

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 0456911
CATALINA COLD TRANSFER INC
PO BOX 111180
HIALEAH FL 33011-1180

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-9915L**

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 October 4, 2010, is AFFIRMED.

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



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. - 0456911
CATALINA COLD TRANSFER INC
ATTN: ADA VALMANA
PO BOX 111180
HIALEAH FL 33011-1180



**PROTEST OF LIABILITY
DOCKET NO. 2011-9915L**

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 October 4, 2010.

After due notice to the parties, a telephone hearing was held on May 16, 2011. The Petitioner's accountant appeared and testified. 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 not received.

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.

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.

Findings of Fact:

1. The Petitioner is a corporation which operates a trucking business which transports refrigerated freight.
2. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records to ensure compliance with the Florida Unemployment Compensation Law for the 2009 tax year.

3. The audit was conducted at the location of the Petitioner's accountant. During the course of the audit the Tax Auditor examined the 1099 forms that were issued to individuals classified by the Petitioner as independent contractors. Most of the 1099 forms were indicated to be for drivers. The Tax Auditor requested documentation to show that the workers were bona fide independent contractors.
4. The accountant provided independent contractor agreements for each of the drivers. However, the Tax Auditor concluded that the agreements were actually employment agreements because there was a continuous relationship between the drivers and the Petitioner. The Petitioner also submitted a form showing that the drivers had elected to be exempt for workers' compensation insurance coverage. Those forms were dated September 8, 2010, which was after the audit year. The Tax Auditor requested proof that the drivers owned and operated their own trucks, however, that proof was not provided for most of the drivers. The proof of ownership was provided for two drivers, Alfredo R. Rodriguez and Julio C. Rodriguez. The Tax Auditor concluded that the services performed by the drivers for whom proof of ownership had not been provided constituted insured employment.
5. A *Notice of Proposed Assessment* was mailed to the Petitioner's accountant by the Department of Revenue. The *Notice of Proposed Assessment* states that it was mailed on or before October 14, 2010. Among other things the Notice states "Your protest must be filed with the Department within 20 days of the 'Mailed on or Before' date shown above."
6. The Petitioner's accountant received the Notice of Proposed Assessment in the mail on October 22, 2010. The envelope in which the *Notice of Proposed Assessment* was mailed bears a postmark date of October 19, 2010.

Conclusions of Law:

7. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
8. Rule 60BB-2.035(5), Florida Administrative Code, provides:
 - (5) Timely Protest.
 - (a)1. Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
9. Although the *Notice of Proposed Assessment* states that it was mailed on or before October 4, 2010, no competent evidence was presented to show that it was actually mailed on that date. The Petitioner provided evidence, a copy of the envelope in which the Notice was mailed, which clearly shows that the Notice was mailed on October 19, 2010. The Petitioner's protest was filed within twenty days of October 19, 2010. Thus, the Petitioner's protest was timely filed.
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.
16. 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.
17. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work."

Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

18. In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), the Florida Supreme Court addressed a factual situation involving the relationship between a truck driver and a trucking company. In that case the parties entered into a written independent contractor agreement which specified that the driver was not to be considered the employee of the trucking company at any time, under any circumstances, or for any purpose. In its decision the Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other." The Court found that the driver owned his own truck and leased the trailer from the trucking company. The trailer was to be used by the driver exclusively for hauling freight for the trucking company. The trucking company told the driver where to pick up the freight and where to deliver the freight. The driver had the right to refuse any dispatch. The trucking company paid the driver a percentage of the freight charge for the shipment. Either party could terminate the relationship without cause upon thirty days written notice to the other. The Court concluded, based on these facts, that the driver was an employee of the trucking company.
19. The testimony of the Petitioner's only witness, the accountant, reveals that the accountant does not have any personal knowledge regarding the details under which the drivers performed services for the Petitioner.
20. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
21. 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.
22. The Petitioner did not submit any additional documentary evidence at the hearing. The Petitioner's evidence is not sufficient to show that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated October 4, 2010, be AFFIRMED.

Respectfully submitted on May 17, 2011.



R. O. SMITH, Special Deputy
Office of Appeals