AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2114612
DIAMANTE PAINT & BODY WORKS INC
1084 E 47TH STREET
HIALEAH FL 33013-2140

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

PROTEST OF LIABILITY
DOCKET NO. 2011-52133L

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 March 25, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 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. - 2114612
DIAMANTE PAINT & BODY WORKS INC
ATTN: ANTONIO GONZALEZ
1084 E 47TH STREET
HIALEAH FL 33013-2140

PROTEST OF LIABILITY
DOCKET NO. 2011-52133L

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 March 25, 2011.

After due notice to the parties, a telephone hearing was held on July 5, 2011. The Petitioner was represented by its attorney. The Respondent, represented by a Department of Revenue Tax Specialist, 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 received from the Petitioner.

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 operates a vehicle paint and body shop.
2. The Joined Party immigrated to the United States in August 2001. In the United States the Claimant has only worked as an auto body technician and for a period of time he operated his own auto body business. The Joined Party closed his business in early 2009. The Joined Party has not had any business license or occupational license, has not had business liability insurance, has not

had any investment in a business, and has not offered to provide auto body services to the general public since early 2009 when he closed his business.

3. In 2010 the Joined Party was seeking work and read a newspaper help wanted advertisement for the position of auto body technician. The Joined Party applied for the position and was interviewed by the Petitioner. The Petitioner asked if the Joined Party was qualified to perform the work of an auto body technician. The Petitioner told the Joined Party that the hours of work were Monday through Saturday from 8 AM until 5:30 PM, that the pay was based on the number of hours that the Petitioner estimated that it should take to complete each job, and that the Petitioner would pay the Joined Party $15 for each estimated or flat rate hour of work. The Joined Party accepted the offer of work and began working for the Petitioner in August 2010.
4. There was no written agreement or contract between the Petitioner and the Joined Party.
5. The work was performed at the location of the Petitioner's business. The Petitioner provided the place of work and all equipment, materials, and supplies that were needed to complete the work. The Joined Party provided his own hand tools including a grinder, a hammer, a ratchet, and a spray gun. The Joined Party did not have any expenses in connection with the work other than maintaining his own hand tools.
6. The Petitioner did not provide any training to the Joined Party. The Joined Party is a professional auto body technician and he knew how to perform the work.
7. The Petitioner assigned the work to the Joined Party and told the Joined Party how the Petitioner wanted the Joined Party to perform the work. The Petitioner observed the Joined Party while the Joined Party performed the work. The Joined Party was not required to report the progress of the work because the Petitioner observed the Joined Party's work activities and progress.
8. The Joined Party was not required to punch a time clock or complete a timesheet. The Joined Party was allowed to take a one hour lunch break each day. The Petitioner posted a schedule listing the times that each worker, including the Joined Party, was allowed to leave for a lunch break each day.
9. The Petitioner provided the Joined Party with a uniform bearing the Petitioner's name. The Joined Party was required to wear the uniform while working.
10. The Petitioner paid the Joined Party on a weekly basis; however, the Petitioner did not withhold any payroll taxes from the pay. The Petitioner did not provide any fringe benefits such as health insurance, paid vacations, or paid holidays. At the end of 2010 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
11. During the time that the Joined Party performed services for the Petitioner the Joined Party did not perform any services for others and he did not believe that he had the right to perform services for others. The Joined Party did not hire others to perform services for him and did not believe that he had the right to subcontract the work or hire others to perform the work for him. The Joined Party believed that he was an employee of the Petitioner.
12. Either party had the right to terminate the relationship at any time without incurring liability. On or about January 15, 2011, the Petitioner stopped providing work assignments to the Joined Party and the Joined Party filed a claim for unemployment compensation benefits effective January 23, 2011.
13. The Joined Party did not receive credit for his earnings with the Petitioner and a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. On March 25, 2011, the Department of Revenue issued

a determination holding that the services performed by the Joined Party and other individuals as auto repairmen constitute insured employment retroactive to August 18, 2010. The Petitioner filed a timely protest.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as auto repairmen 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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.

20. 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.

21. The evidence presented in this case reveals that there was no written or verbal agreement at the time of hire specifying whether the Joined Party would perform services as an employee or as an independent contractor. The Petitioner merely told the Joined Party the days and hours of work, the method of pay, and the hourly rate of pay. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

22. The Petitioner's business is a vehicle paint and body shop. The work performed by the Joined Party was repairing the auto bodies for the Petitioner's customers. 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. The Petitioner provided the place of work and all of the equipment, materials, and supplies that were needed to perform the work. The Joined Party provided only his own hand tools. The hand tools do not represent a significant investment in a business.

23. The Petitioner determined the method and rate of pay. The Petitioner controlled the total pay per job because the Petitioner determined the amount of time for which the Petitioner would pay the Joined Party regardless of the time that was actually required to perform the work. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

24. The Joined Party performed services for the Petitioner for a period of approximately five months. The Joined Party was not engaged for a specific period of time or for a specific job. It was an on-going relationship of indefinite duration and either party could terminate the relationship at any time without incurring liability. These facts reveal an at-will relationship of relative permanence. The Petitioner terminated the Joined Party in January 2011. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. 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."

25. The only competent evidence concerning the belief of the parties is the testimony of the Joined Party. The Joined Party testified that at all times during the relationship he believed that he was the Petitioner's employee. The Joined Party did not perform services for others and did not believe that he had the right to do so. The Joined Party did not hire others to perform the work for him and he did not believe that he had the right to do so.

26. The Petitioner controlled what work was performed, where it was performed, and when it was performed even to the extent of controlling when the Joined Party could take a lunch break and how much time he was allowed to take for a break. The Petitioner monitored the performance of the work. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if 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 the person serving is subject to the control of the person being served as to the means to be used, he is not an

independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

27. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

28. The Petitioner has not established by a preponderence of competent evidence that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated March 25, 2011, be AFFIRMED.

Respectfully submitted on August 2, 2011.

R. O. SMITH, Special Deputy
Office of Appeals