. Although it was not necessary for the Petitioner to control how the work was performed, the Petitioner clearly had the right to direct and control how the work was performed.

34. The analysis using the Restatement factors reveals that the services performed for the Petitioner by the Joined Party constitute insured employment. However, although the Joined Party began work for the Petitioner in 2005, the determination issued by the Department of Revenue is only retroactive to October 1, 2008. Based on the evidence the correct retroactive date is January 1, 2005.

Recommendation: It is recommended that the determination dated April 1, 2010, be MODIFIED to reflect a retroactive date of January 1, 2005. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on September 22, 2010.

R. O. SMITH, Special Deputy
Office of Appeals