

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2722379
XCEL TRANSPORT SERVICES INC
572 TREE SHORE DRIVE
ORLANDO FL 32825-5954

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-14983L**

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 November 17, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 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. - 2722379
XCEL TRANSPORT SERVICES INC
HILDA FRATICELLI
572 TREE SHORE DRIVE
ORLANDO FL 32825-5954

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-14983L**

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 17, 2009.

After due notice to the parties, a telephone hearing was held on January 19, 2011. An attorney appeared for the Petitioner and called the Petitioner's owner as a witness. The Joined Party appeared and testified on his own behalf. A tax specialist appeared 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 and other individuals 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.

Findings of Fact:

1. The Petitioner is a LLC formed in 2005 for the purpose of running a business providing drivers/service agents to client rental car companies.
2. The Joined Party provided services as a driver/service agent to the Petitioner from May 2008 through July 2008.

3. The Joined Party's services were provided, through the Petitioner, to a client company. The client company determined when and where the Joined Party's services were required.
4. The Joined Party was required to report to work each day from 7a.m. through 3p.m. The client company set the schedule.
5. The Joined Party's duties included cleaning the cars for rental and moving the vehicles from the cleaning area to the pick-up area.
6. The Joined Party's work was supervised. The client's oversight was to ensure that the work was performed properly. The Joined Party was provided guidance in how the work should be performed.
7. The Joined Party was paid \$7.21 per hour. The rate of pay was set by the client. The Joined Party kept track of his hours on a timesheet provided by the Petitioner. The Petitioner paid the Joined Party and issued a 1099 for the Petitioner. The Petitioner billed the client company for the Joined Party's services.
8. The Joined Party worked at the client's place of business.
9. The client company provided all tools and equipment needed to perform the job.
10. The Joined Party was discharged by the client company.

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 retained the Joined Party to provide services for a client rental car company. The Petitioner hired and paid the Joined Party. The Joined Party actually provided services to a client rental car company.
18. The Joined Party was supervised while on the work site by employees of the client company. The client company could and in fact did, discharge the Joined Party.
19. The Joined Party was paid by the hour. The Joined Party had no control over the financial aspects as both the rate of pay and schedule of work were dictated to the Joined Party.
20. A preponderance of the evidence presented in this case reflects that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship.

Recommendation: It is recommended that the determination dated November 17, 2009, be AFFIRMED.

Respectfully submitted on March 15, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals