

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

Employer Account No. - 3000362  
MCELROYS CLEANING & COATING  
PO BOX 551541  
JACKSONVILLE FL 32255-1541

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-36993L**

**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 21, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **August, 2011**.



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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. - 3000362  
MCELROYS CLEANING & COATING  
ATTN: LORI M SNELLER  
PO BOX 551541  
JACKSONVILLE FL 32255-1541



**PROTEST OF LIABILITY  
DOCKET NO. 2011-36993L**

**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 21, 2011.

After due notice to the parties, a telephone hearing was held on April 25, 2011. A co-owner appeared and testified for the Petitioner. A tax specialist II appeared and testified on behalf of the Respondent. The Joined Party 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 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.

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 is a sole proprietorship, established in January 1999, for the purpose of running a pressure washing business.

2. The Joined Party performed services as a pressure washer for the Petitioner from April 2008, through October 14, 2010.
3. The Joined Party was a family member of the Petitioner. The Joined Party was informed that work was available. The Joined Party was informed that he would be working as an independent contractor.
4. The Petitioner would contact the Joined Party when work was available. The Joined Party was free to decline work.
5. The Joined Party's start time would vary dependent upon the job. The Joined Party was normally expected to begin at 9 am. The Joined Party performed services at the customer's home.
6. The Joined Party was directly supervised by the Petitioner.
7. The Joined Party was paid \$12.50 per hour. The Petitioner kept track of the hours worked by the Joined Party. The Joined Party received a paycheck once per week. The Petitioner paid the Joined Party \$19,622 in 2009.
8. The Petitioner supplied pressure washers, hoses, tanks, and chemicals. The Joined Party was not required to supply any materials, tools, or equipment.
9. The Petitioner supplied t-shirts with the Petitioner's logo and telephone number. The Joined Party was expected to wear the t-shirt while on job sites.
10. The Joined Party hired a worker on occasion. The Petitioner paid the worker hired by the Joined Party.

### Conclusions of Law:

11. 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.
12. 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).
13. 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).
14. 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.
15. 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.
16. 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. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
17. The evidence presented in this case reveals that the Petitioner controlled the sequence in which the work was performed by the Joined Party. The Petitioner supervised and directed the work performed by the Joined Party.
18. The Petitioner supplied all tools, equipment, and materials needed to perform the work. The Joined Party had no expenses in conjunction with the work.
19. The Joined Party performed services for the Petitioner from April 2008, through October 14, 2010. This term of service was in excess of 2 years and does not reflect the temporary nature of an independent contractor relationship.
20. The Petitioner paid the Joined Party by the hour. Such a means of payment is more typical of an employer-employee relationship.
21. The work performed by the Joined Party as a pressure washer was a regular part of the normal course of business for the Petitioner’s pressure washing business.
22. A preponderance of the evidence presented in this case reveals that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the parties.
23. Section 443.1215, Florida Statutes, provides:
- Each of the following employing units is an employer subject to this chapter:
- i) An employing unit that:
    - a) In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
    - b) For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least

one individual in employment, irrespective of whether the same individual was in employment during each day.

24. In the instant case, the Petitioner paid the Joined Party \$19,622 in 2009. The amount paid for 2009 in addition to the amounts listed on documents in the record demonstrate that the Petitioner paid in excess of \$1500 in a calendar quarter during the 2009 calendar year.
25. A preponderance of the evidence presented in this case reveals that the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective January 1, 2009.

**Recommendation:** It is recommended that the determination dated January 21, 2011, be AFFIRMED.

Respectfully submitted on June 14, 2011.



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KRIS LONKANI, Special Deputy  
Office of Appeals