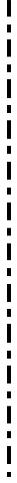


**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2789935
AMNA HEALTHCARE SERVICE
ATTN: JEANNEL LOPEZ
14160 PALMETTO FRNTG RD STE 10
MIAMI LAKES FL 33016-1560



**PROTEST OF LIABILITY
DOCKET NO. 2011-31759L**

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 4, 2011.

After due notice to the parties, a telephone hearing was held on June 7, 2011. The Petitioner’s president appeared and testified at the hearing. The Respondent did not appear at the hearing.

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 filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Jurisdictional Issue: NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

The hearing was originally scheduled for May 9, 2011. The Petitioner did not appear for the hearing. The Petitioner’s standard mail practice was for an assistant to sort mail and present it to the Petitioner’s

representative. The Petitioner's president did not receive the Notice of Hearing. The Petitioner contacted the Agency by telephone to correct the situation upon realizing that the hearing had been missed. There is good cause for proceeding with a new hearing.

Jurisdictional Issue: TIMELINESS: Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

The Department of Revenue file is unclear as to the mail date of the Notice of Proposed Assessment. The Petitioner faxed a letter of protest on January 26, 2011. Because the mailing date for the Notice of Proposed Assessment cannot be determined, it cannot be shown that the protest letter was mailed outside of twenty calendar days from the mail date. Therefore, the protest must be held as timely.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in November 2005 for the purpose of running a home health agency.
2. The Florida Department of Revenue conducted an audit of the Petitioner.
3. The audit was conducted at the place of business of the Petitioner's accountant.
4. The audit held that workers performing services as home health aides, community liaison, case manager supervisor, case manager clerk, office clerk processor, courier, account payable assistant, contractor accounting, contractor billing, admission clerk, and patient supply delivery were employees.
5. The Petitioner ran advertisements for a list of positions in local newspapers to find workers.
6. Home health aides are allowed to work for a competitor.
7. Home health aides are required to sign an independent contractor agreement at the time of hire.
8. The home health aide determines what geographical area the worker will provide coverage for.
9. The Petitioner offers work as it becomes available to home health aides on a rotation basis.
10. The home health aid is free to refuse any given assignment.
11. The home health aid is given the details of the case. These details include how many visits are required and what services are to be provided. The scheduling of visits is based upon the insurance requirements of the client.
12. The home health aide creates the schedule in collaboration with the client. The Petitioner is not informed of the schedule.
13. The home health aides are paid for each visit. The amount paid for each visit is based upon the services provided at the visit. The rate of pay is determined by the Petitioner.
14. The Petitioner provides gloves and an identification card as required by State law. The home health aide provides any other tools or equipment.

15. The Petitioner does not provide training for the home health aides.
16. Home health aides are certified by the State of Florida. Certification requires 120 hours of basic education on patient care, CPR, domestic violence, and OSHA regulations.

Conclusions of Law:

17. 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.
18. 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).
19. 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).
20. 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.
21. 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.
22. 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.

- 23. The evidence presented in this case reveals that the Petitioner does not exercise control over the details of the work performed by home health aides beyond that required under State law. The workers determine what geographical area their services will cover. The workers set their own schedule in collaboration with the clients. The workers are free to reject work.
- 24. The home health aid is required to provide any tools or equipment deemed necessary to perform the work. The Petitioner provides an ID card and gloves as required by law.
- 25. The home health aid is paid for each visit performed. The amount is based upon the work performed at each visit. Payment by the job tends to be indicative of an independent contractor relationship.
- 26. A preponderance of the evidence reveals that the Petitioner did not establish sufficient control over the work performed by home health aides as to create an employer-employee relationship.
- 27. The audit performed by the Florida Department of Revenue covered a number of different classifications of workers. The Petitioner’s appeal was intended by the Petitioner to cover only the class of home health aid workers.

Recommendation: It is recommended that the determination dated January 4, 2011, be REVERSED where it pertains to Home Health aides. It is recommended that the determination dated January 4, 2011, be AFFIRMED for all other matters.

Respectfully submitted on July 27, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals