

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2749804
WEBBS MACHINE DESIGN INC
2251 MONTCLAIR ROAD
CLEARWATER FL 33763-4325

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-31396L**

ORDER

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 January 11, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 2010**.



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. - 2749804
WEBBS MACHINE DESIGN INC
JOHN D WEBB
2251 MONTCLAIR ROAD
CLEARWATER FL 33763-4325



**PROTEST OF LIABILITY
DOCKET NO. 2010-31396L**

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 January 11, 2010.

After due notice to the parties, a telephone hearing was held on July 7, 2010. The Petitioner's owner appeared and provided testimony at the hearing. A tax specialist appeared as representative for the Respondent. A tax auditor 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 constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner was incorporated in 1972 for the purpose of running a medical cart design business. The Petitioner does the design work for a client company. The Petitioner is not a management company. The Petitioner is not an employee leasing company.

2. A tax auditor was provided a list of audit leads which included the Petitioner. The tax auditor mailed an audit announcement letter to the Petitioner. The Petitioner responded to the audit announcement letter and an audit was scheduled for September 10, 2009.
3. The tax auditor went to the Petitioner's place of business to conduct the audit. The Petitioner's representative had power of attorney for the Petitioner.
4. The tax auditor determined that the Petitioner's representative for the audit ran the Petitioner's business and supervised the Petitioner's employees. The Petitioner's representative was a full time manager for the Petitioner, did paperwork for the Petitioner, and supervised the Petitioner's employees.
5. The Petitioner's representative was employed by the client company. The Petitioner was not paying the Petitioner's representative as an employee. The Petitioner did not provide any management agreement or documentation of the relationship between the Petitioner, the Petitioner's representative, and the client company to the tax auditor.
6. The Petitioner had an agreement with the client company to allow the Petitioner's representative to work for the Petitioner. The agreement specified that the Petitioner would pay the client company for the Petitioner's representative's salary, taxes, insurance, and worker's compensation.

Conclusions of Law:

7. Section 443.036(20), Florida Statutes, provides:

"Employing unit" means an individual or type of organization, including a partnership, limited liability company, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign; the receiver, trustee in bankruptcy, trustee, or successor of any of the foregoing; or the legal representative of a deceased person, which has or had in its employ one or more individuals performing services for it within this state.

 - (a) Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit is deemed to be employed by the employing unit for the purposes of this chapter, regardless of whether the individual was hired or paid directly by the employing unit or by an agent or employee of the employing unit, if the employing unit had actual or constructive knowledge of the work.
8. Section 443.1216(1)a), Florida Statutes, provides:

The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

 1. An officer of a corporation.
 2. An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee. However, whenever a client, as defined in s. [443.036\(18\)](#), which would otherwise be designated as an employing unit has contracted with an employee leasing company to supply it with workers, those workers are considered employees of the employee leasing company. An employee leasing company may lease corporate officers of the client to the client and to other workers, except as prohibited by regulations of the Internal Revenue Service. Employees of an employee leasing company must be reported under the employee leasing company's tax identification number and contribution rate for work performed for the employee leasing company.
 3. An individual other than an individual who is an employee under subparagraph 1. or subparagraph 2., who performs services for remuneration for any person:

- a. As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry-cleaning services for his or her principal.
 - b. As a traveling or city salesperson engaged on a full-time basis in the solicitation on behalf of, and the transmission to, his or her principal of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. This sub-subparagraph does not apply to an agent-driver or a commission-driver and does not apply to sideline sales activities performed on behalf of a person other than the salesperson's principal.
4. The services described in subparagraph 3. are employment subject to this chapter only if:
- a. The contract of service contemplates that substantially all of the services are to be performed personally by the individual;
 - b. The individual does not have a substantial investment in facilities used in connection with the services, other than facilities used for transportation; and
 - c. The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.
9. The facts of this case reveal that the Petitioner's representative at the audit ran the Petitioner's business and supervised the Petitioner's employees. The Petitioner's representative performed services as an employee for the Petitioner.
10. Rule 60BB-2.025(1)(a), Florida Administrative Code, provides in pertinent part that each employer must file quarterly reports. Payrolling as defined in Rule 60BB-2.022, F.A.C., is not permitted.
11. Rule 60BB-2.022(7), Florida Administrative Code, provides:
- (7) Payrolling: As used in Rule 60BB-2.025, F.A.C., "payrolling" refers to a practice which is not authorized by law, whereby payrolls for two or more employers are consolidated for tax purposes with one employer reporting for the other(s), when none of the employers is licensed by the Florida Department of Business and Professional Regulation as an employee leasing company or has been approved by the Department as a common paymaster.
12. The Petitioner did not present evidence that either the Petitioner or the Petitioner's client company are licensed as employee leasing companies by the Florida Department of Business and Professional Regulation. No evidence was presented to show that either the Petitioner or the Petitioner's client company are approved by the Department as common paymaster.
13. Rule 60BB-2.035(7) , Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error. The Petitioner has not shown that the determination of the Department is in error.

Recommendation: It is recommended that the determination dated January 11, 2010, be AFFIRMED.

Respectfully submitted on August 24, 2010.



KRIS LONKANI, Special Deputy
Office of Appeals