

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2372930
RIMES PROPERTY MANAGEMENT INC
RONALD B RIMES
POST OFFICE BOX 2935
LABELLE FL 33975-2939



**PROTEST OF LIABILITY
DOCKET NO. 2010-26422L**

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 December 9, 2009.

After due notice to the parties, a telephone hearing was held on September 2, 2010. The Petitioner was represented by its attorney. Erin Houck-Toll, Ronald Rimes, Susan Rimes, Bruce Rimes Jr., Craig Davidson, Robert Ford, Larry Spencer, and Brandon Rimes testified as witnesses for the Petitioner. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Tax Auditor 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 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.

Findings of Fact:

1. The Petitioner is a corporation that operates a business which has contracted to maintain homes that are in foreclosure in a geographical area comprising approximately one-half of Florida. The Petitioner’s office is located in Labelle Florida, and a number of acknowledged employees work in the Petitioner’s office. The Petitioner has contracted with other companies and individuals to

perform the actual property maintenance. Those companies and individuals are classified by the Petitioner as independent contractors and at the end of the year the Petitioner reports the payments made to the independent contractors to the Internal Revenue Service on Forms 1099-MISC.

2. The individuals and companies contracted by the Petitioner to maintain the properties performed work which includes among other things, maintaining lawns, installing locks, boarding windows and doors, and doing evictions. Those individuals and companies were offered the jobs and had the right to accept or refuse. If they accepted a job a work order was issued by the Petitioner. The Petitioner did not tell them when to perform the work or how to perform the work. They provided their own equipment and were responsible for the operating expenses. They were not required to personally perform the work and were free to hire others to perform the work for them. Some of the contractors had their own employees. Some of the contractors performed services for companies other than the Petitioner. The contractors were required to take a photograph of the property before the work was performed and after the work was performed as proof that the work was performed. When the work was completed the contractors would submit an invoice to the Petitioner for the amount that the contractor charged the Petitioner for the work performed.
3. The Petitioner issued a Form 1099-MISC to each of the independent contractors who provided property maintenance services. Individuals who performed property maintenance services to the Petitioner include Robbie White, Scott Berry, Steven Orengo, Ronald Rimes Jr., Royel Salsivar, Robert Ford, Robert Rhoden, Patrick O'Bannon, Perry Whaley, Nathan Pratt, Nathan Mason, Mike Jones, Mike Spencer, Matt Davidson, Matt Whidden, Larry Spencer, Kyle Davidson, Juan Madrid, Kerry Collins, Fredrick Davis, Jeff Castelucci, Denny Spencer, Craig Davidson, Danny Albright, Brett Davidson, Brian Oatswall, and Brandon Rimes. In addition there were a few 1099s that were issued to corporate entities.
4. In 2007 and 2008 the Petitioner hired an individual, Trish Spencer, to run the Petitioner's company. Trish Spencer did not have her own business. Trish Spencer did not write payroll checks to herself from the Petitioner's account, she wrote checks to "cash" and then cashed the checks. For the year of 2008 the Petitioner totaled the amount of the checks received by Trish Spencer and created a Form 1099 in that amount. On August 17, 2009, The Petitioner regained control of the company and discovered that Trish Spencer had also embezzled cash from the company by paying her own personal expenses from the Petitioner's bank account. The State Attorney declined to prosecute Trish Spencer and the Petitioner issued a second Form 1099 for the amount that had been embezzled from the company. The two 1099 forms issued to Trish Spencer for 2008 were in the total amount of \$43,005.82.
5. The Petitioner also discovered that cash payments had been made to acknowledged employees. W-2 forms were issued to the employees reporting the wages paid to the employees. The Petitioner issued 1099 forms to the same employees to report the cash payments which they had received. The 1099 forms issued to employees were issued to Mona O'Bannon in the amount of \$8,280.25, Tiffany Berry in the amount of \$7,180.92, Krystal McClymont-Jacobs, in the amount of \$9,160.87, Jeffrey Green in the amount of \$11,997.59, Diana Blakely in the amount of \$1,456.96, and Amber Furman in the amount of \$2,062.56.
6. On July 27, 2009, the Petitioner filed a Power of Attorney with the Florida Department of Revenue authorizing the Petitioner's accountant to represent the Petitioner in tax matters before the Department of Revenue. The Power of Attorney listed the Petitioner's address as P. O. Box 2935, Labelle, Florida, a mailing address which the Petitioner has used for over ten years.
7. In October 2009, the Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the year of 2008 to ensure compliance with the Unemployment Compensation Law. A letter was mailed to the Petitioner to inform the Petitioner of the audit. The letter was mailed to an incorrect P.O. Box address and was returned by the Post Office. The

Department of Revenue re-mailed the letter to a street address which the Department believed was the Petitioner's physical location. That address was the address of the ex-wife of the Petitioner's president. The Petitioner's president had never resided at that address and the Petitioner had never used that address as a mailing address.

8. The audit was conducted by a Tax Auditor from the Department of Revenue Fort Myers Service Center and was conducted at the office of the Petitioner's accountant. During the course of the audit the Tax Auditor examined each Form 1099-MISC filed by the Petitioner and each Form W-2 filed by the Petitioner for 2008.
9. The Tax Auditor discovered the two 1099s issued to Trish Spencer. The Tax Auditor also discovered that some of the Petitioner's employees had received a Form W-2 and had also received a Form 1099-MISC. The Petitioner's accountant explained the circumstances to the Tax Auditor that had resulted in multiple forms being issued to workers.
10. The Tax Auditor requested documentation from the accountant, such as invoices submitted by the maintenance service providers, independent contractor agreements, or proof that the maintenance service providers had occupational licenses or liability insurance. The accountant did not provide the documentary proof as requested and did not contact the Petitioner to obtain the requested documents.
11. The Tax Auditor completed the audit without contacting the Petitioner directly. The Tax Auditor concluded that each individual to whom the Petitioner issued a Form 1099-MISC was an employee of the Petitioner because the work performed was in the course of the Employer's regular trade. The Tax Auditor concluded that the 1099s issued to corporate entities were not for employment. The Tax Auditor provided the audit results to the Tallahassee office of the Department of Revenue.
12. On or before December 9, 2009, the Tallahassee office of the Department of Revenue mailed a *Notice of Proposed Assessment* to the office of the Petitioner's accountant. The Petitioner did not receive a *Notice of Proposed Assessment* by mail and was not aware of the audit results until the accountant provided the *Notice of Proposed Assessment* to the Petitioner at a later date.
13. Among other things the *Notice of Proposed Assessment* advises "If you do not agree with the proposed assessment in this Notice, you may seek a review of the assessment with the Department of Revenue Compliance Support Process, at the address listed below. Your protest must be filed with the Department within 20 days of the 'Mailed on or Before' date shown above. The protest must include a copy of this notice, contain a statement of all disputed issues, and a statement of the rules or statutes you believe warrant a reversal or modification of the assessment. Rule 60BB-2.035(2) provides a complete listing of the items that must be contained in the protest. If we cannot resolve the issue we will forward your letter of protest, the assessment, and the relevant documentation to the Office of Appeals, Special Deputy Section, in the Agency for Workforce Innovation, for resolution. Based on the hearing with the Office of Appeals, Special Deputy Section, the Agency for Workforce Innovation will file and issue a Final Order."
14. By mail postmarked December 17, 2009, the Petitioner's attorney filed a written protest with the Fort Myers Service Center and sent a copy of the letter of protest to the Department of Revenue Compliance Support Process located in Tallahassee. The protest was in regard to a *Notice of Final Assessment* mailed on or before December 12, 2009, and a *Notice of Final Assessment* mailed on or before December 16, 2009. Both Notices were mailed to an incorrect address. In the protest letter the attorney advised the Department of Revenue that the Petitioner's correct mailing address is P.O. Box 2935. The Tax Auditor received the protest letter and placed the letter in the audit file. The Tax Auditor did not forward the letter to be processed as an appeal. The Tax Auditor did not correct the Petitioner's mailing address because the Tax Auditor was not authorized to correct the mailing address.

15. During the latter part of December 2009 the Petitioner's accountant provided the *Notice of Proposed Assessment* to the Petitioner. On December 31, 2009, the Petitioner's attorney wrote a protest letter again pointing out that the Notice was not mailed to the Petitioner's correct mailing address. The December 31 protest letter was sent by mail postmarked January 4, 2010.

Conclusions of Law:

16. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:

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.

17. Rule 60BB-2.023(1), Florida Administrative Code, provides in pertinent part that it is the responsibility of each employing unit to maintain a current address of record with the Department.
18. Rule 60BB-2.022(1), Florida Administrative Code, defines "Address of Record" for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Agency, and to which the Agency shall mail correspondence. (emphasis supplied)
19. The *Notice of Proposed Assessment*, which is indicated to have been mailed on or before December 9, 2009, was not mailed to the Petitioner's official address of record. The Petitioner's attorney filed a letter of protest by mail on December 17, 2009. The Department of Revenue did not process the letter as a protest but merely placed the letter into a file. Thus, the Petitioner's appeal was timely filed.
20. 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.
21. 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).
22. 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).
23. 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.
24. 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.
25. The maintenance service providers in this case performed the work per a work order and submitted a bill or invoice for payment when the work was completed. They were paid by the job rather than by time worked. The providers determined when and how to perform the work, used their own equipment and were responsible for their own expenses of operation. They performed services for other companies or individuals and were not required to personally perform the work.
26. 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.
27. It is concluded that the maintenance service providers performed services for the Petitioner as independent contractors and not as the Petitioner's employees.
28. Trish Spencer was hired by the Petitioner to run the Petitioner's business in the Petitioner's absence. Since Trish Spencer was operating the Petitioner's business, Trish Spencer clearly performed services as an employee of the Petitioner.
29. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.
30. The money which Trish Spencer received from the Petitioner was for the services which she performed in operating the Petitioner's business. Therefore, it is concluded that Trish Spencer received wages in the amount of \$43,005.82 during 2008.
31. The Petitioner does not dispute that the workers who were issued W-2 forms were the Petitioner's employees. The additional cash which was paid to the employees was remuneration for services performed. The Petitioner does not dispute the fact that the cash payments made to the employees are wages.

Recommendation: It is recommended that the determination dated December 9, 2009, be MODIFIED. The services provided by the maintenance service providers as set forth in the recommended order do not constitute employment.

Respectfully submitted on September 15, 2010.



R. O. SMITH, Special Deputy
Office of Appeals