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

PETITIONER:
Employer Account No. - 2839949
LIVINGSTON GLASS LLC
WILLIAM MEJIA
8310 FOUNTAIN AVE
TAMPA FL 33615-2807

PROTEST OF LIABILITY
DOCKET NO. 2010-98459L

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 May 28, 2010.

After due notice to the parties, a telephone hearing was held on October 13, 2010. The Petitioner, represented by the Petitioner's owner, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 as a glazier constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner, Livingston Glass LLC, is a limited liability company which operates a glass company. The Petitioner's owner is active in the business. The Petitioner has a clerical employee and registered with the Department of Revenue for payment of unemployment compensation tax effective July 1, 2008.
2. The Petitioner engaged the Joined Party to install glass on storefronts and to install glass mirrors. The Petitioner had its accountant prepare an *Independent Sub-Contractor Agreement* for the Joined Party's signature. The Petitioner's owner did not sign the Agreement but wrote on the Agreement that it was signed in the presence of the owner on January 14, 2008. Contrary to that statement the Agreement is notarized as signed by the Joined Party on September 30, 2009.

3. The *Independent Sub-Contractor Agreement* states "Duties: The Sub-Contractor agrees to professionally represent and perform sub-contract duties to businesses on behalf of Livingston Glass." The Agreement also states "Relationship: The Sub-Contractor agrees to initially conduct and manage his/her affairs, time and relationship as an Independent Contractor. This relationship is mandatory for the first 90 days and may be changed upon mutual agreement of both parties." The Agreement provides that the Petitioner reserves the right to terminate the relationship at any time if it is determined that the sub-contractor is in violation of any company policies.
4. The Petitioner bids the jobs and then informs the Joined Party of the amount that the Petitioner will pay the Joined Party for performing the installation. The Joined Party has the right to reject any job and has the right to negotiate a better price.
5. The Joined Party is required to personally perform the work. He is not allowed to hire others to perform the work for him.
6. The Joined Party drives his own vehicle. The Joined Party has his own tools but he also uses tools provided by the Petitioner. The Petitioner does not reimburse the Joined Party for any expenses associated with local jobs. However, if the job is located out of town the Petitioner gives the Joined Party cash to be used for expenses such as meals. The Petitioner reimburses the Joined Party for gas and for the hotel.
7. The Petitioner provides the materials and supplies. The Joined Party picks up the materials and supplies from the Petitioner's shop. If the Joined Party has to cut the metal used for installing he performs that work at the Petitioner's shop.
8. The Petitioner does not supervise the Joined Party while the work is being performed. The Joined Party is required to notify the Petitioner when the work is completed so that the Petitioner can inspect the work performed by the Joined Party. If the work is not completed correctly the Joined Party is responsible for redoing the work without additional compensation.
9. The Joined Party is not required to have liability insurance. If the Joined Party breaks a glass the Petitioner does not require the Joined Party to replace the glass. If the Joined Party causes damage to a customer's property the damage is covered under the Petitioner's liability insurance policy.
10. The Petitioner does not withhold any payroll taxes from the Joined Party's pay. The Petitioner does not provide any fringe benefits such as health insurance to the Joined Party or to the Petitioner's clerical employee. The Petitioner reported the Joined Party's 2009 earnings on Form 1099-MISC as nonemployee compensation.
11. The Joined Party filed an initial claim for unemployment compensation benefits effective April 18, 2010. When the Joined Party did not receive credit for his 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. Shortly after the Joined Party filed the claim for unemployment compensation he returned to work for the Petitioner on a full time basis.
12. On May 28, 2010, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee retroactive to June 27, 2008. The Petitioner filed a timely protest.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

18. 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.

19. 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.

20. The evidence presented in this case reveals the existence of an *Independent Sub-Contractor Agreement* which provides that the Joined Party agrees to provide services to the Petitioner as an independent contractor. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of

the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

21. The Joined Party is paid by the job rather than by time worked. No payroll taxes are withheld from the pay and no fringe benefits are provided. The Joined Party's earnings are reported to the Internal Revenue Service as nonemployee compensation.

22. The Joined Party provides his own tools and provides his own transportation. Although the Joined Party is reimbursed for expenses when working out of town, the Joined Party is responsible for the majority of his work expenses.

23. The Joined Party has the right to refuse any work and the right to negotiate the fee for each job. The Joined Party is not supervised in his work. The Petitioner does not control how the work is performed. If the work is not performed correctly the Joined Party is responsible for redoing the work without additional compensation.

24. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

25. In this case some of the Restatement factors point toward an employer/employee relationship and some point toward an independent contractor relationship. However, the Petitioner does not exercise control over how the work is performed. The Petitioner is concerned only with the results of the work and not with how the Joined Party achieves those results. Thus, it is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured employment.

Recommendation: It is recommended that the determination dated May 28, 2010, be REVERSED.

Respectfully submitted on November 8, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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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 May 28, 2010, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION