AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2943658
L T MEDICAL LLC
2655 NORTHWINDS PKWY
ALPHARETTA GA 30009-2280

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

PROTEST OF LIABILITY
DOCKET NO. 2010-51462L

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 February 10, 2010, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

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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 10, 2010.

After due notice to the parties, a telephone hearing was held on July 20, 2010. An attorney appeared on behalf of the Petitioner. A vice president of a sister company and a senior account executive for a sister company appeared and provided testimony on behalf of the Petitioner. 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 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 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.

Findings of Fact:

1. The Petitioner is a limited liability corporation that handles the billing and payments for a sister company. The sister company acts as a broker for physician referrals. The sister company works with clients such as private practices, prisons, and hospitals to fill their needs for medical personnel. The assignments are typically short term. The sister company enters into a written

agreement with the client; the agreement includes a practice description supplied by the client. The client pays the sister company a daily fee for providing a worker to meet the clients requirements.

2. The sister company maintains a list of doctors in order to meet the requirements of the clients. The sister company attempts to match available positions to the needs of the doctors. When a doctor is interested in a position, an interview is set up between the doctor and the client. In some cases the sister company participates in the interview.

3. Once both client and doctor have agreed to work together, the sister company assists the doctor in obtaining any credentialing and set up any travel logistics required by the doctor.

4. The sister company provides time sheets to the doctor. The timesheets are verified by the client and returned to the sister company on a weekly basis. The sister company provides the timesheets to the Petitioner. The Petitioner processes the timesheets and pays the doctor.

5. The sister company creates a contract for each referral for a specified time period. The contract specifies that the doctor and sister company have an independent contractor relationship. The contract sets out the rates and details for the specific referral being agreed to. The terms of the contract are based upon the client's requirements. The contract requires that the doctor follow the policies and procedures required by the client.

6. The sister company has an internal credential process for new doctors before they can begin work.

7. The client company pays transportation and living costs for the doctor provided by the sister company.

8. The doctor is not required to accept any work offered by the sister company.

9. The sister company provides medical malpractice insurance which protects both the company and the doctor. In instances where the doctor provides his own medical malpractice insurance, the company does not provide further coverage.

10. The Joined Party contacted a recruiter for the sister company expressing interest in being part of the sister company's list of doctors. The Joined Party provided a resume to the sister company.

11. The Joined Party entered into a written agreement with the sister company to provide services for a client in Florida. The Joined Party performed services for the client from April 28, 2008 through September 2009. The Joined Party became a permanent worker for the client in September 2009. The Joined Party signed a written agreement approximately every 2 months. The agreements stipulate that the Joined Party was required to follow the policies and procedures of the client company. The agreements indicate that the relationship between the sister company and the Joined Party is that of independent contractor.

12. The Joined Party was a licensed psychiatrist at the start of the relationship with the company.

13. The Joined Party went through a brief orientation and CPR recertification training provided by the client at the start of the services.

14. The Joined Party provided services for the Florida State Prison system through the company. The Joined Party performed patient evaluations and provided both routine and emergency psychiatric medical care to inmates.

15. The Joined Party was required to follow the guidelines set by the client.

16. The Joined Party was not allowed to subcontract the work.

17. The Joined Party had a set schedule.

18. The Joined Party checked in with the company from time to time during the period of service.

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. 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.

25. The evidence presented in this case reveals that the Petitioner and the Petitioner's sister company did not exercise control over where, when, or how the Joined Party performed services. The Joined Party agreed to be on a list for contact. The Petitioner contacted the Joined Party when a suitable position was open. The Joined Party decided what position, if any, to accept. The Petitioner and the Petitioner's sister company had no influence over how the Joined Party performed the work for the client other than to bring the client and the Joined Party together.
26. The Petitioner and the Joined Party signed multiple agreements which specified an independent contractor relationship. While the presence of an agreement is not in and of itself dispositive in the matter, it does reveal the intentions of the parties at the time of hire and at each juncture during the relationship in which a new agreement was signed.
27. The work performed by the Joined Party was not performed at the Petitioner's place of business, nor was the schedule determined by the Petitioner's hours of operation.
28. The Joined Party is a psychiatrist. The Joined Party is a member of a skilled profession, hired to exercise professional judgment and discretion. The Petitioner may have provided assistance to the Joined Party in obtaining certifications but the Petitioner played no role in the medical training needed for the Joined Party to become a licensed psychiatrist.
29. Florida law does not recognize the existence of payroll companies. Therefore, the Petitioner is properly named as such. The Petitioner is the company responsible for paying the Joined Party for his service and is therefore considered the employing unit in this case.
30. The client company exercised control over the work performed by the Joined Party. The Joined Party was required to follow the schedule, policies, and procedures set forth by the client. The court in Freedom Labor Contractors of Florida, inc., 779 So.2d 663, states that, while the client may have had control over the mode or details of the work, the Petitioner had no direct control and without competent evidence of an agency relationship between the Petitioner and the client, such a finding cannot be me made.
31. A preponderance of the evidence presented in this case reveals that the Petitioner did not exercise sufficient control over the Joined Party as to establish an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated February 10, 2010, be REVERSED.

Respectfully submitted on September 1, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals