DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1394361
AVENTURA LIMOUSINE &
TRANSPORTATION
PO BOX 800146
AVENTURA FL 33280-0146

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

PROTEST OF LIABILITY
DOCKET NO. 2011-76757L

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 3, 2011, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2011**.

TOM CLENDENNING
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

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

PETITIONER:
Employer Account No. - 1394361
AVENTURA LIMOUSINE & TRANSPORTATION
ATTN: JASON SCOTT COUPAL
PO BOX 800146
AVENTURA FL 33280-0146

PROTEST OF LIABILITY
DOCKET NO. 2011-76757L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
THE 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 3, 2011.

After due notice to the parties, a telephone hearing was held on August 22, 2011. The Petitioner was represented by its attorney. The Petitioner's Certified Public Accountant, the Petitioner's Chief Operating Officer, and the Petitioner's Chief Financial Officer testified as witnesses. The Respondent was represented by a Department of Revenue Tax Audit Supervisor.

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 received from the Petitioner.

Issue:
Whether services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which operates a business that provides limousine and other transportation services for passengers in Dade and Broward counties. The Petitioner uses drivers who are classified as independent contractors to drive vehicles that are either owned or leased by the Petitioner.
2. The Petitioner has an operating permit to operate each of its vehicles in Dade and Broward counties. In Dade County operating permits are issued by the county based on a random selection

or lottery system, however, Dade County has discontinued issuing new operating permits. The Dade County ordinance provides that operating permits may not be transferred, assigned, or leased. A driver is not required to have a operating permit unless the driver owns the vehicle. The drivers are required to be registered by Dade County and are required to display the chauffer's registration in the vehicle. Dade County requires that an initial applicant for a chauffer's registration must complete an apprentice program provided by Dade County.

3. Each of the drivers who perform driver services for the Petitioner sign an *Independent Contractor Application and Agreement* which specifies that the driver is operating his or her own independently established business and is not an employee of the Petitioner and is not entitled to participate in any employee pension, health or other fringe benefit plan. The Agreement provides that the driver is responsible for paying his or her own income taxes and Social Security taxes and that the Petitioner is not responsible for withholding payroll taxes from the pay.
4. The Petitioner maintains a list of drivers who have been registered by Dade County to drive the Petitioner's vehicles and who have entered into the *Independent Contractor Application and Agreement* with the Petitioner. The drivers contact the Petitioner to let the Petitioner know when the drivers are available to drive the Petitioner's vehicles. The Petitioner has a dispatch team that will notify the drivers when work assignments are available. The drivers may decline any work assignment. If a driver declines a work assignment the dispatcher contacts the next driver on the list until a driver is located who accepts the work assignment.
5. The Petitioner does not provide any training for the drivers.
6. The Petitioner provides the vehicles that are used to transport the passengers. The Petitioner provides insurance in case of an accident, however, there is a $5,000 deductible and the driver is responsible for paying any damages that are not paid by the insurance company. The driver is responsible for paying for any damage to the vehicle that is intentionally or negligently inflicted by the driver. Each driver is responsible for paying for the fuel used by the driver. The Petitioner is responsible for paying for repairs and ordinary maintenance.
7. The drivers are paid a percentage of the fees that the Petitioner collects from the passengers. If a passenger is dissatisfied and refuses to pay the Petitioner, the Petitioner does not pay the driver for transporting the passenger.
8. The Petitioner pays the drivers on a weekly basis based on the work completed by each driver during the pay period. No taxes are withheld from the pay and at the end of each year the Petitioner reports the earnings of each driver on Form 1099-MISC.
9. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law. The audit was performed at the location of the Petitioner's Certified Public Accountant.
10. Among the books and records examined by the auditor were all of the 1099 forms issued by the Petitioner, and the *Independent Contractor Application and Agreement*. Paragraph 5 of the Agreement provides that the driver may be subject to a background check or random drug or alcohol tests and provides that the driver may not divulge any of the Petitioner's confidential or proprietary information. Paragraph 8 of the Agreement provides that the driver understands that the driver is responsible for paying his or her own income taxes and Social Security taxes and that the Petitioner may require proof that the driver has paid the taxes. Paragraph 11 of the Agreement provides that the driver declares that he or she has complied with all Federal, State, and local laws regarding business permits, certificates and licenses that may be required to carry out the work to be performed under the Agreement.
11. The auditor submitted a list of 95 individuals who received a form 1099 from the Petitioner for 2009 and requested information concerning whether the individuals operated their own vehicles or

operated vehicles owned by the Petitioner. The auditor apparently assumed that all of the names on the list performed services for the Petitioner as drivers. However, 31 of the individuals on the list performed services in some other capacity. Based on paragraphs 5, 8, and 11 of the *Independent Contractor Application and Agreement* the auditor concluded that there were elements of control that determined an employer/employee relationship.

12. On April 27, 2011, the auditor issued a *Notice of Intent to Make Audit Changes* showing additional gross wages of $1,755,305.73. The Notice was received by the Petitioner on or about May 1, 2011. The Notice states that if the Petitioner disagrees with the results of the audit the Petitioner can request an audit conference to review the reasons for the audit adjustments. The Notice states that the Petitioner had until May 27, 2011, to request an audit conference and if an audit conference was not requested the Department of Revenue would then issue a *Notice of Proposed Assessment* based on the adjustments in the *Notice of Intent to Make Audit Changes.*

13. The Department of Revenue did not wait until May 27, 2011, to issue the *Notice of Proposed Assessment.* An undated *Notice of Proposed Assessment* was received by the Petitioner on May 3, 2011. The Petitioner contacted the auditor and requested an audit conference with the auditor's supervisor. The auditor denied the request stating that there was no such thing as an audit conference, that the Petitioner should file a written protest, and that the matter would be assigned to a special deputy to schedule a hearing. The Petitioner filed a timely protest by letter dated May 20, 2011.

Conclusions of Law:

14. 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.

15. 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).

16. 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). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

17. 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.

18. 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.

19. 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.

20. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

21. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

22. In the instant case the *Independent Contractor Application and Agreement* clearly establishes that the intent of the parties was to create an independent contractor relationship rather than an employment relationship.

23. The Petitioner provided the vehicles and was responsible for certain operating costs including repair and maintenance. Although the Petitioner provided the vehicle insurance the drivers were responsible for paying the $5,000 deductable in case of an accident. The drivers were responsible for other costs of operation including the cost of fuel. These facts show that, although the drivers did not have any significant investment in a business, the drivers were at risk of suffering a loss from services performed.

24. The drivers had the right to decline any work offered by the Petitioner without penalty. This fact shows that the drivers had the ability to control what work was performed.

25. The drivers are required by Dade County to complete an apprenticeship program. The Petitioner does not provide any training to drivers. Regulation imposed by governmental authorities does not evidence control by the employer for the purpose of determining if the worker is an employee or an independent contractor. NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, 922 (11th Cir. 1983); Global Home Care, Inc. v. D.O.L. & E.S., 521 So. 2d 220 (Fla. 2d DCA 1988). These facts do not show that the Petitioner controlled how the work was performed.

26. The drivers were paid a percentage of the fees collected from the passengers. This fact reveals that the drivers were paid based on production or by the job rather than by time worked. The

Petitioner did not withhold any payroll taxes and did not provide any fringe benefits. The Petitioner reported the earnings of each driver on Form 1099-MISC.

27. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
28. The evidence presented in this case reveals that the services performed for the Petitioner by the drivers during 2009 do not constitute insured employment.

Recommendation: It is recommended that the determination dated May 3, 2011, be REVERSED.

Respectfully submitted on November 21, 2011.

R. O. SMITH, Special Deputy
Office of Appeals