AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2916717
XTREME WHITENING LLC
8057 WELLSMERE CIR
ORLANDO FL 32835-5361

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

PROTEST OF LIABILITY
DOCKET NO. 2009-166885L

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 that the Petitioner's protest is accepted as timely filed, and the determination dated August 24, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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

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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 August 24, 2009.

After due notice to the parties, a telephone hearing was held on April 13, 2010. The Petitioner, represented by the Petitioner's owner, appeared and testified. 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 in sales constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

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 Florida Limited Liability Company that was formed in 2008 to operate a business involved in the sale of a self administered teeth whitening gel. The Petitioner sold the gel at flea markets and at a shopping mall.
2. The Joined Party has a history of employment in retail sales, as a receptionist, as a personal assistant, and as an income tax preparer. In May 2008 the Joined Party was seeking employment and attended a job fair. The Petitioner was seeking workers to sell the teeth whitening gel and had a booth at the job fair. The Joined Party submitted her resume to the Petitioner and was interviewed on May 13, 2008. During the interview the Petitioner told the Joined Party that the

rate of pay was $8.00 per hour plus 5% commission without any fringe benefits, and that the Joined Party would be an independent contractor. The Joined Party accepted the offer of work and began work on May 21, 2008. The Joined Party signed an *Independent Contractor Agreement.*

3. The Joined Party notified the Petitioner which days and hours she was available to work with the understanding that the Petitioner required her to work at least one day each weekend. The business hours of the flea markets were from 10 AM until 8 PM and the Petitioner was required by the flea markets to have someone at the booths at all times during those hours. The Petitioner scheduled the Joined Party to work during the Joined Party's hours of availability. The Joined Party was required to contact the Petitioner to determine what days and hours the Petitioner scheduled her to work. If the Joined Party was not able to work on a scheduled day, she was required to notify the Petitioner.

4. The Petitioner trained the Joined Party on the Joined Party's first day of work. The Joined Party observed while the Petitioner made sales presentations to several customers. When a customer purchased the product the Joined Party observed as the Petitioner had the customer sit in a chair. The Petitioner poured the gel into a tray so that the customer could put the gel into the customer's mouth. Neither the Petitioner nor the Joined Party were allowed to touch the customer or to put the gel on the customer's teeth. The Joined Party was paid $8.00 per hour while being trained by the Petitioner.

5. The Petitioner provided the work space and all products and supplies that were needed to perform the work. The Petitioner provided the Joined Party with a lab coat to wear while working. The Joined Party did not have any expenses in connection with the work, did not have any type of certification or license, did not have any investment in a business, and did not have liability insurance. The Joined Party worked under the Petitioner's business liability insurance policy.

6. The Petitioner provided sales literature and written directions to be provided to customers and potential customers. The Petitioner created a manual to explain how to make sales and how to apply the gel. The Petitioner observed the Joined Party while the Joined Party made sales. The Petitioner told the Joined Party what to do, what not to do, and how to improve her performance. The Joined Party was not allowed to talk on her cell phone during working hours, could not eat while in the booth, and could not leave the premises during working hours. The Petitioner verbally warned the Joined Party about the Joined Party's low sales.

7. The Joined Party was prohibited from performing services for a competitor. The Joined Party was required to personally perform the work and could not hire others to perform the work for her.

8. At the end of each work day the Joined Party was required to report the total sales for the work shift to the Petitioner. The Joined Party was required to turn all of the money from sales over to the Petitioner.

9. The Joined Party was required to sign a sheet showing the times she reported for work each day and the times she completed her shift each day. On Friday of each week the Petitioner paid the Joined Party for the hours worked and for any commissions earned during the week. No taxes were withheld from the pay and the Petitioner did not provide any fringe benefits. At the end of 2008 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

10. Either party had the right to terminate the relationship at any time, for any reason, without incurring liability. In October 2008, the Joined Party notified the Petitioner that she would not be able to work during weekends for four weeks due to a conflict with her school schedule. As a result the Petitioner removed the Joined Party's name from the work schedule.

11. The Joined Party filed a claim for unemployment compensation benefits effective April 12, 2009. The Joined Party did not receive credit for her earnings with the Petitioner and filed a *Request for*

Reconsideration of Monetary Determination. An investigation was conducted by the Department of Revenue. On August 24, 2009, the Department of Revenue issued a determination holding that the services performed by the Joined Party constituted insured employment. However, the determination was not mailed to the Petitioner's correct address of record and was returned by the post office as undeliverable. On October 28, 2009, the Department of Revenue mailed a *Notice of Final Assessment* to the Petitioner's correct address of record. Upon receipt the Petitioner contacted the Department of Revenue and was advised of the August 24, 2009, determination. The Petitioner filed an appeal by letter dated October 29, 2009.

Conclusions of Law:

12. 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.

13. 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.

14. 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.

15. The determination of August 24, 2009, was not mailed to the Petitioner's correct mailing address and was not received by the Petitioner. Therefore, the Petitioner's protest is accepted as timely filed.

16. 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. At the time of hire the Petitioner informed the Joined Party that the Joined Party was hired as an independent contractor. The Joined Party signed an *Independent Contractor Agreement* to that effect. 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). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme 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."

24. The Petitioner's business is the sale of a tooth whitening gel. The Petitioner hired the Joined Party to sell the gel at the Petitioner's booths at flea markets and at a shopping mall. 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.

25. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

26. The Petitioner determined which days and hours the Joined Party was scheduled to work within the Joined Party's overall days and hours of availability. The Petitioner paid the Joined Party by the hour worked rather than by the job or by production. Although the Petitioner also paid the Joined Party a commission based on sales, Section 443.1217(1), Florida Statutes, provides that wages includes all remuneration for employment including commissions. The fact the Petitioner did not withhold payroll taxes from the pay, standing alone, does not establish an independent contractor relationship.

27. The work performed by the Joined Party did not require any skill or special knowledge. 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)

28. The relationship between the Petitioner and the Joined Party was a continuing relationship and either party had the right to terminate the relationship at any time. 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."

29. The Petitioner determined the work location and controlled the Joined Party concerning what she could do while working and what she could not do. The Petitioner verbally warned the Joined Party concerning the Joined Party's lack of sales. The Petitioner determined what was to be done, where it was to be done, when it was to be done, and how it was to be done.

30. 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).

31. Based on the evidence in the record 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 protest be accepted as timely filed. It is recommended that the determination dated August 24, 2009, be AFFIRMED.

Respectfully submitted on April 19, 2010.

R. O. SMITH, Special Deputy
Office of Appeals