

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 1428734
GONZALEZ & TAPANES FOODS INC
230 MOONACHIE AVE
MOONACHIE NJ 07074-1831

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-142087L**

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 May 24, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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. - 1428734
GONZALEZ & TAPANES FOODS INC
ATTN: FERNANDO GONZALEZ
230 MOONACHIE AVE
MOONACHIE NJ 07074-1831

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-142087L**

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 24, 2010.

After due notice to the parties, a telephone hearing was held on April 26, 2011. An attorney appeared and called the Petitioner’s vice president of sales 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 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.

Findings of Fact:

1. The Petitioner is a Limited Liability company, established in 1968 for the purpose of running a food manufacturing, processing, packaging, and distributing business.
2. The Joined Party performed services for the Petitioner as a travelling salesman from January 28, 2008, through March 21, 2010. The Joined Party worked full time.

3. The Joined Party was responsible for opening accounts, servicing accounts, and selling merchandise for the Petitioner. The Joined Party would sell to grocery stores, bakeries, chain stores, supermarkets, and restaurants.
4. The Petitioner would send in a temporary worker or allow the Joined Party to substitute in the event of an emergency.
5. The Petitioner paid the Joined Party a commission based upon money collected. The prices were set by the Petitioner. The Joined Party was allowed to give bargain prices.
6. The Joined Party provided his own vehicle for performing services. The Joined Party was responsible for fuel and maintenance for the vehicle. The Joined Party rented a scanning device from the Petitioner.

Conclusions of Law:

7. Section 443.1216, Florida Statutes, provides:

Employment, as defined in s. 443.036, is subject to this chapter under the following conditions:

3. An individual other than an individual who is an employee under subparagraph 1. Or subparagraph 2. who performs services for remuneration for any person:

- a. As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry-cleaning services for his principal.

- b. As a travelling or city salesperson engaged on a full time basis in the solicitation on behalf of, and the transmission to, his or her principal of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. This sub-subparagraph does not apply to an agent-driver or a commission-driver and does not apply to sideline sales activities performed on behalf of a person other than the salesperson's principal.

4. The services described in subparagraph 3. Are employment subject to this chapter only if:

- a. The contract of service contemplates that substantially all of the services are to be performed personally by the individual;

- b. The individual does not have a substantial investment in facilities used in connection with the services, other than facilities used for transportation; and

- c. The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

8. The evidence presented in this case reveals that the Joined Party performed full time services for the Petitioner as a travelling salesperson. The Joined Party sold the Petitioner's product to various food businesses including restaurants and supermarkets.
9. The evidence presented reveals that, while workers could be substituted in an emergency, the Joined Party was expected to perform the services for the Petitioner.

10. The Joined Party rented a scanning device from the Petitioner. This does not constitute a substantial investment in facilities used in connection with the services. The Joined Party's vehicle is not considered an investment under Section 443.1216 (1) 4 b., Florida Statutes.
11. The Joined Party provided services from January 28, 2008, through March 21, 2010. This period of service is in excess of two years and as such cannot be construed as being in the nature or a single transaction. The length of service demonstrates a continuing relationship between the parties.
12. A preponderance of the evidence presented in this case reveals that the Joined Party is a statutorily covered employee of the Petitioner.

Recommendation: It is recommended that the determination dated May 24, 2010, be AFFIRMED.

Respectfully submitted on June 14, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals