

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
1511 PONTIAC AVENUE, BLDG. 69-2
CRANSTON, RHODE ISLAND 02920

In the Matter of:	:	
	:	
West Fountain Auto Sales & Body, Inc.,	:	DBR No.: 18AB004
	:	
Respondent.	:	
	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an Order to Show Cause Why Order Should not Issue Revoking License, Notice of Intent to Impose Administrative Penalties and Appointment of Hearing Officer (“Order to Show Cause”) issued by the Department of Business Regulation (“Department”) to West Fountain Auto Sales & Body, Inc. (“Respondent”) on December 13, 2018. The Respondent holds an automobile body repair license (“License”) pursuant to R.I. Gen. Laws § 5-38-1 *et seq.* After the exchange of discovery and status conferences, this matter was heard on July 29, September 10, and October 28, 2019. The parties were represented by counsel and briefs were timely filed by November 26, 2019.¹

II. JURISDICTION

The administrative hearing was held pursuant to R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 5-38-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and 230-RICR-10-00-2 *Rules of Procedure for Administrative Hearings* (“Hearing Regulation”).

¹ Both parties filed briefs but did not file reply briefs.

III. ISSUE

Whether the Respondent violated R.I. Gen. Laws § 5-38-10(4), (7), (8), and/or (9), and if so what are the appropriate penalties.

IV. TESTIMONY AND MATERIAL FACTS

Robert Collins (“Collins”) testified on behalf of the Department. He testified that he has owned a company called Wreck Check for twenty (20) years where he inspects vehicles and evaluates whether repairs were proper. He testified that he has been involved in autobody work for over 45 years starting in 1975 as a technician in collision repairs working his way up to shop manager from 1985 to 2012 when he went full-time with his company. He testified he performs about 150 car examinations a year in Rhode Island, Massachusetts, and Connecticut and is a licensed damage appraiser in those states and has testified in cases like this about 55 times.

Collins testified that Randy Bottella (“Botella”) hired him to evaluate the car (“Car”) (a Mazda) in question, and he did not speak to the owner prior to his evaluation. He testified that generally he checks the VIN, mileage, paint job, damage, photographs the defects, and take notes. He testified that the Car had been taken apart and he compared it to the insurance estimate. He testified that the absorber for the bumper, the piece between the bumper and the steel frame, was damaged with a piece was missing, and was supposed to be replaced. Department’s Exhibit One (1) (Wreck Check report; page three (3)). He testified the top bumper should be clipped with plastic clips, but instead was glued together, and the underbody did not fit together so adhesive was used rather than clips. He testified that the repairs used aftermarket parts rather than Mazda parts as recommended by Mazda. He testified that wires were cut on the electric power steering and the steering wheel could not turn (page six (6) of report). He testified that page seven (7) of his report shows the fender and bumper and 1) damage to the unibody as it is bent, rusted, and

corroded; 2) sheet metal was used and should have been welded not attached by screws; and 3) the piece should be flat and smooth, so the wrinkled condition was caused by collision. He testified that there are safety issues related to the unibody (pages seven (7) to nine (9)) because the unibody is designed so that air bags go off at a predetermined point and if the structure has been damaged, that affects the trigger of the air bag. He testified that paint chips were not been repaired and the paint did not match up (pages 10 and 11 of report) and the steering wheel cannot turn (page 12). He testified that there was no evidence that pre or post scans were performed. He testified that not all repairs on the estimate were made and he listed those not made to the Car on page 13. He testified that the important repairs that were not performed were lines 42-43 on the estimate since those are structural parts, the front body side member and front body apron. He testified that the repairs that were made were very poor and unsafe and the Car should have been scrapped. He testified that the Rhode Island Autobody Association (“ABARI”) paid him approximately \$650 for the evaluation. He testified that Mazda would not recommend screws or those parts, and no manufacturer would recommend that metal be attached by screws as they all would recommend welding. He testified the Car was not repaired to the pre-loss condition.

On cross-examination, Collins testified that he is a licensed appraiser in Rhode Island but upon being shown Respondent’s Exhibit One (1) (Rhode Island licensing records), he realized that his Rhode Island license had expired. He testified he inspected the Car about ten (10) months after the accident, and the Car apparently had gone 2,500 miles since the accident. He testified that he did not check if there were any other accidents after December, 2017. He testified that on occasion ABARI contacts him to evaluate a car and he did not speak to BTS, Tire (“BTS”) or the Respondent prior to his evaluation. On re-direct examination, he testified that his Massachusetts and Connecticut appraiser licenses are current, and he thought he was up to date with Rhode Island.

Diane Cournoyer (“Cournoyer”) testified on behalf of the Department. She testified that it was her 2013 Mazda (the Car) that was in the accident in December, 2017 and she and her boyfriend had the Car towed to the Respondent. Department’s Exhibit Three (3) (Car after accident). She testified that the accident was on a Saturday and on Monday, they got their belongings from the Car, and she told the adjuster who was there that she would prefer the Car not be totaled. She testified that the Respondent said it would repair the car, and that was the understanding. Department’s Exhibits Nine (9) (direction to pay) and Ten (10) (lien and assignment of proceeds). She testified the Car was returned between Christmas and New Year and no one told her before the Car was returned that it was sent to BTS for some repairs.

Cournoyer testified after she got the Car back, there was a problem with the headlights as they were filling with water so she brought it back. She testified then she called about the power steering and had to go to BTS, and she went to BTS about four (4) times for the power steering. She testified that she filed a complaint with the Department. Department’s Exhibits Six (6) and Seven (7). She testified that in her complaint, she wrote it was her first accident, but she meant it was the first time she had to be towed. She testified she never told the Respondent not to perform the repairs on the insurance estimate. She testified that she still is driving the Car because she needs it to get to work, and she and her boyfriend drive the Car. She testified her boyfriend has changed the oil and checked the brakes but has done nothing else to the Car. She testified that at the time of the accident, she still owed money on the Car. She testified the Respondent returned \$300 to her so she could get matching Mazda hub caps. On cross-examination, Cournoyer testified that she had a deductible of \$1,200, and she did not pay the Respondent any money but received \$300. She testified that she did not have any repairs between the accident and the hearing.

Bayron Estrada (“Estrada”) testified on the Department’s behalf. He testified that he is Cournoyer’s boyfriend and when they went to get their belongings from the Car at the Respondent’s, he spoke to Kenny Salvatore (“Salvatore”) who said the Respondent had two (2) frame machines and he would do the work and did not mention BTS. He testified that after the Car was repaired, he was driving with Cournoyer and the power steering went out when they were exiting the highway, and they both had to grab the wheel to get over to the side. On cross-examination, he testified that nobody else drives the Car.

Bottella testified on behalf of the Department. He testified that he owns Reliable Collision and holds repair certifications. Department’s Exhibit 25. He testified that he is Vice President of ABARI and Cournoyer filed a complaint with ABARI stating that she returned the Car three (3) times and the steering did not work. He testified that he has handled about 15 to 20 complaints for ABARI in the past five (5) years. He testified that he inspected the Car and reviewed the insurance estimates and put together a report. Department’s Exhibit Four (4) (his report). He testified he ran a diagnostic scan on the Car, and it came up with the steering. He testified that the bumper was popping out since it was not attached properly. He testified that the right headlight had a zip tie which is not industry standard. He testified that the frame rail should have been welded but was attached by screws, and when it is not welded, it corrodes and becomes weaker and separates and is more likely to break in another accident so using screws is not up to safety standards. He testified that apron should have been welded. He testified that the power steering reservoir was crooked and was leaking. He testified that the Respondent tried to glue the bumper to the mounting bracket (page eight (8) of his report) which is not a proper repair since the bracket and bumper are designed to line up and snap on. He testified that the broken or deformed parts had not been replaced so that their ability to absorb energy in accidents have been comprised so

the timing could be off for inflating air bags. He testified that the energy absorber was broken and dirty so had been in a Car awhile so there was no evidence it was replaced. He testified the apron is deformed and the under-coating looks like it is full of body filler to make panels look straight. He testified that photographs show the power steering leaking. He testified the wires connected to power steering were cut off and not terminated properly (page 10) and when wires are not terminated properly, it allows them to get corroded. He testified that the manufacturer tells one how to repair the cars so there is not much discretion and Department's Exhibit 24 is a Mazda report on how to replace and repair. He testified that he spoke to ABARI which decided to ask Wreck Check to perform an independent evaluation. He testified that the Car was still disassembled when Collins came to the shop. On cross-examination, Bottella testified that he is not testifying against a shop but just about what he found in his evaluation. He testified that ABARI paid Collins for the report and relied on him as an expert.

James Bucci Jr. ("Bucci") testified on behalf of the Respondent. He testified that he has worked at Progressive Insurance for seven (7) years and has a Rhode Island appraisal license and appraised the Car. He testified that he photographed the Car and wrote the estimate based on the visual damage. He testified that a car would be totaled for 75% of the NADA value and the appraisal software indicates when an appraisal reaches that level. He testified that the estimate was written on December 12, 2017. Department's Exhibit Eight (8). He testified that there was no power steering in the appraisal. He testified that he did not have a conversation with Cournoyer during the repairs, but he saw the Car on the frame machine when he was in the shop for another car and the frame was pulled out. He testified that Salvatore said the frame was to be repaired rather than replaced as in the estimate since the shop was working with the deductible. He testified he did not see any screws in the frame rail. He testified that after Cournoyer picked up the Car,

she contacted the insurance company over the headlight, and she said the bumper was not flush and it looked like the bumper had popped out. He testified that he spoke with Salvatore and he, Bucci, understood that she took the Car back and there was an issue with the power steering so he wrote up two (2) supplemental appraisals. Department's Exhibit 23. He testified that the February 22, 2019 supplement was for the steering that seemed related to the accident so he wrote that and did not hear from her again. He testified that he heard that the steering had broken down while the Car was being driven. He testified he did not have any concerns over the repair.

On cross-examination, Bucci testified that he reviewed the estimate with Salvatore and looked at the damage and agreed to the price, and Cournoyer and Estrada were there. He testified that the items on lines 13, 16, 40 to 44 were to be removed and replaced. He testified that he wrote to replace the frame rail, but he saw Salvatore repairing it and he said it was for the deductible.

Salvatore testified on behalf of the Respondent. He testified he has worked for 23 years at the Respondent in the front office and performs body work and hold repair certifications. He testified that Cournoyer did not want the Car totaled. He testified that the Respondent never collected her \$1,000 deductible for the repairs. He testified that he told her he could repair the right rail rather than having it replaced and the insurance company would pay for it to be replaced so that would save on the deductible so he paid her \$300 for that. Respondent's Exhibit Three (3) (\$300 check). He testified that he repaired said frame rather than replace it and he did not put any screws in the frame rail, and he would never use screws in the frame, and it is not customary to use screws. He testified that Cournoyer called with a problem that she could not turn the steering wheel so he told her to go to BTS which fixed it. He testified that BTS is down the street and the Respondent sends all their mechanical work there since the Respondent does not do mechanical work. He testified that he ordered all the parts for the Car from Keystone. Respondent's Exhibits

Four (4), Five (5), and Six (6). He testified that he would not glue the frame to the fender and did not perform that work. He testified he would not use screws on a frame rail. He testified that the Respondent has never had any discipline with the Department.

On cross-examination, Salvatore testified he performed all the repairs and he repaired the frame rail and replaced everything else. He testified that there were other technicians in the shop, but none of them worked on the Car. He testified that he did not run a pre scan or post scan. He testified the damage was visible. He testified that the Respondent does not have any scan tools and he did not seem to know that the insurance estimate included pre or post scans. He testified that he talked to Courmoyer about the frame rail because of the deductible. He testified that the upper left frame was not crushed like in the photograph. He testified that he welded the unibody. He testified that he did not use industry, repair, or Mazda manuals.

Kevin Dietz ("Dietz") testified for the Respondent. He testified that he has been a service technician for 10 years at BTS. He testified that he was working there December, 2017 and worked on the Car. He testified that the Car was initially brought in for the power steering and batteries. He testified that he ran a diagnostic on the Car when it came in. He testified he replaced the tire rod and put on two (2) new tires. He testified that Respondent's Exhibit 12 is for initial repair. He testified that the Car was brought in January, 2018 and he checked it and the Car left on January 19, 2018 and he sent the estimate to Progressive and the supplement was approved. See Department's Exhibit 13 (supplemental invoice). He testified the Car was brought in again on February 12, 2018 because the check light was flashing, and he put in new power steering with parts from LKQ because there was a little of bit of fluid. Department's Exhibit 14 (invoice). He testified that there is a process to ensure the power steering works.

Dietz testified that Cournoyer returned on February 26, 2018 because the power steering light was going on and off. He testified he told his manager and they ran a diagnostic scan but were not approved by the Respondent to replace the wire so did not perform the work. Department's Exhibit 15. He testified for the Wreck Check report on page six (6), the cut wire is a six (6) part connector by Ford (which owns Mazda) but three (3) are only needed so the other three (3) are cut and one can fill or plug the holes to keep water and dirt out. He testified that was his repair. He testified for Bottella's report, Mazda states to solder wires but since that does not work, it is better to use heat glue to seal out moisture which everyone uses (page 10 of report).

On cross-examination, Dietz testified that the third time Cournoyer returned, he found a wire should be replaced since it negatively affected the power steering but that repair was not authorized by Respondent which had approved the prior invoices. Department's Exhibit 15. He testified that every time the Car came in after the initial repair, there was something wrong with power steering. He testified that BTS never performs autobody work for Respondent. After reviewing the Wreck Check report, he testified that he did not repair the bumper or the fender work and did not use adhesive (pages three (3) and four (4)). He testified that he did not perform the repairs on pages five (5) (aftermarket parts); seven (7) (damage to unibody); eight (8) (unibody); and 10 (A pillar and paint) On re-direct, he testified he did not see the screws on page seven (7) (unibody near power steering) when he fixed the power steering. He testified BTS never charged Cournoyer because Respondent has an account with BTS, and the Respondent makes the charges.

Donna Costantino, Associate Director, was called by the Respondent. She testified that she was at the prehearing conference on May 2, 2019 and does not remember saying that Cournoyer cannot drive the Car. On cross-examination, she testified that Cournoyer told her she had to drive the Car to get to work and that there was a problem with the power steering.

Glenn Fortin testified on the Respondent's behalf. He testified that he is a private investigator and observed Cournoyer on three (3) days to see if she was driving the Car and he observed her at work leaving at lunch time and driving to work. Respondent's Exhibits Six (6) (resume); Seven (7) (report); and Eight (8) (surveillance video). On cross-examination, he testified his assignment was to if Cournoyer regularly drove her Car.

V. DISCUSSION

A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM*, 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. **Standard of Review for an Administrative Hearing**

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 (2002). Unless otherwise

specified, a preponderance of the evidence is generally required in order to prevail. *Id.* See *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Relevant Statute

R.I. Gen. Laws § 5-38-10 provides in part as follows:

Grounds for denial, suspension, or revocation of licenses. The department of business regulation may deny an application for license or suspend or revoke a license after it has been granted, for the following reasons:

(4) For defrauding any customer;

(7) For having indulged in any unconscionable practice relating to the business as an automobile body repair shop;

(8) For willful failure to perform work as contracted for;

(9) For failure to comply with the safety standards of the industry.

D. Arguments

The Department sought to revoke the Respondent’s License due to its statutory violations of defrauding a customer, unconscionable practice, failure to perform work contracted; and failure to comply with safety standards. The Department argued that the Respondent’s work was unsafe and acted in an unconscionable manner by making those type of repairs. The Department argued that there was no evidence of an agreement to alter the estimate and there was evidence that the power steering was not fixed at BTS. The Department argued that both Bottella and Collins testified to the substandard and unsafe autobody work performed by Respondent such as bumper

not secured, clips used, no welding, broken energy absorber, and improper zip ties and Salvatore testified that he was the only one who performed the autobody work and that he welded.

The Respondent argued that Cournoyer was not credible because she claimed not to have been in an accident prior to this one when she had, and Bottella was not credible because his testimony about his experience made him starting working on cars when he was age 10 and Collins was paid by ABARI so he was not credible. The Respondent argued that Bucci did not see the screws and Salvatore testified he did not use screws. The Respondent argued that no Department inspector reviewed the Car and ABARI is biased.

E. Whether the Respondent Violated R.I. Gen. Laws § 5-38-10

The Respondent raised the issue of Cournoyer's credibility because in her complaint to the Department indicated she had never been in an accident before, but she had been. She testified that she had really meant that she had not had to be towed before. The Respondent also questioned Cournoyer's testimony regarding why she drove the Car. Her testimony was that she had to drive the Car to work (which was born out by the private investigator who observed her driving to and from work in the Car). The issues at this hearing are about the repairs to the Car. Cournoyer credibly explained the accident and her experience with Respondent. The fact that she defined an accident as being towed does not impact her credibility regarding the Car and her interactions with the Respondent and BTS.

The Respondent questioned Collins' credibility over his Rhode Island appraiser license and for receiving payment from ABARI for his evaluation. Collins testified to a Rhode Island appraiser license that he had at one point and thought he still had. He was surprised to find it had expired. He testified that he was licensed in Massachusetts and Connecticut as an appraiser and there was no evidence that those licenses were not current. However, he was not acting as a Rhode Island

appraiser when evaluating the Car since an appraiser performs that work on behalf of third-party claimants. See R.I. Gen. Laws § 27-10.1-2(2). Collins was paid for his evaluation by ABARI. He did not hide the payment and there is no reason to conclude that just because he was paid to evaluate the Car that he would lie about the Car for ABARI or that ABARI would want him to lie. There was no evidence that ABARI's payment to Collins influenced his judgment. Collins testified to his long experience in autobody repair and testified to what he found when he evaluated the Car which was documented by photographic evidence as well as a written report.

The Respondent questioned Bottella's credibility because based on his age and description of his experience when testifying, he would have started work at about age ten (10). Presumably Bottella was several years older than age ten (10) when he started working on cars but he could have started as a teenager. The fact that Bottella probably rounded up his years in experience does not detract from his long experience in autobody repair and his testimony to what he found when he examined the Car which was documented by photographs as well as a written report.

i. Willful Failure to Perform Work Contracted For

Salvatore testified that the Respondent did not perform a pre or post scan (and that the shop did not have that equipment). Both scans were included in the insurance estimate. The Department submitted two (2) insurance estimates, one dated December 12, 2017 so the first estimate after the accident and the second estimate dated 2/28/18 which included the supplement. Department's Exhibits Two (2) and 23 respectively.² The pre and post scans are listed on lines 84 and 85 in the December 12, 2017 estimate and lines 86 and 87 (entry numbers 900500 for both) in the supplemental write up. Wreck Check referred to line 87 for the post scan in its report. The

² Department's Exhibits Two (2) (Progressive claim file); and Eight (8) (Progressive insurance estimate) were ordered sealed by the undersigned.

Respondent's invoice for its work on the Car does not include a pre or post scan. Department's Exhibit 17 (Respondent's invoice for the Car).

The Wreck Check report found other items on the estimate that also were not completed by Respondent. These include as follows:

Line One (1) (on both estimates) relating to the replacing the inform label; entry number: 102483. That work is not on the Respondent's invoice.

Line 11 (on both estimates) remove/replace front bumper impact absorber; entry number 101049. That work is not on the Respondent's invoice.

Line 19 (on both estimates) refinish hood underside (no entry number). That is listed on line 14 of Respondent's invoice.

Line 41 (on both estimates) refinish right apron/side member (no entry number). That is listed on Respondent's invoice as line 25.

Line 44 (on both estimates) Remove replace right reservoir bracket; entry number 102479. This is not on the Respondent's invoice.

Line 54 (on both estimates) repair windshield glass; entry number 102043. This is not on Respondent's invoice.

Line 62 (on both estimates) Refinish right hinge pillar (no entry number). This is not on Respondent's invoice.

Line 63 (Wreck Check calls it refinish the right hinge pillar which is line 62) but line 63 on both estimates is repair right front door shell, entry number 101608. This is not on the Respondent's invoice.

Line 83 (on February 28, 2018 supplement but is listed as line 81 for December 12, 2017 estimate) mask engine compartment entry number 900500. The Respondent's invoice speaks of masking jambs which is not on the estimate.

Line 88 (on February 28, 2018 supplement but line 86 for December 12, 2017 estimate) set up and measure, entry number 900500. This is included on line 52 on Respondent's invoice.

Line 89 (on February 28, 2018 supplement but line 87 for December 12, 2017 estimate) unibody/frame pull and align, entry number 900500. The Respondent's invoice includes "pull frame to specs" on line 53.

Collins testified that lines 42 and 43 were not completed and that failure was a major safety issue. Those lines provided to remove/replace right front member side frame and remove and replace right front body apron. Salvatore testified that he agreed with Cournoyer not to replace those items but to repair them and that would save her money. He testified that Cournoyer was given a \$300 check for that and never was charged her deductible. Cournoyer testified that she did not have an agreement with the Respondent to vary the repairs as written by the insurance company. She testified that her understanding was that the Car would be repaired by the Respondent and that she never agreed to have the Car repaired differently from the estimate.

The Department has long treated the insurance estimate for the repair of a damaged vehicle as the contract between the car owner and automobile body repair shop. The Department has long held that the car owner and shop can vary this estimate and agree that repairs will be done differently than how the estimate has written and the insurance company is still to pay on its estimate. *Allstate Insurance Company v. Dean Auto Body, Inc.*, DBR No. 07-I-180 (11/4/09); *Allstate Insurance Company v. Leone's Atwood Collision Center and Auto Sales, LLC*, DBR No. 06-L-183 (5/20/09); *Ray Stewart's, Inc. v. Allstate Insurance Company*, DBR No. 03-I-237

(7/2/08); *Rotella v. Autobody Express*, DBR No. 03-L-052 (12/20/04) and reconsidered decision (5/20/05); *Benson v. North Providence Accurate Auto Body & Sale*, DBR No. 00-L-012 (6/16/00); *Teixeira v. Warren Auto Body*, DBR No. 96-L-0012 (9/22/94).

However, there must be evidence of an agreement by the shop and its customer to vary the appraisal. Without such evidence, a body shop must repair according to the appraisal or else it has failed to perform the work contracted for.

The statute speaks of willful failure to perform work as contracted for. “Willful” is defined as “intentional”³ and “deliberate, voluntary, or intentional”⁴. In the context of this statute,⁵ willful refers to doing the act which is here the act of not repairing the vehicle as contracted for. It is not a question of intentionally choosing to violate the statute but rather did a licensee do the act of not performing the work contracted for.

Salvatore testified there was an agreement on about the repairs on lines 42 and 43. He did not testify to any other agreements except to testify that the deductible was not charged.

In *Benson*, the respondent auto body shop accepted the insurance check and did not produce any documentation showing the modification by the customer and shop of the insurance appraisal. In *Teixeira*, the respondent auto body shop accepted the insurance check and did not produce any evidence showing the modification by the customer and shop of the insurance appraisal. In *Rotella*, the respondent automobile body shop accepted the insurance check and there was no agreement with complainant to deviate from the appraisal. As *Rotella* found, an automobile body repair shop cannot unilaterally deviate from an appraisal as it sees fit. If automobile body repair

³ <https://www.merriam-webster.com/dictionary/willful> and <https://www.thefreedictionary.com/wilful>.

⁴ <https://www.dictionary.com/browse/wilful>.

⁵ As stated above, if a statute is clear and unambiguous, the words of the statute are to be given their plain and ordinary meanings. In *Roadway Express, Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673 (R.I. 1980), the Court relied on a dictionary definition in applying the “ordinary meaning” of “must.” *Id.*, at 674. As the Court has found, “[i]n a situation in which a statute does not define a word, courts often apply the common meaning given, as given by a recognized dictionary.” *Defenders of Animals, Inc.*, at 543.

shops were allowed to deviate unilaterally from appraisals, the whole purpose and procedure of having vehicles appraised and repaired based on the appraisals, appraisals on which the insurance company bases payment, would be undermined.⁶

The fact that the Respondent did not charge Cournoyer the deductible is not evidence that there was an agreement to vary the appraisal. There was no written documentation. There was no testimony from Cournoyer as to any agreement to vary the appraisal. Salvatore only testified to an agreement for lines 42 and 43. Even if there was an agreement to vary lines 42 and 43, the Respondent did not repair the Car pursuant to the appraisal as seen by other items missing from its invoices. Collins found some items were not fixed pursuant to the appraisal that were listed on the Respondent's the invoice. Even excluding the items listed as fixed on the invoice and lines 42 and 43, the Respondent did not perform all the work contracted for. E.g. the pre and post scans, remove and replace the front bumper absorber, remove and replace right reservoir bracket, etc. However, there was no evidence that there was an agreement by the Respondent and Cournoyer to vary the repairs. Thus, the Respondent failed to perform the work contracted for in that it failed to repair the work omitted from the Respondent's invoice, those repairs listed in said invoice but noted by Collins as not repaired, and lines 42 and 43.

The Respondent's failure to perform the repair work contracted for pursuant to the appraisal prepared for the insurance company violated R.I. Gen. Laws § 5-38-10(8). See *Rotella, Benson, and Teixeira*.

ii. Failure to Comply with the Safety Standards of the Industry

Both Collins and Bottella testified to substandard repairs to the Car. Both testified that the bumper was glued on. Bottella testified the bumper should line up and snap on and both testified

⁶ Here, the insurance appraisal for the Car was for \$5,619.49 but with the \$1,000 deductible, the appraisal was for \$4,619.49. The Respondent's invoice was for \$6,860.66 with an \$1,000 adjustment so was for \$5,860.66.

that it did not, and that glue/adhesive was used. Bottella testified that filler was used to make parts look smooth. Bottella testified to corrosion on the connector. Collins testified to a variety of repairs where instead of welding, screws or ties were used. Bottella testified that the frame rail should have been welded and not attached by screws. Bottella testified that he performed a diagnostic scan and he came up with a problem with the steering. This was also indicated in Collins' report. Indeed, Dietz testified that he had found several problems with the steering with last problem's repair not being approved by the Respondent. Both reports documented leaking power steering. Salvatore testified that the damage was visible, and he never ran a pre or post scan even though required by the appraisal. Such a scan could have diagnosed the power steering problems which were not visible and Cournoyer ended up returning the Car several times with power steering problems. Collins' report found the steering wheel could not turn.

Salvatore admitted he repaired rather than replaced the frame rail but denied using screws or glue on the frame rail. The photographs showed the use of screws. Bottella and Collins testified and documented the glued bumper and the use of screws including on the unibody. Cournoyer and Estrada testified that only the Respondent (and BTS) repaired the Car. Bucci testified that he did not see screws in the frame rail, but he testified that the Car was on the frame machine and he was not there to examine the Car but was talking to Salvatore when there to look at another vehicle so it is not a surprise he did not notice the screws (if they had already been put in place at the time). Both Bottella and Collins testified that the frame rail was attached by screws and not welded. Both reports have photographs of screws with crushed pieces. Therefore, even if there was an agreement to vary the repair, the frame rail repair was not performed to safety standards of the industry.

While Salvatore denied making poor and improper repairs, he testified that he did not consult the Mazda manual. The evidence was that nobody but the Respondent performed autobody

repair work (BTS only performed mechanical work) on the Car. Salvatore used a frame machine to fix the Car. Cournoyer and Estrada were in possession of the Car after the repairs but were not in the position to fix the Car so that it had screws rather than welds and filler to cover up bad repairs and adhesive on the bumper. The Respondent's invoice did not include any items related to welding.

While some repairs did not raise safety issues (e.g. matching paint), there was a preponderance of evidence about the Respondent's repairs not meeting industry safety standards such as the use of screws rather than welding, use of sheet metal, and glue as well as the crumpled pieces not properly in place that affect the air bag trigger.

The only possible person performing autobody repairs was Salvatore. The Department presented two (2) witnesses with many years of experience in the autobody field who testified to the industry safety standards and how the repair of the Car did not meet industry safety standards. Their reports and testimony were consistent and similar regarding the repairs. See *In the Matter of: Joe's Towing, Inc. d/b/a RI Auto Body*, DBR No. 11-L-002 (1/18/12).

Based on the foregoing the Respondent violated R.I. Gen. Laws § 5-38-10(9).

iii. Unconscionable Practice Relating to the Business as an Automobile Body Repair Shop

1. Contract

Relying on dictionary definitions, *Leone's* found that an unconscionable practice is some kind of action taken by a licensee or an agent of a licensee that is unscrupulous or unjust so that it is behavior that offends the conscience or more simply, is the wrong thing to do. See p. 15. In *Leone's*, the respondent auto body shop did not obtain the customer's consent to repair the car in the manner that the shop repaired the car and that behavior was found to be unconscionable. *Rotella, Dean Auto Body, Leone's, and Teixeira*.

Here the Respondent failed to obtain authority to vary its repair and accepted money for work it did not perform so that the Respondent violated R.I. Gen. Laws § 5-38-10(7) by engaging in an unconscionable practice relating the business as an automobile body repair shop.

2. Safety Standards

As well as failing to perform work contracted for without authorization, the Respondent performed unsafe repairs. As explained in *Leone's*, actions that are unscrupulous or simply the wrong thing to do are unconscionable. The Respondent made repairs that were shoddy and unsafe and inconsistent with industry standards. Based on the Respondent's failure to comply with industry safety standards in its repair, the Respondent violated R.I. Gen. Laws § 5-38-10(7) by engaging in an unconscionable practice relating the business as an automobile body repair shop.

iv. For defrauding any customer

Relying on *Black's Law Dictionary's* definition, *Joe's Towing* found that defraud meant making a misrepresentation of an existing material fact, while either knowing it to be false or making it recklessly without regard to whether true or false, intending that one would rely on such a misrepresentation to his or her detriment. In *Joe's Towing*, the Department found that while the respondent auto body shop made no spoken misrepresentation, it could be inferred that returning a vehicle after repairing it, the respondent was representing that it was repaired properly and in safe condition to operate. In *Joe's Towing*, the Department found that a licensee that returned an improperly repaired and unsafe vehicle misrepresented that the vehicle repair was complete. That licensee had 26 years of experience in automobile body repair work so knew what methods and technology were available for repairs. *Rotella* found that the automobile body repair shop defrauded the complainant by not repairing that vehicle as required under the terms of the appraisal.

Similarly, here, the Respondent returned a Car that it knew had not been properly repaired and also knew that it has not been repaired pursuant to the contract and that such repairs had not been agreed to with Cournoyer. Based on the Respondent's failure to comply with industry safety standards in its repair and failure to perform work contracted for (by performing unauthorized work), the Respondent violated R.I. Gen. Laws § 5-38-10(4) by defrauding a customer.

F. What are the Appropriate Sanctions

R.I. Gen. Laws § 5-38-10 provides that the Department may revoke or suspend a license for any violation of said statute. In addition, R.I. Gen. Laws § 5-38-10.1 provides as follows:

Civil penalties for violations. In addition to every other power granted the department of business regulation, the department may fine a licensee not more than one hundred dollars (\$100) for any violation or failure to comply with the provisions of this chapter or with any rule or regulation promulgated by the department. Section 2.16 of the Hearing Regulation provides as follows:

Penalties

A. In determining the appropriate penalty to impose on a Party found to be in violation of a statute(s) or regulation(s), the Hearing Officer shall look to past precedence of the Department for guidance and may consider any mitigating or aggravating circumstances.

1. Mitigating circumstances may include, but shall not be limited to, the following: the Party's licensing history, i.e. the absence of prior disciplinary actions; the Party's acceptance of responsibility for any violations; the Party's cooperation with the Department; and the Party's willingness to give a full, trustworthy, honest explanation of the matter at issue.

2. Aggravating circumstances may include, but shall not be limited to, the following: the Party's prior disciplinary history; the Party's lack of cooperation and/or candor with the Department; the seriousness of the violation; whether the Party's act undermines the regulatory scheme at issue; whether there has been harm to the public; and whether the Party's act demonstrates dishonesty, untrustworthiness, or incompetency.

B. The finding of mitigating factors will not necessarily lead to a reduction in the penalty imposed if the circumstances of the violations found by the Hearing Officer are such that they do not warrant a reduction in penalty.

The Department sought revocation for what it termed egregious violations. In reviewing aggravating and mitigating factors, the Respondent has no prior discipline but did not accept responsibility for any violations and did not give a trustworthy account of the matter at issue. The Respondent's unsafe work is a danger to the public and demonstrates incompetency.

In reviewing prior sanctions, *Joe's Towing* imposed a seven (7) day suspension and \$400 administrative penalty (or alternatively a \$2,000 penalty) for violations including safety standards. *Teixeira* imposed a five (5) day suspension and a \$1,400 administrative penalty for violations (not including safety). *Rotella* imposed a 14 day suspension and \$400 administrative penalty for violations including safety standards. *Leone's* and *Dean* each imposed a seven (7) day suspension and \$100 administrative penalty for one (1) statutory violation of unconscionable practice.⁷

The Respondent's violations are very serious since it performed substandard and unsafe repairs and acted unconscionably. It failed to account or take responsibility for such actions. Such violations necessitate a severe penalty. As this is a first violation, the undersigned will recommend a suspension rather than revocation but because of the serious public safety concerns, the Respondent will also need to take remedial action to ensure that in future it safely repairs vehicles.

Pursuant to R.I. Gen. Laws § 5-38-10.1, an administrative penalty of \$400 is imposed (\$100 for each violation) on the Respondent. Pursuant to R.I. Gen. Laws § 5-38-10, the Respondent's License is suspended for at least 30 days as prior to the lifting of the suspension, the Respondent must provide the Department with an acceptable remedial plan for its repair work. The plan must include repair training of the Respondent's staff with a time line to complete the training and a written explanation of repair protocols for vehicles which must include that a variance from an

⁷ While both *Leone's* and *Dean* discussed that there must be an agreement to vary the appraisal, neither decision addressed the violation of not performing work contracted for. None of these cited decisions indicated that there had been prior discipline.

appraisal must be documented in writing and that repair protocols include following the relevant manuals.

VII. FINDINGS OF FACT

1. On or about December 13, 2018, the Order to Show Cause was issued to the Respondent by the Department.
2. A hearing was held on July 29, September 10, and October 28, 2019. Briefs were timely filed by November 26, 2019.
3. The facts contained in Section IV and VI are reincorporated by reference herein.

VIII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

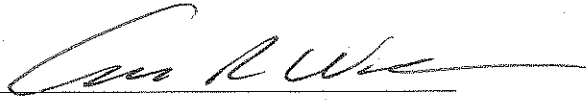
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 5-38-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and the Hearing Regulation.
2. The Respondent violated R.I. Gen. Laws § 5-38-10(4), (7), (8), and (9).

IX. RECOMMENDATION

Pursuant to R.I. Gen. Laws § 5-38-10.1, an administrative penalty of \$400 is imposed (\$100 for each violation) on the Respondent. Pursuant to R.I. Gen. Laws § 5-38-10, the Respondent's License is suspended for at least 30 days as prior to the lifting of the suspension, the Respondent must provide the Department with an acceptable remedial plan for its repair work. The plan must include repair training of the Respondent's staff with a time line to complete the training and a written explanation of repair protocols for vehicles which must include that a variance from an appraisal must be documented in writing and repair protocols that include following the relevant manuals. The administrative penalty shall be paid by the 31st day following the execution of this

decision by the Department director. The suspension shall take effect on the 31st day following the execution of this decision by the Department director.⁸

Dated: January 23, 2020

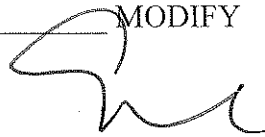

Catherine R. Warren, Esquire
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

ADOPT
 REJECT
 MODIFY

Dated: 1/29/2020


Elizabeth M. Tanner, Esquire
Director

NOTICE OF APPELLATE RIGHTS

THIS ORDER CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

⁸ The Department shall approve a reasonable remedial plan submitted by the Respondent. For the suspension to be lifted, the remedial plan must be approved by the Department. If the plan is approved prior to the completion of the 30 day suspension, the suspension shall terminate after 30 days but if the plan is not approved prior to the completion of the 30 day suspension, the suspension shall continue until the remedial plan is approved. Since the suspension will commence on the 31st day after the execution of this decision, the 30 day suspension would be completed by the 61st day after the execution of this decision if the plan is submitted and approved within that time period. If the plan is not approved by that 61st day, the suspension will continue until approved. Upon the approval of the plan by the Department and implementation by the Respondent, the Department may obviously inspect the Respondent for compliance as provided by statute.

CERTIFICATION

I hereby certify that on this 29th day of January, 2020, that a copy of the within decision was sent by first class mail, postage prepaid to Christopher Maselli, Esquire, Thomas E. Badway & Associates, LLC 1052 North Main Street, Providence, R.I. 02904 and by electronic delivery to Sara Tindall-Woodman, Esquire, Amy Stewart, Esquire, and Donna Costantino, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I.

