TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00770-CV

Jaguar Land Rover North America, Appellant

v.

Board of the Texas Department of Motor Vehicles; Mr. Raymond Palacios, Jr., in his Official Capacity as Chairman of the Board of the Texas Department of Motor Vehicles; and Autobahn Imports, LP, d/b/a Land Rover of Fort Worth, Appellees

DIRECT APPEAL FROM THE MOTOR VEHICLE DIVISION OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

MEMORANDUM OPINION

Jaguar Land Rover North America (Land Rover), seeks direct judicial review in this Court of a final order issued by the Board of the Texas Department of Motor Vehicles (the Department) pursuant to chapter 2301 of the Texas Occupations Code. *See* Tex. Occ. Code § 2301.751 (providing for judicial review in district court in Travis County or in this Court by party to proceeding affected by final order); *see also* 43 Tex. Admin. Code § 215.207(8) (2017) (Tex. Dep't of Motor Vehicles, Contested Cases: Final Orders) (same). Autobahn Imports, LP, d/b/a Land Rover of Fort Worth (Autobahn) filed a complaint against Land Rover with the Department regarding chargebacks issued against Autobahn under Land Rover's Incentive Program and export policy. The Department found the chargebacks and export policy invalid. For the reasons that

follow, we dismiss the appeal as to the issue of the export policy for want of jurisdiction and affirm the final order of the Department in all other respects.

BACKGROUND

Land Rover is the exclusive distributor of Land Rover vehicles in North America and sells Land Rovers through independent retail dealers such as Autobahn. In addition to entering into dealer agreements with retail dealers, Land Rover adopts incentive plans and export policies. The Business Builder Program (Incentive Program) is an incentive program "intended to reward retailers for investing in the franchise, caring for customers, being proactive on future business necessities, and helping [Land Rover] drive success." Export policies, which are designed to address the problem of exporters or brokers purchasing Land Rovers in North America and reselling them to other countries, impose monetary penalties on dealers if they fail to meet certain conditions regarding vehicles that are sold to dealers and subsequently exported. The terms of the Incentive Program and export policies are set out in the Business Builder Program Manual (Manual) and the 2009 Operations Bulletin, Contests and Incentives Standard Eligibility Rules for Retail Programs (Rules). The Manual and the Rules govern the parties' issues in this appeal.[1]

Under the terms of the Incentive Program, Land Rover agreed to pay Autobahn up to 6% of the manufacturer's suggested retail price for each retail sale made by Autobahn that met

[1] Land Rover contends that a settlement agreement the parties entered into in 2011 applies as well, a contention Autobahn disputes. However, as discussed below, the provision in the settlement agreement on which Land Rover relies—the requirement that Autobahn personally deliver vehicles to the "purchaser or end-user"—is contained in the Manual, as well, and the parties do not dispute that the requirement exists, only whether Autobahn met it.

certain requirements set forth in the Manual and the Rules. To be eligible for an incentive payment, Autobahn is required to: (1) "conduct the delivery of the vehicle to the end-user customer" and (2) submit the end user's name and address to Land Rover "as the primary driver of the vehicle." "End user" is not defined in the Manual but is defined in the Rules as follows:

> An end user is a purchaser/lessee purchasing or leasing a vehicle from an authorized Dealership for retail, commercial or business use, with no intent to resell. An approved leasing company purchasing to lease is considered an end user.

When there are multiple end users, Autobahn is to "report only one of them" to Land Rover "as the end user," and program eligibility is "based solely on the qualifications of that reported end user."

From February 1, 2013, to January 31, 2014, Autobahn made 459 retail sales of Land Rover vehicles. At the time of each sale, Autobahn completed and electronically filed a required Retail Dealer Report (RDR) form, filling in the vehicle information, leasing company information, and primary driver information for each vehicle. In February 2014, Land Rover conducted an audit of Autobahn's sales records for the prior year, selecting 134 sales to leasing companies for review. *See* Tex. Occ. Code § 2301.475. Of the 134 sales to leasing companies, Land Rover identified 91 sales for which the vehicle was sold to a leasing company, but Autobahn had submitted the name of the lessee as the primary driver. The auditor determined that those sales were not eligible for payment because the leasing contract showed that "the [leasing company] delivered the vehicle to the end user" and therefore "delivery was not made to the vehicle's end-user by an authorized Land Rover retailer representative" as required. Based on the auditor's review, Land Rover made 91 chargebacks to Autobahn in the total amount of $340,469.80. Autobahn appealed the

chargebacks to Land Rover. Land Rover affirmed the chargebacks for all but five sales and charged back $305,836.80 from incentive payments paid to Autobahn under the Incentive Program. The auditor also noted that 12 vehicles sold by Autobahn had later been exported and noted those sales for "potential" chargebacks for violation of the export policy.

In August 2014, Autobahn filed a complaint against Land Rover with the Department challenging the chargebacks and export policy. Autobahn argued that the chargebacks were unreasonable and unfair in violation of section 2301.467 of the Occupations Code. *See id.* § 2301.467(a)(1) (providing in relevant part that distributor may not "require adherence to unreasonable sales or service standards").[2] Autobahn also argued that Land Rover's export policy violated section 2301.479 of the Occupations Code because it put the burden of proof for export sales on the dealer. *See id.* § 2301.479(c) (providing that dealer is presumed to have no actual knowledge that vehicle it sells will be exported).[3]

The complaint was referred to the State Office of Administrative Hearings (SOAH) and assigned to an administrative law judge (ALJ), Howard S. Seitzman. *See id.* § 2301.704 (providing that contested case hearing must be held by SOAH ALJ); *see also* Tex. Gov't Code

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[2] Autobahn also asserted claims that the chargebacks violated sections 2301.468 and 2301.475. *See* Tex. Occ. Code §§ 2301.468, .475. However, Autobahn concedes on appeal that the chargebacks did not violate section 2301.468, and Land Rover represented at oral argument that the parties no longer dispute the chargeback issue under section 2301.475 and that the issue turns on section 301.468. Therefore, we do not address these additional claims or include them in the procedural background.

[3] As a third claim, Autobahn asserted that Land Rover's incentive payments were not timely under the Occupations Code. *See id.* § 2301.4749(a) (requiring payment of claim within 30 days after it is approved). Autobahn dismissed its claim under section 2301.4749, and that issue is not before us on appeal.

§ 2001.003 (defining "contested case"). Following a preliminary hearing, ALJ Seitzman issued Order No. 2, stating that "the parties agreed to see whether the summary disposition motion to be filed by [Autobahn] narrows the scope of discovery and of the hearing." Autobahn then filed a motion for summary disposition arguing that the chargebacks were unreasonable and unfair and violated section 2301.467 because leasing companies count as end users under the Incentive Program, such that Autobahn satisfied the requirement that it conduct delivery of the vehicles to the end users. Following another prehearing conference, ALJ Seitzman issued Order No. 4, which instructed Land Rover to respond to the motion for summary disposition only as to the issue of whether a leasing company can be an end user under the terms of the Incentive Program and abated all other issues pending further order.

Land Rover filed its response, arguing that the leasing companies were not end users because Autobahn had not submitted the names of the leasing companies as the primary drivers and that, instead, their lessees—who would actually be using the vehicles—were the end users. Land Rover also contended that only "approved" leasing companies may qualify as end users, and there was no evidence that the leasing companies here were "approved." Finally, Land Rover argued that under the Rules, only leasing companies that intend to use the leased vehicles themselves—such as rental car companies or other so-called "fleet leasing companies"—can be end users. After Autobahn filed a reply brief, the case was transferred to a new ALJ, Paul D. Keeper, who asked the parties to brief the issue of the meaning of "approved leasing company" as used in the definition of end user.

In a letter brief, Land Rover argued that an "approved" leasing company is one approved by Land Rover because otherwise a dealer could unilaterally approve leasing companies and trigger an obligation by Land Rover to pay the dealer's incentive claims. In its letter brief, Autobahn asserted that the phrase "approved leasing company" was ambiguous, and that leasing companies could therefore be approved by Land Rover, Autobahn, or the Department, which licenses leasing companies. After considering the parties' letter briefs, ALJ Keeper issued Order No. 6, in which he ruled that "a leasing company is considered an end-user under the Program documents."[4]

The case was then transferred to a third ALJ, Stephanie Frazee, who issued Order No. 7, requesting a joint status report or a joint request for a prehearing conference. At the parties' request, a prehearing conference was held at which the parties did not agree on the effect of Order No. 6. ALJ Frazee issued Order No. 8, which stated that the parties agreed to submit a schedule for "(1) briefing the chargeback issue, including arguments regarding the status of the end-user issue addressed by ALJ Keeper in Order No.6. and (2) filing of [Autobahn's] amended complaint and an amendment to its motion for summary disposition and [Land Rover's] response, as well as any replies that the parties anticipate being necessary." The order lifted the abatement entered in Order No. 4 "to allow the parties to brief all summary disposition issues according to their agreed schedule." The parties submitted an agreed schedule, which ALJ Frazee adopted in Order No. 9. According to the agreed schedule and Order No. 9, Land Rover was to file a letter brief on the

[4] Land Rover submitted an affidavit with its letter brief in which its retail audit manager averred that "approved leasing company" referred to "fleet leasing companies." ALJ Keeper found that there was no support in the program documents to support that assertion and that Land Rover could not use an undefined term and then impose a unique definition on Autobahn.

present status of the issue of whether a leasing company is an end user under the Incentive Program, and Autobahn was to file a reply. Only if Autobahn's motion for summary disposition on the chargeback claim was denied on the ground that a leasing company is an end user under the Incentive Program would Land Rover file a response on the other three grounds raised in Autobahn's motion.[5]

In its letter brief on the status of the end user issue, Land Rover argued that Order No. 6 did not state that it was granting summary disposition, did not specify the facts about which there was no genuine dispute, did not specify the issues for which summary disposition was granted, and did not explain how the fact that a leasing company may be an end user established as a matter of law that the chargebacks were invalid under Texas law. Land Rover also argued that fact issues remained. In its letter brief, Autobahn argued that a leasing company is an end user; that delivery to a leasing company satisfies Land Rover's delivery requirements under the Incentive Program; that, consequently, there was no basis for the chargebacks; and that there were no fact issues remaining. ALJ Frazee then issued Order No. 10, in which she stated:

> Having reviewed the briefs as well as Order No. 6, the ALJ determined that Order No. 6 establishes that there are no genuine issues of material fact as to the end-user issue, and the effect and intent of Order No. 6 is to grant summary disposition on the end-user issue and corresponding chargebacks issue in favor of Autobahn Imports, L.P. Therefore, summary disposition is GRANTED to Autobahn Imports, L.P. as to the end-user issue and corresponding chargebacks issue.

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[5] The agreed schedule and Order No. 9 also included deadlines for further replies and for Autobahn to file its amended complaint and amended motion for summary disposition. The amended complaint and motion added claims concerning Land Rover's new export policy that had been implemented during the course of the proceeding.

The parties subsequently briefed the export policy issue, and Land Rover filed a motion to dismiss Autobahn's export policy claim. Land Rover argued that Autobahn lacked standing to assert the export policy claim, that the claim was not ripe, and that it also failed on the merits and also disputed the payment claim. ALJ Frazee found that the export policy claim was ripe and granted summary disposition in favor of Autobahn on that claim. Autobahn then filed a motion to dismiss and motion to submit, asking ALJ Frazee to sever and dismiss its payment claim and to prepare and present to the Department a proposal for decision that the chargebacks and export policy were invalid. ALJ Frazee granted the motions and closed the administrative record.

ALJ Frazee issued a proposal for decision (PFD) concluding that sales to leasing companies are qualified sales under the Incentive Program according to the Manual and Rules, that Land Rover's export policies violated Texas Occupations Code section 2301.479, and that Autobahn was entitled to summary disposition on its chargeback and export policy claims. Land Rover filed exceptions to the PFD, and Autobahn filed a reply. *See* 1 Tex. Admin. Code § 155.507(c) (2017) (Tex. Office of Admin. Hearings, Proposal for Decision) (providing that parties may submit exceptions and replies to PFD).[6] In a letter explaining her response to the exceptions, ALJ Frazee stated that there was "no basis for substantively amending the PFD," but that she recommended amending the PFD to correct "typographical errors" noted by Autobahn. The recommended amendments included changing Conclusion of Law No. 19, which originally stated, "Sales to leasing companies are qualified sales under [the Incentive Program] according to program documents," to read:

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[6] All cites to 1 Tex. Admin. Code are to rules promulgated by SOAH.

> Sales to leasing companies are qualified sales under [the Incentive Program] according to Program Documents. Land Rover's charge-backs to Autobahn for sales to leasing companies under [the Incentive Program] are invalid under Texas Occupations Code §2301.467(a)(1) for requiring adherence to unreasonable sales or service standards . . . .

In December 2015, the director of the Motor Vehicle Division of the Department issued a "Final Order" holding Land Rover's chargebacks invalid and improper and its export policies invalid under the Texas Occupations Code. Land Rover filed a motion for rehearing arguing, among other things, that the director lacked authority to issue the order. The Department staff subsequently presented the PFD to the board, which issued a Final Order in September 2016, stating the same holdings as the prior "Final Order" issued by the director. Land Rover filed a second motion for rehearing, which the Department denied. This appeal followed.

STANDARD OF REVIEW

Our review of the Department's final decision is governed by section 2001.174 of the Administrative Procedure Act. *See* Tex. Occ. Code § 2301.751; Tex. Gov't Code § 2001.174. This standard requires that we reverse or remand a case for further proceedings "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are (A) in violation of a constitutional or statutory provision; (B) in excess of the agency's statutory authority; (C) made through unlawful procedure; (D) affected by other error of law; (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Tex. Gov't Code § 2001.174(2).

In reviewing fact-based determinations under this standard, we may not substitute our judgment for that of the agency but rather must determine whether, considering the reliable and probative evidence in the record as a whole, some reasonable basis exists in the record for the agency's action. *See id.* § 2001.174(2)(E); *Texas Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC*, 324 S.W.3d 95, 105 n.60 (Tex. 2010). "Thus, the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action." *Texas Health Facilities Comm'n v. Charter Med.-Dal., Inc.*, 665 S.W.2d 446, 453 (Tex. 1984). We presume that the agency's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden is on the appellant to demonstrate otherwise. *See Froemming v. Texas State Bd. of Dental Exam'rs*, 380 S.W.3d 787, 791 (Tex. App.—Austin 2012, no pet.); *Pierce v. Texas Racing Comm'n*, 212 S.W.3d 745, 751 (Tex. App.—Austin 2006, pet. denied). The reviewing court is not bound by the reasons given by an agency in its order, provided there is a valid basis in the record supporting the agency's action. *See Charter Med.-Dal., Inc.*, 665 S.W.2d at 452. We must affirm the agency's findings if they are supported by more than a scintilla of evidence. *Mireles v. Texas Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999) (per curiam).

Land Rover's issues also require us to construe applicable statutes and rules. Statutory construction is a question of law that we review de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Our primary concern is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We apply the plain meaning of the text unless a different

meaning is supplied by legislative definition or is apparent from the context or applying the plain meaning leads to absurd results. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). "We generally avoid construing individual provisions of a statute in isolation from the statute as a whole," *Texas Citizens*, 336 S.W.3d at 628, and we must consider a provision's role in the broader statutory scheme, *see 20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008). We construe administrative rules in the same manner as statutes. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

ANALYSIS

Export Policy Issue

As part of its first issue and in its sixth issue, Land Rover challenges the Department's determination of Autobahn's export policy claims. After the close of the administrative record, but before the Department issued its final order, Land Rover issued a new export policy, and the policy that the Department determined to be invalid is no longer in effect.[7] The parties therefore agree that the export policy issue is now moot.[8] Land Rover further argues that the issue was moot when the Department issued its order and urges that we vacate the Department's final order and remand with instructions to dismiss as moot.

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[7] During the proceeding, the export policy Autobahn challenged was replaced with a second export policy, and Autobahn amended its complaint to encompass that second policy. After implementation of this, their third export policy, after the close of the record, neither the first nor the second policy remains in effect.

[8] "The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events." *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016).

Because the export policy was no longer in effect at the time of the Department's order, this issue was moot prior to inception of this appeal, and Land Rover lacked standing to bring the appeal. *See Texas Quarter Horse Ass'n v. American Legion Dep't of Tex.*, 496 S.W.3d 175, 180–81 (Tex. App.—Austin 2016, no pet.); *see also Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (explaining that general test for standing is that there be real controversy between parties that will actually be determined by judicial declaration sought). Therefore, "the proper remedy is for us to dismiss the appeal" as to the export policy issue "for want of subject-matter jurisdiction without disturbing" the final order. *See, e.g.*, *Texas Quarter Horse*, 496 S.W.3d at 185 (concluding that where appellants lacked standing to bring appeal, proper remedy was to dismiss for want of jurisdiction without disturbing district court's judgment). Accordingly, we dismiss this appeal as to the export issue for want of jurisdiction and do not reach the merits of Land Rover's first issue as it relates to the export policy or its sixth issue

Interpretation of Section 2301.475

In the remainder of its first issue, Land Rover argues that ALJ Frazee, and the Department in adopting her findings of fact and conclusions of law, violated its substantial rights by misinterpreting section 2301.475(b) concerning when fraud must be shown. However, as noted above, Land Rover stated in oral argument that the parties now agree as to the interpretation of section 2301.475 and that the application of section 2301.475 to the chargebacks is no longer at issue. Moreover, it is apparent from ALJ Frazee's PFD that the discussion of fraud under section

2301.475 related to consideration of the export policy issue, which the parties agree is now moot. We therefore do not reach Land Rover's first issue as it relates to the interpretation of section 2301.475.

Opportunity to Respond

In its second issue, Land Rover argues that the ALJs, and the Department in adopting ALJ Frazee's findings of fact and conclusions of law, violated its substantial rights by failing to afford it the opportunity to file a responsive brief on Autobahn's chargeback claims, thus violating its due process rights. *See* Tex. Gov't Code § 2001.174(2)(A). Before the time had expired for Land Rover to file a brief in response to Autobahn's motion for summary disposition, ALJ Seitzman issued Order No. 4, instructing Land Rover to respond to the motion only as to the issue of whether a leasing company can be an end user under the Incentive Program and abating all other issues pending further order. Land Rover therefore contends that it was not allowed to respond to issues other than the end user issue prior to summary disposition. However, in Order No. 8, ALJ Frazee lifted the abatement "to allow the parties to brief all summary disposition issues according to the agreed schedule." Land Rover chose not to brief the other issues at that time, agreeing instead to wait to do so only "[i]f Autobahn's Motion for Summary Disposition . . . on the Chargebacks claim is denied on Autobahn's ground . . . that a leasing company is an end-user under the Program." Thus, Land Rover voluntarily waived its right to brief issues other than the end user issue unless Autobahn's motion was denied as to that issue.

Land Rover argues that because Order No. 10 stated that the effect and intent of Order No. 6 was to grant summary disposition, summary disposition was granted before Order No. 8 lifted

the abatement, precluding Land Rover from briefing other issues before summary disposition was granted. We do not find this argument persuasive. Although ALJ Frazee ultimately concluded that the effect and intent of ALJ Keeper's Order No. 6 was to grant summary disposition, prior to Order No. 10, the effect of Order No. 6 was very much in dispute. The dispute became apparent at the prehearing conference convened by ALJ Frazee after she was assigned the case. And it was because the parties disagreed as to the effect of Order No. 6 during that conference that ALJ Frazee issued Order No. 8, requesting an agreed briefing schedule and lifting the abatement to open briefing to all issues. Thus, Land Rover had the opportunity to fully brief all issues prior to ALJ Frazee's clarification of Order No. 6 and unequivocal statement in Order No. 10 that "summary disposition is **GRANTED**." Land Rover did not do so. We overrule Land Rover's second issue.

Procedural Requirements for Summary Disposition

In its third issue, Land Rover argues that ALJ Frazee, and the Department in adopting her findings of fact and conclusions of law, violated its substantial rights by failing to comply with the procedural requirements for summary dispositions. Specifically, Land Rover complains that the Board acted through unlawful procedure by failing to comply with SOAH rule 155.505(f)(3), which provides that "[i]f summary disposition is granted on some but not all of the contested issues in a case," then the ALJ "shall issue an order: (A) specifying the facts about which there is no genuine issue [and] (B) specifying the issues for which summary disposition has been granted."[9] *See*

[9] Land Rover cites current rule § 155.505(f)(3), which was not adopted until October 28, 2016, after this proceeding was closed. *See* 41 Tex. Reg. 3383 (2016), *adopted* 41 Tex. Reg. 8603 (2016) (codified at 1 Tex. Admin. Code § 155.505(f)(3) (2017) (Tex. Office of Admin. Hearings, Summary Disposition)). However, 1 Texas Administrative Code section

1 Tex. Admin. Code § 155.505(f)(3) (2017) (Summary Disposition); *see also* Tex. Gov't Code § 2001.174(2)(C). Land Rover contends that Order No. 6 did not meet the requirements of subsection (A) because it did not specify the facts about which there was no genuine issue and could not have done so because there were several disputed issues of fact, discussed in Issue 5. Land Rover also contends that Order No. 6 did not meet the requirements of subsection (B) because ALJ Keeper's conclusion that leasing companies *may* be end users—without a conclusion that the leasing companies in this case were end users—was insufficient as a matter of law as a basis for summary disposition on the issue of Land Rover's chargebacks and because the order does not state that it grants summary disposition on whether the chargebacks violated the Occupations Code—or even use the term "summary disposition." Autobahn and the Department argue that in Order No. 10, ALJ Frazee determined that there were no fact issues as to the end user issue and specified the issues for which summary disposition had been granted—the end user issue and corresponding chargeback claim—leaving the export policy and payment claims to be disposed of later. The Department also argues that Land Rover has not shown that this alleged unlawful procedure prejudiced its substantial rights. *See* Tex. Gov't Code § 2001.174(2).

We agree with Autobahn and the Department. Land Rover's reliance on Order No. 6 is misplaced. As discussed above, although ALJ Frazee ultimately concluded that the effect and intent of ALJ Keeper's Order No. 6 was to grant summary disposition, the effect of Order No. 6 was very much in dispute. ALJ Frazee resolved that dispute in Order No. 10, which stated that

155.505(e)(3), in effect during the course of this proceeding, was identical. *See* 41 Tex. Reg. 3383. For convenience, we cite to the current rule.

