AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2751903
JAZZI HAIR SALON INC
ELLEN LAWRENCE
8158 GLADES RD
BOCA RATON FL 33434-4064

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

PROTEST OF LIABILITY
DOCKET NO. 2010-46909L

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 February 25, 2010.

After due notice to the parties, a telephone hearing was held on September 13, 2010. An attorney appeared on behalf of the Petitioner. The Petitioner's owner was called as a witness on the Petitioner's behalf. The Joined Party appeared and provided testimony on her own behalf. A tax specialist appeared and provided testimony for 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 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.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in 2002 for the purpose of running a hair salon.

2. The Joined Party contacted the Petitioner to see if work was available. The Joined Party made an appointment with the Petitioner and was interviewed. The Joined Party provided services as a hairdresser for the Petitioner from December 2007, through August 25, 2009. The Petitioner informed the Joined Party at the time of hire that the Joined Party would be working as a contractor. There was no written agreement between the parties.

3. The Joined Party was licensed by the State of Florida as a hair dresser prior to the Joined Party's work for the Petitioner.

4. The Petitioner provided a chair and workspace for the Joined Party's exclusive use. The Joined Party provided her own shears, combs, and hand tools. The Petitioner made shampoo available for the Joined Party's use. The Joined Party was free to provide her own shampoo or conditioner. The Joined Party was required to reimburse the Petitioner in the form of a charge back for the use of hair color products.

5. The Petitioner monitored the Joined Party on the job. The Petitioner provided suggestions and critiques to the Joined Party regarding the performance of the work.

6. The Joined Party was paid weekly by the Petitioner. The Joined Party received a 55% commission on work performed. The Petitioner had ultimate control over the prices charged to customers for services.

7. The Joined Party performed services at the Petitioner's place of business. The Joined Party performed services within the Petitioner's hours of operation.

8. The Joined Party was allowed to work for a competitor.

9. The Joined Party was covered by the Petitioner's workmen's compensation insurance.

10. The Joined Party would handle her own clientele. The Joined Party would also handle walk in customers and scheduled customers that were not the Joined Party's clients. The Petitioner maintained a schedule. The Joined Party would inform the Petitioner in the event that a client of the Joined Party contacted the Joined Party directly to schedule an appointment.

11. Either party had the right to end the relationship at anytime and without liability.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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.

18. The Petitioner exercised some control over the hours the Joined Party could perform the work. The Joined Party was limited to performing services during the hours of operation established by the Petitioner. The Joined Party performed all services for the Petitioner at the Petitioner's place of business. The Petitioner monitored the Joined Party's work and, while not a licensed hair dresser, provided suggestions and commentary to the Joined Party while the work was being performed. While the Petitioner's suggestions may not have risen to the level of actual orders, they do demonstrate an intention to exercise control over the performance of the work.

19. The Joined Party provided her own shears and blow dryers for the performance of the work. The Petitioner provided a workspace, chair, and various hair products. The Petitioner charged the Joined Party for the use of colors and for certain processes. The Joined Party had the right to use her own products at her own expense.

20. The Joined Party performed services for the Petitioner for approximately one year and nine months. This length of time is indicative of a long term relationship between the parties rather than the temporary nature of an independent contractor relationship.

21. The work performed by the Joined Party as a hair dresser was an integral part of the Petitioner's hair salon business.

22. The Joined Party was paid a commission on work performed. The Petitioner was not involved with any tips received by the Joined Party from customers. The Joined Party was allowed to set her own prices for services however the Petitioner retained and exercised ultimate control over the price of services.

23. The Joined Party was a licensed hairdresser with an established clientele before being retained by the Petitioner.

24. 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 Petitioner and the Joined Party.

25. A preponderance of the evidence presented in this case reveals that the Joined Party's conditions of employment were unique to the Joined Party and as such, the determination dated February 25, 2010, should be modified to apply only to the Joined Party and not to other members of the class.

26. Proposed Findings of Fact and Conclusions of Law were submitted by the Petitioner on September 23, 2010. The Special Deputy considered the proposals and where they are supported by the record are incorporated into this decision. Where those proposals are not supported by the record, they are respectfully rejected.

27. Proposed Findings of Fact and Conclusions of Law were submitted by the Joined Party on September 30, 2010. These proposals were not timely submitted and therefore were respectfully rejected.

Recommendation: It is recommended that the determination dated February 25, 2010, be MODIFIED to apply to the Joined Party only, and as modified, the determination dated February 25, 2010, is AFFIRMED. .

Respectfully submitted on October 21, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

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DOCKET NO. 2010-46909L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals working as hairdressers constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19); 443.036(21); 443.1216, Florida Statutes.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Special Deputy issued the Recommended Order on October 21, 2010. The Petitioner's exceptions to the Recommended Order were received by mail postmarked November 12, 2010. Rule 60BB-2.035(19)(c), Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Agency may not consider the Petitioner's exceptions in this order because the exceptions were filed more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated February 25, 2010, is MODIFIED to apply to only the Joined Party. It is further ORDERED that the determination is AFFIRMED as modified.

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

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TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION