AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2886742
CARIBE TRUCKING EXPRESS LLC
1810 SW 103RD AVENUE
MIAMI FL 33165-7318

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

PROTEST OF LIABILITY
DOCKET NO. 2009-117468L

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 June 10, 2009, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

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BEATRIZ CUEVAS
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MIAMI FL 33165-7318

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RESPONDENT:
State of Florida
Agency for Workforce Innovation
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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 June 10, 2009.

After due notice to the parties, a telephone hearing was held on May 13, 2010. The Petitioner, represented by its accountant, appeared and testified. An office secretary testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 working as a truck driver 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. Caribe Trucking Express, Inc. is a corporation that operated a trucking business until September 30, 2008, when it merged with the Petitioner, Caribe Trucking Express, LLC. The Joined Party began working for the corporation as a truck driver on February 19, 2008.
2. The corporation required the Joined Party to sign an *Independent Contractor's Equipment Lease & Service Agreement.* The Agreement states that the Joined Party is an independent contractor and not an employee of the corporation.

3. Although the Joined Party signed the *Independent Contractor's Equipment Lease & Service Agreement* he did not lease the equipment from the corporation and he did not work as an owner-operator. He was classified as a company driver and he was assigned to drive a company owned truck. The corporation was responsible for the fuel, maintenance, repairs, insurance, license, and all other costs of operation.

4. Before each trip the corporation gave the Joined Party an advance to cover any expenses which the Joined Party might have on the road. The Joined Party was not responsible for any expenses in connection with driving the truck.

5. The dispatcher told the Joined Party where to pick up the freight and where to deliver the freight. Each trip was routed for the Joined Party by the dispatcher and the Joined Party was not allowed to deviate from the assigned route for any reason. The Joined Party was required to contact the dispatcher every other morning at a designated time. The Joined Party was required to notify the dispatcher when the Joined Party made the delivery.

6. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him. The Joined Party was prohibited from using the truck to attend to personal business. The Joined Party was prohibited from performing work for a competitor.

7. The corporation assigned the trips to the Joined Party with the understanding that the Joined Party had the right to refuse any assigned trip. On one occasion the Joined Party refused to accept an assigned trip because he had just returned from a trip. The corporation punished the Joined Party for refusing the work assignment by not allowing the Joined Party to drive for one week.

8. The corporation paid the Joined Party at the rate of thirty-three cents per mile. The corporation did not withhold payroll taxes from the pay. The corporation did not pay unemployment compensation taxes on the Joined Party's earnings.

9. Either party had the right to terminate the relationship at any time without incurring liability.

10. Beginning October 1, 2008, the Joined Party worked for the Petitioner Caribe Trucking Express, LLC under the same terms and conditions.

11. On November 3, 2008, the Petitioner informed the Joined Party that the Joined Party's services were no longer required.

12. At the end of 2008 the corporation reported the Joined Party's earnings from the corporation to the Internal Revenue Service on Form 1099-MISC. The Petitioner filed a separate Form 1099-MISC to report the Joined Party's earnings with the LLC to the Internal Revenue Service as nonemployee compensation.

13. The unemployment compensation tax experience rating records of the corporation were transferred to the Petitioner effective October 1, 2008.

14. The Joined Party filed a claim for unemployment compensation benefits effective May 3, 2009. His filing on that date established a base period consisting of the calendar year 2008. The Joined Party did not receive credit for his earnings from either the corporation or from the LLC.

15. The Joined Party filed a *Request for Reconsideration of Monetary Determination* and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

16. On June 10, 2009, the Department of Revenue issued a determination holding that the Joined Party was an employee of the Petitioner, Caribe Trucking Express, LLC, retroactive to October 1, 2008. Caribe Trucking Express, LLC filed a timely protest.

17. The unemployment compensation tax reports filed by Caribe Trucking Express, Inc. for the first and second quarters 2008 have been amended to include the Joined Party's earnings. No earnings

were reported for the Joined Party by either the corporation or by the LLC for the third quarter 2008.

Conclusions of Law:

18. The issue in this case, whether services performed by the Joined Party for the Petitioner, Caribe Trucking Express, LLC., 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.

19. 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).

20. 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).

21. 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.

22. 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.

23. 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.

24. 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.

25. The Joined Party performed services as a truck driver for Caribe Trucking Express, LLC under the same terms and conditions as when he performed services for Caribe Trucking Express, Inc. He worked under the same *Independent Contractor's Equipment Lease & Service Agreement.* The written agreement states that the Joined Party is an independent contractor.

26. 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.

27. The Petitioner's representative and primary witness, the Petitioner's accountant, testified that his only connection with the Petitioner is that he works for an accounting firm that has prepared the quarterly and yearend tax reports for both the corporation and the LLC. The accountant is not directly involved in the daily operation of the Petitioner's business and his testimony is based on what he has been told by others.

28. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Fla. Statutes.

29. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

30. The Petitioner's evidence is not sufficient to establish that the determination of the Department of Revenue holding that the services performed for Caribe Trucking Express, LLC by the Joined Party retroactive to October 1, 2008, constitute insured employment, is in error.

Recommendation: It is recommended that the determination dated June 10, 2009, be AFFIRMED.

Respectfully submitted on May 19, 2010.

R. O. SMITH, Special Deputy
Office of Appeals