Order No. 6 had established that there were no genuine issues of material fact as to the end user issue and which expressly ordered that "summary disposition is **GRANTED** . . . as to the end user issue and the corresponding chargebacks issue."[10] Thus, while the "intent" and "effect" of Order No.6 were to grant summary disposition, Order No. 10 expressly did so. We conclude that Order No. 10 met the requirements of rule 155.505(f)(3). Further, even if Order No. 6 and Order No.10 failed to meet the statutory requirements, Land Rover has not explained how this alleged unlawful procedure violated its substantial rights other that to state that it "was entitled to the procedural protections of Section 155.505(f)(3)." *See id.* Land Rover was afforded procedural protections by Order No. 8, which lifted the abatement and allowed Land Rover to brief all summary disposition issues, and by Order No. 10, which met the statutory requirements. *See* 1 Tex. Admin. Code § 155.505(f)(3). We overrule Land Rover's third issue.

Application of Section 2301.467 to Chargebacks

In its fourth issue, Land Rover argues that ALJ Frazee, and the Department in adopting her findings of fact and conclusions of law, violated its substantial rights by determining that the chargebacks violated section 2301.467 of the Occupations Code. *See* Tex. Occ. Code § 2301.467(a)(1) (providing in relevant part that distributor may not "require adherence to unreasonable sales or service standards") Land Rover first reasserts its due process argument that it was not afforded an opportunity to respond to the issue of the validity of the chargebacks under section 2301.467, an argument we have already addressed and overruled. *See* Tex. Gov't Code

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[10] As explained below in our discussion of Issue 5, we do not agree with Land Rover's contention that there were fact issues remaining that precluded summary disposition.

§ 2001.174(2)(A). Land Rover next argues that ALJ Frazee's amendment to her PFD was made through unlawful procedure. *See id.* § 2001.174(2)(C) (providing that court shall reverse or remand if rights of appellant have been prejudiced because findings and conclusions are made through unlawful procedure). Land Rover submitted exceptions to Judge Frazee's PFD, and Autobahn filed a reply. In response, ALJ Frazee made several changes in an Exceptions Letter. The changes included adding to Conclusion of Law No. 19—which originally stated, "Sales to leasing companies are qualified sales under [the Incentive Program] according to program documents"—the following sentence: "Land Rover's charge-backs to Autobahn for sales to leasing companies under [the Incentive Program] are invalid under Texas Occupations Code § 2301.467(a)(1) for requiring adherence to unreasonable sales or service standards . . . ." Land Rover contends that this amendment was substantive, not clerical, and ALJ Frazee acted through unlawful procedure by calling it a correction of a "typographical error."

SOAH rules provide that after reviewing exceptions and replies, an ALJ shall notify the parties whether she recommends any changes, *see* 1 Tex. Admin. Code § 155.507(d), and may amend the PFD in response to the exceptions and replies, *see id.* § 155.507(e)(1), and correct any clerical errors, *see id.* § 155.507(e)(2). Thus, under the rules, even if ALJ Frazee mischaracterized the nature of the amendment, she had the authority to amend the proposal in response to the parties' exceptions and replies, and the amendment was not achieved through unlawful procedure. *See id.* § 155.507(e)(1); Tex. Gov't Code § 2001.062(d) (providing that PFD may be amended in response to exceptions, replies, or briefs submitted by parties).

Finally, Land Rover argues that ALJ Frazee, and the Department in adopting her findings of fact and conclusions of law, violated its substantial rights by misinterpreting section 2301.467 of the Occupations Code, which prohibits a distributor from "requir[ing] adherence to unreasonable sales or service standards." *See* Tex. Occ. Code § 2301.467(a)(1). Land Rover argues that section 2301.467 does not apply because (1) the Incentive Program is not a sales or service standard but is a set of terms agreed to by the parties that applies to incentive payments; (2) the Incentive Program is not "required" but is an optional incentive program, and (3) even if the Program qualified as a required sales standard, there is no finding that it was "unreasonable." Land Rover also argues that ALJ Frazee did not explain why the chargebacks violate section 2301.467. On these bases, Land Rover contends that ALJ Frazee's interpretation of section 2301.467 was arbitrary and capricious and affected by legal error. *See* Tex. Gov't Code § 2001.174(2)(D), (F). Autobahn argues that the Incentive Program, the RDR forms on which Autobahn was required to report the sales, and Land Rover's "attempted requirements for record keeping" were "all about sales" and that the ALJ found that the documentation and delivery requirements were unreasonable under the evidence in this record.

"Sales standard" is not defined in the statute, so we apply its ordinary meaning. *See Marks*, 319 S.W.3d at 663. A "sale" is defined as "[t]he transfer of property or title for a price." *Sale*, *Black's Law Dictionary* (10th ed. 2014). It appears undisputed that the transactions at issue were sales; Land Rover admitted in its reply to Autobahn's complaint that "the RDR process involves Autobahn providing sales information to [Land Rover]," and the Manual and Rules refer to "sales." The definitions for "standard" include: "[a] model accepted as correct by . . . authority"

and "[a] criterion for measuring acceptability." *Id.* at *Standard*. The Manual and Rules establish "criteria" that must be met for a sales transaction to be eligible or "acceptable" for the Incentive Program. In fact, the Manual provided that "[a]ny sales transaction" that did not meet certain "criteria," including the personal delivery requirement, would be "disqualified from the full [Incentive Program] payment." To "require" means "to ask, request, or desire (a person) to do something," "to ask for authoritatively," and "to call for as suitable or appropriate in a particular case." *Webster's Third New Int'l Dictionary* 1929 (2002). Land Rover requested "authoritatively" or "called for" Autobahn to meet the "criteria" for sales set out in the Manual, Rules, and RDR forms "as suitable or appropriate for" eligibility or "acceptability" in the Incentive Program. Thus, based on the plain language of the statute, there is some reasonable basis in the record for the determination that the Incentive Program is a "sales standard" "required" by Land Rover for payments under the Incentive Program. *See Marks*, 319 S.W.3d at 663; *Texas Indus. Energy*, 324 S.W.3d at 105 n.60. Further, in Conclusion of Law No. 19, ALJ Frazee determined that the personal delivery "sales standard" in the Incentive Program was "unreasonable" within the meaning of section 2301.467(a)(1) when she concluded that the chargebacks were "invalid under Texas Occupations Code § 2301.467(a)(1) for requiring adherence to unreasonable sales or service standards."

Additionally, ALJ Frazee sufficiently explained how the personal delivery criteria for sales to leasing companies to be eligible for the incentive program violated section 2301.467(a)(1) by first stating her conclusion that sales to leasing companies are qualified sales under the Incentive Program and then finding that the personal delivery criteria, as applied to these sales to leasing companies, were unreasonable. We cannot conclude that there is no reasonable basis in the record

for the determination that the chargebacks violated section 2301.467(a)(1) or that the determination was arbitrary, capricious or affected by legal error. *See* Tex. Gov't Code § 2001.174(2)(D), (E), (F); *Texas Indus. Energy*, 324 S.W.3d at 105 n.60. We overrule Land Rover's fourth issue.

Genuine Issues of Material Fact

In its fifth issue, Land Rover argues that ALJ Frazee, and the Department in adopting her findings of fact and conclusions of law, violated its substantial rights by granting summary disposition in favor of Autobahn when there were genuine issues of material fact remaining. "Summary disposition shall be granted if the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion." 1 Tex. Admin. Code § 155.505(a). Land Rover contends that several issues of material fact remain with respect to Autobahn's chargeback claims and that, consequently, the final order is arbitrary and capricious and not reasonably supported by substantial evidence. *See* Tex. Gov't Code § 2001.174(2)(E), (F). Land Rover lists seven issues of fact it contends remain.[11]

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[11] One of the alleged fact issues concerns the application of section 2301.468, which Autobahn has conceded does not apply. The remaining six fact issues Land Rover lists are:

> 1. Are the end-users of the 90 vehicles identified in the audit the retail customers or leasing companies?
> 2. Did Autobahn identify the retail customers or leasing companies to Land Rover as the end-users of those vehicles?
> 3. Are the leasing companies "approved" leasing companies?
> 4. Did Autobahn in fact deliver the vehicles to the leasing companies?
> 5. Did Autobahn comply with all of the requirements of the [Incentive Program],

These alleged fact issues either are questions of law, have been resolved and are therefore not remaining fact issues, or are irrelevant given the facts and posture of the case. Item 1, concerning whether the "end users" were leasing companies or lessees; item 3, concerning whether the leasing companies were "approved;" and item 6, concerning whether the Incentive Program was a "sales or service standard," are questions of law requiring interpretation of the Manual and Rules that have been resolved by the ALJ Frazee's findings and conclusions on the chargeback claims. In its reply brief, Land Rover contends that even though ALJ Keeper concluded in Order No. 6 that a leasing company is considered an end user under the program documents, there are fact issues as to whether the leasing companies here were the end users for purposes of the incentive payments at issue, whether the leasing companies in this case were approved, and whether the Incentive Program is a sales or service standard.

However, the parties specifically briefed the end user and "approved" leasing company issues prior to Order No. 6. After reviewing the parties' additional briefs on the effect of Order No. 6, ALJ Frazee—in Order No. 10—concluded that Order No. 6 had the effect of granting summary disposition and expressly granted summary disposition of the chargeback issue, resolving the legal issues of whether, under the program documents, the leasing companies in this case were approved and qualified as end users for purposes of the Incentive Program. Although Land Rover

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including the requirement that the end-user be listed as the primary driver and that Autobahn submit only one end-user to Land Rover, whose qualifications are used to determine Autobahn's eligibility for the incentive payments?
6. Is the [Incentive Program] a "sales or service standard," such that Occupations Code Section 2301.467(a)(1) applies?

had the opportunity to brief all summary disposition issues, Land Rover did not raise the issue of whether the Incentive Program or its delivery requirement was a "sales or service standard" until its first motion for rehearing. Nonetheless, to the extent it was an "issue" in the case, it was a legal issue that was resolved by the grant of summary disposition in Order No. 10 and by Conclusion of Law No. 19 that the chargebacks were "invalid under Texas Occupations Code §2301.467(a)(1) for requiring adherence to unreasonable sales or service standards." *See* Tex. Occ. Code § 2301.467(a)(1).

Item 2—whether Autobahn "identified" the lessees or leasing companies as the end users—does not raise a *material* fact issue. Autobahn was required to deliver to the end user and to submit the end user's name as the primary driver. Land Rover's only basis for the chargebacks was that Autobahn did not meet the requirement that it deliver to the end user primary driver. Land Rover did not allege or base the chargebacks on any claim that Autobahn had submitted the incorrect end user as the primary driver. Land Rover contends that there remains the question of who Autobahn "identified" as the end user. But Autobahn submitted the required RDR forms, which asked for the vehicle information, leasing company information, and primary driver information for each vehicle. The RDR forms contained no reference to and required no "identification" of the end user. Thus, to the extent this inquiry is relevant, the information Autobahn actually submitted is undisputed, and whether Autobahn submitted the correct end user is a legal question involving interpretation of the program documents, including the definition of end user, that was determined by ALJ Frazee in Order No. 10 and in her conclusions of law.

Land Rover did not raise Item 4—whether Autobahn in fact delivered the vehicles to the leasing companies—during the proceeding before the ALJ despite having specifically briefed the end user issue and having had the opportunity to brief all summary disposition issues. Instead, Land Rover focused on who had delivered the vehicles to the primary driver lessees because it considers them the end users. Land Rover concluded that the leasing contract showed that the leasing companies delivered the vehicles to the end user lessees so that delivery was not made to the vehicles' end users by Autobahn as required. As Land Rover stated in its response to Autobahn's motion for summary disposition, the basis for the chargebacks was "Autobahn's failure to personally deliver Land Rovers to its end-user customers." Despite these conclusions and assertions, Land Rover argued in its exceptions to the PFD and in two motions for rehearing that there was a fact issue as to who made the deliveries to the end user primary drivers. But it did not claim a fact issue as to whether Autobahn delivered the vehicles to the leasing companies. Rather, it appears to have been established or presumed that Autobahn delivered the vehicles to the leasing companies. It was understood that Autobahn sold the vehicles to leasing companies, who in turn leased them to individual primary drivers. It is logical to conclude that Autobahn delivered the vehicles to the leasing companies, and Land Rover did not question that assumption below. In its reply brief, Land Rover recharacterizes this item as a fact question regarding whether Autobahn delivered the vehicles to the "end user." But whether Autobahn delivered to the end user is, like items 1, 3, and 6, a legal question requiring interpretation of the Manual and Rules that was resolved by the ALJ Frazee's findings and conclusions on the chargeback claims.

Finally, item 5, concerning whether Autobahn complied with of all the requirements of the Incentive Program, is not a material fact issue that precludes summary disposition. The only basis for the chargebacks was Autobahn's alleged failure to deliver the vehicles to the end user primary drivers, and that was the only program requirement at issue. That issue was fully briefed and resolved by ALJ Frazee. On this record, we cannot conclude that any of items1 through 6 remained a fact issue precluding summary disposition.[12] *See* 1 Tex. Admin. Code § 155.505(a).

CONCLUSION

We dismiss that portion of the appeal that relates to the export policy for want of jurisdiction. We affirm the Department's final order in all other respects.

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[12] Land Rover also argues that these disputed fact issues require discovery and requests discovery and a hearing on these issues. Having determined that there were no fact issues precluding summary disposition, we need not reach this argument. Moreover, we observe that Land Rover was provided Autobahn's files for 459 transactions, audited 134 transactions, and, in Land Rover's own words "reviewed [Autobahn's] entire Dealership files for each of the [vehicle identification numbers of the vehicles at issue]." Further, the record does not reflect that Land Rover served any discovery requests on Autobahn or did anything more to seek discovery than to include a statement in the conclusion of its letter response to Order No. 9 on the effect of Order No. 6 requesting that it be allowed to conduct discovery "to determine the details of each transaction" and to include the statement that the case "should proceed to discovery" in its exceptions to the PFD and in its two motions for rehearing. Land Rover did not seek rulings on these "requests" for discovery.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Dismissed in Part for Want of Jurisdiction; Affirmed in Part

Filed: December 21, 2017