

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2969876
SHERIDAN GARCIA INC
2269 KENSINGTON LN
ORANGE PARK FL 32073-5273

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-143570L**

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 July 15, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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. - 2969876
SHERIDAN GARCIA INC
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2269 KENSINGTON LN
ORANGE PARK FL 32073-5273

**PROTEST OF LIABILITY
DOCKET NO. 2010-143570L**

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 July 15, 2010.

After due notice to the parties, a telephone hearing was held on January 13, 2011. The Petitioner, represented by the corporate president, appeared and testified. The corporate vice president testified as a witness. 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 and other individuals working as corporate officers constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

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 was formed in 2002 to receive income from an out-of-state insurance company for services performed by the Petitioner's president, Sheridan Garcia, as a customer service representative. Subsequently, the president ceased performing

services as a customer service representative. On January 10, 2005, the Petitioner began the operation of a business involved in the repairing and remodeling of homes under the fictitious name of Broken Home Repairs.

2. The Petitioner's president, Sheridan Garcia, continued to be active in the operation of the business. The corporate vice president, Jose Garcia, also was active in the operation of the business. Both Sheridan Garcia and Jose Garcia derived income from the services which they performed for the corporation.
3. The Joined Party, Orry Combs, began performing services for the Petitioner on July 6, 2006, as a laborer. Initially, the Petitioner paid the Joined Party \$10 per hour and subsequently increased the rate of pay to \$10.50 per hour. The Joined Party does not have a drivers' license. The Petitioner provided transportation for the Joined Party to and from work and to the job sites. The Petitioner provided all of the tools and supplies that were needed to perform the work. The Petitioner told the Joined Party what to do and when to do it.
4. In approximately 2007 the Petitioner appointed the Joined Party to the office of secretary of the corporation and gave him the authority to sign checks on behalf of the Petitioner. The Petitioner changed the method and rate of pay. The Petitioner paid the Joined Party 25% of the income of the business and provided the Joined Party with five paid vacation days per year and three paid sick days per year. The Petitioner placed the Joined Party in charge of the other laborers. The Petitioner continued to provide transportation for the Joined Party and continued to provide all tools and supplies. The Petitioner continued to instruct the Joined Party concerning what to do and when to do it.
5. Generally, the Petitioner paid the Joined Party in cash. However, sometimes the Petitioner paid the Joined Party by check. No taxes were withheld from the Joined Party's pay. At the end of each year the Petitioner reported the Joined Party's earnings on form 1099-MISC as nonemployee compensation.
6. The Joined Party did not offer services to the general public as a self employed contractor. He was not licensed to work as a contractor or to operate a business separate from the Petitioner's business. He did not have personal business liability insurance. The Joined Party performed services only for the Petitioner.
7. Either party had the right to terminate the relationship at any time without incurring liability.
8. The Joined Party took an authorized vacation, however, he was one day late returning from vacation. The Petitioner's president sent a text message to the Joined Party as a warning due to the absence. Subsequently, the Joined Party requested a day off from work and received permission from the vice president. The Joined Party had exhausted his vacation time and sick time for the year and when he did not report for work the president discharged the Joined Party on June 15, 2010.
9. The Joined Party filed an initial claim for unemployment compensation benefits effective June 20, 2010. When the Joined Party did not receive credit for his earnings with the Petitioner he filed a *Request for Reconsideration of Monetary Determination* and an investigation was assigned to the Department of Revenue to determine if the Joined Party was entitled to credit for his earnings. On July 15, 2010, the Department of Revenue determined that the Joined Party and other individuals performing services as corporate officers were the Petitioner's employees retroactive to April 1, 2005. The retroactive liability for the Petitioner was limited to April 1, 2005, by a statute of limitations. The Petitioner filed a timely protest.

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 Petitioner initially hired the Joined Party as a laborer and paid him by the hour for the work which he performed. The Joined Party did not have any expenses in connection with the work and the Petitioner provided the transportation, tools, and supplies. The Petitioner told the Joined Party what to do and when to do it. 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. These facts reveal that the Joined Party was an employee of the Petitioner during the time that he worked as a laborer.

18. 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.
19. 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.
20. 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.”
21. The corporate secretary, Orry Combs; the corporate president, Sheridan Garcia; and the corporate vice president, Jose Garcia; were all active in the operation of the business and were all compensated for their services by the Petitioner. Thus, the corporate officers, including the Joined Party, Orry Combs, are statutory employees of the Petitioner.

Recommendation: It is recommended that the determination dated July 15, 2010, be AFFIRMED.

Respectfully submitted on January 13, 2011.



R. O. SMITH, Special Deputy
Office of Appeals