AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2970396
METRO COURIER SERVICES INC
5007 N COOLIDGE AVENUE
TAMPA FL 33614-6421

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

PROTEST OF LIABILITY
DOCKET NO. 2010-162697L

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 October 12, 2010, is REVERSED.

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. - 2970396
METRO COURIER SERVICES INC
ELIZABETH H ANDERSON
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PROTEST OF LIABILITY
DOCKET NO. 2010-162697L

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 October 12, 2010.

After due notice to the parties, a telephone hearing was held on March 30, 2011. The Petitioner was represented by its attorney. The Petitioner's president and the Petitioner's secretary/treasurer testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. Joined Party Reginald Sitze appeared and testified. Joined Party Roger Becerra did not participate.

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 received from the Petitioner.

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 meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a corporation which was formed in 1984 to operate a parcel delivery business. Both the Petitioner's president and the Petitioner's secretary/treasurer are active in the business. In approximately 1998 the Petitioner contracted with an employee leasing company to provide employees to deliver the parcels. Both the president and the secretary/treasurer receive a salary from the employee leasing company.
2. The Petitioner currently has approximately 33-35 acknowledged employees who are leased from the employee leasing company to deliver the parcels. The employees work a regular schedule. The Petitioner provides the vehicles which are driven by the employees and the Petitioner is responsible for all operating expenses.
3. Beginning in approximately 1998 the Petitioner hired some drivers who worked as contract drivers. The contract drivers were not leased from the employee leasing company and were paid directly by the Petitioner. The Petitioner currently has approximately 35-40 contract drivers. Most of the contract drivers enter into a written *Work for Hire Agreement* with the Petitioner. The contract drivers provide their own vehicles and are responsible for all expenses. All of the contract drivers work under the same terms and conditions.
4. Joined Party Roger Becerra was hired as a contract driver in the Petitioner's Orlando Branch on January 14, 2009. The Petitioner did not enter into a written *Work for Hire Agreement* with Roger Becerra. Roger Becerra provided his own vehicle for deliveries and was responsible for the fuel, maintenance, and other operating expenses. He was free to work for other parcel delivery companies and was free to hire others to perform the work for him. He had the right to refuse work and to set his own work hours. He determined the sequence of the deliveries and the routes to be driven. He was paid per delivery rather than by time worked. No taxes were withheld from the pay and the Petitioner did not provide any fringe benefits. At the end of the year the Petitioner reported Roger Becerra's earnings on Form 1099-MISC as nonemployee compensation. Either party could terminate the relationship without incurring liability. The Petitioner terminated Roger Becerra on April 23, 2009, due to poor work performance.
5. Joined Party Reginald Sitze was hired by the Petitioner as a contract driver on January 22, 2009. The parties entered into a *Work for Hire Agreement* which provides, among other things, that it is understood by the parties that the Joined Party is an independent contractor and not an employee of the Petitioner, that the Petitioner does not provide any fringe benefits, and that the Joined Party is responsible for his own taxes. The Agreement does not require the Petitioner to provide work for the Joined Party nor does the Agreement require the Joined Party to accept work. The Agreement states that the Petitioner will pay the Joined Party on a weekly basis after receipt of the Joined Party's invoice for services performed. The Agreement provides that the Joined Party will be responsible for providing the vehicle and for the vehicle expenses. Joined Party Reginald Sitze read the Agreement before he signed the Agreement. Reginald Sitze understood the Agreement and always believed that he was a self employed independent contractor while performing services for the Petitioner.
6. The Petitioner provided training to Joined Party Reginald Sitze at the time of hire. The Petitioner assigned a territory to Reginald Sitze and the training consisted of riding with an employee to learn the territory. The employee showed Reginald Sitze the most efficient routes within the territory.

7. Reginald Sitze provided his own truck for making the deliveries and was responsible for his own expenses. Although he was not required to follow a specified route he usually chose to follow the routes that were suggested during training because he was responsible for his own expenses and those routes were the most efficient. Reginald Sitze provided his own cell phone. The Petitioner did not provide any equipment, tools, or supplies and did not reimburse Reginald Sitze for any expenses.

8. Joined Party Reginald Sitze understood that he was free to perform services for other parcel delivery companies and that he was free to hire others to perform the work for him.

9. The Petitioner opens its warehouse at 3:30 AM, Monday through Friday, so that the drivers can load their trucks to make the deliveries. The Petitioner did not tell Reginald Sitze what days he was required to work or what time he was required to report for work. Reginald Sitze chose to work Monday through Friday because if he did not work he did not earn any money. Reginald Sitze chose to report for work at 5 AM or earlier because that was the time that the employee drivers reported for work.

10. The Petitioner paid Reginald Sitze and all of the other contract drivers $2.50 per delivery, regardless of the distance and expense involved. The contract drivers have the right to refuse to make a delivery, however, the contract drivers usually choose to negotiate a higher rate of pay for undesirable deliveries.

11. Due to fluctuating fuel costs the Petitioner agreed to provide a fuel subsidy to the drivers during times of high fuel costs. The fuel subsidy is not based on actual expenses and is not based on mileage or on the number of deliveries. The Petitioner determines the amounts of the subsidies based on the size of each delivery territory. The Petitioner does not consider the subsidy to be a reimbursement of fuel costs but considers it to be an additional amount paid for making deliveries.

12. At the end of each week Joined Party Reginald Sitze submitted an invoice to the Petitioner for the deliveries which he had completed during the week. He listed the deliveries which he made on each day as well as the total deliveries for the week. He multiplied the number of deliveries by $2.50 to compute the earnings and he then added the amount of the weekly fuel subsidy. Reginald Sitze's weekly fuel subsidy was $95 per week because he had one of the larger territories. The Petitioner paid Reginald Sitze upon receipt of Reginald Sitze's invoice. The Petitioner did not withhold any taxes from the pay and did not provide any fringe benefits such as health insurance, paid vacations, paid holidays, or paid sick days. At the end of the year the Petitioner reported Reginald Sitze's earnings on Form 1099-MISC as nonemployee compensation.

13. The contract drivers are not required to report for work each day and they are not required to notify the Petitioner if they choose not to work on a particular day. The Petitioner prefers that the drivers notify the Petitioner if they are not going to work so that the Petitioner can arrange for a substitute driver. If a driver does not report for work as anticipated by the Petitioner, the Petitioner assigns a back-up driver to deliver the route. The Petitioner has never terminated a contract driver due to attendance. Reginald Sitze never missed time from work with the exception of a vacation. He was not required to obtain permission to take time off for his vacation but he did notify the Petitioner in advance that he was taking a vacation so that the Petitioner could schedule a back-up driver.

14. The contract drivers are not required to wear a uniform, however, they may choose to purchase uniform shirts from the Petitioner for identification purposes. Reginald Sitze chose to purchase uniform shirts from the Petitioner for identification purposes.

15. Joined Party Reginald Sitze worked as a contract driver for the Petitioner until October 22, 2009, at which time he voluntarily left to accept other work.

16. Joined Party Roger Becerra filed an initial claim for unemployment compensation benefits effective May 30, 2010. His filing on that date established a base period consisting of the calendar year 2009. When he 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 Roger Becerra performed services as an employee or as an independent contractor. On July 26, 2010, the Department of Revenue issued a determination holding that persons performing services for the Petitioner as couriers are the Petitioner's employees retroactive to January 14, 2009. The determination also held that any officers of the corporation performing services for the corporation are statutory employees. The Petitioner filed a timely protest.

17. Joined Party Reginald Sitze filed an initial claim for unemployment compensation benefits effective August 8, 2010. His filing on that date established a base period from April 1, 2009, through March 31, 2010. When he 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. On October 12, 2010, the Department of Revenue issued a determination identified as an affirmation of the determination dated July 26, 2010. The determination stated that Reginald Sitze and the class of workers performing services as couriers are the Petitioner's employees retroactive to January 14, 2009, and that the Petitioner was responsible for reporting the wages of the couriers as well as the wages of the corporate officers. The Petitioner filed a timely protest.

Conclusions of Law:

18. Section 443.1216(13)(w), Florida Statutes, provides that service performed by an individual for a private, for-profit delivery or messenger service is exempt from coverage under the Florida Unemployment Compensation Law, if the individual:
    1. Is free to accept or reject jobs from the delivery or messenger service and the delivery or messenger service does not have control over when the individual works;
    2. Is remunerated for each delivery, or the remuneration is based on factors that relate to the work performed, including receipt of a percentage of any rate schedule;
    3. Pays all expenses, and the opportunity for profit or loss rests solely with the individual;
    4. Is responsible for operating costs, including fuel, repairs, supplies, and motor vehicle insurance;
    5. Determines the method of performing the service, including selection of routes and order of deliveries;
    6. Is responsible for the completion of a specific job and is liable for any failure to complete that job;
    7. Enters into a contract with the delivery or messenger service which specifies that the individual is an independent contractor and not an employee of the delivery or messenger service; and
    8. Provides the vehicle used to perform the service.

19. The evidence presented in this case reveals that Joined Party Reginald Sitze determined when he worked for the Petitioner, determined the route he drove and determined the order of the deliveries. He provided his own vehicle and was responsible for all of the costs of operation. He entered into a written contract with the Petitioner which specified that he was an independent contractor and not an employee of the Petitioner. He had the ability to realize a profit from services performed but was at risk of suffering a financial loss. These facts reveal that the services performed by Reginald Sitze are exempt from the Florida Unemployment Compensation Law.

20. Although it has been shown that the services performed by Reginald Sitze are exempt from the Florida Unemployment Compensation Law, it has not been shown that the services performed by

Joined Party Roger Becerra and the other individuals performing services as couriers are statutorily exempt. No competent evidence was presented to show the existence of any agreement, either verbal or written, between the Petitioner and Roger Becerra or between the Petitioner and other couriers. The only written agreement which was produced is the *Work for Hire Agreement* signed by Joined Party Reginald Sitze. Neither of the Petitioner's witnesses hired Joined Party Roger Becerra or had ever spoken to him.

21. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes. The Petitioner's evidence concerning any agreement between the Petitioner and Roger Becerra is hearsay and is insufficient to establish the existence of an agreement or contract.

22. Since the services performed by Joined Party Roger Becerra and other couriers have not been shown to be statutorily exempt it must be determined whether they performed services as employees or as independent contractors.

23. The issue of 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.

24. 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).

25. 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).

26. 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.

27. 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.

28. 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.

29. 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.

30. The evidence adduced in this case reveals that all of the contract drivers perform services under the same terms and conditions as Joined Party Reginald Sitze. All of the contract drivers provide their own vehicles to use for the delivery services and are responsible for all expenses. They are free to accept or decline work. They determine their own hours of work, determine the sequence of the deliveries, and the routes to be driven. They are not compensated by time worked but by production. No payroll taxes are withheld from the pay and they do not receive fringe benefits that are usually associated with employment relationships. They are at risk of suffering a financial loss from performing services.

31. The contract drivers determine what work to perform, when to perform the work, and how to perform the work. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

32. It is concluded that the services performed for the Petitioner by Joined Party Roger Becerra and the other contract drivers do not constitute insured employment.

33. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

34. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

35. Section 443.036(18), Florida Statutes, provides that "Employee leasing company" means an employing unit that has a valid and active license under chapter 468 and that maintains the records required by s. 443.171(5) and, in addition, is responsible for producing quarterly reports concerning the clients of the employee leasing company and the internal staff of the employee leasing

company. As used in this subsection, the term "client" means a party who has contracted with an employee leasing company to provide a worker, or workers, to perform services for the client. Leased employees include employees subsequently placed on the payroll of the employee leasing company on behalf of the client. An employee leasing company must notify the tax collection service provider within 30 days after the initiation or termination of the company's relationship with any client company under chapter 468.

36. Section 443.1216(1)(a)2., Florida Statutes, provides in pertinent part that whenever a client, as defined in s. 443.036(18), which would otherwise be designated as an employing unit has contracted with an employee leasing company to supply it with workers, those workers are considered employees of the employee leasing company. An employee leasing company may lease corporate officers of the client to the client (emphasis supplied) and other workers to the client, except as prohibited by regulations of the Internal Revenue Service. Employees of an employee leasing company must be reported under the employee leasing company's tax identification number and contribution rate for work performed for the employee leasing company.

37. The evidence in this case reveals that the Petitioner has contracted with an employee leasing company to supply the Petitioner with workers and that the Petitioner's corporate officers are also leased employees of the employee leasing company. Thus, it is the responsibility of the employee leasing company to report the wages of the corporate officers and to pay the unemployment compensation tax on those wages.

Recommendation: It is recommended that the determination dated October 12, 2010, be REVERSED.

Respectfully submitted on April 25, 2011.

R. O. SMITH, Special Deputy
Office of Appeals