STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION, Petitioner, vs. DTS, LLC, Respondent.	)	Case No. 09-3484
DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION, Petitioner, vs. P.A.T. AUTO TRANSPORT, INC., Respondent.	)	Case No. 09-3486

RECOMMENDED ORDER

Pursuant to appropriate notice, this matter came on for final hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings on November 3, 2009, in Pensacola, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Kristian E. Dunn, Esqire
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For Respondent: Douglas F. Miller, Esquire
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STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent, P.A.T. Auto Transport, Inc., committed the violations alleged in the relevant Stop-Work Order and the Fourth Amended Order of Penalty Assessment, and, if so, what, if any, penalty is warranted.

PRELIMINARY STATEMENT

This cause arose upon the issuance of a Stop-Work Order (SWO) on or about May 5, 2009, directing the Respondent, P.A.T. Auto Transport, Inc. (P.A.T., Respondent) to stop work and cease all business operations in Florida because of allegedly failing to obtain workers' compensation insurance coverage meeting the standards of Chapter 440, Florida Statutes, and the Florida Insurance Code. The Department calculated an initial Amended

Order of Penalty Assessment (AOPA), which was amended a number of times so that the 4th AOPA was issued and served on November 3, 2009, the initial day of hearing.

On receiving the initial AOPA, the Respondent filed a Petition for Hearing and the matter was referred to the Division of Administrative Hearings and the undersigned Administrative Law Judge, on or about June 24, 2009. The case was consolidated with Case Number 09-3484, by an order entered, pursuant to motion, on August 7, 2009. In the meantime, the matter had been set for hearing for October 7 and 8. Thereafter, a stipulated Motion for Continuance was filed and the matter was continued and rescheduled for a hearing for November 3 and 4, 2009.

Case 09-3484, by the Department of Financial Services, Division of Workers' Compensation against DTS, LLC, had originally been assigned to Judge Cleavinger, before consolidation with Case Number 09-3486.

Upon the convening of the hearing, the Department presented the 4th AOPA and Penalty Worksheet. The admissibility of this document, and proceeding on the 4th Amended Order of Penalty Assessment was not challenged by the Respondent, but the Respondent did challenge the amount of penalty and the entries on the Penalty Worksheet, as addressed herein.

The Petitioner presented the testimony of Michelle Newcomer, the Department's Investigator, and also presented the

testimony of one of Investigator Newcomer's staff employees, Janice Evers. The Respondent presented the testimony of Tracie Hedges as its corporate representative and admitted into evidence, without objection, were depositions of the following persons: Candy Baker, Greg Hedges, Mike Short, Mike Staines, Lloyd Young, and Tracie Hedges. Also admitted into evidence without objection were Composite Exhibits 1A through 1F, Composite Exhibits 2A through 2E, Composite Exhibits 5A through 5D, Petitioner's Exhibit 6, as well as the Petitioner's answers to the Respondent's Interrogatories, Respondent's Request for Admissions and the Petitioner's responses.

The parties stipulated to the admission of the depositions listed herein, although the Respondent had objections to specific questions asked by the Petitioner, as well as specific responses from deponents Michael Short and Lloyd Young. Those objections were sustained or overruled as set forth in the transcript of the proceeding on pages 17 through 35.

P.A.T. moved that its Request for Admissions be deemed admitted because the Department failed to file responses to the request within the 30 days required by Fla. R. Civ. Pro. 1.370. If a party admits a matter in response to a Request for Admission, that matter is generally conclusively established, unless a court, on motion, permits withdrawal or amendment of the admission. It is not disputed that P.A.T. filed its

admissions request on July 5, 2009, and the Department did not answer those requests until August 26, 2009, obviously more than 30 days after the request was served. The Motion to Deem Matters Admitted was not raised until the outset of the hearing. Therefore, since response time had not been afforded the Petitioner to respond to the Respondent's motion, ruling thereon on was reserved until the entry of the Recommended Order and the parties were given the opportunity to file briefs or memoranda concerning the matter, and to incorporate such into their proposed recommended orders. The Motion to Deem Matters Admitted is addressed in the Conclusions of Law below.

Upon conclusion of the proceeding, the parties elected to obtain a transcript thereof. The transcript was filed November 23, 2009. The parties had requested an extension of the customary period for filing proposed recommended orders. Therefore, Proposed Recommended Orders were timely filed on or before December 17, 2009. Those Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is an agency of the State of Florida, charged with the responsibility of enforcing the Workers' Compensation coverage requirements embodied in Section 440.107, Florida Statutes (2008), whereby Florida employers must secure

the payment of workers' compensation insurance coverage and benefits for their employees. See § 440.107(3), Fla. Stat.

2. The Respondent, P.A.T., is a corporation conducting a trucking business, headquartered in Pensacola, Florida. The Respondent's services include transporting motor vehicles using a fleet of some 61 highway tractors and associated auto transport trailers.

3. Michelle Newcomer is an investigator employed by the Petitioner. Her duties include conducting inspections and investigations of businesses who may be workers' compensation employers, to determine if they are required to have workers' compensation coverage under Florida law, and the extent and compliance of that coverage. Ms. Newcomer conducted an inspection of the Respondent at 6732 Rambler Drive in Pensacola, Florida, on March 18, 2009. She determined that two companies, or businesses, operated at that address, the Respondent and MNT Enterprises (MNT). MNT had a workers' compensation policy covering its employees and was statutorily compliant.
Ms. Newcomer also investigated the Respondent and learned that the principal stockholder, George Hedges, was exempt from coverage. She inquired about the status of the truck drivers working for the company and was told by Tracie Hedges that they were independent contractors. She was unable to witness any

violations occurring at that time and concluded the investigation.

4. Later, in April 2009, she received information that led her to believe that the Respondent's truck drivers were employees and not independent contractors.

5. She had an opportunity to see a pay stub for a truck driver who had worked for the company who had been injured and had a workers' compensation issue. She noticed that the pay stub reflected that Federal Income Tax withholding had been deducted, along with various other deductions, such as Social Security and Medicare. She felt this might be indicative of an employee relationship, rather than the drivers being independent contractors.

6. She returned to the Respondent's address later that month and issued a written Request for Production of Business Records to the Respondent and to an associated company called TK131. She issued a Stop-Work Order for the Respondent due to its purported failure to comply with workers' compensation coverage requirements for employees. The Respondent did provide the required business records.

7. She reviewed the records provided to her and was able to ascertain that the Respondent employed more than four employees. Additionally, she learned that, although the Respondent, through a leasing arrangement for its office

employees, had workers' compensation coverage for them, the 59 drivers and corporate officers did not appear to be covered by workers' compensation insurance. Thereafter, the Stop-Work Order was amended to include the purported failure to secure payment of workers' compensation coverage as required by Chapter 440, Florida Statutes. That resulted in a Stop-Work Order and Penalty Assessment. The Department also issued a Stop-Work Order and Penalty Assessment to DTS, LLC, which included the predecessor company, Darts Transport. The Stop-Work Order and Penalty Assessment issued to DTS was later revoked, however.

8. The Department takes the position that the Respondent, P.A.T., paid its drivers through the entity known as "DTS", or directly with P.A.T. checks during the audit period, and that the number of drivers paid for their services was more than four employees and closer to 59 drivers for the 61 tractor-trailers owned by the Respondent. The Department does concede that a small number of the drivers were clearly owner-operators and no longer contends that they were employees. The Department thus contends that at no time pertinent hereto did the Respondent have a workers' compensation policy or an employee leasing arrangement in place by which workers' compensation coverage was provided for the drivers. The original Order of Penalty Assessment covered the period April 22, 2006, through April 22, 2009. The 4th Amended Order of Penalty Assessments for those

dates, which is at issue in this case, also included a $108,000 fine for the Respondent's working in violation of a Stop-Work Order. The total fine assessed and sought by the Petitioner is $1,564,707.91.

9. The Department maintains that the drivers working for the company are employees and therefore should have been covered with workers' compensation insurance, but the Respondent disputes that claim, asserting that the drivers are independent contractors and therefore do not need to be covered by workers' compensation insurance. The Petitioner maintains that office workers employed by the Respondent were required to be covered by workers' compensation insurance as well. The Respondent maintains that these were covered through coverage obtained from an employee leasing company, through an employee leasing program. The Department also maintains that three employees, as corporate officers, were not properly qualified to be exempt. The Respondent maintains that the required Exemption Request forms were properly delivered to the Department and therefore it complied with the law in obtaining exemptions from workers' compensation coverage. Finally, the Department maintains that certain named individuals were employees of the Respondent and should have been covered by workers' compensation coverage or insurance, but the Respondent maintains that these employees, who essentially performed incidental, non-recurring tasks for

the Respondent, were not employees and did not have to be covered by such insurance. Moreover, the Respondent claims that it has a contingent liability insurance policy in place which served as a policy of workers' compensation insurance and for this reason it is compliant also.

10. The parties agree that Florida Administrative Code Rule 69L-6.035 defines "payroll" as the basis for calculating a penalty. Payroll can include any of ten variations of payments from or through an employer to or on behalf of an employee. These include the payment of traditional wages and also bonuses, un-repaid loans to employees, expense reimbursements that are not documented on the employer's business records, payments binding an employer to a third party on behalf of an employee for services rendered by the employee, among others.

11. Investigator Newcomer relied on Florida Administrative Code Rule 69L-6.035(1)(a) to define payroll for the office workers and truck drivers paid directly from the Respondent's account. The drivers were paid from the P.A.T. account from July 16, 2008, through April 22, 2009. Investigator Newcomer opined that the drivers' payroll prior to July 16, 2008, could not be included on the Penalty Worksheet based upon Rule 69L-6.035(1)(a), but rather was based on Rule 69L-6.035(1)(i). Ms. Newcomer did not rely on Rule 69L.6.035(1)(b),(d),(e),(f),(h), or (j) to define P.A.T.'s payroll.

12. The Department included payments to various child support enforcement agencies, made on behalf of drivers, on the Penalty Worksheet, by authority of Florida Administrative Code Rule 69L-6.035(1)(c), defined as payments made to a third party on behalf of the employer for services rendered to the employer by the employee.

13. The Department also included as payroll on the Penalty Worksheet loans made to drivers, maintaining that these have not been repaid and should be deemed as part of payroll under Rule 69L-6.035(1)(g). There is no proof that this is the case, however, because neither Ms. Newcomer nor Ms. Hedges offered any evidence to establish that there is proof that some or all of the loans remained unpaid.

14. The Petitioner, through the testimony of Investigator Newcomer, takes the position that payments made by P.A.T. to Darts Transports or DTS,LLC are properly included on the Penalty Worksheet by authority of Florida Administrative Code Rule 69L.-6.035(1)(i). Those payments were made prior to July 16, 2008, before P.A.T. began making payments directly to drivers. The Rule provision in question, concerns payments made to an alleged non-compliant employer who has contracted with the customer, if the contract includes payment for labor and materials. If it is impossible to segregate the cost of materials from the employee payroll in such a contract, then under this Rule provision, 80

percent of the total contract price shall be presumed to be the employer's payroll, with regard to that customer and contract. The unrefuted evidence, however, establishes that the drivers in this situation were paid a flat 25 percent commission of the hauling fee charged by P.A.T., after deduction of the cost of fuel for the trucks. P.A.T.'s customers paid the fuel surcharge to P.A.T. There is no evidence that P.A.T. provided customers with any materials. Its business operation involves solely and simply the transportation of customer-owned vehicles.

15. The Department also maintains that corporate officers Bradley Hedges and Gregory A. Hedges, as well as Teri Kimberly Forret, corporate officers of P.A.T., are non-exempt employees. It contends that under Rule 69L-6.035(2) their compensation constitutes "payroll," under the default formula in that Rule provision, for defining payroll to a corporate officer, if the ten factors under sub-section(1) of that Rule do not address the means of compensation received by those corporate officers.

16. The quintessential question in this case, however, concerns whether the drivers are independent contractors or employees. If they are independent contractors, then there is no obligation on the part of the Respondent to ensure payment of workers' compensation benefits for them. This would mean that the Respondent cannot be adjudicated non-compliant by the Petitioner Department and payments to the drivers would not

constitute payroll and would be stricken from the Penalty Worksheet calculation.

17. Independent contractor status is defined in Section 440.02(15)(d)1.a.(I)-(VI) and b.(I)-(VII), Florida Statutes (2008). Under the former statutory provision, four of the six criteria must be met for independent contractor status to be established. Under the latter provision, any of the seven conditions named in that provision may be satisfied and independent contractor status thus established. With regard to the criteria in Section 440.02(15)(d)1.a.(I)-(VI), the preponderant weight of the evidence shows that some of the truck drivers are independent contractors with federal employer identification numbers and some are sole proprietors who are therefore not required to obtain a federal employer identification number under pertinent state or federal regulations. § 440.02(15)(d)1.a.(II), Fla. Stat.

18. The evidence also shows, for purposes of Subsection(15)(d)1a.(V) of this statutory provision, that the drivers are permitted to work or perform work for other entities or companies needing their services, in addition to the Respondent, at the election of the driver. There is no showing that an employment application must be completed to perform such tasks for other unrelated entities. The drivers must use the unrelated company's truck for work assigned to them by such

other companies or entities. They are not permitted to use P.A.T. trucks for non-P.A.T. transportation work (driving) they have agreed to perform. Moreover, all the drivers are compensated for completion of a task or set of tasks according to a flat 25 percent commission of the hauling charge imposed by P.A.T. There is no evidence that clearly shows a contractual agreement which expressly states that an employment relationship exists between the drivers and P.A.T.

19. Even if the status and operations of the drivers referenced above does not meet four of the criteria listed in sub-subparagraph a. Subsection 440.02(d)1., they may still be presumed to be independent contractors and not employees, based upon a full consideration of the nature of their individual situation with regard to satisfying any of the conditions or criteria referenced in Section 440.02(15)(d)1.b.(I)-(VII).

20. With regard to the first criteria under that provision, the drivers perform the services of driving for a specific amount of money in the form of a 25 percent commission. They control a substantial amount of the means of performing the services or work. The driver is asked to deliver vehicles from point A to point B for that commission. He gets paid that commission whether it takes one day or six days to accomplish the task. The driver determines the route to be driven. The driver, within the limits of the Department of Transportation

rules, determines when to begin driving and when to pull over to sleep. The driver is free to decline to accept a hauling job. There is no detrimental action taken against a driver for declining to accept a given hauling job, unless it happens too frequently for satisfactory conduct of P.A.T.'s operations. The driver must provide the incidental tools and equipment, such as binding chains and maintenance tools to operate the truck and securely transport the load of vehicles he is required to transport. The driver is responsible for maintaining current driver's license qualifications and DOT physical examination requirements. The driver is responsible for paying for any necessary badges authorizing entry at maritime ports, a frequent occurrence in the transportation of foreign-manufactured vehicles.

21. The Respondent, P.A.T., either owns or leases the trucks used by the drivers and pays for the insurance policies for the trucks. P.A.T. also pays for routine maintenance of the truck. If the driver causes damage of any sort to the truck, the driver must bear the financial responsibility for repair of the damage. The driver must also bear responsibility for any damage to the vehicles being transported on the trucks. It can thus be seen that both the Respondent and the drivers control a substantial portion, respectively, of the means of performing the services or work.

22. Clearly, the unrefuted evidence shows that the drivers receive compensation for the work or services performed (driving services, incidental loading and unloading and protection responsibilities, with regard to the vehicular cargo), for a commission or per job basis and not on any other basis. Therefore criterion number IV, cited last above, is clearly met.

23. Concerning criterion (II) under the last-referenced provision cited above, the drivers incur expenses for costs of their commercial driver's license, repair costs for any vehicle damage to the truck or to the vehicles which are being transported by the truck; any DOT fines incurred by the drivers; any badge expenses, as port entry and exit fees, must be borne by the drivers; lodging and meal expenses on the road during a haul must be borne by the drivers, without reimbursement.

24. Concerning criterion (III), the driver is responsible for the satisfactory completion of the work or services that he or she agrees to perform, in the operational sense, in that the driver will not be paid if the delivery of the vehicles ordered to be transported is not satisfactorily accomplished. The privity of contract, however, for a given hauling job runs between the customer and P.A.T., the Respondent, who the customer actually contracts with to have the vehicles transported.

25. The drivers, for purposes of criteria (V), (VI), (VII), of the last-referenced statutory provision, as established by the unrefuted testimony of Ms. Hedges, stand to realize a profit, or suffer a loss, in connection with performing the transportation driving services. They have continuing or recurring business liabilities or obligations aside from the expense of owning or leasing the truck, insuring the truck, or the fuel expense which they do not bear. They do, however, have recurring or continuing business liabilities or obligations which have a direct effect on whether they realize any net gain from a commission on a given hauling job. The success or failure of their business, even as sole proprietors, depends on the relationship of their receipts, under their 25 percent commission arrangement, and their expenditures for each hauling job for which they earn that commission. Drivers often complain of losing money due to vehicle repair bills, fines, towing charges, etc.

26. Additionally, as referenced above, although when transporting loads for P.A.T., the drivers must use P.A.T. owned or leased trucks, the drivers are free, under their arrangement, to engage in hauling for other companies or customers, if they are not currently engaged in the middle of a hauling job for P.A.T. They may do so for other companies using other trucks, so long as they do not engage in such transportation services

for other entities with P.A.T.'s truck. This factual arrangement tends to also militate in favor of the drivers not being employees.

27. Many of the drivers have the standard federal tax withholdings deducted from their commission payments, as well as, in some cases, court-ordered child support payments. While this might be deemed to militate in favor of an employer/employee relationship, the unrefuted testimony of Ms. Hedges establishes that this is a service that drivers have come to P.A.T.'s management and requested, because in view of their many hours and days spent on the road, and for other reasons, involving their business management abilities, it is an assistance to them to have the tax liabilities simply withheld from their commission payments. This helps to avoid personal difficulties involving arrearages to the Internal Revenue Service.

Status of Non-Driver P.A.T. Workers and Corporate Officers

28. Persuasive testimony offered by Tracie Hedges, established that Regina Davis, Robin Hand, Stanley Warren, William Bertelsen, Cecil Hannah, Chipley Atkinson, Kristene Viverios, Katherine Flores, Laura Dunn, Amber Taylor, Amy Murphy, and Ms. Hedges herself, are office workers of P.A.T. They are covered by a policy of workers' compensation insurance

through AES Leasing, a worker leasing company. Apparently the Petitioner no longer disputes this.

29. Ms. Hedges reviewed, in her testimony, the final Penalty Worksheet concerning the status of various named persons who the Petitioner contends were employees, not covered by workers' compensation coverage. Ms. Hedges established with persuasive testimony that Arthur Nicolas was not a P.A.T. employee, but did some improvements on the office building (i.e. in the nature of carpentry). Alex Sibbach and Witt Davis did not ever work as employees for P.A.T. They may have performed some yard work or sold some equipment to P.A.T., but were never employees. She also established that Richard Burrson and Robert Marra were dump truck drivers for a company by the name of MNT Enterprises and had never been P.A.T. employees.

30. Bradley and Gregory A. Hedges and Kimberly Forret are officers of P.A.T., or were at times pertinent to this case. The Petitioner contends that they had not established an exemption from the requirement of being covered under a policy of workers' compensation insurance. This is because of the Petitioner's contention that no corporate officer exemption had been filed or made effective. Bradley Hedges and Gregory A. Hedges are children of owners Greg and Tracie Hedges. Kimberly Forret is Tracie Hedges' sister. Ms. Forret is an office worker

at P.A.T. and both Bradley and Gregory A. Hedges work at P.A.T. on a part-time basis while attending school.

31. Ms. Hedges completed exemption forms for all three of them and delivered them to Investigator Newcomer's office on Burgess Road in Pensacola, Florida. Investigator Newcomer took the position that the exemptions for these people had not been established or filed based on her examination of agency computer records. The computer program or site failed to establish to her that the three individuals in question had established exemptions. Exemption status is triggered by compliance with Section 440.05, Florida Statutes (2008).[1/]

32. Tracie Hedges established with persuasive testimony that the exemption applications for the named three officers had been hand-delivered to the Burgess Road office of the Department of Financial Services. Janice Evers is a staff worker at that office. She testified that her research could neither confirm nor deny that the exemption applications were delivered to her office, but acknowledges their receipt by the Department. It must be concluded that the applications were delivered to the office on Burgess Road but were never forwarded to the Tallahassee office by Ms. Newcomer's or Ms.' Evers staff. Investigator Newcomer's business address is 610 East Burgess Road in Pensacola, the location where Ms. Hedges testified that the exemption applications were delivered. When the Department

made a Discovery Request for Production of the Business Records of the Respondent, it required that those records be produced at that same business address in Pensacola, Florida. It is thus "an office of the Department" for purposes of Section 440.05(c), Florida Statutes (2008).

33. Ms. Hedges established that the exemption applications were delivered during the 2005 calendar year although she was unable to provide an exact date of delivery. Ms. Evers acknowledges that fact in her testimony. The Stop-Work Order at issue in this case by statute can only date back as early as April 22, 2006. Even if the applications were delivered on December 31, 2005, the three officers in question would be exempt from workers' compensation coverage requirements prior to April 22, 2006, when the time period, or audit period, related to the Stop-Work Order began. It is determined that at least by January 30, 2006, exemptions had been established, by delivery at least 30 days prior thereto, for Bradley Hedges, Gregory Hedges, and Terri Kimberly Forret. It is found that the exemptions were shown by persuasive evidence to have been delivered during the 2005 calendar year. Inasmuch as they were "received" by the Department in 2005, then they would have become effective, by operation of law, on or before January 30, 2006, well before the effective date of the Penalty Assessment of April 22, 2006.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla.Stat. (2009).

35. It has been determined that administrative fines are penal in nature. Thus the Department has the burden to prove its position in this case by clear and convincing evidence, in establishing that the Respondent failed to comply with the workers' compensation requirements at issue. Department of Banking and Finance, Division of Securities and Investor Protection v. Osbourne Stern, Inc., 670 So. 2d 932 (Fla. 1996) and L and W Plastering and Drywall Services, Inc. v. Department of Financial Services, Division of Workers' Compensation, Case No. 06-3261 (DOAH, March 16, 2007).

36. Section 440.10, Florida Statutes (2009), requires every employer as defined in Section 440.02(16)(a), Florida Statutes (2009), to secure the payment of workers' compensation coverage. In order to establish that a person or entity is an "employer" within the statutory provision, an employer and employee relationship must exist between that entity and the worker or workers at issue.

37. "Employee" is defined in Section 440.02(15), Florida Statutes (2009). An independent contractor is not an employee, as provided in Section 440.02(15)(d), Florida Statutes (2009).

38. "Employee means any person who received remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implie

39. Independent contractor is defined in Section 440.02(15)(d)(1), Florida Statutes (2009). Sub-subparagraph a. provides six criteria. Four of these statutory criteria must be met to attain the status of independent contractor under this provision of Section 440.02(15)(d)1., Florida Statutes:

> (I) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;
>
> (II) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;
>
> (III) The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;
>
> (IV) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;
>
> (V) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without

> the necessity of completing an employment application or process; or
>
> (VI) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

40. Concerning criteria (I) through (VI), quoted above, the evidence is not clear which of the drivers hold federal employer identification numbers, although some do, nor which ones are sole proprietors, although a substantial number of them are. The proof does not show that compensation for services was only paid to a business, rather than to individuals, nor was there definitive proof as to which drivers held one or more bank accounts in the name of a business entity for purposes of paying business expenses, etc. The proof does show that the drivers in question can perform work or are able to perform work for any entity, in addition to the Respondent P.A.T., without any proof that there was a necessity of completing an employment application process. This is true so long as they use a different truck and trailer than one owned by P.A.T. that is in the possession of the drivers for only P.A.T.-contracted transportation purposes. The proof also shows that the drivers in question received compensation for work or services upon completion of a task or a set of tasks, as defined by their

agreement, written or oral, with P.A.T. There is no persuasive proof that any contractual agreement expressly states that an employment relationship exists. Therefore, the drivers in question comply with criterion (VI). Accordingly, at most, it can be determined that the drivers in question meet the standards or criteria (V) and (VI) of the above-referenced statutory provision. Because they must meet four of the above six criteria of the statute in order to be qualified as independent contractors, they cannot so qualify under these provisions.

41. Be that as it may, pursuant to Section 440.02(15)(d)1.b., Florida Statutes (2009): "If four of the criteria listed in sub-subparagraph a. do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying <u>any</u> of the following conditions (emphasis added):

> (I) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work.
>
> (II) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform.
>
> (III) The independent contractor is responsible for the satisfactory completion

> of the work or services that he or she performs or agrees to perform.
>
> (IV) The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis.
>
> (V) The independent contractor may realize a profit or suffer a loss in connection with performing work or services.
>
> (VI) The independent contractor has continuing or recurring business liabilities or obligations.
>
> (VII) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

42. Concerning (I), quoted above, the drivers did control a substantial portion of the means of performing the driving services or transportation work involved. It is true that the Respondent, P.A.T., owned the trucks and was responsible for insuring them, paid routine maintenance costs, and fuel, until the customer reimbursed for the fuel. The drivers had possession of the trucks, at their own residences or places of business, or while traveling on the road. They did not return the trucks to the Respondent's yard or storage facility in between trips. The drivers had the option of selecting the route for the transportation service on a given load or hauling arrangement and controlled the time of departure and time of arrival. The driver determined, within reasonable limits, when

to pick up the load of vehicles and when to deliver them at the destination. The drivers were also free to refuse to accept a hauling order from P.A.T. There was no penalty imposed on a driver for doing this, so long as it did not occur too frequently. Thus, in view of the above findings of fact, the drivers did not control all the means of performing the services or work, but did control a substantial portion thereof.

43. The drivers also incurred substantial expenses related to performing the transportation work, but did not bear the "principal expenses" because they were not responsible for the routine maintenance on the truck, the payments on the truck loan or lease, nor the insurance payments. Moreover, P.A.T. paid any tolls incurred by the drivers on trips, so long as the driver submitted receipts for reimbursement. The drivers were responsible to pay for any government-mandated items such as physicals and decals, as well as lodging, food, and Department of Transportation fines, if any. They paid fees required to enter and exit port facilities. On balance, it is determined that the drivers do not really qualify as independent contractors under the provision at (II) of the above-cited statute.

44. The drivers were clearly responsible for the satisfactory completion of the work and, in fact, were responsible for payment for any damages to the trucks, trailers,

or to the cargo they were transporting. However, the ultimate contractual responsibility for satisfactory completion of the transportation work was the responsibility of the Respondent, P.A.T. itself. It was in privity of contract with the customers, who ordered the vehicles transported. It is also true that the drivers were responsible for the satisfactory completion of the work in the sense that they would not be paid if it was not satisfactorily accomplished, in terms of timeliness, proper delivery of undamaged vehicles, etc. On balance, however, with regard to Criterion (III), the satisfactory completion of the work was the primary obligation of the Respondent and not the driver.

45. There is no question that the drivers received compensation for their work or services performed by payment of a commission or on a per job basis and not on any other basis for purposes of paragraph (IV), above. The drivers clearly meet this criterion and thus are independent contractors pursuant to this standard.

46. It is also true, as established by unrefuted testimony of Ms. Hedges, that the contractors stand to obtain a profit or suffer a loss in connection with performing the transportation services involved. It was shown that they do have recurring business liabilities or obligations, in spite of the fact that they do not own the trucks or pay the routine maintenance on the

trucks. This is shown in the above findings of fact and it is noteworthy that any damage to the truck must be the responsibility of the driver, not the Respondent.

47. Ms. Hedges also established that the success or failure of the drivers' businesses depended on the relationship of their receipts or revenues, generated from their commissions, to the expenditures they had to pay in accomplishing their hauling duties. These included government compliances, fines, towing expenses, lodging on the road, if necessary, and food purchased on the road on hauling trips.

48. Thus, it must be concluded that, on balance, the drivers are presumed to be independent contractors and not employees, based on a full consideration of the nature of the individual situation with regard to P.A.T. and its drivers, in light of the fact that they have satisfied Criteria (IV) through (VII), quoted above. It is certainly noteworthy that, under Section 440.02(15)(d)1.b., the consideration of the nature of the individual situation is with regard to satisfaction of <u>any</u> of the conditions enumerated at (I) through (VII). A plain meaning reading of this statutory provision clearly shows that if even one criterion under this provision at sub-subparagraph b.(I-VII) is satisfied, then the drivers can be deemed independent contractors. There is no question that they satisfy criterion IV in terms of the method of payment for compensation

for their work and Ms. Hedges' testimony concerning their income and expenses, especially the fact that she frequently experiences drivers complaining of insufficient receipts to cover their expenses, shows that they comply, with Paragraphs (V), (VI) and (VII), quoted above. Therefore the drivers, for these reasons, are concluded to be independent contractors and not employees.

49. Section 440.02(15)(b)1.and 3. Florida Statutes, authorize corporate officers, not engaged in the construction industry, to elect exempt status from the provisions of the Workers' Compensation Act. A Notice of Officer Exemption shall become effective when issued by the Department <u>or</u> within 30 days after an application for an exemption is <u>received</u> by the Department, whichever occurs first. § 440.05, Fla. Stat. (2009). "Department" is defined in Section 440.02(12) as the Department of Financial Services.

50. The testimony of Tracie Hedges, as well as Janice Evers, establishes that the exemption applications for Bradley Hedges, Gregory A. Hedges and Terry Kimberly Forret were hand-delivered to the Burgess Road office of the Department in Pensacola. Janice Evers is a staff worker at that office. She testified that she did not have knowledge of the actual delivery of the exemption applications to her office, but she did acknowledge, in her testimony, that the applications had been

received by the Department in 2005. It is concluded that the applications were delivered to Investigator Newcomer's office on Burgess Road, in Pensacola, but for unknown reasons were never forwarded to Tallahassee by her staff. The question becomes whether delivery to that office in Pensacola is receipt by the Department, pursuant to Section 440.05(5), Florida Statutes. Investigator Newcomer is clearly employed by the Department of Financial Services. Her business address is 610 East Burgess Road in Pensacola. The Department's request for production of the Respondent's business records in this case directed that the records must be produced at 610 East Burgess Road, Pensacola, Florida, 32504-6320. Clearly, it is concluded that that office is an office of the Department for purposes of the above-cited statute.

51. Tracie Hedges established that the exemption applications in question were delivered during the 2005 calendar year and Ms. Evers' testimony confirms that. Although the exact date of delivery could not ascertained, the Stop-Work Order can only date back to April 22, 2006. It is established that the exemption request or applications were received by the Department in 2005. Therefore, at the latest, the exemption would have taken effect, by operation of law, 30 days beyond the last day of the year 2005 or on or before January 31, 2006. Thus the three corporate officers in question would have been

exempt from workers' compensation coverage requirements prior to April 22, 2006. It is concluded that they were indeed exempt from such workers' compensation coverage requirements. Therefore the Respondent would be in compliance as to them, if they were not covered by a policy of workers' compensation insurance between April 2006 and April 2009. Thus three corporate officers cannot be the basis of a Stop-Work Order and Penalty Assessment

52. The above findings of fact, based upon the preponderant, persuasive evidence offered by the Respondent through, primarily, Ms. Hedges' testimony, shows that Robert Marra, Alex Sibbach, Greg Hall, Richard Burson, Tanner Hanna, Tony Burson, Kenneth Sibbach, Bobby Laballe, Arthur Nicholas and Witt Davis had received payments from the Respondent for various incidental jobs or tasks, not involving transportation, as for instance, office renovations, landscaping, etc. While there is evidence of payments to these individuals, there is no convincing evidence that they were on a payroll or that these were payroll payments. There is no clear and convincing evidence that these persons were employees of the Respondent. There was no evidence presented to contradict Ms. Hedges' testimony and it has been deemed credible and accepted. Consequently, these persons named must be stricken from the Penalty Worksheet and cannot be the basis of a Stop-Work Order

or Penalty Assessment because there is no evidence of non-compliance with regard to them by the Respondent. Hoar Construction v. Varney, 586 So. 2d 463 (Fla. 1st DCA 1991).

53. The remaining persons named in the above Findings of Fact were office workers at P.A.T. When the investigation was commenced, these office workers were covered by a policy of workers' compensation insurance issued through AES Employee Leasing. Because of this, the office workers named in the above Findings of Fact were compliant as to the workers' compensation coverage requirements of Chapter 440, Florida Statutes, at the time of issuance of the Stop-Work Order and Penalty Assessment which initiated this proceeding. They were compliant at the time of the business records request as well.

54. In summary, the Petitioner has not presented clear and convincing evidence to establish that the drivers in question were employees. Rather it is determined, based upon the factors and considerations referenced above, that they were independent contractors and therefore compliant as to workers' compensation coverage. Likewise, the office workers and the other-named workers have not been proven, by clear and convincing evidence, to be employees such that the Respondent would be required to provide for workers' compensation benefits for them.

55. The Respondent has filed a Motion to Deem Matters Admitted, referencing its Request for Admissions that was filed

and served upon the Petitioner. The Request for Admissions was not timely responded to, but was answered to some twenty-one days late. The Petitioner filed no motions seeking relief from the time constraints for responding to the Request for Admissions, nor relief from any of the admission requests. The Respondent seeks to enforce the provision of Florida Rule of Civil Procedure 1.370(a), because the Petitioner failed to respond to the Request for Admissions within the required 30 days.

56. The undersigned has considered argument at the outset of the hearing by the parties on the motion, in their Proposed Recommended Orders, as well as the decisional authority cited by the parties. It is undisputed that the Request for Admissions were answered 21 days late and that no motion seeking an extension of time, or otherwise seeking relief from the Request for Admissions was advanced by the Petitioner. It is also true that, after the Request for Admissions was answered, there still remained approximately two month's time available for consequent hearing preparation. Therefore, in consideration of this factor and the arguments and the legal authority relied upon by the parties, it is determined that no undue prejudice has been occasioned the Respondent by the late service of the answers to the Request for Admissions. Therefore, in view of the lack of substantial prejudice, the motion is denied.

57. In view of the lack of clear and convincing evidence establishing that the Respondent committed the violations of the relevant provisions of Chapter 440, Florida Statutes, addressed herein, is determined that there is no proven basis for the Stop-Work Order or for the Assessment of Penalty. In view of the above findings, conclusions, and considerations, it is moot and unnecessary to determine if the disputed contingent liability insurance policy actually constituted a policy of workers' compensation insurance.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, dismissing the Stop-Work Order and Fourth Amended Order of Penalty Assessment, in its entirety.

DONE AND ENTERED this 29th day of January, 2010, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2010.

ENDNOTE

[1/] A notice given under Subsection(1), Subsection (2) or Subsection (3) [Concerning claiming corporate officer exempt status] shall become effective when issued by the Department or thirty (30) days after an application for an exemption is received by the Department, whichever occurs first. (Emphasis applied).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.