AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2298996
CORAL RIDGE AUTO & RV INC
3017 COOPER ST
PUNTA GORDA FL 33950-7229

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

PROTEST OF LIABILITY
DOCKET NO. 2010-82777L

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 13, 2010, is AFFIRMED.

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. - 2298996
CORAL RIDGE AUTO & RV INC
JIM HARROWER
3017 COOPER ST
PUNTA GORDA FL 33950-7229

PROTEST OF LIABILITY
DOCKET NO. 2010-82777L

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 May 13, 2010.

After due notice to the parties, a telephone hearing was held on August 12, 2010. The Petitioner's owner appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A tax specialist II appeared and provided testimony 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 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 1999 for the purpose of running an automobile repair business. The Petitioner made use of independent contractor mechanics until 2010.

2. The Joined Party provided services for the Petitioner as a mechanic from January 2009, through February 2010.

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

4. The Petitioner's hours of operation were from 7:30 to 6. The Joined Party was required to report to the Petitioner's place of business at 8. The Joined Party received a lunch break from 12 to 1 and was off work at 5. The Joined Party was allowed to work late and outside the Petitioner's business hours. The Joined Party did not have a key for afterhour's access to the Petitioner's place of business. The Petitioner determined the Joined Party's schedule.

5. The Joined Party was covered under the Petitioner's workmen's compensation insurance.

6. The Petitioner supplied all of the tools and equipment necessary to perform the work. The Petitioner supplied uniform shirts for the Joined Party.

7. The Petitioner directed and supervised the work of the Joined Party throughout the day. The Petitioner would instruct the Joined Party in how to perform the work at times.

8. The Joined Party was paid by the hour. The Joined Party was paid with a weekly check. The Petitioner instituted an incentive program that was subsequently discontinued. The rate of pay was set by the Petitioner.

9. The Petitioner required the Joined Party to take three days off without pay as a result of tardiness.

10. Either party could end the relationship at will, without liability.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.
17. The evidence presented in this case reveals that the Petitioner controlled where, when, and how the work was performed by the Joined Party. The Petitioner set the Joined Party's schedule and required that the work be performed at the Petitioner's place of business. The Petitioner provided direction and supervision to the Joined Party as the work was performed. The Petitioner retained the right to punish the Joined Party for tardiness.
18. The Petitioner provided the tools, equipment, and place of work for the Joined Party.
19. The work performed by the Joined Party as a mechanic was an integral part of the normal course of business for the Petitioner's automobile repair business.
20. The Joined Party was paid by the hour. This is indicative of an employment.
21. The relationship was terminable at will. Either party could end the relationship at anytime and without liability. 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."
22. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated May 13, 2010, be AFFIRMED.

Respectfully submitted on September 2, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals