DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2977761
AZLAND MINING LLC
ATTEN M LEE PERRY
PO BOX 550
FREEPORT FL 32439-0550

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2011-150616L

O R D E R

This matter comes before me for final Department 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 September 29, 2011, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 2012**.

Altemese Smith,
Assistant Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

DEPUTY CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of April, 2012.

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

AZLAND MINING LLC
ATTEN M LEE PERRY
PO BOX 550
FREEPORT FL 32439-0550

WARREN CORNELL
39 WEST SNOWDROP STREET
DEFUNIAK SPRINGS FL 32433

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
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RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Interim Executive Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated September 29, 2011.

After due notice to the parties, a telephone hearing was held on January 26, 2012.
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 an operator/laborer constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21), and 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a limited liability company that provides fill material for construction sites. The company maintains an office location and a separate mine, or pit, location. The Petitioner excavates and stockpiles the fill material at the pit. The fill material is loaded into customer trucks for sale. The pit operates from 7:00 a.m. to 4:00 p.m., Monday through Friday. The Petitioner employs a foreman who manages the pit. The foreman's duties include excavating and stockpiling fill material, loading fill, and completing customer truck tickets.

2. The Joined Party performed services for the Petitioner from November 8, 2010, until May 27, 2011. The Joined Party contacted the Petitioner looking for work. He was unemployed at the time, having been laid off from his prior job. The Petitioner told the Joined Party the company was in need of someone to clear land using a bulldozer that had been rented for a period of one month. The Joined Party met the Petitioner's representative, identified as the president, at the pit where he was asked to demonstrate that he could operate an excavator. The Petitioner told the Joined Party that he would be paid at the rate of $10 per hour.

3. The Petitioner and the Joined Party entered into an *Independent Contractor Agreement* dated November 8, 2010. The Joined Party was required to sign the agreement in order to obtain the work. The agreement provides that the Joined Party is an independent contractor, and not an employee, that the Joined Party is not entitled to fringe benefits, that the Joined Party is responsible for the payment of his own taxes, that the Joined Party waives all rights to claims arising from accidents, disabilities, or medical conditions, that the Joined Party is not subject to personnel policies, rules or regulations applicable to employees, and that the Joined Party will work without supervisory control by the Petitioner. The Joined Party did not know what was meant by the term "Independent Contractor." The Joined Party thought it meant his initial period of employment would be probationary.

4. The Joined Party performed land clearing services for approximately one week. The foreman then directed the Joined Party to begin operating the excavator to stockpile material for a particular customer. When the Joined Party did not report for work one day during the following week, the Petitioner hired another individual to complete the land clearing work. Thereafter, the Joined Party performed work, including fence relocation, excavating, loading, and completing customer tickets, as directed by the Petitioner's president or foreman. When the foreman was absent from the pit, the Joined Party performed the foreman's duties.

5. All of the Joined Party's services were performed at the Petitioner's business location. The Joined Party was given the combination to the pit gate lock. The Petitioner provided all of the equipment, tools and supplies needed for the work. For the fence work, the Joined Party used his own hammer and crowbar in addition to the equipment and supplies provided by the Petitioner. The Joined Party did not have any expenses in connection with the work.

6. The Petitioner's foreman told the Joined Party what time to report to the pit each day. Usually, the Joined Party reported at 6:45 a.m., and worked until the pit closed. Several times, when the foreman left early, the Joined Party locked the pit at the end of the day. Occasionally, the foreman would tell the Joined Party to come in at a later time or not to report the following day. The Joined Party had to attend to a personal matter that required him to be absent one day per month. At one point, the foreman told the Joined Party if he could not report to work every day, the Petitioner would have to find someone else to do the work. After the first few days, the foreman kept track of the hours the Joined Party worked.

7. The Joined Party had prior excavating and loading experience. The foreman told the Joined Party how to complete the customer tickets. The Petitioner's president provided detailed instructions as to how the fencing was to be installed. The Petitioner checked the progress of the work. If the Petitioner's president thought the Joined Party's work was inadequate, he would instruct the Joined Party to perform the work in a different manner. The Joined Party was not required to correct his work without compensation.

8. The Petitioner paid the Joined Party on a weekly basis. The Joined Party did not invoice for his services. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide the Joined Party with any fringe benefits, such as health insurance, vacation pay, or sick pay. The Joined Party completed a Form W-9, and the Petitioner reported the Joined Party's 2010 earnings on a Form 1099-MISC.

9. Either party could terminate the relationship at any time without penalty. When business increased to the point that the Petitioner had a need for a second full-time employee, the Petitioner told the Joined Party his services were no longer required. The Petitioner hired an individual that the Petitioner believed had more experience in the mining business.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. 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.

17. The evidence presented in this case shows the Joined Party signed an agreement stating that he is an independent contractor. While the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties, but upon all the circumstances of their dealings with each other. Cantor, 184 So.2d at 174.

18. The record reflects the Petitioner exercised significant control over the details of the work. The Petitioner assigned specific tasks to the Joined Party and prioritized the work to be performed. The Petitioner directed the Joined Party to perform the work in a manner the Petitioner deemed adequate. The Joined Party reported to a foreman who kept track of the hours worked by the Joined Party and directed the Joined Party's performance. The Joined Party was required to perform most of the work during the Petitioner's regular hours of operation. The Petitioner furnished the equipment and supplies needed for the work. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court held that the basic test for determining a worker's status is the employing unit's right of control over the manner in which the work is performed. The court, quoting Farmer's and Merchant's Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: "[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor."

19. It was not shown that the Joined Party was engaged in a distinct occupation or business. The record demonstrates that the Joined Party was actively seeking employment at the time he began performing his services for the Petitioner. The Joined Party had no expenses in connection with the performance of the work. Everything that was needed for the Joined Party to perform the work was provided by the Petitioner.

20. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate and method of payment. The Joined Party did not invoice for his services. The Joined Party was paid hourly and not by the job. These factors are more indicative of an employer-employee relationship. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

21. The Petitioner's operates a mining and fill supply operation. With the exception of the land clearing, the Joined Party performed the same duties as the Petitioner's foreman, a permanent employee. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business.

22. Either party could terminate the relationship at any time without incurring liability. The Petitioner terminated the relationship with the Joined Party upon deciding to hire a more experienced individual as a second employee. In Cantor, 184 So.2d at 174, the court, quoting 1Larson, Workmens'Compensation Law, Section 44.35, stated: "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."

23. It is concluded that the services performed for the Petitioner by the Joined Party as an operator/laborer constitute insured employment.

Recommendation: It is recommended that the determination dated September 19, 2011, be AFFIRMED.

Respectfully submitted on February 21, 2012.

SUSAN WILLIAMS, Special Deputy
Office of Appeals