AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2579761
ALB TRUCKING INC
7287 W BEAVER ST
JACKSONVILLE FL 32254-2767

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

PROTEST OF LIABILITY
DOCKET NO. 2011-52132L

O R D E R

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 April 6, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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. - 2579761
ALB TRUCKING INC
ATTN: FRANK TONUZI
7287 W BEAVER ST
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PROTEST OF LIABILITY
DOCKET NO. 2011-52132L

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 April 6, 2011.

After due notice to the parties, a telephone hearing was held on June 16, 2011. The Petitioner, represented by the Operations Manager, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party appeared and testified.

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 working as drivers 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.

Findings of Fact:

1. The Petitioner is a trucking company which owns trucks and trailers that are used to transport freight. The Petitioner also uses some owner operators to transport freight using trucks that are the property of the owner operators.
2. The Joined Party was hired by the Petitioner in approximately June 2008 to drive a truck owned by the Petitioner. The Joined Party was an employee of the Petitioner and was paid by the mile. The Petitioner withheld payroll taxes from the pay and at the end of each year the Petitioner reported the Joined Party's earnings on Form W-2 as wages.

3. The Petitioner was responsible for paying for the fuel, maintenance, repairs, insurance, and licenses for the truck.
4. The Petitioner told the Joined Party when to pick up the loads, where to pick up the loads, when to deliver the loads, and where to deliver the loads.
5. The Joined Party was prohibited from working for another trucking company while working for the Petitioner. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.
6. The Joined Party was required to attend periodic safety meetings conducted by the Petitioner.
7. The Joined Party did not have any investment in a business, did not have any occupational or business license, did not have business liability insurance, and did not offer services to the general public.
8. Either the Petitioner or the Joined Party were free to terminate the relationship at any time without incurring liability for breach of contract.
9. Effective October 1, 2009, the Petitioner informed the Joined Party in writing that "all drivers will fall under the 1099-MISC for tax purposes. Taxes will no longer be taken out of your weekly checks. Your earnings will be reported to the IRS at the end of each year on a 1099 form. Please sign below signifying that you have received this notification and this record will be placed into your personnel file for reference." The Joined Party was verbally informed that he was required to sign the notification and that if he did not he would no longer have a job with the Petitioner.
10. After the Joined Party signed the notification on September 27, 2009, no changes occurred in the terms and conditions under which the Joined Party performed the work except that the Petitioner discontinued withholding payroll taxes from the pay.
11. The Joined Party last worked for the Petitioner in approximately July 2010.
12. The Joined Party filed a claim for unemployment compensation benefits effective January 9, 2011. When the Joined Party did not receive credit for his earnings with the Petitioner for the period of time after October 1, 2009, a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee. On April 6, 2011, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as drivers are the Petitioner's employees retroactive to October 1, 2009. The Petitioner filed a protest by letter dated April 13, 2011.

Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as drivers 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.
14. 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).
15. 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).

16. 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.

17. 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.

18. 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.

19. 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.

20. The Joined Party was hired to be an employee of the Petitioner in June 2008. Effective October 1, 2009, the Petitioner unilaterally reclassified the Joined Party and all other drivers from employees to independent contractors. The reclassification was forced upon the Joined Party and the evidence does not show that there was a meeting of the minds. The Joined Party continued to work under the exact same terms and conditions with the exception that the Petitioner discontinued withhold payroll taxes from the pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. The Petitioner continued to provide the truck and trailer and continued to be responsible for all of the expenses of operation. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business. The Petitioner controlled what work was performed, when it was performed, and how it was performed.

21. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work

which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

22. In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), the Florida Supreme Court addressed a similar 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.

23. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals working as drivers constitute insured employment.

Recommendation: It is recommended that the determination dated April 6, 2011, be AFFIRMED.

Respectfully submitted on June 17, 2011.

R. O. SMITH, Special Deputy
Office of Appeals