AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2503276
REMBRANDT MOBILE DIAGNOSTICS INC
1682 NW 143RD WAY
PEMBROKE PINES FL 33028-3009

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

PROTEST OF LIABILITY
DOCKET NO. 2011-21001L

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, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

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**.**

On March 28, 2011, the Petitioner submitted additional evidence not provided at the hearing. The Special Deputy issued the Recommended Order on May 23, 2011. The Special Deputy did not address the Petitioner's submission in the Recommended Order. Rule 60BB-2.035(19)(a) of the Florida Administrative Code prohibits the acceptance of evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. No other submissions were received from any party.

Having 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.

Therefore, it is ORDERED that the determination dated December 8, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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:
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PROTEST OF LIABILITY
DOCKET NO. 2011-21001L

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 December 8, 2010.

After due notice to the parties, a telephone hearing was held on March 23, 2011. The Petitioner's president appeared and testified at the hearing. The Joined Party appeared and testified on her own behalf. A tax specialist II appeared and testified 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 September 2002 for the purpose of running a mobile x-ray provider company.

2. The Joined Party provided services to the Petitioner as an x-ray technician from October 22, 2006, through September 27, 2010.

3. The Joined Party was referred to the Petitioner by a friend. The Joined Party submitted an application and was interviewed for the work.

4. The Joined Party had a basic Florida x-ray operator's license.

5. The Petitioner provided training to the Joined Party in the use of the mobile x-ray machines.

6. The Petitioner would contact the Joined Party each day to inform the Joined Party of where, when, and what work was to be performed. The Joined Party was required to stay in contact with the Petitioner throughout the day to keep the Petitioner informed as to the progress of the work and to receive new assignments or be informed of schedule changes.

7. The Petitioner provided direction and coordination for the Joined Party during the work day. The Petitioner instructed the Joined Party as to how the Petitioner wanted work done.

8. The work required the use of a vehicle, x-ray machines, x-ray plates, a mobile dark room, and lead letters. All equipment was provided by the Petitioner. The Petitioner paid for fuel for the vehicle. The Joined Party was allowed to take the vehicle home.

9. The Joined Party was given a written warning by the Petitioner when she failed to report to work due to a family issue.

10. The Joined Party was paid by the patient. The rate of pay was established by the Petitioner. The Petitioner provided vacation pay. The Petitioner provided bonuses for good performance.

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 exercised control over where, when, and how the work was to be performed. The Petitioner created and modified a schedule that the Joined Party was expected to follow. The Petitioner provided instruction in how the work should be performed and required updates as to the progress of the work.
18. The Petitioner had unilateral control over the financial aspects of the work. The Joined Party was paid on a per patient basis. The Petitioner dictated the rate of pay as well as determined what patients the Joined Party would treat on any given day.
19. All of the equipment, tools, and materials needed for the work were provided by the Petitioner. The Joined Party had no expenses in conjunction with the work.
20. The Joined Party received vacation pay and performance bonuses. Such perquisites tend to indicate an employer-employee relationship.
21. The Joined Party performed services for the Petitioner for almost four years. Such a length of service is reflective of a permanent relationship and not the temporary relationship inherent in an independent contractor relationship.
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 parties.

Recommendation: It is recommended that the determination dated December 8, 2010, be AFFIRMED.

Respectfully submitted on May 23, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals