



Maura Healey
MICHAEL DONOVAN
GOVERNOR

Kim Driscoll
LIEUTENANT GOVERNOR

THE COMMONWEALTH OF MASSACHUSETTS AUTO DAMAGE APPRAISER LICENSING BOARD

1000 Washington Street • Suite 810 • Boston, MA 02118-6200
(617) 521-7794 • FAX (617) 521-7475
TTY/TDD (617) 521-7490
<http://www.mass.gov/doi>

MICHAEL DONOVAN, CHAIRMAN
WILLIAM E. JOHNSON
RICHARD STARBAR
SAMANTHA L. TRACY
PETER SMITH

Minutes of the Meeting of the Board held on March 16, 2023, and approved at the Board Meeting held on May 23, 2023; Motion of Board Member Richard Starbard, Seconded by Board Member William Johnson. The Motion Passed by a Vote of: 4-0, with Chairman Michael D. Donovan Abstaining.

Minutes of the Board Meeting held on March 16, 2023

The Auto Damage Appraiser Licensing Board (ADALB or Board) held a meeting on Thursday, March 16, 2023, at 1000 Washington Street, Boston, Massachusetts.

Members Present:

Chairman Donovan
Samantha Tracy
William Johnson
Richard Starbard
Peter Smith

Attending to the Board:

Michael D. Powers, Counsel to the Board

Call to Order:

Chairman Michael Donovan Promptly called the meeting to order at 10:00AM.

Chairman Donovan then asked those recording the proceedings to identify themselves and state with whom they were affiliated. Those responding to the Chairman's request were: Jim Steere of The Hanover Insurance Company and "Lucky" Papageorg" of the Alliance of Automotive Service Providers of Massachusetts.

Approval of the Board minutes for the Board meeting held on February 16, 2023:

Chairman Donovan called for a motion to approve the Board minutes of the Board meeting held on February 16, 2023, Board Member Richard Starbard made the motion to approve, and Board Member William Johnson seconded the motion. The motion passed by a vote of: 4-0, with Chairman Donovan abstaining.

Report on Part-II Examination for motor vehicle damage appraiser license:

Chairman Donovan requested a report by Board Member Peter Smith about the status of the Part-II examination for motor vehicle damage appraiser.

Mr. Smith reported that the Part-II examination was held on Saturday, March 11, 2023, as scheduled. Board Member Smith projected that there would be about 43 participants and the final amount of those taking the examination was 40 people. Of the 40 taking the examination, 34 passed and 6 failed. Mr. Smith reported that 2 of those who failed, failed the examination in so many of the components of the exam that it caused him and Board Member Starbard to check into the approved motor vehicle damage appraiser class that they took and report back to the Board. Board Member Smith noted that the 2 applicants arrived together in a lettered insurance company vehicle registered in Massachusetts, and he concluded that they may be writing appraisals in Massachusetts.

Mr. Smith thanked those who participated in the testing process including the individuals from Progressive Insurance Company, from MAPFRE Insurance Company, and Jim Steere from The Hanover Insurance Company. Mr. Smith reported that the next session is tentatively scheduled for June 10, 2023 and is planning it to be administered inside the building rather than the outside setting that has been used at Progressive's office complex. Chairman Donovan asked how much time it took for the entire process, and Mr. Smith responded about three hours. Chairman Donovan asked whether the participants received their results that same day. Mr. Smith replied that the results are sent by Mr. Hunter from the Licensing Unit of the Division of Insurance the following Monday of the examination and he immediately provides electronic notification to the applicants. Mr. Starbard commended Board Member Smith on coordinating the sessions, which includes making packets of materials available, such as the databases and additional items needed by the test takers.

Hearing by the Board to review the revocation of the motor vehicle damage appraiser license of Justin Forkuo based on the findings that were made against Mr. Forkuo as the owner of defendant 290 Auto Body Inc. ("290") in the case of Preferred Mutual Insurance Company v. 290 Auto Body Inc. Civil Action 18- 01813, (Worcester Superior Court):

Just prior to the hearing that was scheduled for this matter, licensed motor vehicle damage appraiser Justin Forkuo contacted legal counsel to the Board and requested a postponement of the hearing because he asserted that he and his lawyer were in the process of appealing the decision rendered in the Superior Court for Worcester County. The hearing before the Board was on the following final findings made by Massachusetts Associate Superior Court Justice A. Gavin Reardon Jr. in which Associate Justice Reardon entered a final judgment and found that Mr. Forkuo created a fraudulent auto damage invoice and engaged in fraud and deceit in the appraisal of damage of a motor vehicle:

In short, I find that Forkuo was unable to provide any paperwork or explanation justifying the invoices he sent in this matter and that the invoices were excessive. I also find that he created the billing and email system he used in this matter for the express purpose of frustrating insurance carriers like the plaintiff, with the intent of forcing them to pay excessive and unwarranted fees in order to avoid accrual of storage charges.

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RULINGS OF LAW

1. Fraud and Deceit.

...

Finally, the invoices and demands 290 sent to Preferred did not accurately reflect work performed or charges incurred by 290. 290's "Direction to Pay" to Preferred indicated that 290 was due payment for, among other things, work dismantling the Honda, a gate fee, a hazardous waste fee, a blueprint fee, an administration fee, and a collision access fee. However, Forkuo was unable to specifically relate the itemized costs in the "Direction to Pay" to the Honda. As Forkuo failed to maintain accurate records of what work was actually performed on the Honda, and as I credit McKeen's testimony that the reasonable cost to appraise the Honda was less than \$100, 290 grossly overstated the amounts due from Preferred, seeking payment for at least some work not actually performed by 290 and not actually due from Preferred. Further, 290's repeated demands for reimbursement of attorney's fees by Preferred were fraudulent as 290 failed to demonstrate that it actually incurred those attorney's fees for which it sought reimbursement from Preferred.

Taking these findings together, 290 knowingly made multiple false representations of material fact to Preferred for the purpose of inducing Preferred to pay more to 290 than was actually due...

...

Such conduct violates M.G.L. c. 26 § 8G which provides in relevant part:

...

The board, after due notice and hearing, **shall revoke any license issued by it and cancel the registration of any person who pleads guilty to or is convicted of a fraudulent automobile damage report as a result of a court judgment and said license shall not be reinstated or renewed nor shall said person be relicensed.**

....

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(Emphasis added).

The Board will also review whether such conduct violated the Board's Regulation 212 CMR 2.08 which provides:

(8) Revocation or Suspension of a License. The Board may revoke or suspend any appraiser's license at any time for a period not exceeding one year if the Board finds, after a hearing, that the individual is either not competent or not trustworthy or has committed fraud, deceit, gross negligence, misconduct, or conflict of interest in the preparation of any motor vehicle damage report. The following acts or practices by any appraiser are among those that may be considered as grounds for revocation or suspension of an appraiser's license:

(a) material misrepresentations knowingly or negligently made in an application for a license or for its renewal;

(b) material misrepresentations knowingly or negligently made to an owner of a damaged motor vehicle or to a repair shop regarding the terms or effect of any contract of insurance;

- (c) the arrangement of unfair and or unreasonable settlements offered to claimants under collision, limited collision, comprehensive, or property damage liability coverages;
- (d) the causation or facilitation of the overpayment by an insurer of a claim made under collision, limited collision, comprehensive, or property damage liability coverage as a result of an inaccurate appraisal;
- (e) the refusal by any appraiser who owns or is employed by a repair shop to allow an appraiser assigned by an insurer access to that repair shop for the purpose of making an appraisal, supervisory reinspection, or intensified appraisal;
- (f) the commission of any criminal act related to appraisals, or any felonious act, which results in final conviction;
- (g) knowingly preparing an appraisal that itemizes damage to a motor vehicle that does not exist;
- and (h) failure to comply with 212 CMR 2.00.

Chairman Donovan agreed to postpone the hearing, in response to Mr. Forkuo's request and await the outcome of any appeal that Mr. Forkuo was filing.

Chairman Donovan requested the status of the responses to the letters which went out on the complaints voted to move to the next step in the Complaint Procedures Process, Complaints numbered 2022-26, 36, 43, 45, 50, 54, and 96. Mr. Powers stated that responses have been received noting 2022-26 and 36 asked for a continuance and 2022-36, 43, 45, 50, 54 will be heard in Executive Session.

The next meeting date:

The Board determined the next meeting date would be on May 9, 2023, at 10:00AM in Boston.

Other business – reserved for matters the Chair did not reasonably anticipate at the time of the posting of the meeting and agenda:

Board Member Johnson followed up on a subject he brought forward during the prior meeting in February about USAA Insurance Company declaring a damaged motor vehicle located at one of Mr. Johnson's facilities, of the Johnson Groups of South Hadley, Massachusetts, a total loss without having an appraiser make a personal inspection of the damage. Mr. Johnson stated that he is crafting the letter but wonders whether it should be written on ADALB letterhead or his business' letterhead. Mr. Johnson preferred it come from the Board supporting his position as provided for under the governing statues and regulations. Legal Counsel Powers suggested that Mr. Johnson send a letter citing the applicable law under his business letterhead and report back to Board. Board Member Tracy noted that the letter from the insurance carrier came from their medical department, and Mr. Johnson noted it was from within the same company.

Board Member Starbard stated that some third-party claim handlers have a disclaimer within their estimates which states the estimate is subject to audit and adjustment by the insurance company, which is technically a violation of the Board's Regulation and stated that he would draft a letter for the Board to review at the next meeting.

Board Member Starbard stated he heard concerns about the definition of Like Kind and Quality (LKQ) and noted some insurance carriers considered LKQ parts which are much older than the model year of the damaged motor vehicle and asked how the Board would handle such a complaint. Board Member Johnson observed that rust is also a factor to be taken into consideration when degerming LKQ and believed sheet metal parts should be the same year or newer as the damaged part and mechanical parts should have the same miles or fewer miles than the damaged mechanical part. Board Member Johnson noted that this is not codified anywhere in the Board's Regulation or under Massachusetts law. Board Member Smith pointed out that, the provision describing LKQ parts and its definition are found in 211 CMR 133.00, and that determination is within the Division of Insurance's regulations, which states "equal to or better than" without mentioning the year. Chairman Donovan asked whether this is a frequent occurrence. Mr. Johnson and Mr. Starbard both answered it was, and Mr. Starbard stated some companies more than others. Mr. Starbard noted the inner components may have more use on an older door.

Mr. Papageorg requested permission to speak, and Chairman Donovan granted permission. Mr. Papageorg stated that this continues to be a problem and asked the Board to make a clarification, or interpretation and add an age factor to clarify how the Board would address such a complaint. Mr. Johnson offered the analogy of a person facing a heart transplant at 60 years of age and pointed out that the person would rather receive a heart from a 60-year-old donor, rather than from a donor who was 80 years of age. Mr. Starbard volunteered to draft a change to the Division of Insurance's Regulation with recommendations and solutions for the Board's review at the next meeting. Mr. Powers stated that, as is often the case with a new Governor takes office, there may be a call for a complete review of the Commonwealth's current regulations and Mr. Starbard's position is timely.

Mr. Papageorg stated that the situation is currently hypothetical and asked if the Board would be willing to adopt Mr. Johnson's definition of LKQ parts in the interim, until the Division of Insurance can be convinced to make the changes needed. Bord Member Starbard suggested that a complaint could be brought rather than have the Board decide today.

Executive session to review complaints filed against licensed motor vehicle damage appraisers:

The Board reviewed several complaints that the Board voted to move to the next step of the Board's Complaint Procedures out of over 100 complaints filed against motor vehicle damage appraisers brought by the same licensed appraiser who also owns an auto body shop, most of the complaints have been brought against 2 insurance companies and their authorized appraisers. The review by the Board was conducted in accordance with the Auto Damage Appraiser Licensing Board's "Complaint Procedures" to determine whether: the Board lacked jurisdiction, the complaints were based on frivolous allegations, lacked sufficient evidence, lacked legal merit or factual basis, no violation of the regulation was stated, or other basis. During the review, the Board reviewed and discussed whether the complaints would be dismissed or whether a complaint would proceed to the next step of the ADALB's Complaint Procedures with the following Complaints listed on the Board's agenda: 2022-26, 36, 43, 45, 50, 54, and 96.

