

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2744907
DISCOVER MARBLE & GRANITE III, INC.
3423 ALL AMERICAN BLVD
ORLANDO FL 32810-4722

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-135449L**

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 August 10, 2010, is MODIFIED to reflect that the employer prior to July 2009 was Imaginative Solutions, Inc., and beginning in July 2009 the employer was LLT Management, LLC. The determination holding that Jorgo Alla was an employee rather than an independent contractor is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 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. - 2744907
DISCOVER MARBLE & GRANITE III, INC.
ATTN: FERNANDO OLIVEIRA
3423 ALL AMERICAN BLVD
ORLANDO FL 32810-4722

**PROTEST OF LIABILITY
DOCKET NO. 2010-135449L**

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 August 10, 2010.

After due notice to the parties, a telephone hearing was held on May 12, 2011. The Petitioner, Discover Marble and Granite III, Inc., was represented by its attorney. The Petitioner's Vice President and the Petitioner's Director of Operations testified as witnesses for the Petitioner. The Respondent was represented by a Department of Revenue Tax Specialist II. The Joined Party, Jorgo Alla, and a witness appeared. The hearing was continued. LLT Management LLC was joined as a party and after due notice to the parties a telephone hearing was held on June 28, 2011. The Petitioner was represented by its attorney. The Petitioner's Vice President and the Petitioner's Director of Operations appeared as witnesses. The Chief Executive Officer of LLT Management LLC appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. Joined Party Jorgo Alla appeared and testified. The Joined Party's brother testified as a witness.

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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner, Discover Marble and Granite III, Inc., is a corporation which operates a granite and marble countertop fabricating and installation business. In approximately 2008 the Petitioner was approached by a representative of Imaginative Solutions, Inc., a company which identified itself as a "staffing agency." Imaginative Solutions, Inc. offered to provide all of the workers for Discover Marble and Granite III, Inc.
2. The Joined Party, Jorgo Alla, applied for work with Discover Marble and Granite III, Inc. in the summer of 2008 and was interviewed and hired as a polisher by the Vice President of Discover Marble and Granite III, Inc.. Discover Marble and Granite notified Imaginative Solutions, Inc. that the Joined Party had been hired.
3. The work performed by a polisher does not require special skill. Any individual can perform the work with training.
4. The contract between Imaginative Solutions, Inc. and Discover Marble and Granite III, Inc. allowed Discover Marble and Granite III, Inc. to provide uniforms, equipment, and materials to the workers. Discover Marble and Granite III, Inc. provided a uniform to Jorgo Alla and provided all of the equipment and materials that were needed to perform the work.
5. Discover Marble and Granite III, Inc. informed Jorgo Alla that the hours of work were from 7 AM, Monday through Friday, until the work was finished each day. At the end of each workday Discover Marble and Granite III, Inc. would tell Jorgo Alla and the other workers when they could leave for the day. Jorgo Alla could not come and go as he pleased. He was allowed to take a one hour lunch break from 12 PM until 1 PM each workday. During some weeks Jorgo Alla was told by Discover Marble and Granite III, Inc. that he was required to work on Saturday.
6. Jorgo Alla was required to personally perform the work. He was not allowed to hire others to perform the work for him.
7. Each morning Discover Marble and Granite III, Inc. would tell Jorgo Alla what to do and how to do it. Jorgo Alla was supervised throughout the workday by the Vice President of Discover Marble and Granite III, Inc. or by another worker who was designated by Discover Marble and Granite III, Inc. to be a supervisor.
8. Jorgo Alla was required to punch a time clock located at the location of Discover Marble and Granite III, Inc. each day. At the end of the workweek the Director of Operations for Discover Marble and Granite III, Inc. would calculate the total hours for the week for Jorgo Alla and the other workers. The Director of Operations would then send that information to Imaginative Solutions, Inc. Imaginative Solutions, Inc. would then send an invoice to Discover Marble and Granite III, Inc. for the amount of the wages plus an additional fee for providing the employees to Discover Marble and Granite III, Inc. Imaginative Solutions, Inc. would then deliver the paychecks to Discover Marble and Granite III, Inc. in sealed envelopes. Discover Marble and Granite III, Inc. would give the sealed envelopes to the workers without opening the envelopes or seeing the paychecks.
9. Imaginative Solutions, Inc. did not withhold payroll taxes from the earnings of Jorgo Alla. Imaginative Solutions, Inc. did cover Jorgo Alla under its workers' compensation policy because Imaginative Solutions, Inc. considered Jorgo Alla to be an employee of Imaginative Solutions, Inc. Imaginative solutions did not pay unemployment tax on the earnings of Jorgo Alla.
10. The owner of Imaginative Solutions, Inc. wanted to eliminate a business partner from the business. Therefore, the owner formed LLT Management, LLC and transferred the business of Imaginative Solutions, Inc. to LLT Management, LLC in July 2009, including the contract to provide workers to Discover Marble and Granite III, Inc. After the transfer Jorgo Alla continued to work at

Discover Marble and Granite III, Inc. under the same terms and conditions. The only change was that beginning in July 2009 the paychecks were issued by LLT Management, LLC rather than by Imaginative Solutions, Inc.

11. LLT Management, LLC reported the earnings of Jorgo Alla to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
12. LLT Management, LLC provided periodic safety training to the workers, including Jorgo Alla. LLT Management, LLC trained Jorgo Alla how to safely use the equipment provided by Discover Marble and Granite III, Inc.
13. On one occasion, Jorgo Alla approached the Vice President of Discover Marble and Granite III, Inc. and requested permission to take a three week vacation so that he could visit his homeland. The request was granted, however, Jorgo Alla was not paid for the time that he was on vacation. Following the vacation Jorgo Alla returned to work at Discover Marble and Granite III, Inc.
14. Occasionally, Discover Marble and Granite III, Inc. warned Jorgo Alla concerning work performance issues. On some occasions Jorgo Alla was required to redo work because it was not performed to the satisfaction of Discover Marble and Granite III, Inc. Jorgo Alla was paid for the additional time required to redo the work.
15. At some point in time after Jorgo Alla began working at Discover Marble and Granite III, Inc., his brother, Avni Alla, was hired to work at Discover Marble and Granite III, Inc. Subsequently, Avni Alla was promoted to be a supervisor over the other workers including Jorgo Alla. Avni Alla was also paid by the staffing companies, Imaginative Solutions, Inc. and LLT Management LLC. No taxes were withheld from the pay of Avni Alla and unemployment tax was not paid on his wages until approximately February 2010. Discover Marble and Granite III, Inc. obtained a government job and was required to use workers who were classified as employees on the government job. LLT Management, LLC withheld taxes from the pay and reported the wages to the Department of Revenue for payment of unemployment tax while Avni Alla worked on the government job. Jorgo Alla did not work on the government job. After the government job was completed LLT Management, LLC discontinued withholding taxes from the pay of Avni Alla.
16. Because the workers were considered to be employees of LLT Management, LLC, Discover Marble and Granite III, Inc. could not discharge any of the workers without the permission of LLT Management, LLC. The Vice President of Discover Marble and Granite III, Inc. frequently found workers to be unsatisfactory and asked LLT Management, LLC to remove the workers.
17. Both Jorgo Alla and Avni Alla worked forty or more hours each week. In approximately June 2010 they approached the Vice President of Discover Marble and Granite III, Inc. and asked why they were not paid overtime pay when they worked more than forty hours in a week. Shortly thereafter, the Vice President informed Jorgo Alla and Avni Alla that they were fired for questioning the overtime pay. Jorgo Alla and Avni Alla then went to the office of LLT Management, LLC and complained about not receiving overtime pay. LLT Management, LLC agreed to pay the overtime pay.
18. During the time that Jorgo Alla worked at Discover Marble and Granite III, Inc. he did not have any financial investment in a business, did not have a business or occupational license, did not advertise, did not offer services to the general public, and did not perform any services other than the services which he performed at Discover Marble and Granite III, Inc.
19. Jorgo Alla filed a claim for unemployment compensation benefits effective June 20, 2010. His filing on that date established a base period consisting of the 2009 calendar year. When Jorgo Alla did not receive credit for his base period earnings a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if Jorgo Alla worked for LLT Management, LLC as an employee or as an independent

contractor. As proof of his earnings Jorgo Alla provided copies of paychecks from LLT Management, LLC and a copy of the 2009 Form 1099-MISC from LLT Management LLC. Jorgo Alla also provided a copy of a letter from Discover Marble and Granite III, Inc. dated August 17, 2009, signed by the Director of Operations. The letter states "This is to inform you that Jorgo Alla is an employee of Discover Marble and Granite. We also would like to inform you that we have switched our payroll company from Imaginative Solutions to LLT Management LLC on the week of July 13, 2009. His first payday with this new company was on July 22, 2009."

20. Based on the use of the term "payroll company" the Department of Revenue Tax Auditor concluded that LLT Management, LLC was an employee leasing company. However, the investigation revealed that LLT Management, LLC was not licensed by the Department of Business and Professional Regulation to operate as an employee leasing company.
21. On August 10, 2010, the Department of Revenue issued a determination to Discover Marble and Granite III, Inc. explaining that it had been determined that Jorgo Alla was an employee and that since LLT Management, LLC was not an authorized employee leasing company, Discover Marble and Granite III, Inc. was responsible for paying the unemployment tax on the earnings of Jorgo Alla. Discover Marble and Granite III, Inc. filed a timely protest.

Conclusions of Law:

22. 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.
23. 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).
24. 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.
25. 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.
26. 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.
27. 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.
28. 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.
29. No evidence was presented to show the existence of any written contract between Jorgo Alla and Discover Marble and Granite III, Inc., between Jorgo Alla and Imaginative Solutions, Inc., or between Jorgo Alla and LLT Management, LLC. No competent evidence was presented to show that Jorgo Alla entered into any verbal agreement with any individual or company to perform services as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
30. The evidence presented in this case reveals that Jorgo Alla was not an independent contractor. He did not have a financial investment in a business, did not have an occupational license, and did not offer services to the general public. Jorgo Alla was not in control of what work was performed, where it was performed, or when it was performed. Discover Marble and Granite III, Inc. told Jorgo Alla what to do, when to do it, where to do it, and how to do it. Jorgo Alla was not permitted to hire others to perform the work for him.
31. Jorgo Alla was paid by the hour rather than by the job or by production. Payment by an hourly wage is indicative of an employment relationship. The fact that payroll taxes were not withheld from the pay does not, standing alone, establish an independent contractor relationship.
32. It was not shown that any skill or special knowledge was required to perform the work of a polisher. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)
33. The relationship was subject to termination at any time without incurring liability for breach of contract. Jorgo Alla worked at the location of Discover Marble and Granite III, Inc. for a period of approximately two years. These facts reveal the existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control.

The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract.”

34. Discover Marble and Granite III, Inc. is in the business of fabricating countertops. The work performed by Jorgo Alla was an integral and necessary part of the business of Discover Marble and Granite III, Inc. Imaginative Solutions, Inc. and LLT Management, LLC are in the business of providing workers to their clients. Jorgo Alla was a worker who was provided to the client of Imaginative Solutions, Inc. and LLT Management, LLC., which was Discover Marble and Granite III, Inc. Thus, Jorgo Alla was a part of the business of Imaginative Solutions, Inc. and LLT Management, LLC.
35. The Chief Executive Officer of LLT Management, LLC, who was the owner of Imaginative Solutions, Inc. and is the owner of LLT Management, LLC. testified that Jorgo Alla was an employee of LLT Management, LLC. and not an employee of Discover Marble and Granite III, Inc. That testimony is supported by the facts of this case. LLT Management, LLC. exercised some direct control over Jorgo Alla, however, LLT Management, LLC. delegated the responsibility for exercising the majority of the direct control to the client company, Discover Marble and Granite III, Inc.
36. 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.
37. It is concluded that the services performed by Jorgo Alla constitute insured employment. However, Jorgo Alla was not employed by Discover Marble and Granite III, Inc. but by Imaginative Solutions, Inc. prior to July 2009 and by LLT Management, LLC. beginning in July 2009.

Recommendation: It is recommended that the determination dated August 10, 2010, be MODIFIED to reflect that the employer prior to July 2009 was Imaginative Solutions, Inc., and beginning in July 2009 the employer was LLT Management, LLC. As modified the determination holding that Jorgo Alla was an employee rather than an independent contractor is AFFIRMED.

Respectfully submitted on August 12, 2011.



R. O. SMITH, Special Deputy
Office of Appeals