

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2360091
LARAS TRUCKING INC
ATTN: RUBEN G LARA
12451 NW 7TH ST
MIAMI FL 33182-2049

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-146113L**

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 September 8, 2010.

After due notice to the parties, a telephone hearing was held on December 8, 2010. The Petitioner, represented by its accountant, appeared and testified. The Respondent was represented by a Department of Revenue Tax Audit Supervisor. A Tax Auditor testified as a witness.

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 constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which operates a short trip local trucking company which hauls produce to warehouses in refrigerated trucks. The Petitioner owns the trucks which are used to transport the produce.
2. The Florida Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Unemployment Compensation Law.
3. The Petitioner designated the Petitioner's current accountant as the individual to be contacted for the audit. The Petitioner completed a Power of Attorney appointing the accountant as the Petitioner's representative for the unemployment tax audit. The Petitioner's current accountant was not the Petitioner's accountant during 2008. The Petitioner engaged the current accountant on or about January 1, 2010.

4. During 2008 the Petitioner issued 54 1099 forms, two of which were issued to corporations. The Tax Auditor request proof to establish that the workers were bona fide independent contractors. The Tax Auditor examined the proof that was provided. The Tax Auditor concluded the 52 individuals to whom the Petitioner issued 1099 forms, most of who were truck drivers, were misclassified as independent contractors and were in fact the Petitioner's employees.
5. On or before September 8, 2010, the Department of Revenue issued a *Notice of Proposed Assessment* showing the additional tax that was due as a result of the audit. The Petitioner filed a timely protest by letter dated September 16, 2010.

Conclusions of Law:

6. 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.
7. 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).
8. 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).
9. 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.
10. 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.
11. 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.
12. 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.

13. In this case the only evidence presented by the Petitioner at the hearing was the testimony of the Petitioner's current accountant. The current accountant was not associated with the Petitioner during 2008. Although the accountant stated that independent contractor agreements were provided to the Tax Auditor for some of the workers, no independent contractor agreements, or other documentary proof, were offered into evidence.
14. Section 90.801(1)(c), Florida Statutes, defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”
15. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
16. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
17. The evidence presented in this case is not sufficient to show by a preponderance of competent evidence that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated September 8, 2010, be AFFIRMED.

Respectfully submitted on December 9, 2010.



R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA**

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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 September 8, 2010, is AFFIRMED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION