AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 0464081
BABBSCO OF WEST PALM BEACH INC
950 D ROAD
LOXAHATCHEE FL 33470-4849

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

PROTEST OF LIABILITY
DOCKET NO. 2009-76226L

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 April 17, 2009, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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Unemployment Compensation Appeals
MSC 346 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 April 17, 2009.

After due notice to the parties, a telephone hearing was held on April 6, 2010. The Petitioner's President and Office Manager both appeared and provided testimony. The Joined Party did not appear at the hearing. A Tax Specialist appeared and provided testimony on behalf of the Respondent.

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 as a mechanic/handyman 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.

Jurisdictional Issue: Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

The Respondent issued a determination dated April 17, 2009. The envelope in which the determination was mailed was post marked April 22, 2009. The Petitioner received the determination on or about April 25, 2009. The Petitioner began investigating the determination upon receipt and mailed a protest letter on May 8, 2009. Rule 60BB-5.005(1), Florida Administrative Code, states that an appeal shall be filed

within 20 calendar days of the date the determination was mailed. The rule further states that appeals filed by mail shall be considered to have been filed when postmarked by the United States Postal Service. The mailing date of a determination is generally considered to be the same as date of the determination. In this case, due to the difference between the date of the determination and the date of the postmark, the date of the post mark will be used to establish the actual mailing date of the determination. The Petitioner's protest letter was mailed within 20 days of the mailing date of the determination. Therefore, the protest is timely filed.

Findings of Fact:

1. The Petitioner is a corporation founded in 1978 for the purpose of running a towing service.

2. The Joined Party provided services for the Petitioner from October 2007, through November 13, 2008. The Joined Party performed services as a mechanic and handyman. The Joined Party's services included mowing the grass at the Petitioner's place of business, changing oil and tires on vehicles, and maintenance on the septic system and water pump of the Petitioner.

3. The Joined Party was contacted by the Petitioner to perform some routine repair work on a vehicle. One of the Petitioner's employees recommended the Joined Party's services to the Petitioner. The Petitioner sent vehicles to the Joined Party for repair work on a few different occasions. The Joined Party began to call the Petitioner to see if any work was available. The Petitioner would then make a list of routine tasks that needed to be completed. The Joined Party was free to complete any of those tasks. The Joined Party kept track of when the Petitioner's vehicles needed routine maintenance and would perform the required maintenance when needed.

4. The Petitioner paid the Joined Party an hourly rate based upon the type of work being performed. The Joined Party maintained a logbook in which he recorded what work was being performed and what hours were spent upon the work.

5. The Joined Party was allowed to work for a competitor. The Joined Party was allowed to subcontract his work.

6. The Joined Party provided his own hand-tools. The Petitioner would provide any tools the Joined Party needed but did not have or could not transport. The Petitioner paid for any parts necessary in the performance of the Joined Party's duty.

7. The Joined Party quit providing services for the Petitioner by ceasing to contact the Petitioner for work or return the Petitioner's calls offering work.

Conclusions of Law:

1. 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.

2. 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).

3. 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).

4. 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.

5. 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.

6. 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. 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.

7. The evidence presented in this hearing reveals that the Petitioner sought the services of the Joined Party after his services were recommended by an employee. The evidence indicates that the Petitioner initially hired the Joined Party for specific jobs. The Joined Party began contacting the Petitioner for additional work. The Petitioner provided a list of available work and allowed the Joined Party to work on the list at his own discretion. The degree of control exercised by a business over a worker is the principal consideration in determining employment status. If the business is only concerned with the results and exerts no control over the manner of doing the work, then the worker is an independent contractor. United States Telephone Company v. Department of Labor and Employment Security, 410 So.2d 1002 (Fla. 3rd DCA 1982); Cosmo Personnel Agency of Ft. Lauderdale, Inc. v. Department of Labor and Employment Security, 407 So.2d 249 (Fla. 4th DCA 1981).

8. The Joined Party provided his own hand tools for the work. The Petitioner provided additional needed tools and the parts necessary for the work.
9. The Joined Party maintained a log book in which to record the type of work and number of hours spent working. This log was required by the Petitioner in order to determine the hourly pay of the Joined Party.
10. A preponderance of the evidence in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated April 17, 2009, be REVERSED.

Respectfully submitted on June 15, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals