**AGENCY FOR WORKFORCE INNOVATION**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 2919158
MCKNIGHT TRANSPORTS LLC
2611 OLD SOUTH DRIVE
JONESBORO GA 30236-2812

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2009-155796L**

**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 September 25, 2009, is MODIFIED to reflect a retroactive date of November 3, 2007. It is also ORDERED that the determination is AFFIRMED as modified.

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

**PETITIONER:**
Employer Account No. - 2919158
MCKNIGHT TRANSPORTS LLC
JAMES H MCKNIGHT JR
2611 OLD SOUTH DRIVE
JONESBORO GA 30236-2812

**PROTEST OF LIABILITY**
**DOCKET NO. 2009-155796L**

**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 September 25, 2009.

After due notice to the parties, a telephone hearing was held on July 8, 2010. The Petitioner, represented by its president, appeared and testified. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Revenue Specialist III testified as a witness. 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 truck 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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

**Findings of Fact:**

1. The Petitioner is a limited liability company which was formed to deliver plastic bottles from a manufacturing plant in Jacksonville, Florida, to a company which manufactures vitamins in Deerfield Beach, Florida. The plastic bottle manufacturing plant is the Petitioner's only client.

2. The Petitioner transports the bottles by truck. Initially, the Petitioner's president was the truck driver. The Petitioner's president developed sciatica and was not able to drive the truck. On or about November 3, 2007, a friend of the Petitioner's president began driving the Petitioner's truck to deliver the bottles. The Petitioner paid the friend in cash at the rate of $200 per trip. During the fourth quarter 2007 the Petitioner paid the driver more than $1,500.

3. In 2008 the Joined Party was referred to the Petitioner for the position of truck driver. The Petitioner interviewed the Joined Party and told the Joined Party exactly what the Joined Party would be required to do. The Petitioner told the Joined Party that the Joined Party would be required to work Monday through Friday and some Saturdays, that the bottles had to be delivered to Deerfield Beach by 7 AM each day, that the Joined Party would be paid $200 per trip, that he would be paid in cash, and that he would be paid weekly. The Petitioner went on a short test drive with the Joined Party to ensure that the Joined Party was able to drive the Petitioner's truck. The Petitioner then had the Joined Party drug tested.

4. The Joined Party began work on September 2, 2008. The Petitioner and the Joined Party did not enter into any written agreement or contract.

5. Both the Petitioner's president and the Joined Party considered the Joined Party to be the Petitioner's employee.

6. The Joined Party drove the Petitioner's truck to deliver the bottles. The Petitioner was responsible for the fuel, maintenance, repairs, insurance and all other expenses of operation. The Petitioner provided the Joined Party with a fuel card for the purchase of fuel. The Joined Party did not have any expenses in connection with the work.

7. The Joined Party towed the Petitioner's trailer with the Petitioner's truck. At the end of each trip the Joined Party would drop-off the trailer at the plastic bottle manufacturer and would drive the Petitioner's truck to the Joined Party's home. The bottle manufacturer would load the trailer overnight and contact the Joined Party when the trailer was loaded. The Joined Party would then pick up the loaded trailer so he could deliver the load in Deerfield Beach before 7 AM.

8. The Joined Party was required to personally drive the truck. He could not hire others to drive the truck for him.

9. It is a four and one-half to five hour drive from Jacksonville to Deerfield Beach, a distance of 324 miles. The Joined Party was not allowed to deviate from the prescribed route. The Petitioner monitored the mileage and the fuel consumption to verify that the Joined Party did not deviate from the route.

10. Initially, the Joined Party made the daily trips by himself. At some point in time the Joined Party requested permission to take his wife with him as a passenger and the request was granted. The Petitioner added passenger insurance to the insurance policy so that the Joined Party's wife would be covered in case of an accident.

11. The Joined Party was required to report any problems to the Petitioner. On one occasion the Joined Party notified the Petitioner that the truck had mechanical problems. The Petitioner told the Joined Party where to take the truck to have it repaired.

12. The Joined Party was required to notify the Petitioner if the Joined Party was not able to work as scheduled. The Joined Party never missed a day of work. If the Joined Party had been absent the Petitioner's president would have delivered the load to Deerfield Beach. The Joined Party did not have the right to decline to deliver a load.

13. The Joined Party did not submit a bill or invoice to the Petitioner for the Joined Party's work. As agreed, the Petitioner paid the Joined Party in cash at the end of each week. Although the Petitioner did not withhold any money from the Joined Party's pay the Joined Party was not aware

that the Petitioner did not withhold payroll taxes from the pay. The Joined Party became aware that taxes were not withheld when the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC.

14. Either party had the right to terminate the relationship at any time without incurring liability. The Petitioner fired the Joined Party on or about July 6, 2009, because the Joined Party failed to deliver a load.

15. The Joined Party filed an initial claim for unemployment compensation benefits effective August 16, 2009. His filing on that date established a base period from April 1, 2008, through March 31, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed 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 September 15, 2009, the Department of Revenue issued a determination holding that the Joined Party and other persons performing services for the Petitioner as truck drivers were the Petitioner's employees retroactive to September 1, 2008. On September 25, 2009, the Department of Revenue issued a determination identified as an affirmation of the September 15, 2009, determination. The Petitioner filed a written protest by fax on October 13, 2009.

17. Pursuant to the Petitioner's protest a telephone hearing was scheduled to be held on March 22, 2010. A hearing notice was mailed to all parties instructing the parties to provide the name and telephone number of the person to be contacted for the conference telephone hearing. No response was received from the Petitioner. At the time of the hearing the special deputy attempted to contact the Petitioner at a telephone number printed on the Petitioner's fax cover page. There was no answer and the special deputy left two voice mail messages. Since the Petitioner did not participate in the hearing a recommended order was mailed recommending that the protest be dismissed.

18. The telephone number at which the special deputy attempted to contact the Petitioner is the Petitioner's home telephone number. The Petitioner's president was not at home because he was on the job in Jacksonville. The Petitioner filed a written request for rehearing on March 22, 2010.

**Conclusions of Law:**

19. Rule 60BB-2.035, Florida Administrative Code, provides:

> (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

20. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.

21. The Petitioner promptly requested reopening of the appeal after the Petitioner failed to participate

in the March 22, 2010, scheduled hearing. Since the Petitioner's reason for failing to participate in the hearing was due to human error and since the Petitioner exercised due diligence in requesting reopening, good cause is established.

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).

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. There was no written agreement or contract between the Petitioner and the Joined Party. The evidence presented does not show the existence of any verbal agreement concerning whether the Joined Party would perform services as an employee or as a self employed independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "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 Petitioner's business is to deliver plastic bottles from the bottle manufacturer to one customer of the bottle manufacturer. It was the Joined Party's assigned responsibility to deliver the bottles. 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.

31. The Petitioner provided the truck and trailer which were used to deliver the bottles. The Petitioner was responsible for all of the expenses of operating the truck including fuel, maintenance, repairs, and insurance. The Joined Party did not have any expenses in connection with the work and did not have any investment in a business. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

32. It was not shown that any special knowledge or skill is required to drive a truck. 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. Both the Petitioner's president and the Joined Party testified that it was their belief that the Joined Party was the Petitioner's employee. Although no payroll taxes were withheld from the pay, the lack of payroll tax withholding does not, standing alone, establish an independent contractor relationship.

34. The Joined Party worked for the Petitioner for a period of approximately ten months. Either party had the right to terminate the relationship at any time without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the relationship. 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."

35. The evidence presented in this case reveals that the Petitioner determined what work was performed, when it was performed, and how it was performed. The Joined Party was required to personally perform the work. 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.

36. The evidence presented in this case reveals that the services performed for the Petitioner by the Joined Party and other individuals as truck drivers constitute insured employment. Although the Department of Revenue extended the determination to include individuals other than the Joined Party, the retroactive date of the determination is consistent with the Joined Party's beginning date of employment rather than the first date of employment of a truck driver. The evidence establishes that the Petitioner first employed a truck driver on November 3, 2007.

37. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

38. The testimony of the Petitioner's president reveals that the Petitioner paid wages to a truck driver of at least $1,500 during the fourth quarter 2007. Therefore, the Petitioner established liability for payment of unemployment compensation tax effective with the fourth quarter 2007.

**Recommendation:** It is recommended that the determination dated September 25, 2009, be MODIFIED to reflect a retroactive date of November 3, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on July 9, 2010.

R. O. SMITH, Special Deputy
Office of Appeals