AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2991073
SHEAR PREFECTION LLC
6554 S KANNER HWY STE 301
STUART FL 34997-6396

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

PROTEST OF LIABILITY
DOCKET NO. 2011-22315L

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 November 15, 2010, is MODIFIED to reflect a retroactive date of January 2, 2006. It is also ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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
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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 November 15, 2010.

After due notice to the parties, a telephone hearing was held on May 31, 2011. The Petitioner, represented by the Petitioner's owner, appeared and testified. The Respondent, represented by a Department of Revenue Tax Auditor 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 and other individuals working as hairdressers constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a limited liability company which has operated a hair salon since January 2, 2006. The Petitioner's shop is closed on Sundays and Mondays. The hours of operation are from 9 AM until 9 PM on Tuesday and Thursday and from 9 AM until 6 PM on Wednesday, Friday, and Saturday.
2. In early 2006 the Joined Party was working for a salon as a hairdresser but wanted to relocate to the city where the Petitioner's salon is located. A mutual friend told the Petitioner about the Joined Party and the Petitioner contacted the Joined Party concerning working for the Petitioner as a hairdresser. The Petitioner briefly interviewed the Joined Party and showed the Joined Party

around the Petitioner's salon. The Petitioner told the Joined Party that the Petitioner would pay the Joined Party 60% of the income from the Joined Party's work less 3% for supplies, and that the Joined Party's work schedule would be Tuesday and Thursday from 9 AM until 9 PM and on Wednesday, Friday, and Saturday from 9 AM until 6 PM. The Joined Party accepted the Petitioner's offer of work and began work for the Petitioner on or about March 15, 2006. The parties did not enter into any written agreement or contract.

3. The Petitioner provided the place of work, the furnishings, equipment, and the supplies including towels, smocks, and hair products. The Joined Party provided her own hand tools including combs, scissors, brushes, and curling irons. The Petitioner deducted 3% from the pay of each hairdresser to cover the cost of the hair supplies, regardless of the amount of supplies used by each hairdresser or the cost of the supplies. The Petitioner required the Joined Party to use the Petitioner's supplies. The Joined Party was not allowed to purchase or use her own supplies.

4. The Petitioner uses a particular company to provide business cards for the hairdressers; however, the hairdressers pay for the cost of their own business cards. The Joined Party's business cards contained the Petitioner's name, The Joined Party's name, the Joined Party's days and hours of work, and the Petitioner's telephone number. The Petitioner would not allow the Joined Party to put the Joined Party's cell phone number on the business cards because the Petitioner wanted all of the calls from customers to come through the Petitioner's telephone.

5. The Petitioner determined the amounts that were to be charged to customers for each service provided by the hairdressers. If a hairdresser believed that a customer would require additional time, such as if the customer had extraordinarily long hair, the hairdresser had the right to charge the customer additional money because of the additional work. The Petitioner advertised the Petitioner's services through coupons that offered discounts for certain services. The hairdressers were required to honor the Petitioner's coupons even though the coupons reduced the hairdressers' income.

6. The Petitioner's receptionist checked customers in and checked the customers out. Generally, the Petitioner's receptionist scheduled the appointments for the hairdressers. If a walk-in customer came into the shop the receptionist determined which hairdresser would serve the customer. The receptionist collected the fees from the customers after each hairdresser completed the work. If the receptionist was not in the salon the Petitioner's owner would perform the duties of the receptionist or the Petitioner's owner would assign the duties to another worker such as a nail technician or a hairdresser.

7. The Petitioner informed the Joined Party that the Joined Party was not allowed to perform services for any competitor of the Petitioner. If the Joined Party was not able to work on a scheduled day the Joined Party was required to notify the Petitioner so that the Petitioner could cancel the Joined Party's scheduled appointments or reschedule the appointments with another hairdresser. The Joined Party was not allowed to hire others to perform the work for her.

8. In addition to styling hair the hairdressers were required to perform other chores in the salon such as taking out the trash, doing laundry, cleaning the coffee maker, and other housekeeping duties. All of the hairdressers were expected to perform the additional chores; however, the Petitioner received frequent complaints that some of the hairdressers were not performing an equal amount of the chores. When the Petitioner received those complaints the Petitioner would warn the hairdressers that were the subject of the complaints that they were required to perform their share of the additional chores. The Petitioner also received complaints as a result of personality conflicts. The Petitioner warned hairdressers about the way that the hairdressers spoke to other hairdressers.

9. The Petitioner had periodic staff meetings. Attendance at the staff meetings was mandatory for all of the hairdressers although no extra pay was provided for attending the staff meetings. Generally,

the Petitioner held the staff meetings after work on Saturday, a day that all hairdressers worked. At the staff meetings the Petitioner would discuss matters such as new products purchased by the Petitioner and the Petitioner's coupons. A frequent topic at the meetings was the Petitioner's dress code. The hairdressers were not required to wear any type of standard uniform or smock. The Petitioner required the hairdressers to wear heels. During the busy season the Petitioner required the hairdressers to wear dress clothes including dress slacks. During the summer the dress code was more relaxed and the hairdressers were allowed to wear shorts as long as the shorts were long shorts. The Petitioner prohibited the hairdressers from wearing jeans, tank tops, or revealing clothes. The hairdressers were required to wear makeup and to have their hair styled.

10. The Joined Party attended continuing education classes during the time that she worked for the Petitioner. The Joined Party paid for some of the classes that she attended and the Petitioner paid for some of the classes that the Joined Party attended.

11. The Petitioner paid the Joined Party and the other hairdressers on a weekly basis with Tuesday as the regularly established payday. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance, paid vacations, or paid holidays. The Petitioner paid Christmas bonuses to the hairdressers, the amount of which varied from hairdresser to hairdresser based on the amount of time worked by each hairdresser. 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.

12. During the time that the Joined Party worked for the Petitioner the Joined Party never had an occupational or business license and never had business liability insurance. The Joined Party worked under the Petitioner's occupational license and was covered under the Petitioner's liability insurance policy. The Joined Party did not advertise her services to the general public and she performed services only for the Petitioner.

13. Either party was free to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party last performed services for the Petitioner on Saturday, September 25, 2010. On Tuesday, September 28, 2010, The Petitioner informed the Joined Party that the Joined Party was fired effective immediately. The Petitioner terminated the relationship because of what the Petitioner considered "uncontrollable issues" involving the Joined Party's attitude.

14. The Joined Party filed an initial claim for unemployment compensation benefits effective September 26, 2010. When the Joined Party did not receive credit for her 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 employee or as an independent contractor.

15. On November 15, 2010, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as hairdressers were the Petitioner's employees retroactive to January 1, 2009. The Petitioner filed a timely protest.

Conclusions of Law:

16. 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. The evidence presented in the instant case reveals that the only agreement between the parties was a verbal agreement. The verbal agreement was that the Joined Party would work a full time schedule determined by the Petitioner to perform duties as a hairdresser in the Petitioner's salon and that the Petitioner would pay the Joined Party 60% of the income generated by the Joined Party. The evidence does not reveal the existence of any agreement, verbal or written, specifying whether the Joined Party would perform services as an employee or as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "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."

24. The Petitioner's business is a hair salon. The Joined Party performed services as a hairdresser exclusively for the Petitioner in the Petitioner's salon on a full time basis. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business. The Petitioner provided the place of work, the equipment, and all supplies. The Joined Party only provided her hand tools such as combs, brushes, and styling irons, which does not represent a significant investment in a business. The Joined Party worked under the Petitioner's occupational license and liability insurance policy.

25. Although the work performed by hairdressers does require some training and skill it was not shown that the work performed by the Joined Party required significant skill 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)

26. The Petitioner paid the Joined Party a commission based on the amount of work completed by the Joined Party. However, the Petitioner exercised control over the Joined Party's earnings because the Petitioner determined when the Joined Party worked and the amounts that the Joined Party was allowed to charge for the Joined Party's services. The Petitioner deducted a flat rate amount from the Joined Party's earnings for supplies, however, the deduction was not directly related to the actual supplies used by the Joined Party. 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.

27. The Joined Party performed services for the Petitioner for a period of approximately four and one-half years. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. 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."

28. The Petitioner exercised significant control over how the Joined Party performed the work. The Joined Party was required to use the Petitioner's hair products. The Joined Party was required to attend staff meetings and to perform side duties for which she did not receive additional pay. The Joined Party was required to dress in a certain manner specified by the Petitioner and to behave in a manner specified by the Petitioner. The Joined Party was required to personally perform the work and she could not hire others to perform the work for her. The Petitioner determined when the work was performed and where the work was performed. 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. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

29. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as hairdressers constitutes insured employment. The Petitioner's evidence reveals that the Joined Party first performed services for the Petitioner in March 2006 and that other

hairdressers performed services for the Petitioner as early as January 2, 2006. However, the determination issued by the Department of Revenue is retroactive only to January 1, 2009.

30. Rule 60BB-2.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered.

31. It is concluded that the correct retroactive date of liability for payment of unemployment compensation taxes by the Petitioner is January 2, 2006.

Recommendation: It is recommended that the determination dated November 15, 2010, be MODIFIED to reflect a retroactive date of January 2, 2006. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 2, 2011.

R. O. SMITH, Special Deputy
Office of Appeals