AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2989103
AMERICHAIR CORP INC
750 UNITED ST
KEY WEST FL 33040-3251

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

PROTEST OF LIABILITY
DOCKET NO. 2011-6495L

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 November 5, 2010, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
Employer Account No. - 2989103
AMERICHAIR CORP INC
ATTN: SIMON DUDAI
750 UNITED ST
KEY WEST FL 33040-3251

PROTEST OF LIABILITY
DOCKET NO. 2011-6495L

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 November 5, 2010.

After due notice to the parties, a telephone hearing was held on March 31, 2011. An attorney appeared for the Petitioner and called the Petitioner's president as a witness. 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 received. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on April 14, 2011.

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.

Findings of Fact:

1. The Petitioner is a subchapter C corporation, incorporated in 2002 for the purpose of running a business that marketed mobility products.

2. The Joined Party provided services as an engineer for the Petitioner from May 1, 2003 through July 2010.

3. The Joined Party signed a written agreement at the start of service. The agreement indicated that the Joined Party would be working as an independent contractor. The Joined Party considered himself to be an independent contractor.

4. The Joined Party was hired by the Petitioner to design mobility systems, including wheel chairs, and to build prototypes of the designs. The Joined Party performed the design work from his home.

5. The Joined Party set his own schedule for performing the work. The Petitioner was unaware of what times or days the Joined Party performed services.

6. The Petitioner was located in a different city from the Joined Party and exercised no direct control over the work performed by the Joined Party.

7. The Joined Party would contact the Petitioner when a design had been completed or improved. The Petitioner would then inspect the design.

8. The Joined Party requested a work space from the Petitioner once the work had reached the prototype building stage. The Petitioner rented a workspace in the Joined Party's city of residence for the Joined Party's sole use. The Joined Party was the sole key holder of the work space. The Joined Party controlled how the work space was used. The workspace was not retained by the Petitioner after the assignment was completed.

9. The Joined Party provided his own hand tools. The Joined Party purchased the materials needed to perform the work. The Petitioner paid for all materials selected by the Joined Party.

10. The Joined Party was paid $300 per week for the duration of the project. Once the project was complete, the relationship between the parties ended.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. The evidence presented in this case reveals that the Petitioner did not exercise control over how, when, or where the Joined Party performed the work. The Petitioner was not aware of what schedule the Joined Party used. The Joined Party determined where the work should be performed at any given time. The Petitioner did not exercise any control over the details of the work, the timing of the work, or the location of the work.

18. Both parties considered the relationship to be an independent contractor relationship. While this is not, in and of itself dispositive, it does demonstrate the intentions of the parties.

19. The work performed by the Joined Party designing products is separate and distinct from the Petitioner's primary purpose of marketing products.

20. 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.

21. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on April 14, 2011. Where those findings are supported by the record, they are incorporated into this recommended order. Where those findings do not comport with the record, they are respectfully rejected

Recommendation: It is recommended that the determination dated November 5, 2010, be REVERSED.

Respectfully submitted on June 3, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals