AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2818624
SIGN PARROT.COM
2020 HELM LANE
VALRICO FL 33594-4417

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

PROTEST OF LIABILITY
DOCKET NO. 2011-36990L

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 February 2, 2011, 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. - 2818624
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ATTN: JOHN WEBBER
2020 HELM LANE
VALRICO FL 33594-4417

PROTEST OF LIABILITY
DOCKET NO. 2011-36990L

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 February 2, 2011.

After due notice to the parties, a telephone hearing was held on June 23, 2011. The Petitioner, represented by its president, appeared and testified. The Petitioner's treasurer testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 vehicle wrap specs 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 Florida limited liability company which was formed in 2008 to operate a sign printing company. The business is managed by the Petitioner's president. In 2009 the Petitioner expanded its business to include wrapping vehicles in vinyl signs.
2. The Joined Party is an individual who initially approached the Petitioner as a salesman for a product that was unrelated to the sign industry. From conversations with the Joined Party the Petitioner's president learned that the Joined Party had previously performed work for several different sign companies wrapping vehicles. Vehicle wrapping was new to the Petitioner's president and the president did not know how to perform the vehicle wrapping. The Joined Party

represented himself as being qualified to perform the work and the Petitioner agreed to allow the Joined Party to wrap vehicles for the Petitioner.

3. There was no written agreement or contract between the Petitioner and the Joined Party. The only verbal agreement was that the Joined Party would perform the work on an as-needed basis and that the Petitioner would pay the Joined Party based on the amount of time needed to complete the work.
4. The Petitioner did not provide any training for the Joined Party because the Petitioner did not know how to perform the work.
5. Whenever the Petitioner had a vehicle wrap job, the Petitioner would contact the Joined Party and offer the work to the Joined Party. The Joined Party never refused any work that was offered but he was free to decline any offer. If the Joined Party had declined work the Petitioner would have contacted another installer.
6. The Joined Party was required to personally perform the work. He was not allowed to subcontract the work or hire others to perform the work for him.
7. The Petitioner did not supervise the work performed by the Joined Party.
8. The Joined Party told the Petitioner that, in addition to the work which the Joined Party performed for the Petitioner, the Joined Party performed similar work for other sign companies.
9. The Petitioner required the Joined Party to perform the work at the Petitioner's business location because the Joined Party did not have a drivers license and was not allowed to drive the vehicles belonging to the Petitioner's customers.
10. The Petitioner printed the vinyl wraps that were to be applied to the vehicles. The wraps were printed in sheets that were 52 inches wide and approximately five or six feet high. The sheets were self adhesive and a vehicle could be wrapped by one person. The only tool required was a squeegee.
11. The Petitioner kept track of the time that the Joined Party spent on each job. The Petitioner paid the Joined Party on Friday of each week based on the time worked by the Joined Party. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. At the end of 2009 the Petitioner did not report the Joined Party's earnings to the Internal Revenue Service on a Form 1099-MISC or on a Form W-2.
12. Either party could terminate the relationship at any time without incurring liability for breach of contract.
13. The Petitioner was not satisfied with the quality of the Joined Party's work and the Petitioner was not satisfied with the amount of time that the Joined Party took to complete the jobs. As a result, on or about April 14, 2010, the Petitioner converted the Joined Party from independent contractor status to employee status.
14. After April 14, 2010, the Joined Party was required to work a set schedule. The Joined Party worked until August 27, 2010, at which time he was discharged.
15. At the end of 2010 the Petitioner reported the money earned by the Joined Party prior to April 14, 2010, on Form 1099-MISC as nonemployee compensation and the money the Joined Party earned after April 14, 2010, on Form W-2 as wages.

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. According to the Petitioner's witnesses there was no written agreement or contract between the Petitioner and the Joined Party. The testimony also reveals that there was no verbal agreement that defined the nature of the relationship. The only agreement was that the Joined Party would perform the work and that the Petitioner would pay the Joined Party for the work performed.

24. 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."

25. The evidence in this case, the testimony of the Petitioner's president, is not rebutted by other competent evidence. The Petitioner's testimony reveals that the Joined Party controlled when the work was performed and how the work was performed. No training was provided to the Joined Party by the Petitioner and the Petitioner did not supervise the Joined Party. The Joined Party was free to decline any work offered and he was free to perform services for a competitor of the Petitioner. The Petitioner provided the product that was to be applied to the vehicles and the Joined Party provided the skill and expertise necessary to apply the product. No significant investment in tools or equipment was required. The work performed by the Joined Party was part of the Petitioner's business and was not separate and distinct from the Petitioner's business.

26. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

27. The evidence reveals that some of the factors present in this case point to an employer/employee relationship. However, the evidence reveals that the Petitioner did not control how the work was performed. The Petitioner was only interested in the end result and not how that result was achieved. Thus, it is concluded that the services performed for the Petitioner by the Joined Party from September 15, 2009, until April 14, 2010, do not constitute insured employment.

Recommendation: It is recommended that the determination dated February 2, 2011, be REVERSED.

Respectfully submitted on June 30, 2011.

R. O. SMITH, Special Deputy
Office of Appeals