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

PETITIONER:
Employer Account No. - 2962213
ALPHA PACK BILLING INC
JEFFERY J PAPRZYCKI
1502 MURRAY AVENUE
CLEARWATER FL 33755

PROTEST OF LIABILITY
DOCKET NO. 2010-98460L

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 17, 2010.

After due notice to the parties, a telephone hearing was held on October 11, 2010. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. 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 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's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which began operating a medical billing company in early February 2008. The Petitioner's president is active in the operation of the business and operates the business from his residence. Although the president does not receive a salary from the Petitioner, the president's rent, utilities, and other personal living expenses are paid by the Petitioner.

2. The Joined Party was the girlfriend of the Petitioner president. The Joined Party worked for the president's sister who also operated a medical billing company. The president hired the Joined Party at the inception of the Petitioner's business in February 2008 to work part time until the Petitioner obtained enough business to allow the Joined Party to work full time. There was no written agreement or contract. The only verbal agreement was that the Joined Party would work for the Petitioner.

3. The Joined Party performed the work at the residence of the Petitioner's president. The Petitioner provided the Joined Party with a desk, computer, telephone, fax machine, supplies, and everything else that was needed to perform the work. The Joined Party was not required to provide anything to perform the work and did not have any expenses in connection with the work.

4. The president told the Joined Party that he was the Joined Party's boss and that he ran the show. Although the Joined Party was more experienced than the Petitioner's president, the president told the Joined Party how to perform the work. The president criticized the Joined Party because the president believed that the Joined Party wrote notes that were too lengthy.

5. The Joined Party and the Petitioner's president worked side-by-side at desks that were approximately six feet apart. The president told the Joined Party what days to work, what time to start work each day, when to take a lunch break, and when to stop working at the end of the day. If the Joined Party needed to take time off from work she had to obtain permission from the president.

6. Initially, the Petitioner paid the Joined Party $10 per hour. In approximately May 2008 the president decided that the Joined Party was working hard and was doing a good job. As a result the Petitioner increased the Joined Party's pay to $10.25 per hour.

7. The Joined Party was required to complete a daily timesheet showing her beginning and ending times each day and the amount of time she took for a lunch break. The Joined Party discovered that the Petitioner's president would change her timesheets after the timesheets were submitted.

8. The Petitioner did not always pay the Joined Party for all of the hours which the Joined Party worked. The president would give the Joined Party a weekly paycheck based on the Petitioner's available funds. Sometimes the paychecks were for uneven amounts. When the Joined Party protested the president told her that the Petitioner did not have enough money to pay the total earnings.

9. The Petitioner did not withhold any payroll taxes from the Joined Party's pay or provide any fringe benefits because the president decided that the Petitioner could not afford to withhold taxes. The Petitioner did not register with the Department of Revenue for payment of unemployment tax because the president was not aware of that responsibility. At the end of the year the Petitioner reported the earnings received by the Joined Party on Form 1099-MISC as nonemployee compensation. For the 2008 tax year the Petitioner reported earnings of $9,303.81. For the 2009 tax year the Petitioner reported earnings of $6,913.35.

10. The Petitioner worked under a contract with another medical billing company. That contract required the Petitioner to pay the other billing company a portion of the Petitioner's revenue. The president decided that the Joined Party should form her own medical billing company with separate clients to avoid having to pay a portion of the revenue to another party. The president helped the Joined Party form Second to None Billing, LLC in October 2008. The Joined Party continued to work for the Petitioner after October 2008.

11. Either party had the right to terminate the working relationship at any time without incurring liability. In May 2008 the Joined Party spent the night with the Petitioner's president. The Joined Party awoke early and left to go to the store to purchase cigarettes. She was gone for about thirty minutes and when she returned the president accused her of cheating on him. As a result the

president fired the Joined Party. The president rehired the Joined Party shortly thereafter. In May 2009 the Joined Party broke up with the Petitioner's president. The president fired the Joined Party again, stating that if they were not boyfriend/girlfriend the Joined Party could not work for the Petitioner. A few days later the Petitioner's president told the Joined Party that she could continue working for the Petitioner. On June 2, 2009, the president told the Joined Party to remove her personal belongings from his residence. The working relationship ended at that time.

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.

18. 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.

19. There was no written agreement or contract between the parties. The only verbal agreement was that the Joined Party would work for the Petitioner. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

20. The Petitioner's business is medical billing and the Joined Party performed the medical billing for the Petitioner along with the Petitioner's president. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work.

21. The Petitioner controlled the days and hours of work, even to the point of determining when the Joined Party could take a work break. The Joined Party had to obtain permission to take time off from work. The Petitioner's president told the Joined Party how to perform the work even though the Joined Party had more experience doing medical billing. The president told the Joined Party that he was her boss and that he ran the business.

22. The Joined Party's pay was based on time worked rather than based on production or by the job. Although the Joined Party was required to complete a timesheet, the Petitioner altered the timesheets. The Petitioner unilaterally determined the hourly rate of pay and controlled the financial aspects of the relationship. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

23. The Joined Party worked for the Petitioner for a period of approximately sixteen months. Either party could terminate the working relationship at any time without incurring liability. These facts reveal the existence of an at-will working relationship of relative permanence. The Petitioner's president terminated the Joined Party on several occasions. 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."

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. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

25. The Petitioner controlled what was to be performed, where it was to be performed, when it was to be performed, and how it was to be performed. The Petitioner exercised significant and extensive control over the Joined Party. Thus, it is concluded that the services performed by the Joined Party constitute insured employment.

26. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

27. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

28. The Petitioner is a corporation and the Petitioner's president is a statutory employee of the Petitioner. The Petitoner's president has been active in the operation of the business since inception. The Joined Party also worked each week beginning at the inception of the business and continuing for a period of sixteen months.

29. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

30. The evidence reveals that the Petitioner had at least one employee during twenty different calendar weeks during 2008. The evidence also reveals that the Petitioner paid wages of more than $1,500 during a calendar quarter. Thus, the Petitioner has establsihed liability for payment of unemployment taxes.

31. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.

32. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."

33. The Petitioner is a subchapter S corporation and the Petitioner's profits pass through the corporation to the Petitioner's president at the end of each tax year. Although the president did not receive a salary from the Petitioner, the Petitioner paid the president's personal living expenses.

The personal living expenses paid by the Petitioner constitute compensation for employment and are subject to unemployment compensation tax.

Recommendation: It is recommended that the determination dated May 17, 2010, be AFFIRMED.

Respectfully submitted on October 12, 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 17, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION