DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2114807
FOUR SEASONS LAWN SERVICE
522 YOUTH CAMP ROAD
GROVELAND FL 34736

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2011-76753L

O R D E R

This matter comes before me for final Department 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 6, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **January, 2012**.

TOM CLENDENNING
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2114807
FOUR SEASONS LAWN SERVICE
ATTN: JAMES HICKS
522 YOUTH CAMP ROAD
GROVELAND FL 34736

PROTEST OF LIABILITY
DOCKET NO. 2011-76753L

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 6, 2011.

After due notice to the parties, a telephone hearing was held on August 1, 2011. The Petitioner's owner appeared and testified at the hearing. The Joined Party appeared and testified in his own behalf. A tax specialist 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 and other individuals 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 sole proprietorship, established in 1993 for the purpose of running a lawn service and maintenance business.

2. The Joined Party provided services for the Petitioner as a lawn maintenance worker from August 2009, through February 2011. The Petitioner had three other workers, working under the same conditions as the Joined Party.

3. The Joined Party contacted the Petitioner to see if the Petitioner was hiring. There was no written agreement or contract between the parties.

4. The Petitioner would pick up the Joined Party Monday through Friday. The Petitioner would transport the Joined Party to and from the work site. The hours were determined by the Petitioner.

5. The Joined Party would mow or edge three days per week. The Joined Party would lay sod two days each week. The work was directed by the Petitioner.

6. The Joined Party was required to follow the Petitioner's rules including a prohibition on bringing a cell phone to the work site. The Petitioner restricted what equipment the Joined Party was allowed to use.

7. The Petitioner provided all tools and equipment needed to perform the work. The equipment included a riding mower, an edger, a weeder, a hedge trimmer, a sod cutter, a wheelbarrow, a shovel, and a rake.

8. The Petitioner paid the Joined Party $10 per hour. The Joined Party's hours were written down to keep track of the hours worked. The Joined Party was paid every two weeks. The Joined Party was issued a 1099 form by the Petitioner.

9. The Joined Party did not have his own business.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. The evidence presented in this case reveals that the Petitioner exercised control over where, when, and how the work was performed. The Petitioner picked up the Joined Party and took him to the work site. The Petitioner determined what hours would be worked. The Petitioner directed the work of the Joined Party. The Joined Party was required to follow the Petitioner's rules which included a policy against cell phones and limitations on what equipment could be used.

17. The Petitioner provided all of the tools necessary to perform the work.

18. The Joined Party provided services to the Petitioner for approximately a year and a half. Such a length of service is not indicative of a temporary relationship between the parties.

19. The Joined Party was paid an hourly wage. Payment by the hour tends to indicate an employment relationship between the parties.

20. The work performed by the Joined Party as a lawn maintenance worker was a part of the regular course of business for the Petitioner's lawn maintenance business.

21. A preponderance of the evidence presented 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 May 6, 2011, be AFFIRMED.

Respectfully submitted on November 30, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals