AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2848941
CLAIMS SERVICE INTERNATIONAL INC
PO BOX 880505
PORT SAINT LUCIE FL 34988-0505

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

PROTEST OF LIABILITY
DOCKET NO. 2011-22311L

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 December 2, 2010, is REVERSED.

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:
Employer Account No. - 2848941
CLAIMS SERVICE INTERNATIONAL INC
ATTN: DONNA GATLIB
PO BOX 880505
PORT SAINT LUCIE FL 34988-0505

PROTEST OF LIABILITY
DOCKET NO. 2011-22311L

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 2, 2010.

After due notice to the parties, a telephone hearing was held on May 18, 2011. The Petitioner's owner appeared and testified 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 2007 for the purpose of running a claims adjusting firm.

2. The Joined Party provided services as a claims adjuster from May 11, 2010, through July 23, 2010.

3. The Petitioner was seeking a claims adjuster to complete a set of manual claims as the Petitioner transitioned to an online system. The Petitioner placed an advertisement for a claims adjuster on Craig's List. The Joined Party responded to the Petitioner's advertisement. The Joined Party was interviewed and retained by the Petitioner. The Petitioner informed the Joined Party that the relationship would be an independent contractor relationship at the time of hire.

4. The relationship between the parties was terminated when the Joined Party completed the work for which she had been hired.

5. The Joined Party was allowed to set her own schedule.

6. The Petitioner provided home office space for the Joined Party. The Joined Party could elect to use the provided office space or work from home.

7. The Joined Party was initially paid $8 per hour. The Joined Party later asked for and received a pay increase to $10 per hour. The Joined Party was required to submit an invoice listing hours worked to the Petitioner each pay period.

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

9. The Petitioner provided two months of training to employee claims adjusters. The Joined Party was not provided any training by the Petitioner.

10. The Petitioner did not supervise or review the work of the Joined Party.

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 did not exercise control over when, where, or how the work was to be performed. The Joined Party was allowed to set her own schedule and could work from the location of her choice. The Petitioner did not supervise or direct the Joined Party's work other than to assign the specific work at the start of the assignment.

18. The Petitioner made office space available for the Joined Party's use but the Joined Party was not required to use the space. The Joined Party was allowed to work from home or the location of her choosing.

19. Both parties were aware that an independent contractor relationship was being created at the time of hire.

20. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish 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 2, 2010, be REVERSED.

Respectfully submitted on July 18, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals