

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2678058
AQUATEK WELL & PUMP SERVICE INC
CHARMAINE FELICE
4401 S FLORIDA AVE STE E
INVERNESS FL 32399-4143

**PROTEST OF LIABILITY
DOCKET NO. 2010-98457L**

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 2, 2010.

After due notice to the parties, a telephone hearing was held on September 17, 2010. An accountant appeared on behalf of the Petitioner. The Petitioner's owner appeared and provided testimony. The Joined Party and a co-worker appeared and provided testimony. 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.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in October 2005, for the purpose of running a well drilling and service business. The Petitioner also provides services in property preservation.
2. The Joined Party provided services for the Petitioner doing property preservation from September 2009, through March 2010. The Joined Party signed an independent contractor agreement at the time of hire.

3. The Petitioner provided property preservation services to a bank. The bank would issue work orders to the Petitioner. The Petitioner would provide copies of the work orders to the Joined Party and other workers. The work orders include the location and date the work should be completed.
4. The Petitioner was required to follow the United States Department of Housing and Urban Development guidelines for property preservation. These guidelines included mandatory initial training and the submission of proper reports and paperwork.
5. The Joined Party would pick up available work orders each morning. The Joined Party would proceed to the addresses listed in the work orders and complete whatever work was required to maintain the property as required by the federal guidelines. The Joined Party was required to take photographs of the property and the work in accordance with federal guidelines.
6. The Joined Party's work included, trimming hedges and trees, mowing lawns, changing locks, and repair of any pre-existing damage.
7. The Joined Party had no set hours. The Joined Party was only limited by any time limit for completion outlined in the work order.
8. The client bank would hire contractors to inspect the work of the Joined Party after its completion.
9. The Joined Party was required to provide his own vehicle. The Petitioner allowed the Joined Party and other workers to borrow equipment from the Petitioner. Over time the Petitioner began to enforce the requirement that the workers provide their own equipment. The Joined Party provided his own camera for the work. The Petitioner maintained large or specialty equipment for the use of the workers when needed. The Petitioner provided any materials needed for the work.
10. The Joined Party initially provided a compressor, a blower, and a gas can for the work. The Joined Party later purchased a Global Positioning System for the work.
11. The Petitioner made t-shirts with the Petitioner's logo available to the workers for purchase. The Petitioner made magnetic vehicle signs with the Petitioner's logo available to workers. For certain work orders, the client bank would require the use of the signs for identification purposes.
12. The Petitioner was paid \$100 per day of work. The Joined Party was paid each Friday. The Petitioner did not hold the Joined Party's pay. The Petitioner reimbursed the Joined Party for fuel at a rate of approximately \$.12 per mile.
13. The Joined Party was allowed to work for a competitor.
14. The Joined Party was allowed to subcontract the work so long as the hired party was trained in the federal guidelines.
15. The Joined Party was not covered by the Petitioner's workmen's compensation insurance.

Conclusions of Law:

16. 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.

17. 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).
18. 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).
19. 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.
20. 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.
21. 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.\
22. The evidence presented in this case reveals that the Petitioner did not exercise control over the performance of the work. The Joined Party worked alone and without any direct or indirect supervision. The Joined Party was required to pick up the work orders at the Petitioner's place of business. The Joined Party could determine in what order he would fulfill the work orders and accomplish the requisite tasks as he saw fit.
23. The Petitioner made tools and equipment available to the Joined Party where the Joined Party did not have his own tools. The Joined Party provided his own vehicle for the work. The Petitioner provided some compensation for fuel.

24. The Joined Party signed an independent contractor agreement at the time of hire. While such an agreement is not dispositive, it does reflect the intentions of the parties.
25. The Joined Party had the right to work for a competitor and to subcontract the work to a properly trained contractor.
26. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish 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 2, 2010, be REVERSED.

Respectfully submitted on October 27, 2010.



KRIS LONKANI, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA**

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ORDER

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 2, 2010, is REVERSED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION