AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2781231
LASERSHIP INC
1912 WOODFORD RD
VIENNA VA 22182-3700

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

PROTEST OF LIABILITY
DOCKET NO. 2010-56826L

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 October 15, 2008, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 2010**.

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. - 2781231
LASERSHIP INC
1912 WOODFORD RD
VIENNA VA 22182-3700

PROTEST OF LIABILITY
DOCKET NO. 2010-56826L

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 15, 2008.

After due notice to the parties, a telephone hearing was held on August 16, 2010. The Petitioner was represented by its tax representative. The Petitioner's General Manager of the Miami Branch testified as a witness. The Respondent was represented by a Department of Revenue Area Service Center Manager.

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 transportation driver and warehouse 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 Virginia corporation which operates a branch office in Miami to provide warehouse and delivery services for the Petitioner's clients. The delivery services are performed by individuals who are classified by the Petitioner as independent contractors.
2. On July 30, 2007, the Joined Party entered into an *Independent Contractor Agreement* with the Petitioner to work as a driver on a nonexclusive basis.
3. The Agreement provides that the Joined Party will provide the services as an independent contractor and not as an employee of the Petitioner and that the Joined Party is not entitled to receive the benefits provided to the Petitioner's employees.

4. The Agreement states that the Joined Party has the right to work for other companies and to make the Joined Party's services available to the general public. The Agreement states that the Joined Party has the right to accept or reject any work offered by the Petitioner, that the Joined Party is not required to personally perform the work, and that the Joined Party may hire others to perform the work for him.

5. The Agreement states that the Joined Party is responsible for providing the vehicle which the Joined Party will use to perform the delivery services. The Joined Party was responsible for all costs associated with the Joined Party's vehicle including, but not limited to, fuel, repair, maintenance, toll expenses, parking, traffic tickets, and insurance. The Joined Party was responsible for all other equipment, tools, materials, and supplies that might be needed to perform the work.

6. The Agreement provides that the Petitioner will pay the Joined Party forty-five percent of the gross receipts generated by the Joined Party's completed work or will pay the Joined Party a mutually agreed upon price per job.

7. The Agreement was for the term of one year with renewal by written mutual assent of both parties. Either party could terminate the Agreement with thirty days written notice.

8. The Joined Party also entered into an *Equipment Lease* with the Petitioner in order to lease a two-way radio from the Petitioner. The lease payment was in the amount of $22.50 per week to be paid in biweekly installments.

9. The Petitioner did not provide any training to the Joined Party.

10. Whenever the Petitioner offered work to the Joined Party the Petitioner provided information concerning the pickup location, the delivery location, and the time frame specified by the customer. The Joined Party had the right to accept or reject the work offer. If the Joined Party accepted the assignment the Joined Party determined the route that he would drive to complete the delivery.

11. The Joined Party had an accident during his first week of work and he notified the Petitioner that he was not able to drive his own vehicle due to the damage. The Joined Party notified the Petitioner that he had borrowed a vehicle from a family member but that his availability to accept assignments was limited. After working for the Petitioner for a period of approximately three weeks the Joined Party notified the Petitioner that he had accepted work elsewhere.

12. The Petitioner paid the Joined Party and the other drivers on a biweekly basis. No taxes were withheld from the pay and at the end of the year the Petitioner reported the earnings of each driver to the Internal Revenue Service on Form 1099-MISC.

Conclusions of Law:

13. 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.

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 "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).

21. The agreement in this case, the *Independent Contractor Agreement*, sets forth the extent of control which the Petitioner had the right to exercise over the details of the work. The Agreement states that the Joined Party was free to perform services for others, free to hire others to perform the work, and free to accept or reject any work. The Agreement does not indicate that the Petitioner had the right to exercise any control over the means and manner that the Joined Party used to perform the work.

22. The Joined Party provided the vehicle and any equipment, tools, materials, and supplies that were needed to perform the work. The Joined Party was responsible for all expenses in connection with the delivery services which the Joined Party provided. These facts reveal that the Joined Party had an investment that was at risk.

23. The Agreement was for a specified period of time, one year, with the right to renew with the assent of both parties. The Agreement provides that either party could terminate the Agreement prior to the end of the term with thirty days written notice. These facts reveal that the relationship was a contractual relationship rather than an at-will relationship subject to termination at any time without prior notice.

24. The Joined Party's earnings were not based on time worked. The earnings were based on either the Joined Party's production or by the job. No payroll taxes were withheld from the pay and the Joined Party was not entitled to the fringe benefits which the Petitioner provided to the Petitioner's employees.

25. The words found in a contract are to be given meaning and are the best possible evidence of the intent of the contracting parties. Jacobs v. Petrino, 351 So.2d 1036 (Fla. 4th DCA 1976). The Florida Supreme Court held that in determining the status of a working relationship, the agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

26. In Kearns v. Dept. of Labor and Employment Security, 680 So. 2d 619 (Fla. 3rd DCA 1996) it was held that a secretary who worked in the office of an attorney was an independent contractor. The court placed emphasis on the fact that there was an express understanding between the parties that the secretary was an independent contractor, that the secretary provided her own equipment to perform the work, had the right to determine when or if she worked, and was free to perform work for others. Thus, as in Kearns, it is concluded that the Joined Party was an independent contractor while performing services for the Petitioner.

Recommendation: It is recommended that the determination dated October 15, 2008, be REVERSED.

Respectfully submitted on August 17, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2781231
LASERSHIP INC
1912 WOODFORD RD
VIENNA VA 22182-3700

PROTEST OF LIABILITY
DOCKET NO. 2008-124401L

RESPONDENT:
State of Florida
AGENCY FOR WORKFORCE INNOVATION
c/o Department of Revenue

REMAND ORDER

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as transportation drivers/warehouse workers constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

A telephone hearing was held on February 10, 2009. The Petitioner, Joined Party, and Respondent appeared and testified at the hearing. A recommended order in favor of the Petitioner was issued by the Special Deputy on July 1, 2009. No parties filed exceptions to the recommended order. An Agency review of the hearing record revealed that procedural error required remanding of the case. The Agency issued a remand order on October 1, 2009, in order to allow cross-examination of witnesses by the Joined Party and rebuttal testimony from the parties as appropriate.

A second telephone hearing was held on November 10, 2009. The Petitioner, Joined Party, and Respondent appeared for the hearing. A recommended order in favor of the Petitioner was issued by the Special Deputy on December 4, 2009. No parties filed exceptions to the recommended order. This subsequent hearing was also subject to review by the Agency. This Order is the result of that Agency review.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or

> interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

A complete review of the record establishes that the Special Deputy did not comply with the remand order issued by the Agency and did not allow any party to provide rebuttal testimony during the hearing held on November 10, 2009. Section 120.57(1)(l), Florida Statutes, provides that the Agency may reject findings of fact when the Agency determines from a review of a hearing record that the findings are not based on competent substantial evidence or that the proceedings on which findings were based did not comply with essential requirements of law. Section 120.57(1)(b), Florida Statutes, further provides that all parties must have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination, and submit rebuttal evidence. The Special Deputy's failure to allow all parties an opportunity to provide additional or rebuttal evidence during both hearings was a violation of section 120.57(1)(b), Florida Statutes, and provides a basis for rejecting the Special Deputy's findings under section 120.57(1)(l), Florida Statutes, since the hearings did not comply with the essential requirements of law.

A review of the entire hearing record also reveals that the Special Deputy failed to ensure that the Joined Party was provided adequate translation services for both hearings. Specifically, the Special Deputy did not inform all interpreters that they were being recorded, did not place all interpreters under oath, and did not ensure that the interpreters translated all testimony completely and accurately. During the November 10, 2009, hearing, the Special Deputy did not act in response to the Petitioner's objections that the interpreter translating testimony inaccurately. These procedural errors, along with the procedural errors addressed above, constitute a denial of the Joined Party's due process right to be heard. In the face of the recurring procedural errors present in both hearings conducted by the Special Deputy, the hearing must be remanded to preserve the rights of all parties involved in the case.

In consideration thereof, it is ORDERED that the case is REMANDED for a hearing de novo. The definition of "de novo" is "anew" or "from the beginning," and a "hearing de novo" is a new hearing. The case will now be assigned to another special deputy, and a new hearing will be scheduled. The

parties should receive written notice that the hearing is being held de novo, that the hearing will be conducted as if the previous hearings on the issue did not take place, and that the parties should be prepared to submit all testimony and evidence that they wish to have considered at the time of the hearing. All witnesses should appear on behalf of the parties for the next hearing since the prior testimony of witnesses cannot considered by the special deputy. An interpreter other than the interpreter used in the November 10, 2009, hearing will be provided for the Joined Party by the Agency without cost to the Joined Party. Upon the conclusion of the next hearing, the Special Deputy will issue another recommended order based only on the new hearing record.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 2010**.

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

PETITIONER:
Employer Account No. - 2781231
LASERSHIP INC
1912 WOODFORD RD
VIENNA VA 22182-3700

PROTEST OF LIABILITY
DOCKET NO. 2008-124401L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
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 15, 2008.

After due notice to both parties, a telephone hearing was held on February 10, 2009. The Petitioner was represented by an unemployment services representative. The Respondent was represented by a Revenue Administrator from the Department of Revenue. The Joined Party represented himself.

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/or Conclusions of Law were not received.

Issue: Whether services performed for the Petitioner by the Joined Party and other individuals working as transportation driver/warehouse workers, 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.

Case History: A telephone hearing was held on February 10, 2009. The Petitioner, Joined Party, and Respondent appeared. A Recommended Order was issued on July 1, 2009. Subsequently, the Agency issued a Remand Order on October 1, 2009 in order to give the Joined Party the opportunity to cross-examine other parties' witnesses. After due notice to both parties, a supplemental hearing was scheduled on November 10, 2009. The Petitioner, Joined Party, and Respondent appeared. The Joined Party was given the opportunity to cross examine other parties' witnesses.

Findings of Fact:

1. The Petitioner is a corporation in business in Florida as a transportation broker since 2007. The Petitioner provides drivers for over 150 companies. The Joined Party was one of approximately 20 drivers providing the work under the same terms and conditions. The Petitioner would inform drivers through a dispatcher about potential work through Nextel

phone. Each driver was required to have their own Nextel phone. The Joined Party and other drivers rented the Nextel phones from the Petitioner if they did not have one of their own. The drivers would respond to the Petitioner to accept the jobs as they were available. At the beginning of the association, the Joined Party signed an independent contractor agreement on July 30, 2007.

2. Provided in the agreement signed on July 30, 2007, the Joined Party was free to accept jobs from other transportation companies. The Petitioner provided potential jobs and the Joined Party was free to accept or reject work at his own discretion. The Joined Party determined the route he would take to complete deliveries. The Joined Party provided his own vehicle, gasoline, was required to provide his own liability insurance, and was responsible for servicing the vehicle he used to make deliveries.

3. Also provided in the agreement, the Joined Party was free to hire other drivers to complete deliveries and did not have to personally render services. Either party was allowed to terminate the agreement by providing 30 days prior notice. The Joined Party was not required to have any specific company logo on his vehicle.

4. The Petitioner did not monitor the Joined Party's performance and only knew how the Joined Party was performing through customer feedback. The Petitioner did not provide any workers' compensation coverage to the Joined Party. The Joined Party was paid his commissions through a payroll company that had a contract with the Petitioner.

5. The Joined Party had no set hours with the Petitioner. The Joined Party was paid 50% of the customers' invoice for the delivery. The Petitioner set the commission rate through "industry standard." The Petitioner determined the fee charged to customers for delivery services. The Joined Party was required to provide the invoices by 12:00 p.m. the day after performing the services or incur a $10.00 penalty. The Joined Party and other drivers were required to wear the Petitioner's logo on their shirts when making deliveries. The Joined Party often picked up payroll or transported pharmaceuticals. The Joined Party was required to repair any problems with the deliveries or transport without additional compensation.

6. The Joined Party stopped working for the Petitioner around October 2007. The Petitioner did not pay the Joined Party any type of bonus, holiday pay, or sick pay. The Joined Party received a Form 1099 for each year worked.

Conclusions of Law:

7. The issue in this case, whether services performed for the Petitioner by transportation driver/warehouse workers 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.

8. 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).

9. 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); Mangarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So2d 1061 (Fla. 2d DCA 1987).

10. 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.

11. 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.

12. 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.

13. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

14. The facts reveal some elements of independence and some elements of employment in this relationship. Factors pointing toward an employment relationship include that the Petitioner required the Joined Party and drivers to have Nextel phones. Additionally, the Petitioner set the prices charged for delivery services and the commission rate the Joined Party would be paid. The Petitioner established how the Joined Party would be paid, through invoice and provided for a penalty if the invoices were turned in late. The Joined Party and other drivers were required to wear a company logo on their shirt. This was for identification purposes as they were receiving payroll information from customers and pharmaceuticals. However, significant factors of independence in the relationship outweigh the factors of employment. The Petitioner did not set days or times when the Joined Party was to report to work. The Joined Party could accept or decline work as he chose. The Joined Party provided his own vehicle, gasoline, vehicle maintenance and vehicle insurance. The Joined Party signed an independent contractor agreement at the beginning of the relationship, indicating a willingness to enter into a contractor relationship. The Joined Party received a Form 1099 for each year worked. The Joined Party was free to work elsewhere. The Joined Party received no bonus,

vacation or sick pay and was solely responsible for any losses incurred in the scope of making deliveries for the Petitioner.

15. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof is on the protesting party to establish by a preponderance of the evidence that the determination was in error. The Petitioner demonstrated by a preponderance of the evidence that the Joined Party and other transportation driver/warehouse workers working under the same terms and conditions were independent contractors. In view of the evidence presented, it is concluded that the Petitioner met this burden.

Recommendation: It is recommended that the determination dated October 15, 2008, be modified to reflect the class of workers as transportation drivers. It is further recommended that as modified, the determination dated October 15, 2008 be REVERSED.

Respectfully submitted on December 4, 2009.

MAGNUS HINES III, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2781231
LASERSHIP INC
1912 WOODFORD RD
VIENNA VA 22182-3700

PROTEST OF LIABILITY
DOCKET NO. 2008-124401L

RESPONDENT:
State of Florida
AGENCY FOR WORKFORCE INNOVATION
c/o Department of Revenue

REMAND ORDER

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals working as transportation/driver and warehouse workers, 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.

A complete review of the hearing record establishes that the case must be remanded due to procedural error. Section 120.57(1)(l) of the Florida Statutes provides that the Agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Section 120.57(1)(b) of the Florida Statutes also provides that all parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. The record reflects that the Joined Party was not given an opportunity to cross-examine the testimony of all witnesses. The failure to comply with Section 120.57(1)(b), Florida Statutes,

is a failure to comply with the essential requirements of law and requires remanding of the case for further proceedings under Section 120.57(1)(l), Florida Statutes.

In consideration thereof, it is ORDERED that the case is remanded to allow the Joined Party the opportunity to cross-examine witnesses and provide rebuttal testimony. The Special Deputy will also allow any further cross-examination and rebuttal testimony as is appropriate from the other parties. Upon conclusion of the hearing, the Special Deputy will issue a new Recommended Order based on the complete record of the hearing.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 2009**.

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

Copies mailed to:
Petitioner
Respondent
Joined Party:

REINALDO BARRETO
6805 WEST 3RD COURT #303
HIALEAH FL 33014

ALACHUA TAX OFFICE
ATTN: JOHN HAMPTON
14107 US HWY 441 #100
ALACHUA FL 32615-6378

DEPARTMENT OF REVENUE
ATTN: ELIZABETH BURNSED
LAKE CITY SERVICE CENTER
1401 US HWY 90 WEST STE 100
LAKE CITY FL 32055

CONSULTECH
ATTN: PAUL ROSANO
176 WASHINGTON AVENUE
ALBANY NY 12210-2304

DEPARTMENT OF REVENUE
ATTN: DENNIS FINKEY - BUILDING G
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399-0100

AGENCY FOR WORKFORCE INNOVATION
Office of Appeals
MSC 347 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

PETITIONER:
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PROTEST OF LIABILITY
DOCKET NO. 2008-124401L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
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 15, 2008.

After due notice to both parties, a telephone hearing was held on February 10, 2009. The Petitioner was represented by an unemployment services representative. The Respondent was represented by a Revenue Administrator from the Department of Revenue. The Joined Party represented himself.

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/or Conclusions of Law were not received.

Issue: Whether services performed for the Petitioner by the Joined Party and other individuals working as transportation driver/warehouse workers, 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 corporation in business in Florida as a transportation broker since 2007. The Petitioner provides drivers for over 150 companies. The Joined Party was one of approximately 20 drivers providing the work under the same terms and conditions. The Petitioner would inform drivers through a dispatcher about potential work through Nextel phone. Each driver was required to have their own Nextel phone. The Joined Party and other drivers rented the Nextel phones from the Petitioner if they did not have one of their own. The drivers would respond to the Petitioner to accept the jobs as they were available. At the beginning of the association, the Joined Party signed an independent contractor agreement on July 30, 2007.

2. Provided in the agreement signed on July 30, 2007, the Joined Party was free to accept jobs from other transportation companies. The Petitioner provided potential jobs and the Joined Party was free to accept or reject work at his own discretion. The Joined Party determined the route he would take to complete deliveries. The Joined Party provided his own vehicle, gasoline, was required to provide his own liability insurance, and was responsible for servicing the vehicle he used to make deliveries.

3. Also provided in the agreement, the Joined Party was free to hire other drivers to complete deliveries and did not have to personally render services. Either party was allowed to terminate the agreement by providing 30 days prior notice. The Joined Party was not required to have any specific company logo on his vehicle.

4. The Petitioner did not monitor the Joined Party's performance and only knew how the Joined Party was performing through customer feedback. The Petitioner did not provide any workers' compensation coverage to the Joined Party. The Joined Party was paid his commissions through a payroll company that had a contract with the Petitioner.

5. The Joined Party had no set hours with the Petitioner. The Joined Party was paid 50% of the customers' invoice for the delivery. The Petitioner set the commission rate through "industry standard." The Petitioner determined the fee charged to customers for delivery services. The Joined Party was required to provide the invoices by 12:00 p.m. the day after performing the services or incur a $10.00 penalty. The Joined Party and other drivers were required to wear the Petitioner's logo on their shirts when making deliveries. The Joined Party often picked up payroll or transported pharmaceuticals. The Joined Party was required to repair any problems with the deliveries or transport without additional compensation.

6. The Joined Party stopped working for the Petitioner around October 2007. The Petitioner did not pay the Joined Party any type of bonus, holiday pay, or sick pay. The Joined Party received a Form 1099 for each year worked.

Conclusions of Law:

7. The issue in this case, whether services performed for the Petitioner by transportation driver/warehouse workers 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.

8. 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).

9. 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); Mangarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So2d 1061 (Fla. 2d DCA 1987).

10. 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.

11. 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.

12. 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.

13. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

14. The facts reveal some elements of independence and some elements of employment in this relationship. Factors pointing toward an employment relationship include that the Petitioner required the Joined Party and drivers to have Nextel phones. Additionally, the Petitioner set the prices charged for delivery services and the commission rate the Joined Party would be paid. The Petitioner established how the Joined Party would be paid, through invoice and provided for a penalty if the invoices were turned in late. The Joined Party and other drivers were required to wear a company logo on their shirt. This was for identification purposes as they were receiving payroll information from customers and pharmaceuticals. However, significant factors of independence in the relationship outweigh the factors of employment. The Petitioner did not set days or times when the Joined Party was to report to work. The Joined Party could accept or decline work as he chose. The Joined Party provided his own vehicle, gasoline, vehicle maintenance and vehicle insurance. The Joined Party signed an independent contractor agreement at the beginning of the relationship, indicating a willingness to enter into a contractor relationship. The Joined Party received a Form 1099 for each year worked. The Joined Party was free to work elsewhere. The Joined Party received no bonus,

vacation or sick pay and was solely responsible for any losses incurred in the scope of making deliveries for the Petitioner.

15. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof is on the protesting party to establish by a preponderance of the evidence that the determination was in error. The Petitioner demonstrated by a preponderance of the evidence that the Joined Party and other transportation driver/warehouse workers working under the same terms and conditions were independent contractors. In view of the evidence presented, it is concluded that the Petitioner met this burden.

Recommendation: It is recommended that the determination dated October 15, 2008, be modified to reflect the class of workers as transportation drivers. As modified, the determination dated October 15, 2008 is REVERSED.

Respectfully submitted on July 1, 2009.

MAGNUS HINES III, Special Deputy
Office of Appeals