Before conducting the review Chairman Donovan requested that Board Legal Counsel Michael D. Powers read the statement contained on the agenda about the Board proceeding into the executive session.

Legal Counsel Powers announced that the Board would adjourn in the executive session and then read the following:

Such discussion during the executive session is allowed under M.G.L. c. 30A, §21(a)(1) and in accordance with the Office of the Attorney General's Open Meeting Law (OML) decisions such as *Board of Registration in Pharmacy Matter*, OML 2013-58, *Department of Public Safety Board of Appeals Matter*, OML 2013-104, and *Auto Damage Appraisers Licensing Board Matter*, OML 2016-6. Section 21(a) states "A public body may meet in executive session only for the following purposes:

(1) To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties. A public body shall hold an open session if the individual involved requests that the session be open. If an executive session is held, such individual shall have the following rights:

- i. to be present at such executive session during deliberations which involve that individual;
- ii. to have counsel or a representative of his own choosing present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session;
- iii. to speak on his own behalf; and
- iv. to cause an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense.

The rights of an individual set forth in this paragraph are in addition to the rights that he may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements and the exercise or non-exercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

The licensed appraisers have requested the matter be heard in the executive session.

Chairman Donovan called for a motion to enter the executive session including within the motion a request that the Board adjourn in the executive session, Mr. Starbard made the motion, the motion was seconded by Board Member Johnson, and by a roll-call vote the motion passed by a Vote of: 4-0, with Chairman Donovan abstaining.

Executive Session:

Prior to the meeting several appraisers contacted the Board and requested a postponement until the next Board meeting, which was allowed. The following were the Complaints that were discussed and voted on by the Board.

Complaint 2022-43:

The complaint was reviewed by the Board and after discussion Chairman Donovan called for a vote, Board Member Peter Smith made a motion to dismiss, the motion was seconded by Board Member Tracy, and the complaint was dismissed by a Vote of: 3-1 with Board Member Johnson voting no and Chairman Donovan abstaining.

Complaint-45:

The complaint was reviewed by the Board and after discussion Chairman Donovan called for a vote, Board Member Starbard made a motion to move to the next step, the motion was seconded by Board Member Johnson, and the motion failed by a Vote of: 2-2 with Board Members Starbard and Johnson in favor and Board Members Smith and Tracy opposed, and Chairman Donovan abstaining. The Complaint was dismissed.

Complaint-50:

The complaint was reviewed by the Board and after discussion Chairman Donovan called for a vote, Board Member Starbard made a motion to move to the next step, the motion was seconded by Board Member Johnson, and the motion passed by a Vote of: 3-2 with Board Members Johnson, Starbard, and Chairman Donovan in favor and Board Members Tracy and Smith opposed.

Complaint-54:

The complaint was reviewed by the Board and after discussion Chairman Donovan called for a vote, Board Member William Johnson made a motion to move to the next step and the motion was seconded by Board Member Starbard, the motion failed by a vote of 2-2 with Board Member Peter Smith recusing himself from participating or voting because the complaint involved his insurance company's appraiser, and Chairman Donovan voting no. The complaint against the named appraiser was dismissed.

Board Member Johnson made a motion to have the other appraiser named in Complaint 2022-54 file a response to the complaint, the motion was seconded by Board Member Starbard and the motion passed by a Vote of: 3-1 with Board Member Tracy voting no and Chairman Donovan, and Board Members Johnson and Starbard voting yes. Board Member Peter Smith recused himself because the complaint involved his insurance company's appraiser.

Motion to adjourn:

Chairman Donovan called for a motion to adjourn, the motion was made by Board Member Smith, seconded by Board Member Johnson, and the motion passed by a Vote of: 4-0, with Chairman Donovan abstaining.

Whereupon the Board's business was concluded.

The form of these minutes comports with the requirements of M.G.L. c. 30A, §22(a)