AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2714266
LANDMARK ENGINEERING
1300 RIVERPLACE BLVD SUITE 210
JACKSONVILLE FL 32207

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

PROTEST OF LIABILITY
DOCKET NO. 2009-166882L

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 Petitioner's appeal is accepted as timely filed and the determination dated April 29, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
Employer Account No. - 2714266
LANDMARK ENGINEERING INC
NINA C SICKLER
1300 RIVERPLACE BLVD SUITE 210
JACKSONVILLE FL 32207

PROTEST OF LIABILITY
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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 April 29, 2009.

After due notice to the parties, a telephone hearing was held on March 31, 2010. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. A Revenue Specialist III 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 by the Joined Party and other individuals working as civil engineers 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.

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 an engineering services business specializing in the design of highways and bridges. The Petitioner registered with the Florida Department of Revenue for payment of unemployment compensation taxes effective September 1, 2006. On the registration form the Petitioner listed the business location and a separate mailing address. For the mailing address the Petitioner listed the residential address of the Petitioner's president.

2. In June 2007 the Petitioner's president was informed through a friend of a friend that the Joined Party, who was a professional engineer, was seeking work. The president interviewed the Joined Party. The Joined Party informed the Petitioner that her previous job was in sales and that, although the Joined Party had never worked as an independent contractor, the sales position was sort of like an independent sales position. The Joined Party informed the Petitioner that she looking for work with that same form of independence with flexible hours so that she could do other types of work. The Joined Party requested a pay rate of $44 per hour. The Petitioner felt that the rate of pay was fair and the Petitioner offered the position of senior engineer to the Joined Party as a "contract employee." The Joined Party accepted. The parties did not enter into any written agreement or written contract.

3. The Joined Party's primary assigned responsibility was to do roadway design work. The Petitioner's employees were either interns or structural engineers and the work performed by the Joined Party required coordination. The Petitioner's president likes to immediately see the work when it is produced so that the president can discuss technical issues with the individuals who perform the work. The employees are not required to punch a time clock and the work is generally performed in the Petitioner's office between the hours of 8 AM and 6 PM. The work generally requires special computer software. The Petitioner has laptop computers available so that employees may perform some of the work from other locations. The Petitioner determined that it was in the Petitioner's best interest to have the Joined Party perform the work from the Petitioner's office. However, the Petitioner had a laptop computer available for the Joined Party's use so that the Joined Party could perform a small amount of the work from other locations.

4. The Petitioner provided the Joined Party with a desk in the Petitioner's office, a computer with the required software, a printer, and all other supplies and equipment that were needed to perform the work. The Petitioner provided the Joined Party with a key to the Petitioner's office so that the Joined Party could come to work early or work late. Usually, the Joined Party worked twenty to thirty hours per week.

5. The Petitioner provided the Joined Party with business cards listing the Petitioner's name and address. The Petitioner also provided the Joined Party with a company email address. The purpose of the business cards and email address was so the Petitioner's clients would know that the Joined Party was connected to the Petitioner and would know how to contact the Joined Party at the Petitioner's business location.

6. The Joined Party was required to personally perform the work. She could not hire others to perform the work for her. As senior engineer the Joined Party was required to review the work performed by the interns and other individuals. Most of the time the president determined what was to be done and determined the way that projects were to be completed. The president routinely reviewed the Joined Party's work and on occasions directed the Joined Party to make changes. The Petitioner was responsible for any errors or omissions in the Joined Party's work.

7. The Petitioner had weekly staff meetings which the Joined Party was required to attend. In addition, the Petitioner's president had one-on-one meetings with the Joined Party to discuss the Joined Party's performance and the performance of the interns.

8. On one occasion the Petitioner scheduled the Joined Party and the Petitioner's president to attend out of town training. The Petitioner made the hotel reservations and paid for the Joined Party's hotel room.

9. The Joined Party was required to record her hours worked in the Petitioner's timesheet system. The Petitioner reviewed the timesheets every week to make sure that the Joined Party charged the time to the correct project codes. Sometimes the Petitioner directed the Joined Party to make changes to the times reported to individual project codes. However, the Petitioner never

questioned the total hours reported by the Joined Party and never refused to pay the Joined Party for any of the time reported by the Joined Party.

10. Since the Petitioner considered the Joined Party to be a "contract employee" rather than a "direct employee", the Petitioner did not withhold payroll taxes from the Joined Party's pay. The Petitioner allowed the Joined Party to participate in the Petitioner's employee medical insurance plan and paid 60% of the premium, the same percentage that the Petitioner paid for the "direct employees." The Petitioner also covered the Joined Party under the Petitioner's workers' compensation insurance policy. The Petitioner provided paid vacations and holiday pay to the "direct employees" but did not provide any paid time off for the Joined Party. The Petitioner reported the Joined Party's earnings for 2007 and for 2008 to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
11. Either party had the right to terminate the relationship at any time without incurring any liability.
12. The two projects the Joined Party was working on were long term projects. At the end of 2008 the Petitioner hired a roadway engineer to design roadways and the Petitioner planned to expand the Joined Party's responsibilities to include marketing. Most of the Petitioner's employees were "direct employees." In January 2009, based on the overall way that the president wanted to handle things and based on things that the president felt the Joined Party was interested in doing, the Petitioner felt that the Joined Party was ready to become a "direct employee." The Petitioner advised the Joined Party that she would be allowed to accrue paid time off and be paid for holidays as an employee. The Joined Party accepted the Petitioner's offer.
13. There was no change in the manner the Joined Party performed the work after the Petitioner converted the Joined Party from a "contract employee" to an employee in January 2009. Beginning with the first quarter 2009 the Petitioner reported the Joined Party's earnings to the Department of Revenue for payment of unemployment compensation taxes. On March 23, 2009, the Petitioner terminated the Joined Party due to lack of work.
14. The Joined Party filed a claim for unemployment compensation benefits effective March 22, 2009. Her filing on that date established a base period from October 1, 2007, through September 30, 2008. The Joined Party did not have any wage credits during the base period because the Petitioner did not begin reporting the Joined Party's earnings until 2009. 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 was entitled to wage credits based on her earnings with the Petitioner.
15. The investigation was conducted by a Revenue Specialist III. On April 29, 2009, the Revenue Specialist III issued a determination holding that the persons performing services for the Petitioner as civil engineers are covered employees and reportable for unemployment tax purposes retroactive to April 1, 2007. The Revenue Specialist III personally mailed the determination to the Petitioner at the Petitioner's address of record, the residence of the Petitioner's president.
16. Among other things the determination states "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter. If your protest is filed by mail, the postmark date will be considered the filing date of your protest."
17. The Petitioner's president had previously directed the Petitioner's office manager to change the Petitioner's address of record to the Petitioner's office location address because of difficulties that the president had in receiving mail at the residence address. The Petitioner did not receive the determination in the mail.

18. In October 2009 the Department of Revenue selected the Petitioner for a random audit of the Petitioner's books and records to ensure compliance with the Unemployment Compensation Law. The auditor examined the Form 1099-MISC which was issued to the Joined Party by the Petitioner. The auditor explained to the Petitioner that the Department of Revenue had issued a determination holding that the Petitioner was required to pay unemployment compensation tax on the Joined Party's earnings. The Petitioner requested a copy of the determination. Upon receipt of a copy of the determination the Petitioner filed a protest by letter dated November 2, 2009.

Conclusions of Law:

19. Section 443.141(2)(c), Florida Statutes, provides:
    (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

20. 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.

21. Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:
    Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.

22. 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.

23. 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.

24. Rule 60BB-2.025(2)(b), Florida Administrative Code, provides that employers must report changes to business name, address, ownership, officers, legal entity status, (such as from sole proprietorship to corporation or from partnership to limited liability company) and business operations in the manner required on Form UCS-3, *Employer Account Change Form*, or by writing to the Department.

25. The testimony of the Petitioner's president reveals that the Petitioner did not receive the April 29, 2009, determination until on or about November 2, 2009. Upon receipt the Petitioner promptly filed a written protest.

26. 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.

27. 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).

28. 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).

29. 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.

30. 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.

31. 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.

32. 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.

33. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. 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).

34. The only evidence of an agreement between the parties is the Petitioner's testimony concerning the verbal agreement of hire. The term used by the Petitioner, "contract employee" is ambiguous and contradictory. The evidence is not sufficient to establish that there was a clear understanding between the parties that the Joined Party would perform services as an independent contractor. In addition, it has previously been held that a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), that while the obvious purpose to be accomplished by an agreement is 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. Therefore, it is necessary to analyze the actual practice of the parties.

35. The Petitioner's testimony reveals that the Joined Party was represented to the Petitioner's clients as being connected with the Petitioner. 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 business. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services.

36. The work performed by the Joined Party required a high degree of knowledge and skill. In Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980) the court held that 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. In James v. Commissioner, 25 T.C. 1296, 1301 (1956), the court stated in holding that a doctor was an employee of a hospital "The methods by which professional men work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of an employer over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over the non-professional employees."

37. The Petitioner exercised a significant degree of control over the Joined Party. The Joined Party was required to personally perform the work. She did not have the independence to hire others to perform the work for her. The Petitioner required the Joined Party to perform the majority of the work from the Petitioner's location so that the Petitioner could exercise immediate control. The Petitioner determined what was to be done and how it was to be done. If the Petitioner was not satisfied with the Joined Party's work product, the Petitioner directed the Joined Party to make changes. The Petitioner was liable for the Joined Party's errors and omissions.

38. The Joined Party did not bill the Petitioner for the services she performed. The Joined Party was paid by the hour and was required to record her work hours in the Petitioner's timesheet system. The Joined Party was paid by time worked rather than by production or by the job.

39. The Petitioner did not withhold payroll taxes from the Joined Party's pay. The lack of payroll tax withholding, standing alone, does not establish an independent relationship. The Petitioner provided benefits to the Joined Party that are normally reserved only for employees, such as medical insurance and workers' compensation coverage. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

40. The Joined Party worked for the Petitioner for a period of a year and one-half before the Petitioner converted the Joined Party to acknowledged employee status. 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. 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."

41. 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.

42. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the Petitioner's appeal be accepted as timely filed. It is recommended that the determination dated April 29, 2009, be AFFIRMED.

Respectfully submitted on April 5, 2010.

R. O. SMITH, Special Deputy
Office of Appeals