STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS{PRIVATE }
DEPARTMENT OF BUSINESS REGULATION
233 RICHMOND STREET
PROVIDENCE, RHODE ISLAND 02903

IN THE MATTER OF:	:	
VINCENT DIPAOLO,	:	**DBR No. 02-I-0040**
RESPONDENT.	:	

DECISION

Hearing Officer: Michael P. Jolin, Esq.

Hearing Held: September 18, 2006
October 6, 2006
January 19, 2007

Appearances:

For Respondent: John B. Harwood, Esq.
Gregory DiPaolo, Esq., *pro hac vice*

For the Department: Joseph J. LoBianco, Esq.

I. INTRODUCTION

Vincent DiPaolo ("Respondent") holds two licenses issued by the Department of Business Regulation ("Department"), an insurance claim adjuster license pursuant to R.I. Gen. Laws § 27-10-1, *et seq*.,[1] and a motor vehicle damage appraiser license pursuant to § 27-10.1-1, *et seq*. The Department issued Respondent an Amended Order to Show Cause Why Licenses Should Not Be Revoked on May 19, 2006 ("Amended Order") for operating an auto body shop without a license and failing to properly serve the interests of the public in accordance with §§ 27-10-7 and 27-10.1-1(e). Respondent filed a timely request for hearing, which was subsequently

[1] All further statutory citations reference the Rhode Island General Laws.

conducted pursuant to § 42-35-1, *et seq*., and the Department's *Central Management Regulation 2 – Rules of Procedure for Administrative Hearings*. Following the hearing, Respondent moved for judgment as a matter of law. As discussed herein, the motion is denied.

Based on the evidence presented at hearing and the applicable law, the Department has preponderated that there is cause for the revocation of Respondent's insurance claim adjuster license and motor vehicle damage appraiser license pursuant to §§ 27-10-7 and 27-10.1-1(e), respectively.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant §§ 5-38-19(b), 27-10-7, 27-10.1-1(e), 42-14-1, *et seq*., and 42-35-1, *et seq*.

III. AMENDED ORDER TO SHOW CAUSE AND ISSUES PRESENTED

In the Amended Order to Show Cause, the Department sets forth the bases for which it seeks the revocation of Respondent's licenses. First, the Department believes that Respondent operated an unlicensed body shop. Second, the Department submits that Respondent, in his capacity as a licensed insurance claim adjuster, improperly represented a consumer with respect to her automobile insurance claim. Third, the Department avers that Respondent's actions regarding the consumer's insurance claim warrant revocation of his motor vehicle damage appraiser license as well. Finally, the Department argues that Respondent violated the terms of a consent order dated April 15, 1999 ("Consent Order"). In the Consent Order, Respondent agreed to cease and desist from all unlicensed auto body repair work and to cease and desist from further violations of the statute regulating motor vehicle damage appraisers.

After a pre-hearing conference held on the Amended Order on July 25, 2006, the issues were considered and set forth in a pre-hearing order dated that same day. The Department then filed a Motion to Amend the pre-hearing order to more accurately reflect the issues framed on the record at the July 25, 2006 pre-hearing conference. The Motion to Amend was granted without objection at

the start of the hearing on September 18, 2006. The issues are further clarified here and presented as follows:

A. Whether or not Respondent operated an auto body repair shop without a license in violation of § 5-38-4(b),[2] and if so, whether or not such violation warrants the revocation of Respondent's insurance claims adjuster license and Respondent's motor vehicle damage appraiser license;

B. Whether or not Respondent's insurance claim adjuster license should be revoked for cause or a failure to properly serve the interests of the public under the license in violation of § 27-10-7;

C. Whether or not Respondent's motor vehicle damage appraiser license should be revoked for cause or a failure to properly serve the interests of the public under the license in violation of § 27-10.1-1(e); and

D. Whether or not Respondent violated the Consent Order dated April 15, 1999, and if so, whether or not such violation warrants the revocation of Respondent's insurance claim adjuster license and Respondent's motor vehicle damage appraiser license.

IV. FACTUAL BACKGROUND

The Department relied on two witnesses and seven documents to support its case to revoke Respondent's licenses. Respondent did not testify but had one witness testify on his behalf. He also entered one document into evidence.

On April 12, 2005, Mariah Nelson's 2000 Nissan Xterra was damaged in an auto accident. At hearing, Ms. Nelson testified that a family friend of the Respondent recommended

[2] After an examination of the record, it appears that the incorrect statute was cited in the pre-hearing conference order, the Department's motion to amend same, and during the hearing itself. The prohibition of operating an auto body repair shop without a license is found in R.I. Gen. Laws § 5-38-4(b), not in §§ 5-38-9(b) or 5-38-19(b). Referencing the correct statute does not affect the substance of the proceedings and therefore will be used herein.

that she bring the vehicle to Respondent's shop to be fixed. She testified that she spoke with Respondent and that he told her that he would contact her insurance company and have her car repaired at his auto body shop. She said she signed two documents at that first meeting, both dated April 20, 2005. These two documents, an authorization and a direction to pay, appear to be the only documentation of the business relationship between Ms. Nelson and Respondent in this matter.

The first document, marked as DBR Exhibit 3, authorized Respondent and United Auto[3] to act on her behalf to negotiate a settlement of her claim with her insurance company, Farmers Insurance. It also states that Respondent would act as her agent "with respect to the handling of the loss to [her] automobile" but would not act as a "repair facility." Lastly, this document authorized Respondent to disburse any funds necessary to repair her vehicle.

The second document, marked as DBR Exhibit 4 and entitled "Direction to Pay," authorized Ms. Nelson's insurance company to pay the proceeds of her claim to United Auto directly. No reference is made in this document to Respondent directly and neither document explains how Respondent was going to get paid for his services as an insurance claim adjuster or otherwise. According to Ms. Nelson, no fee arrangements for his services were ever made.

On cross-examination, Ms. Nelson admitted that she did not read these documents carefully. When specifically asked about the sentence in the authorization that stated that Respondent would not act as a repair facility, she stated that she was not aware of it because she was paying more attention to what Respondent was telling her. As a result, Respondent led her to believe that he was the owner of United Auto Body Shop and that he was going to repair her car.

[3] DiPaolo's United Auto Sales, Inc., d/b/a United Auto, is a Rhode Island corporation, whose sole shareholder is Carol DiPaolo. The Department does not license either United Auto or Carol DiPaolo. They are not parties in this matter. The record makes no mention of Respondent's relationship or connection with either Carol DiPaolo or United Auto Sales, Inc.

On redirect, when queried whether she would have signed the "Direction to Pay" had she understood that someone else was going to repair her car, Ms. Nelson replied, "No."

Meanwhile, Ms. Nelson's insurance company hired an independent firm, Doan and Company, to appraise the damage to her car. This firm, which is not related in any way to Respondent, inspected and appraised the vehicle on April 21, 2005, the day following Ms. Nelson's initial meeting with Respondent. The appraisal, marked as DBR Exhibit 9, identified "United Auto Body" as the repair facility and detailed the repairs necessary to make her car whole. It estimated the cost of these repairs at $9,348.20.

For his part, Respondent wrote in a letter to his attorney, dated July 21, 2006 and marked as DBR Exhibit 1, that Ms. Nelson only hired him to do two things: (1) negotiate the insurance claim for the damages sustained to her vehicle and (2) "negotiate with a certified auto repair facility to repair her vehicle."[4] As for the first task, Respondent wrote that he successfully obtained a final settlement of $8,848.20, which was paid to him (or more accurately, to United Auto) pursuant to the aforementioned "Direction to Pay." While he failed to explain the basis for

[4] Respondent objected to the admission of this letter, or at least the whole letter, into the record. A ruling on the objection was reserved but the objection is now overruled and will be considered in this decision. It is undisputed that the Department received the letter from Respondent's counsel during discovery. While not signed, Respondent's name is typed at the bottom of the letter. Moreover, the letter's contents relate directly to Respondent's representation of Ms. Nelson as an insurance claim adjuster. Section 14 of *Central Management Regulation 2 – Rules of Procedure for Administrative Hearings* provides: "[w]hile the rules of evidence as applied in civil cases in the Superior Courts of this state shall be followed to the extent practicable, the Hearing Officer shall not be bound by the technical evidentiary rules. Evidence not otherwise admissible may be admitted, unless precluded by statute, when necessary to ascertain facts not reasonably susceptible of proof under the rules, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Here, there is no reason to doubt the authenticity of the letter given the manner in which the Department received it and the nature of its contents. Moreover, Respondent had an opportunity to explain it or deny its authorship but he chose not to testify. It is certainly relevant to these proceedings and its probative value is not substantially outweighed by any dangers of unfair prejudice or confusion of the issues. Finally, fairness dictates that the complete letter be admitted. In that way, the danger of a particular passage being taken out of context is avoided.

this settlement in his letter, it appears to equal the difference between the initial appraisal, $9,348.20, and Ms. Nelson's $500.00 deductible. Interestingly, he also states in the letter that the insurance company's appraiser told him that the car was a borderline total loss. Ms. Nelson testified that she was never made aware of this fact and stated that it was the type of information that she would have wanted to know.

As for the second task, the repair of her car, Respondent wrote that he engaged two different shops to work on her car, Capital Car Center and Greenville Collision. He wrote that the work by Capital Car Center came to $2,250.00 and the work by Greenville Collision, $2,500.00. As for the $4,098.20 difference between the $8,848.20 paid to him (or more accurately, to United Auto) to settle the claim and the $4,750.00 actually spent in repairing the vehicle, Respondent explained that he used the money to repair four loaner cars that he provided Ms. Nelson while her car was being repaired. He asserted that each one was returned with some sort of damage that, all together, totaled $4,300.00. Ms. Nelson denied that she returned three of the four cars with damage. She did admit, however, that the fourth car was damaged from a hit and run accident and testified that she filed a police report to document the incident. The Department entered this police report into the record as DBR Exhibit 13 without objection from Respondent.

In this same letter, Respondent wrote that Ms. Nelson told one of his employees, John Voller, to use the balance of the claim proceeds to repair these loaner cars. On both direct and cross-examination, Ms. Nelson denied telling Mr. Voller to use the insurance money in this way or making an agreement to do so. Unfortunately, Mr. Voller did not testify.

Lastly, Respondent wrote that Ms. Nelson refused to pay her $500.00. On cross-examination, she admitted that she did not pay her deductible but denied that she refused pay it.

She also strenuously denied asking Respondent to use the insurance money to repair the damage unrelated to the accident.

On July 18, 2005, Ms. Nelson picked up her car at United Auto but soon discovered that it was in rough shape. In her testimony, she describes what she found wrong with the car:

> When I turned on the AC, there was no AC. When I drove down the road at 50 miles an hour, it veered to the right so bad I had to use almost all my strength to hold onto the steering wheel to keep it centered. I observed that the right front headlight is hanging. Standing in front of the car, the left side of the hood is about three finger spaces from the left side of the car, and on the right side it's completely aligned. I observed that the hood was not painted even though Farmers Insurance paid for it to be painted I observed that there were washers underneath the hood to shut it to make it even. There were six on one side and only one on the other side. Therefore, it did not close properly, and I observed that my driver's side visor was not only broken, but it was missing. The mud flaps that were paid for were not replaced. The paint on the car had bubbles. The radiator is not connected to anything in the car. The hose is hanging. The coolant box had a hole in it. Therefore, it overheated. There is no skid plate on the bottom of the car. My fan was in backwards, and somebody had put kind of like the rubber foaming – if you have like an egg crate mattress on your bed; somebody had taken like that kind of material and put a strip across where the radiator is, when it should be a piece of black rubber like which I had observed the past five years of owning my car, and now all of a sudden it's this foam-like material. I observed that my almost brand new tires on the front right side were completely bald. And my stereo was broken. (Tr. 09/29/06, at pp. 15-16.)

To buttress Ms. Nelson's observations and confirm that her car had been improperly repaired, the Department presented the testimony of Robert Botelho, a motor vehicle damage appraiser licensed in Massachusetts and Rhode Island. Given his licensure and his experience operating an auto body repair shop in Massachusetts for twenty years, Mr. Botelho was deemed qualified to testify as an expert witness in the area of automobile damage appraisal and auto body repair.

Mr. Botelho testified that Ms. Nelson's insurance company hired him to re-inspect her vehicle around November 7, 2005, about three months or so after Ms. Nelson picked it from Respondent. Mr. Botelho testified that he compared what he found on his re-inspection with the damage listed in the original appraisal and the photographs taken of the vehicle when the initial

appraisal was conducted. He concluded that much of the damage to the vehicle had not been repaired and stated that he found many of the parts that were to be replaced per the insurance company's appraisal had not in fact been replaced. Indeed, he pointed to the rust he found around many of the bolts that should have been replaced had the car been properly repaired. Based on his reinspection, Mr. Botelho estimated that the repairs there were done amount to only $3,000.00 to $3,300.00, not the $9,348,20 estimated under the insurance company's independent appraisal. He also concluded that the vehicle was unsafe as repaired and would not have passed reinspection under Rhode Island law.

In spite of her own observations that the car was not properly repaired, Ms. Nelson signed a handwritten note when she picked up her car at United Auto on July 18, 2005, marked as DBR Exhibit 8, in which she acknowledges that the vehicle is "accepted" and that she was "satisfied with all repairs." In addition to the acknowledgement, the note also states that United was to order some parts for the "right hand side [sic]" of the car and makes some type of reference to "upper & lower ball joints & tie rod encl [sic]." Ms. Nelson testified that she was not happy with the condition of the car but signed the note anyway because she believed the United Auto employee with whom she was dealing would not release her car until she did so.

Respondent presented the testimony of only one witness, Bruno Porreca. Mr. Porreca testified that he knew Ms. Nelson through her boyfriend, David Lang, who was his co-worker around the time of the accident. Mr. Porreca testified that he was the person who recommended Respondent to Ms. Nelson. Mr. Porreca had known Respondent for over ten years as a family friend.

According to Mr. Porreca, he was present at Respondent's premises in April 2005 when Ms. Nelson and Respondent were discussing the damage to her vehicle. He testified that he walked around the vehicle with Ms. Nelson and Respondent and heard Ms. Nelson request that

Respondent repair the damage to the rear bumper. Mr. Porreca testified that this damage was unrelated to the April 2005 accident.[5] When asked how he knew this, Mr. Porreca testified that he was aware that Mr. Lang damaged the rear bumper of Ms. Nelson's car when he backed it into a pole. Mr. Porreca testified that the accident with the pole occurred prior to Mr. Lang's April 2005 accident with Ms. Nelson's vehicle. At this point, Respondent introduced his sole exhibit, a bill and delivery receipt from Robertson's Auto Salvage, both addressed to United Auto, for a rear bumper assembly for a 2000 Nissan Xterra, dated May 16, 2005.

Ms. Nelson testified in rebuttal to Mr. Porreca's testimony and stated that when she examined her vehicle at Respondent's premises, the only person with her and Respondent was her boyfriend, Mr. Lang. She also testified that she and Mr. Porreca were never together at Respondent's premises at anytime.

At the close of the Department's case-in-chief, Respondent moved for judgment as a matter of law pursuant to R.I. Super. Ct. R. Civ. P. 50, which was denied.[6] Respondent renewed the Rule 50 motion at the close of his case. A ruling on the motion was reserved to allow for a full examination of the record.

V. RESPONDENT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

In accordance with Section 11 of the Department's *Central Management Regulation 2 – Rules of Procedure for Administrative Hearings*, Rule 52 of the Rhode Island Superior Court Rules of Civil Procedure governs Respondent's motion for judgment as a matter of law. It

[5] In her earlier testimony, Ms. Nelson denied requesting that the rear bumper be repaired, although she acknowledged that she requested the repair of some non-accident-related damage to the interior of the vehicle.

[6] Although this motion was filed under Rule 50 of the Rhode Island Rules of Civil Procedure, Rule 52(c) is the authority for such a motion in a non-jury proceeding. The 1995 Committee Note under Rule 52 explains, "the addition of subdivision (c) represents a transfer from Rule 41(b). It parallels amended Rule 50(a) and is applicable to non-jury trials." Thus, the error is harmless because the Rule 50(a) standard of review is applicable to analogous motions under Rule 52(c).

provides, in part:

> "(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule...."

The 1995 Committee Note further explains that "[t]he addition of subdivision (c) represents a transfer from Rule 41(b). It parallels amended Rule 50(a) and is applicable to non-jury trials."

Thus, a party's motion for judgment as a matter of law may be granted if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable [fact finder] to find for that party on that issue." R.I. R. Civ. P. Rule 50(a). In ruling on such a motion, all evidence is viewed in a light most favorable to the nonmoving party. *McLaughlin v. Moura*, 754 A.2d 95, 98 (R.I. 2000); see also *Skaling v. Aetna Ins. Co.*, 742 A.2d 282, 287 (R.I. 1999); *Mellor v. O'Connor*, 712 A.2d 375, 377 (R.I. 1998); and *DeChristofaro v. Machala*, 685 A.2d 258, 262 (R.I. 1996). Similarly, all reasonable and legitimate inferences drawn from this evidence are made without weighing the evidence or assessing the credibility of the witnesses and viewed in the nonmoving party's favor. *Id*. However, such reasonable inferences must be based on more than "conjecture, speculation, or surmise." *Long v. Atlantic PBS, Inc.*, 681 A.2d 249, 252 (R.I. 1996).

Judgment as a matter of law is not appropriate if "there remain factual issues upon which reasonable persons might draw different conclusions." *DeChristofaro*, 685 A.2d at 262. At a minimum then, the party moving for judgment as a matter of law must show that the opposing party "failed to meet [its] burden of offering evidence sufficient to establish a prima facie case." *Id*. at 263-264. Where Rule 50 motions have been upheld, "there is a total absence of proof

sufficient to support any of plaintiff's claims." *Francis v. American Bankers Life Assurance Co. of Florida*, 861 A.2d 1040, 1045 (R.I. 2004).

In this case, Respondent argues that judgment as a matter of law is appropriate for all of the issues presented by the Department. Respondent avers there is no evidence that establishes that he repaired Ms. Nelson's vehicle and therefore could not have engaged in an unlicensed activity as an auto body repair shop. In addition, Respondent argues that he could not have violated the licensing statute on motor vehicle damage appraisers because it is undisputed that he did not appraise Ms. Nelson's car. With respect to his insurance claim adjuster license, he contends that the Department's reliance on evidence unrelated to the negotiation and adjustment of Ms. Nelson's property damage claim precludes any violation under § 27-10-7. Finally, Respondent argues that the Department failed to submit any evidence that Respondent violated the terms of the Consent Order.

Contrary to these arguments, when the evidence is viewed in the light most favorable to the Department, the nonmoving party, there is sufficient evidence to sustain the merits of the Department's Amended Order to revoke Respondent's licenses. Ms. Nelson testified that Respondent told her he was going to fix her car at his shop. Respondent disputes this claim but the Farmers Insurance appraisal lists United Auto Body as the repair facility. Also, Ms. Nelson dropped off and picked up her vehicle from United Auto. While the authorization signed by Ms. Nelson states that Respondent was not acting as a repair facility, a receipt and order slip, the sole exhibit submitted by Respondent, shows that United Auto ordered a 2000 Nissan Xterra rear bumper assembly from a salvage yard. This evidence provides at least some basis to support a finding that Respondent was operating as an unlicensed auto body repair shop in violation of § 5-38-4(b).

Similarly, given that Respondent agreed to cease and desist from operating an auto body repair shop in the Consent Order, this evidence, when viewed in light most favorable to the Department, establishes that he violated the Consent Order as well. Upon a finding of a subsequent violation, the Consent Order also provides for the revocation of his motor vehicle damage appraiser license after notice and a hearing. Thus, it necessarily follows that, if there is a legally sufficient basis for supporting a claim of unlicensed auto body repair activity, there is a sufficient basis for revoking his motor vehicle damage appraiser license.[7]

As for the insurance claim adjuster license, the record contains ample evidence that, when viewed in the light most favorable to the Department, would allow a fact finder to conclude that Respondent's license could be revoked for violating § 27-10-7. As discussed *infra*, the lack of any substantive documentation of his claim adjuster work product alone provides a basis for finding that Respondent failed to properly serve the interests of the public under this license. The questionable handling of the insurance claim proceeds only adds further weight to a finding that Respondent violated this statute.

Clearly, there is more than a modicum of legally sufficient evidence here to sustain the Department's Amended Order. As such, judgment as a matter of law is inappropriate under Rule 52. Respondent's motion is therefore denied.

VI. 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 at 759 (2002). In this case, the proponent of this enforcement action is the Department. Unless otherwise specified, a

[7] At the time the Consent Order was executed, Respondent did not hold an insurance claims adjusters license.

preponderance of the evidence is generally required in order to prevail. *Id*. at 763-766; see also, *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); *Parker v. Parker*, 238 A.2d 57, 60 (R.I. 1968) ("satisfaction by a 'preponderance of the evidence' [is] the recognized burden [of proof] in civil actions"). 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. See *Parker*, 238 A.2d at 60. 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, 100 (R.I. 2006).

Here, the Department bears the burden for establishing why it is more likely than not that Respondent conducted himself in a manner that violated the Consent Order dated April 15, 1999 and/or the statutes and regulations under which he holds his insurance claim adjuster license and his motor vehicle damage appraiser license.

VII. DISCUSSION

A. Unlicensed Auto Body Shop Allegation

A review of the record reveals that there is not enough evidence to support a finding that it is more probable than not that Respondent engaged in unlicensed auto body repair.

A person cannot operate an auto body repair shop without a license. R.I. Gen. Laws § 5-38-4(b). A license is not only required for auto body repairing and painting but also for entering into contracts for such work or representing in any form or manner that he is acting as an auto body shop. R.I. Gen. Laws § 5-38-4(b). If the Department has reason to believe that any person is conducting an automobile body repair shop business without obtaining a license, the Department may issue an order to that person to cease and desist from that violation after hearing thereon. R.I. Gen. Laws § 5-38-19(b).

It is undisputed that Respondent does not have a license to engage in the business of auto body repair. Nevertheless, there is some evidence to support the Department's case against him. Ms. Nelson testified that Respondent told her he was going to repair her vehicle. She testified that she dropped off and picked up her vehicle from Respondent's place of business, United Auto. On the appraisal form from the independent contractor hired by Ms. Nelson's insurance company to appraise her car, "United Auto Body" was listed under the heading, "Repair." Finally, there is the receipt and order slip indicating that United Auto had ordered a rear bumper assembly for a 2000 Nissan Xterra from a salvage yard.

Taken together, one could conclude that Respondent was operating an unlicensed auto body repair shop. However, there is evidence that contradicts or at least calls into question such a finding. In his letter, Respondent states that Ms. Nelson hired him to find someone to repair her vehicle. To that end, Respondent stated that he gave the work to Capital Car Center and Greenville Collision. In her testimony, Ms. Nelson admitted to seeing her vehicle at Greenville Collision. She also stated that she never saw her vehicle in any state of repair at Respondent's premises. Additionally, one of the documents that she signed, the authorization form, explicitly states that Respondent would not act as a "repair facility." The other form, the "Direction to Pay," makes no mention of any vehicle repair whatsoever.

In short, the Department's case hinges on Ms. Nelson's testimony that there was an oral agreement for Respondent to repair her car. While it was clear from her answers and her demeanor that Ms. Nelson believed this to be so, it is more likely that Respondent meant that he was going to arrange to get the car fixed. Such confusion is not surprising in this case. The record consistently shows that there was a general failure to communicate, disclose, and understand the nature and scope of the relationship between Respondent and Ms. Nelson. Nonetheless, there is simply not enough support for a finding that it is more probable than not

that both parties knowingly entered into an oral agreement for Respondent to perform the actual body work on Ms. Nelson's vehicle.

The documentary evidence provides little in the way of support of a finding against Respondent as well. While the appraisal indicates that United Auto is listed as the repair facility, the vehicle was located at United Auto when the appraisal was conducted. It would have been logical for the appraiser to assume the vehicle was being repaired there and note that in his report. He would not have necessarily known about any arrangements to send the car elsewhere for repair. Unfortunately, the appraiser who conducted the initial appraisal did not testify. The receipt and order slip from the salvage yard for the rear bumper is more intriguing as it lists United Auto as the purchaser. However, it too, fails to illuminate. Respondent may have ordered it on behalf of Greenville Collision because such a repair was outside the scope of the initial appraisal. Or maybe he was going to do the work himself. There is no way to know for sure. Needless to say, such speculation cannot constitute a basis for the violation of a statute.

Likewise, the failure to present any eyewitnesses that could attest to seeing Ms. Nelson's car being repaired at United Auto leaves too much room for speculation as well. Indeed, the fact that Ms. Nelson saw her vehicle at Greenville Collision lends weight to Respondent's version of the story. Moreover, the authorization signed by Ms. Nelson explicitly states that Respondent was not acting as a repair facility, a declaration that is difficult to ignore. At the very least, this proclamation should have raised some questions for Ms. Nelson as to the exact role that Respondent was to take with respect to the repair of her car. She testified that she did not pay much attention to this document when she signed it. But that does not vitiate her responsibility to read it and understand it. This document contains only three sentences, making such a statement hard to miss – especially when it directly contradicts what Ms. Nelson testified was her understanding of the services Respondent was to perform.

In sum, the Department has failed to meet its burden of proof with respect to its allegation of unlicensed auto body repair activity. Such a finding also quashes the Department's contention that Respondent has violated the Consent Order, at least with respect to the provision prohibiting him from engaging in the unlicensed auto body repair business. Similarly, unlicensed auto body repair activity cannot serve as a basis for revoking Respondent's insurance claim adjuster license and motor vehicle damage appraiser license.

B. Insurance Claim Adjuster License

The Rhode Island Supreme Court has consistently held that an agency's interpretation of a statute is "entitled to great deference," especially when "it is consistent with the overall purpose of the legislation." *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289, 1293 (R.I. 1997). This rule applies even when there are other permissible interpretations. *Pawtucket Power Associates Limited Partnership v. City of Pawtucket*, 622 A.2d 452, 456-7 (R.I. 1993).

Rhode Island law authorizes the Department to oversee the licensure and regulation of insurance claim adjusters. An insurance claim adjuster is one who negotiates adjustments of property insurance claims for compensation. R.I. Gen. Laws § 27-10-1. A claim adjuster may work on behalf of an insurance company or, as in the instant case, on behalf of a member of the public as a "public adjuster." *Id.*[8] The Department may issue an insurance claim adjuster license ("adjuster license") to "any suitable person who is a resident of this state." R.I. Gen. Laws § 27-10-3. Each applicant must present satisfactory evidence that he or she has the requisite good moral character and is trustworthy and competent. R.I. Gen. Laws § 27-10-5.

[8] The General Assembly amended R.I. Gen. Laws § 27-10-1 in 2007 to provide a more expansive definition of "public adjuster." See P.L. 2007, ch. 404, § 1. However, this Decision references the statute as it existed in 2005, the year in which the events alleged in this enforcement action occurred.

According to the National Association of Public Insurance Adjusters, the role of a public adjuster is to provide a service where he or she inspects the loss, analyzes the damages, assembles claim support data, reviews the insured's coverage, determines current replacement costs, and exclusively serves the client. See, National Association of Public Insurance Adjusters, *What is a Public Adjuster,* available at http://www.napia.com/ (last visited December 12, 2007); see also, *Linder v. Insurance Claims Consultants, Inc.*, 560 S.E.2d 612 (S.C. 2002); *Utah State Bar v. Summerhayes & Hayden,* 905 P.2d 867, 868 (Utah 1995). The industry practice is that a public adjuster is paid a percentage of the insured's recovery. See, National Association of Public Insurance Adjusters, *Frequently Asked Questions*, available at http://www.napia.com/learn/faq.asp (last visited December 12, 2007).

The purpose for licensing adjusters is to help protect members of the public from an industry that has been rife with fraud and abuse.[9] The statutory and regulatory scheme of licensing public adjusters ensures a system in which consumers can rely on licensed professionals to represent them in a trustworthy and competent manner. To aid in the enforcement of this statute, the Department has the authority to suspend or revoke a license. R.I. Gen. Laws § 27-10-7. Two bases for such action include proof that the interests of the public are not properly served under the license, or for cause. *Id*. They allow the Department to take administrative action against a licensee to protect the public from dishonest, untrustworthy, and/or incompetent individuals. The importance for maintaining the integrity of this profession cannot be overstated. A public adjuster has a special relationship above and beyond that found in an ordinary business transaction with his or her client. It is a relationship in which a fiduciary duty

[9] As an example, the insurance industry has organized to fight fraud by establishing groups such as the Insurance Crime Prevention Institute (ICPI), the National Automobile Theft Bureau (NATB), and in-house "special investigation units" (SIUs).

arises that requires the licensed adjuster to act in the other party's best interests. *A. Teixeira & Co., Inc. v. Teixeira*, 699 A.2d 1383, 1387 (R.I. 1997); *Frailoi v. Lemcke*, 328 F.Supp.2d 250, 267 (D.R.I. 2004).

In this case, the Department believes that Respondent's conduct while handling Ms. Nelson's claim warrants the revocation of his adjuster license for both cause and a failure to properly serve the public's interest. It argues that once Respondent received the negotiated insurance proceeds through the "Direction to Pay," he had a duty to use them in such a way to make Ms. Nelson whole following her insurable loss. But instead of making her whole, the Department submits that Respondent disbursed only part of the funds to repair her vehicle while retaining almost 50% of the remaining funds. As a result, the insurance proceeds actually spent to repair Ms. Nelson's vehicle were insufficient to repair it properly. The Department submits that Respondent's improper use of his client's settlement – money received in his capacity as a licensed public adjuster – establishes cause to revoke his adjuster license and demonstrates that he did not act in the public's interest.

For his part, Respondent argues that revocation is inappropriate because the Department relies on activities wholly unrelated to the duties required under his insurance claim adjuster license. Respondent states that he negotiated the claim for the damage to Ms. Nelson's vehicle and obtained a reasonable result. When the settlement was reached, Respondent contends that his work as an insurance claim adjuster ended and his role as a "consultant" began. Respondent argues that it was in his "consultant" role that he arranged for her car to be fixed. In other words, by virtue of switching hats, Respondent did not have a duty under his adjuster license to ensure that the auto body shop he chose performed the repairs properly. Remarkably, Respondent did not seriously dispute the inadequacy of the repair work performed on Ms. Nelson's car.

In considering these arguments, the record developed, and the statutory framework, it is clear that both parties' arguments miss the mark. Nevertheless, the Department has provided enough evidence to show that it is more probable than not that Respondent violated § 27-10-7. As the Department avers, there is cause to revoke Respondent's license but not necessarily for the reasons it argued at hearing, specifically with respect to the Department's focus on Respondent's conduct following the settlement of the claim. The subsequent conduct is certainly relevant but only because of his failure to represent Ms. Nelson's interests (and therefore the public's interests) in his work as a licensed insurance claim adjuster. The facts adduced at hearing indicate that Respondent engaged in little, if any, meaningful work as an insurance claim adjuster on Ms. Nelson's behalf. Rather, they paint a picture where it is more likely than not that Respondent took advantage of Ms. Nelson's situation and used his insurance claim adjuster license to inure a benefit for himself. Finally, Respondent's woefully inadequate business practices demonstrate a level of incompetence that seriously calls into question his fitness to be licensed in the public adjuster profession. When taken together, there is ample cause for the revocation of his adjuster license.

The amount of actual adjuster work performed under Respondent's license is suspect to say the least. It leads one to question whether his so-called services provided any value to Ms. Nelson at all. An independent appraisal firm, hired by her insurance company, appraised the damage to her car. In this appraisal, the damage was estimated to cost $9,348.20 to repair. According to Respondent's own letter, this independent appraiser told him that Ms. Nelson's vehicle was a borderline total loss. Without informing his client of this rather important fact, Respondent supposedly negotiated with Ms. Nelson's insurer in order to obtain a settlement of $8,848.20. He avers that this achievement alone establishes that he comported himself properly under his adjuster license.

However, one can easily infer that Respondent failed to act in any manner consistent with the industry custom for public adjusters. There is no escaping the fact that, after subtracting Ms. Nelson's deductible of $500.00, the insurance company simply paid the claim based on its own appraiser's report. A public adjuster is supposed to analyze the damages, assemble claim support data, review the insured's coverage, and determine the appropriate replacement costs for the damaged vehicle. There is no evidence that he engaged in any such activity on Ms. Nelson's behalf. Rather, it appears that Respondent simply allowed the insurance company to rely on its own appraisal to settle Ms. Nelson's loss. It indicates that he did not negotiate or adjust the claim because, in actuality, there was nothing to negotiate and nothing to adjust.

From this, one can only conclude that it is more likely than not that Respondent took advantage of Ms. Nelson's situation. When Ms. Nelson came to him, he had her sign an authorization form that appointed Respondent to "act in my place and stead with my permission and authority to negotiate, on my behalf, a settlement of my claim for property damage to my automobile[.]" It further states that Respondent would act as her *agent* "with respect to the handling of the loss to [her] automobile." The use of the word "agent" indicates that Respondent understood the nature of the relationship that he formed with Ms. Nelson. In other words, he knowingly undertook a fiduciary obligation to represent her interests in a manner that was worthy of Ms. Nelson's total trust and required his good faith and honesty. A fiduciary is expected to have greater knowledge and expertise about the matters being handled than his or her client. In addition, there is a standard of conduct and trust above that of a stranger or of a casual businessperson owed to the client. As such, he or she must avoid "self-dealing" or "conflicts of interests" in which the potential benefit to the fiduciary is in conflict with what is best for the person who trusts him or her.

As a fiduciary, Respondent's argument that his role as a public adjuster ended when the settlement check was cut offends the spirit, if not the letter, of the law. While there is a point where the fiduciary relationship ends, Respondent had not yet reached it. Regardless of who was supposed to repair the car, there is no doubt that Respondent was going to, at the very least, arrange for it to be fixed as part the settlement of Ms. Nelson's claim. Respondent admits as much in his July 21, 2006 letter to his attorney.

After receiving the insurance money via the "Direction to Pay," Respondent sent Ms. Nelson's car to two separate auto body repair shops that, by his own admission, made only $4,750 worth of repairs. If that is so, he must have known or at least suspected that something was amiss given the insurance company's estimate detailing $9,348.20 worth of repair costs, the insurance company's opinion that the car was a borderline total loss, and his own experience as a licensed motor vehicle damage appraiser. Given that Respondent did not dispute the insurance company's appraisal,[10] he either sanctioned the inadequate repairs or, at the very least, acquiesced to having them performed. Taking the charitable view, his apparent evaluation of the damage and so-called negotiation of the claim indicate a level of incompetence and lack of fitness to be licensed in this profession. A just as reasonable inference from these facts is that Respondent, with his knowledge of the industry, took advantage of the situation in order to inure a benefit for himself when he kept almost half of the insurance settlement. Either way, he did not act in a responsible manner in his role as a licensed public adjuster on behalf of Ms. Nelson.

Respondent attempts to rationalize the significant disparity between the insurance settlement and the actual money spent on repairs by blaming Ms. Nelson. He states that she

[10] Even if he did, the Department's witness, Mr. Botelho provided credible testimony that the initial appraisal was correct. He re-inspected and re-appraised the car and testified that the car required the repairs listed. It was his expert testimony that most of these repairs were not completed or were done in a manner that was extremely poor.

caused $4,300.00 worth of damage to his loaner cars and therefore was entitled to the remaining $4,373.20 of the settlement. However, Respondent failed to present any evidence as to the terms, expectations, rights, and responsibilities regarding her use of these loaners. There was no paperwork whatsoever regarding the use of these cars introduced at hearing. Respondent contends that Ms. Nelson agreed to pay for the alleged damage with the remaining insurance proceeds, but he failed to prove such an agreement existed. But even if there were such an agreement, it does not follow that he has any right to withhold the balance of Ms. Nelson's insurance proceeds for this purpose.

In a further attempt to obfuscate the obvious, Respondent points out that Ms. Nelson neglected to pay her deductible, something to which she admits. While certainly not appropriate on her part, it does not adequately explain how Respondent arranged for repairs that came in $4,373.20 below the actual settlement. Finally, he seeks to justify the disparity by asserting that Ms. Nelson asked him to make repairs to her car unrelated to the accident. Ms. Nelson denies she ever requested Respondent to make the repairs asserted by Respondent, but even if she did, logic would dictate that more of the insurance proceeds would be needed to make that happen. It certainly does not justify the failure to make all the necessary repairs listed on the insurance company's appraisal.

Granted, it is understood that Respondent makes these assertions more to impugn the credibility of Ms. Nelson than to absolve his failure to see that her car was properly repaired. But whether or not Ms. Nelson was hopelessly naïve or looking to make some quick cash for herself, her motives are irrelevant. Indeed, given the self-serving nature of her testimony, little of it has been given weight here. Instead, more reliance is put on the initial appraisal, the amount of the settlement, the absence of a contract or any provision for compensation, the inadequate amount spent on the repairs, the failure to make the required repairs, the dearth of paperwork

documenting the repairs, and the re-inspection by Mr. Botelho, as they are mostly undisputed facts that speak for themselves. With these facts in mind and the understanding of Respondent's position as Ms. Nelson's fiduciary, he either knew or should have known that his client was being ill-served. As a licensee, Respondent is held to a higher standard, a standard he clearly failed to meet and therefore provides cause for revocation.

Cause is also found in Respondent's failure to adhere to even the most basic, commonly accepted business procedures. For example, communication between Respondent and Ms. Nelson appears to have been nonexistent. Communication is a basic obligation of any licensee as he or she is the professional in the relationship. Ms. Nelson's testimony and the scant documentary evidence make it clear that he failed to inform or disclose important information about his role, his services, his compensation, and his evaluation of the damage to her vehicle and her insurance claim. In terms of paperwork, there is only an authorization form and a "Direction to Pay," both of which fail to establish the rights, roles, responsibilities, duties, and expectations between the parties. There is no evidence of a separate "consulting" agreement to oversee the referral of Ms. Nelson's car to Capital Car Center or Greenville Collision. There are no documents relating to the referral between Respondent and Capital Car Center or Greenville Collision. There is no evidence of an agreement to repair damage unrelated to the accident. There are no loaner car agreements. And there is nothing in writing about Ms. Nelson's alleged permission to allow Respondent to keep almost half of the insurance settlement to repair the loaner cars.

There is a lack of other business records, indicating incompetence as well. There are no notes of his inspection or analysis of the damage, no assembled claim support data, and no record of how he determined the replacement costs that either justified his acceptance of the insurance company's appraisal on Ms. Nelson's behalf or the $4,475.00 actually spent by the auto body

shops he selected. Because of this, there is no meaningful way to determine the exact nature of the relationship – where it started, its terms, what he was supposed to do for her, when the relationship was supposed to end, and in which "role" he was serving.

What is clear from the record is that Respondent accepted the insurance check and found an auto body repair shop that failed to perform the repairs set forth on the appraisal. While Respondent contends that there was an oral agreement to use the insurance monies in a way not specified in the appraisal – a claim Ms. Nelson denies – there is no evidence corroborating such an arrangement. And if there were, it would only serve to establish Respondent's lack of fitness to be a licensee. When an appraisal provides the basis for a good faith settlement of an insurance claim, the subsequent failure to follow it (or directing another to do so) undermines the closely regulated business conducted between insurance companies and auto body repair facilities. Respondent's argument that he was a licensee who supposedly negotiated a claim on her behalf and then is blameless for not attending to her best interest because he switched roles to act as a "consultant" is unconvincing. The record demonstrates that he failed to uphold the fiduciary requirements of trustworthiness, competency, and acting in the public's interest that the statute requires. As such, it is appropriate to find that it is more probable than not that Respondent violated R.I. Gen. Law § 27-10-7 in this matter.

C. Motor Vehicle Damage Appraiser License

The State of Rhode Island has empowered the Department to regulate motor vehicle damage appraisers pursuant to § 27-10.1-1, *et seq*. A motor vehicle damage appraiser, as the name implies, is one who appraises of damages to motor vehicles insured under automobile policies. The Department may suspend or revoke such a license in accordance with the Administrative Procedures Act if a licensee fails to serve the interests of the public properly under the license, or for cause. § 27-10.1-1(d).

In this case, the Department believes that Respondent's overall conduct in his representation of Ms. Nelson warrants revocation of his motor vehicle damage appraisers license ("appraisers license"). Respondent, on the other hand, argues that the Department vitiated its right to this charge by submitting the insurance company's independent appraisal. In essence, Respondent contends that because he did not appraise Ms. Nelson's car, he cannot be found to have violated the statute.

It is undisputed that Respondent did not perform an appraisal of Ms. Nelson's car under his motor vehicle damage appraiser license. However, for two separate reasons, the Department need not show that Respondent acted in the capacity of that license in order to seek its revocation. First, the stated purpose of the motor vehicle damage appraiser statute is "to subject certain individuals to the jurisdiction of the insurance commissioner" because of concern "with the business of appraising damaged automobiles[.]" § 27-10.1-1(a). It does so by requiring the passage of an examination and the issuance of a license to engage in such business. If a licensee obtains a license by fraud or misrepresentation, the license may be revoked. Similarly, if the licensee fails to act in the public's interests under the license or, more generally, provides cause, the license may be revoked.

As this regulatory framework establishes, there is a certain standard of conduct expected of licensed motor vehicle damage appraisers. To maintain this standard, the Department must ensure that its licensees maintain a level of competency, trustworthiness, and honesty worthy of licensure. Importantly, the statute makes no requirement that only conduct under the license be considered. Indeed, it would be illogical to overlook a licensee's ethical lapses or incompetent behavior merely because such activity does not occur as a direct result of appraisal work. Ultimately, licensure is a concept grounded in competency and character. If Respondent provides

cause for revocation under one license, it necessarily follows that such cause may be considered in the revocation of another license.

Here, as discussed *supra*, Respondent has failed to serve the interests of Ms. Nelson and the public at large with his conduct under his insurance claim adjuster license. Whether characterized by incompetence or self-dealing, his behavior under the adjuster license unavoidably implicates his fitness to hold a motor vehicle damage appraiser license. The fact that the two licenses utilize many of the same skills and require the public's trust leaves no doubt as to the appropriateness of revoking Respondent's appraiser license.

Additionally, there is another avenue for the revocation of this license. In the Consent Order signed by Respondent, he explicitly admitted that he had violated both the insurance claim adjuster statute and the motor vehicle damage appraiser statute. To resolve the matter, he agreed to the revocation of his appraiser license should he fail to maintain compliance with relevant statutory requirements. As previously discussed, Respondent's conduct in his representation of Ms. Nelson constitutes cause for the revocation of his adjuster license and therefore provides cause for the revocation of his appraiser license as well. Accordingly, Respondent has triggered the provision in the Consent Order authorizing the revocation of his appraiser license.

VIII. CONCLUSION

Based on the evidence presented at the hearing and the applicable law, the Department has established that there is cause for the revocation of Respondent's insurance claim adjuster license and motor vehicle damage appraiser license pursuant to §§ 27-10-7 and 27-10.1-1(e), respectively.

IX. FINDINGS OF FACT

1. The Department issued Respondent an Amended Order to Show Cause Why Licenses Should Not Be Revoked on May 19, 2006

2. Respondent made a timely request for a hearing in a letter received on November 8, 2006, which was held on September 18, 2006, October 6, 2006, and January 19, 2007.

4. The facts contained in Sections IV and VII are incorporated by reference herein.

X. CONCLUSIONS OF LAW

In accordance with the testimony and facts presented:

1. The Department has jurisdiction over this matter as set forth in Section II, *supra*.

2. Under the standard set forth in Section VI and the statutory framework and analysis set forth in Section VII-A, the Department did not establish by a preponderance of the evidence that Respondent operated an auto body repair shop in violation of § 5-38-4(b).

3. Under the standard set forth in Section VI and the statutory framework and analysis set forth in Section VII-B, the Department established by a preponderance of the evidence that Respondent's insurance claim adjuster license should be revoked for cause and a failure to properly serve the interests of the public under the license in violation of § 27-10-7.

4. Under the standard set forth in Section VI and the statutory framework and analysis set forth in Section VII-C, the Department established by a preponderance of the evidence that Respondent's motor vehicle damage appraiser license should be revoked for cause and a failure to properly serve the interests of the public under the license in violation of § 27-10.1-1(e).

5. Under the standard set forth in Section VI and the statutory framework and analysis set forth in Section VII-C, the Department established by a preponderance of the

evidence that Respondent's motor vehicle damage appraiser license should be revoked for violating the Consent Order dated April 15, 1999.

6. Given the conclusion of law in paragraph 3 above, there is no need to reach the question as to whether Respondent's insurance claim adjuster license should be revoked for violating the Consent Order.

XI. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Department of Business Regulation revoke Respondent's insurance claim adjuster license and motor vehicle damage appraiser license.

Dated: December 21, 2007

Michael P. Jolin
Hearing Officer

I have read the Hearing Officer's Decision and Order in this matter, and I hereby take the following action:

___x____ ADOPT
_____ REJECT
_____ MODIFY

DATED: December 21, 2007

A. Michael Marques
Director

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO RHODE ISLAND GENERAL LAWS TITLE 42, CHAPTER 35. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.