REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

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DIVISION OF WORKERS' COMPENSATION
TALLAHASSEE, FLORIDA

IN THE MATTERS OF:

DTS, LLC., and

Case No. 09-139-1A-WC

P.A.T. AUTO TRANSPORT, INC.

Case No. 09-128-1A-WC

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order filed in this cause on January 29, 2010, by Administrative Law Judge (ALJ) P. Michael Ruff after formal hearing held on November 3, 2009. A copy of that Recommended Order is attached as Exhibit A hereto. The Division of Workers' Compensation (division) timely filed numerous exceptions to the Recommended Order, and P.A.T. timely filed responses to those exceptions. The Recommended Order, the transcript of proceedings, the admitted exhibits, the exceptions and responses thereto, and applicable law have all been considered during the preparation of this Final Order.

RULINGS ON THE DIVISION'S EXCEPTIONS AND P.A.T.'S RESPONSES

The division filed thirty one (31) individual exceptions covering thirty seven (37) pages, and an additional fifty one (51) pages of attachments. P.A.T. filed fifteen (15) pages of responses. Numerous individual topics were addressed in that voluminous exchange, but the central, and as the ALJ observed "quintessential question" to be determined by all the record evidence is whether the numerous truck drivers utilized by P.A.T. to transport P.A.T.'s customers' automobiles from point to point are P. A. T.

employees or independent contractors for workers' compensation coverage and compliance purposes.

After considering all the record evidence, the ALJ found and concluded that said truck drivers qualified as independent contractors under Section 440.02(15)d.1.b., Fla. Stat., and more particularly, parts I, IV, V, VI, and VII thereof. The ALJ also concluded that P.A.T. had properly filed for, and thereby received, exemptions from workers' compensation coverage for its office employees. The ALJ then recommended that the entire case against P. A. T. be dismissed.

Essentially, the division's exceptions fall into two broad categories. One category contends that certain of the ALJ's Findings of Fact are actually Conclusions of Law, which would thus grant this Department broader discretion to reject or modify them under Section 120.57(l), Fla. Stat., than if they were fact findings. The second category broadly contends that there is record evidence contrary to one or more of the ALJ's Findings of Fact.

While some of the individual exceptions appear to have merit, none, taken either individually or collectively, show the complete lack of competent, substantial evidence needed to modify or supplant the ALJ's Findings of Fact, as required by Section 120.57 (l), Fla. Stat. While numerous exceptions contend that certain fact findings are actually Conclusions of Law, it is well settled that the "quintessential question" of whether the truck drivers in question are employees or independent contractors is a matter of fact, not law. *See, e.g. Blackman & Huckaby Enterprises v. Jones*, 104 So.2d 667 (Fla. 1st DCA 1958); *Rainsford v. McArthur Dairies*, 108 So.2d 914 (Fla. 3rd DCA 1959); *Adams v. Wagner*, 129 So.2d 129 (Fla. 1961); *Burns v. Hartford Accident And Indemnity*

Company, 157 So.2d 84 (Fla. 3rd DCA 1963); *A Nu Transfer, Inc., v. Dept. of Labor, Etc.*, 427 So.2d 305, 306 (Fla. 3rd DCA 1983). Therefore, the ALJ was correct in determining that question as a matter of fact. Moreover, merely labeling an ALJ's finding of fact a conclusion of law does not make it so, and an agency cannot transform one into another to reach its desired results. *Pillsbury v. State, Dept. of Health and Rehabilitative Services*, 744 So.2d 1040 (Fla. 2nd DCA 1999), reh. den.; *Burke v. Harbor Estates Associates, Inc.*, 591 So.2d 1034 (Fla. 1st DCA 1991); *Department of Labor and Employment Security v. Little*, 588 So.2d 281 (Fla. 1st DCA 1991), appeal after remand, 652 So.2d 297, reh. den. Therefore, the Division's exceptions contending that the ALJ's findings of fact material to resolving the question of whether the truck drivers in this case were P.A.T. employees or independent contractors are actually conclusions of law subject to agency modification or rejection under Section 120.57 (1)(l), Fla. Stat., is rejected without further discussion.

Because there is competent substantial evidence in the record, particularly the testimony of Tracie Hedges (Tr. 178-343), to support the ALJ's quintessential determination that the truck drivers in question are independent contractors, all exceptions that argue for a re-weighing of the evidence, even if there is conflicting evidence, must be rejected. It is the exclusive province of an ALJ to weigh all evidence and resolve all conflicts therein *Walker v. Board of Professional Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985), and an agency is not at liberty to re-weigh that evidence. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of*

Alcoholic Beverages and Tobacco, 475 So.2d 1277 (Fla. 1st DCA 1985); *Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985); *Howard Johnson v. Kilpatrick*, 501 So.2d 61 (Fla. 1st DCA 1987); *Nat. Ins. Serv. v. Fla. Unemp. App. Com'n*, 495 So.2d 244 (Fla. 2nd DCA 1986); *Groves-Watkins Const. v. Dept. of Transp.*, 511 So.2d 323 (Fla. 1st DCA 1987); *Rogers v. Dep't. of Health*, 920 So.2d 27 (Fla. 1st DCA 2005). Accordingly, all those exceptions that urge a re-weighing of the evidence, even in the face of conflicts therein, must be, and are, rejected.

Additionally, it must be noted that the division presented little evidence directly disputing the Respondent's qualification of the truck drivers at issue as independent contractors under Section 440.02(15)d.1. b., Fla. Stat. Instead, the division focused on the fact that at a certain point in time P.A.T. paid those truck drivers' commissions by checks written on its own company account rather than through another checking account it had previously opened and maintained for that express purpose. (Apparently, at some point in time, the supply of checks for that other account became exhausted, so P.A.T. thereafter paid the commissions from its own account rather then purchasing additional checks for the other account.) The division's own investigator affirmed that but for that insular practice, the division would have determined that those truck drivers were independent contractors, and that this action would not have been brought on the basis that they were P.A.T. employees. (Tr. 152-154, 162-163)

Nothing in Section 440.02(15(d)1.b., *supra,* requires paychecks to be written a certain way or by a certain entity to conclusively include or exclude a person from the status of independent contractor. The Respondent presented competent, substantial

evidence that otherwise established the truck drivers as independent contractors pursuant to that statute.

Similarly, the division's arguments that under federal law dealing with taxation the truck drivers might have been deemed employees overlooks the fact that workers' compensation coverage and compliance is not a taxation question, is not a federal question, and is thus not determinative under Section 440.02(15)(d) 1.b., *supra*, to qualify one as an independent contractor. The division's exceptions brought on that basis are therefore ultimately unpersuasive, and are rejected.

The un-refuted testimony of Tracie Hedges as to the office employee exemptions was that in 2005 she hand-delivered the all appropriate exemption forms to the division's Burgess Road office in time to receive the appropriate exemptions. (Tr. 226-230). The division's witness acknowledged receipt of some of the forms and the existence of certain exemptions in 2005, but she could not state precisely when they had been received or when or whether they had been forwarded to the division's Tallahassee headquarters for scanning as was the practice in 2005. The division's witness also testified that she had no knowledge about P.A.T. exemptions for 2009. (Tr. 345-353) Although there are gaps in the witnesses' testimony regarding exactly who was exempted and when, the testimony allows the ALJ's factual inference that all the exemption forms were timely hand delivered to the Burgess Road office in 2005. Moreover, no division witness provided any testimony as to the 2009 status of those exemptions. Thus, the division failed to carry its burden of proving by clear and convincing evidence that the exemptions in question were not in effect at any of the times in question. Accordingly, any exception contending to the contrary is rejected.

WHEREFORE, in consideration of all of the above,

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law set forth in the Recommended Order are adopted as the Department's Findings of Fact and Conclusions of Law, and that the Stop Work Order and the Fourth Amended Order of Penalty Assessment are hereby dismissed.

DONE AND ORDERED this 28th day of April, 2010.

Brian London
Deputy Chief Financial Officer

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P. Review proceedings must be instituted by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street Tallahassee, Florida, 32399-0390, and a copy of the same with the appropriate district court of appeal, within thirty (30) days of rendition of this Order. Filing may be accomplished via U.S. Mail, express overnight delivery, or hand delivery. Filing cannot be accomplished by facsimile transmission or electronic mail.

Copies to:

ALJ P. Michael Ruff
Douglas D. Dolan
Douglas F. Miller