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

**PETITIONER:**
Employer Account No. - 2942489
DAN O BURKS
3027 REYNOLDS ROAD
LAKELAND FL 33803-8327

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-118672L**

**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 21, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 2011**.

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. - 2942489
DAN O BURKS
3027 REYNOLDS ROAD
LAKELAND FL 33803-8327

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-118672L**

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

# RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
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 21, 2010.

After due notice to the parties, a telephone hearing was held on March 2, 2011. The Petitioner's owner and an employee appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A tax specialist II appeared and testified 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 and other individuals 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.

**Jurisdictional Issue:** The Respondent issued an Employee Determination Notice to the Petitioner on June 21, 2010. The Respondent issued a modification of the Employee Determination Notice on June 30, 2010. The Petitioner submitted a letter of protest on or about July 13, 2010. While the modification did not have language regarding appeal rights, it is in effect a new determination and the window for appeal rights must begin anew with the date of the modification. Therefore, the modification was dated June 30, 2010. The letter of protest was dated July 13, 2010. The protest was submitted within 20 days of the modification and is deemed to be timely.

**Findings of Fact:**

1. The Petitioner is a sole proprietorship, established in 2008, for the purpose of running a business doing electrical work on asphalt plants.

2. The Joined Party performed services for the Petitioner from December 13, 2008, through March 5, 2009 as an electrical worker.

3. The Petitioner considered the Joined Party to be an independent contractor. The Joined Party was not informed that he would be working as an independent contractor. The Joined Party considered himself to be an employee of the Petitioner.

4. The Joined Party was required to report to the Petitioner's place of business Monday through Friday at 7am. The Joined Party would clock in and out using a time card. The Petitioner would instruct the Joined Party as to what work needed to be performed that day. The Joined Party was required to work within the hours set by the Petitioner.

5. The Petitioner was present at the work site and supervised some of the work performed by the Joined Party.

6. The Joined Party was paid $18 per hour by the Petitioner.

7. The Joined Party provided his own hand tools. The Petitioner provided all large tools. The Joined Party was not required to supply any materials. The Petitioner's vehicle was used to transport the Joined Party to and from the work site.

8. The Joined Party had no license or certification to perform the work. The Joined Party had prior experience.

**Conclusions of Law:**

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence presented in this hearing reveals that the Petitioner exercised control over where, when, and how the Joined Party performed the work. The Joined Party was required to report to the Petitioner's place of business to be informed of what work needed to be done and to be transported to the work site. The Petitioner supervised the work of the Joined Party when necessary. The Joined Party was required to follow a set schedule.

16. The work performed by the Joined Party as an electrical worker was a regular part of the day to day business of the Petitioner's business performing electrical work on asphalt plants.

17. The Joined Party provided his own hand tools. The Petitioner provided all large tools and equipment needed to perform the work. The Joined Party was not responsible for supplying any materials for the work.

18. The Joined Party was paid an hourly wage rather than by the job. Hourly pay tends to be indicative of an employer-employee relationship rather than the by the job pay typical of an independent contractor relationship.

19. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

**Recommendation:** It is recommended that the determination dated June 21, 2010, be AFFIRMED.

Respectfully submitted on May 2, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals