AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2929398
DORIS OTTO
708 SW HIDDEN RIVER AVE
PALM CITY FL 34990

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

PROTEST OF LIABILITY
DOCKET NO. 2010-3561L

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 November 17, 2009, is MODIFIED to reflect the correct legal entity, Doris Otto. It is also ORDERED that the determination is AFFIRMED as modified.

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

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. - 2929398
DORIS OTTO
C/O MARGUERITE STEJSKAL
708 SW HIDDEN RIVER AVE
PALM CITY FL 34990

PROTEST OF LIABILITY
DOCKET NO. 2010-3561L

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 November 17, 2009.

After due notice to the parties, a telephone hearing was held on June 1, 2010. The Petitioner, represented by the Petitioner's Certified Public Accountant, appeared and testified. The Petitioner's daughter and the Petitioner's son-in-law testified as witnesses. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. A Revenue Specialist III testified as a witness. 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 and other individuals adult care/caregivers 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.

Findings of Fact:

1. The Petitioner, Doris Otto, was an individual who passed away on August 10, 2009, at the age of 100. The Petitioner's daughter, Marguerite Stejskal, provided care for her mother; however, the daughter was planning to go away for the summer of 2007. The daughter needed to find individuals to care for her mother while she was on vacation. A member of the church which the daughter attended told the daughter about the Joined Party, Cheryl Mott. The church member told

the daughter that the Joined Party needed a job and that the Joined Party was someone that the Petitioner might like.

2. The Joined Party is an individual who has a history of employment with home health care agencies as a certified home health aide. The Joined Party has also done private duty cases as an independent contractor; however, she does not advertise her services as a caregiver to the general public.

3. The Petitioner's daughter contacted the Joined Party and asked her to visit the Petitioner so that the Petitioner and the daughter could meet her. The daughter explained that the job was just for the summer and that the Joined Party would prepare meals, clean the house, bathe and dress the Petitioner, take the Petitioner to doctor appointments, and do the grocery shopping. The daughter told the Joined Party that the hours of work were 24 hours per day and that the Joined Party would work every other day. The rate of pay was $10 per hour. The daughter did not tell the Joined Party whether she would be classified as an employee or as an independent contractor. The Joined Party accepted the offer of work and began caring for the Petitioner on April 1, 2007.

4. The Petitioner and the Joined Party did not enter into any written agreement or contract. The Joined Party believed that she was hired to be an employee of the Petitioner.

5. Although the Petitioner was an elderly individual the Petitioner was capable of telling the Joined Party what to do.

6. The Petitioner's daughter prepared a work schedule. The Petitioner hired two other caregivers to work on the days that the Joined Party was not scheduled to work.

7. The Petitioner's daughter had a power of attorney and paid the Joined Party by check at the end of each week. Although the agreement was $10 per hour the daughter paid the Joined Party $200 for each twenty-four hour shift. The daughter also reimbursed the Joined Party for use of the Joined Party's car when the Joined Party took the Petitioner to the doctor.

8. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work.

9. The Joined Party was required to personally perform the work. The Joined Party could not hire others to perform the work for her.

10. The Petitioner's daughter returned home after the summer vacation. However, the daughter informed the Joined Party that the Joined Party would continue to care for the Petitioner.

11. The Petitioner's daughter did not want to get involved in the tax system and never withheld payroll taxes from the Joined Party's pay. At the end of 2007 the Petitioner's daughter told the Joined Party for the first time that the Joined Party was responsible for her own taxes. The Petitioner's daughter provided the Joined Party with Form 1099-MISC reporting the Joined Party's earnings as nonemployee compensation.

12. At some point in time the Petitioner's daughter increased the Joined Party's pay to $230 per shift and at a later date increased the pay to $250 per shift. The daughter paid Christmas bonuses to the Joined Party. When the Petitioner's daughter returned from her 2008 summer vacation she paid the Joined Party a $400 bonus. From time to time the Petitioner's daughter loaned money to the Joined Party. When the Petitioner passed away in August 2009 the Joined Party owed the Petitioner $750. The Petitioner's daughter did not require the Joined Party to repay the money.

13. The Petitioner did not provide any fringe benefits such as health insurance or paid vacations. When the Petitioner's daughter returned from summer vacation in 2008 the Joined Party requested permission to take a week off since the daughter would be able to provide care for her mother. The Joined Party's request was granted. The Joined Party was not paid for the week that she was off.

14. Although the work which the Joined Party performed for the Petitioner did not require the Joined Party to have any type of license or certification, the Joined Party kept her certification current while working for the Petitioner.

15. Either party had the right to terminate the relationship at any time without incurring liability. The relationship ended when the Petitioner passed away on August 10, 2009.

16. The Joined Party filed an initial claim for unemployment compensation benefits effective September 27, 2009. When the Joined Party did not receive credit for her earnings with the Petitioner an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

17. On November 17, 2009, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services as adult care/caregivers were employees. The determination incorrectly identified the employer as the Petitioner's daughter, Marguerite Stejskal. Marguerite Stejskal filed an appeal by mail postmarked November 23, 2009.

18. On November 25, 2009, the Department of Revenue issued a liability determination showing the correct name of the Petitioner as Doris Otto.

Conclusions of Law:

19. 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.

20. 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).

21. 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).

22. 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.

23. 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.

24. 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.

25. 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.

26. The agreement between the Petitioner and the Joined Party was a verbal agreement. There was no agreement concerning whether the Joined Party would perform services as an independent contractor or as an employee. The Joined Party believed that she was hired to be the Petitioner's employee. It was not until approximately nine months after the Joined was hired that the Petitioner's daughter informed the Joined Party that the Joined Party would be responsible for paying her own taxes. Therefore, the terms of the relationship must be examined to determine the status of the Joined Party and the other caregivers.

27. The Petitioner determined what work was to be done and when the work was to be done. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate of pay and the amount of reimbursement for use of the Joined Party's vehicle. The Petitioner required the Joined Party to personally perform the work for her. The Joined Party was not allowed to hire others to assist her or to perform the work. All of these facts show control on the part of the Petitioner.

28. Although the Joined Party is a certified home health aide, she was not required to have any certification or license to perform the services for the Petitioner. The work did not require any skill or special knowledge. The duties consisted primarily of helping the Petitioner bathe, helping the Petitioner dress, housecleaning, and cooking. 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)

29. The method and rate of pay was determined by the Petitioner. The Petitioner paid the Joined Party by time worked. The fact that the Petitioner did not want to get involved in the tax system and chose not to withhold taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

30. The Petitioner was not in business and the work performed by the Joined Party was not part of a business. Instead the Joined Party's assigned duties were domestic work. Section 443.1216(6), Florida Statutes, provides that employment subject to the Unemployment Compensation Law

includes domestic service performed by maids, cooks, maintenance workers, chauffeurs, social secretaries, caretakers and house parents in a private home. Therefore, the services performed for the Petitioner are not excluded from coverage just because the Petitioner was not in business.

31. The Joined Party worked exclusively for the Petitioner for a period of over two years. Although the relationship ended when the Petitioner passed away, either party had the right to terminate the relationship at any time without incurring liability. 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."

32. 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.

33. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals working as adult care/caregivers constitute insured employment.

34. The special deputy was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Petitioner's daughter was involved in the hiring of the Joined Party but the daughter was not always present when the Joined Party performed the work. Several times during the hearing the Petitioner's daughter testified that her memory was not very good and testified that the Joined Party's memory was much better. Therefore, the conflicts are resolved in the Joined Party's favor.

Recommendation: It is recommended that the determination dated November 17, 2009, be MODIFIED to reflect the correct legal entity, Doris Otto. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 22, 2010.

R. O. SMITH, Special Deputy
Office of Appeals