



**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
Toll-free (877) 563-4467
<http://www.mass.gov/doi>

DEVAL L. PATRICK
GOVERNOR

GILBERT W. COX Jr.
CHAIRMAN

CARL GARCIA
DAVID KRUPA, CPCU
JOSEPH COYNE
THOMAS MCCLEMENTS

Minutes of Meeting of the Board on June 11, 2014, Approved the Board on August 6, 2014
Motion of Board Member Carl Garcia Second by Board Member Joseph Coyne-by a Vote
of: 4-0, Chairman Cox Abstained.

June 11, 2014 Minutes of Board Meeting
Automobile Damage Appraiser Licensing Board Meeting Held at
Division of Insurance, 1000 Washington Street, Boston, Massachusetts

Members Present:

Gilbert Cox, Chairman
Carl Garcia
David Krupa, CPCU
Joseph Coyne
Thomas McClements

Attending to the Board:

Michael D. Powers, Counsel to the Board
Steven Zavackis for the Division of Insurance, assigned to the Office of the General Counsel,
took the minutes of the Board meeting.

Proceedings recorded by:

Jillian Zwien of the Alliance of Automotive Service Providers of Massachusetts (Audio/Video).

Review of minutes:

Review of the minutes from the meeting held on May 20, 2014, was conducted by the Board.

A motion was made by Board Member Joseph Coyne, seconded by Board Member Thomas McClements to approve the minutes of the Board Meeting held on May 20, 2014. The motion passed by a vote of: 5-0.

Discussion of defining the terms “estimate” and “appraisal” for purposes of 212 CMR 2.00 et seq.:

Chairman Cox asked whether the Board would like to issue an Advisory Ruling or take some other action defining the words “appraisal” and “estimate” and invited the Board Members to offer any opinions they may have on the topic.

Board Member McClements replied that he had his own opinion about these terms. He asserted that, however the damage is calculated, an appraisal is the cost to repair a motor vehicle.

Board Member David Krupa stated that an estimate is what the body shop submits to an insurance company, and an appraisal is what an insurance company provides after reviewing the damage to a motor vehicle.

Mr. McClements responded that, he viewed these things differently and believes the auto body shop knows better the damage to the motor vehicle than the insurance company's appraiser. He elaborated, there clearly is a difference between an estimate and an appraisal based on what the Insurance Commissioner came up with.

Mr. Garcia interjected and asserted that the whole issue arose because the Insurance Commissioner took the position that the body shop issues an estimate of the damage to a motor vehicle.

Mr. McClements opined that the body shop's review of the damage has more weight than that of an insurance company's appraiser. The Board's review of the regulation is supposed to make things better and more efficient.

Board Member Coyne offered that the dictionary definition of estimate is the same as appraisal. He read from a definition from a dictionary by stating the definition of "estimate" is the act of estimating or appraising.

Mr. Garcia pointed out that when a consumer comes into his shop with a damaged motor vehicle and the review of the damage is prepared, it is not an estimate and not to be changed, it is an appraisal of the damage to the motor vehicle.

Mr. McClements added that he had been a member of the board for 3 years, and he felt an estimate is not an appraisal.

Chairman Cox posed the question: Is an appraiser in violation of the Board's governing law if one does not write an appraisal; would such conduct violate the regulation?

Mr. McClements asked why is it when he deals with an independent appraiser he has to wait until the independent appraiser approves the final documentation of the damage. He affirmed that we [the Board] are the Auto Appraiser Licensing Board, not the estimators licensing board.

Chairman Cox queried: If an estimate is different, then, does the appraiser still have to provide an appraisal in five business days as required by the regulation?

Board Member Krupa observed that, when an appraisal is written by a licensed appraiser who is employed by an auto body shop, that is an appraisal. The problem lies in the "Conflict of Interest" language placed in the Board's regulation [212 CMR 2.00 et seq.], which is not found in the enabling legislation [M.G.L. c. 26, §8G]. He expounded, the discussion that the Board should be having is: What is the definition of a conflict of interest, when an auto body shop writes an appraisal?

Chairman Cox asked, what about steering? If the Board would forego the Conflict of Interest language would it cause problems that would affect steering of auto body business by insurance companies?

Board Member Krupa responded that steering is different than a conflict of interest.

Mr. McClements began to read from the ADALB's enabling statute M.G.L. c. 26, §8G by stating, "No person licensed under this section shall have any interest in any damage report prejudicial to or in conflict with his professional interest therein."

Mr. Krupa volunteered that that section in the statute is not about a conflict of interest.

Mr. McClements posited the scenario wherein an auto body shop writes an appraisal, hands it to the customer, and, thereafter, the appraisal provides the customer a choice to have the motor vehicle repaired.

Mr. Krupa added, if one follows the process through, that the auto body shop appraiser writes an appraisal and gives it to an insurance company that approves the work he asked: How is that a conflict of interest?

Chairman Cox queried: If an auto body shop writes an appraisal, the insurance company writes a check to the consumer for direct payment, and the consumer returns to the same auto body shop to do the work, is that a conflict of interest?

Board Member Garcia asserted, at no point is there a contract between an auto body repair shop and an insurance company, auto body shops are not working for insurance companies. Mr. Garcia further explained that, under the Office of the Attorney General's regulations, auto body shops are required to write an appraisal for consumers [940 CMR 5.05], at that point, if the consumer wants the auto body shop to send the appraisal to the insurance company, then it is sent; the consumer must authorize the auto body shop to send the appraisal to the insurance company.

Board Member Coyne opined, whether a consumer authorizes repairs or not a conflict is a conflict. When an insurance company instructs a consumer to go to an insurance company's program shop and the shop writes the appraisal that is a conflict.

Chairman Cox pointed out, the Board's business is to license appraisers and it needs a complaint filed against a specific appraiser.

Mr. Coyne responded, don't you think the quality of repair work is going to change for the consumer when they are directed to specific auto body repair shops. The Board is here for the consumers.

Chairman Cox reasserted that the Board needs a complaint brought before it, before it can rectify a problem.

Board Member McClements replied that the Board can start issuing fines.

Chairman Cox noted that the Board cannot fine insurance companies and noted that, Board Member Krupa disagreed with whether or not a conflict exists between the manner of appraisals conducted by auto body repair shops and insurance companies.

Mr. Krupa felt that this may be a bigger issue that could be addressed at a Special Public Meeting of the Board (to gather input from interested and affected parties for proposed amendments to the Board's regulation) that would be scheduled on or about September of this year. When one starts to mix the issue of conflict of interest with steering of auto body repair work, it is a different issue. Mr. Krupa agreed with Board Members Garcia and McClements, that an appraisal is being conducted at the time a damaged motor vehicle is brought to an auto body repair shop.

Board Member McClements advised that he had been receiving complaints and there was a need for consistency throughout the industry.

Mr. Krupa reiterated his position that the issue should be placed on the agenda for the Special Public Meeting of the Board.

Chairman Cox asserted that there may be a need for clarification of the persons who are doing the appraisals and those who perform the motor vehicle damage repair. The Board is limited in its enforcement power, and it appears that the office of the Commissioner of Insurance would be better suited to enforce some of these issues. Chairman Cox requested Board Legal Counsel Michael D. Powers to draft some language further defining those licensees conducting appraisals for repairs of the motor vehicles.

Mr. McClements pointed out that 212 CMR 2.00 et seq. provides for the penalty of suspension of licenses.

Chairman Cox added that there are other penalties, including a fine of \$50, but the penalties can only be imposed by the Board against a licensed appraiser and not an insurance company. If after the Special Public Meeting, it is found that there are violations, the Board would need to write to the Commissioner of Insurance. The Commissioner of Insurance has approved Direct Payment Plans.

Item IV on the Board's agenda was addressed by the Board which read:

- I. Discussion of amending the ADALB's regulation, 212 CMR 2.00, including changing the requirement of conducting an appraisal for any damage to a motor vehicle in excess of \$1,500 to damage in excess of \$4,000. Specifically, 212 CMR 2.04 "(1) Conduct of Appraisals. (a) Assignment of an Appraiser. Upon receipt by an insurer or its agent of an oral or written claim for damage resulting from a motor vehicle accident, theft, or other incident for which an insurer may be liable, the insurer shall assign either a staff or an independent appraiser to appraise the damage. Assignment of an appraiser shall be made within two business days of the receipt of such claim. However, the insurer may exclude any claim for which the amount of loss, less any applicable deductible, is less than \$1,500.00."

Board Member Krupa indicated that this matter should be added to the Board's agenda for the Special Public Meeting for public comment.

Board Member Coyne raised concerns about elevating the amount from \$1,500 to a higher amount. He added, the higher the Board raises the threshold figure from \$1,500 the higher the risk to the consumer. The more damage there is to the motor vehicle, the more likely the safety of the operation of the motor vehicle is involved.

Mr. McClements questioned the responsibility that licensed appraisers have for the safety of a consumer operating a damaged motor vehicle.

Chairman Cox questioned whether the \$1,500 threshold should be changed.

Mr. McClements suggested that the issue should be at the back of the line.

Board Member Garcia pondered how it was that the figure was set at \$1,500.

Board Member Coyne asserted that the cost of repairing a dent on the fender of a motor vehicle was \$1,500 and the figure was set at that amount to expedite the repair of a dent, or such minor damage, to a motor vehicle.

Board Member Krupa asserted that it was 8 years ago when this threshold figure of \$1,500 was established and the cost of inflation has risen since that time. He suggested that it should be placed on the Board's agenda for the Special Public Meeting for comments. Mr. McClements believed that the figure should be maintained at \$1,500 and Mr. Coyne believed the matter should be added to the Special Public Meeting of the Board.

Reporting of the Board's action on: Complaint 2014-1; Complaint 2014-2; and Complaint 2014-3.

The Legal Counsel to the Board, Michael D. Powers, requested the Board's advice as to the manner of reporting the dismissals of these three complaints that had been voted by the Board at the May 20, 2014, meeting, as to whether the Board intended the names of the licensed motor vehicle damage appraisers, complained against, to appear in the minutes of the Board's meeting.

Chairman Cox stated, because no action had been taken against the licensed motor vehicle damage appraisers, the Board had previously determined the individuals would not be identified by the Board and, therefore, their names would not be reported in the minutes of the Board's meetings.

Complaint 2014-4.

Mr. Peter D'Agostino, a lobbyist for the Alliance of Automotive Service Providers of Massachusetts, requested to speak to the Board about this complaint. He requested that after the Board considered the matter in its executive session, that the Board return to the public session and report the matter as whether it was moving to the next step in the process.

Chairman Cox responded, as reported in the minutes of the May 20, 2014, meeting, the Board decided to hold the complaint to provide Mr. McClements, who did not attend the Board meeting on May 20, 2014, an opportunity to review the complaint. Chairman Cox stated that the Board

would review the matter during the executive session and at that time make a determination as to how it would proceed.

Item VI on the Board's agenda was the following:

Discussion of letter sent to the Board from Attorney Rebecca Woodworth Brodie, of 65 Union Street, Ashland, Massachusetts relative to two questions: "(1) Can carriers use a 'Market Value' in place of the Actual Cash Value for total losses? (2) Can carriers use an average price of vehicles sold at auction to determine the salvage value?"

Board Member McClements volunteered that the letter from Attorney Brodie listed Mr. McClements' father's business address and had the same telephone number and same fax number as his father's business. He informed the Board that he now is employed elsewhere, and asked whether he should recuse himself from the matter.

Chairman Cox responded that, in the past the issue of a Board Member recusing himself from participating in an item on the agenda or a matter before the Board has been left to the Board Member's determination. Because the attorney did not indicate in her letter the party she was representing, Chairman Cox suggested that the Board write to her and ask her who she is representing. Chairman Cox reflected that during his 50 year career as a practicing attorney he always notified a party of the person he was representing when he wrote a letter.

Board Member Krupa felt that matter that was raised in the letter should be one for the Commissioner of Insurance to respond to.

Board Member Coyne opined that the subject matter of the letter is spelled out in the regulation, and that if there is a disagreement between the consumer and the insurance company about the price of salvage value of a "totaled motor vehicle" then the regulation requires the consumer to pursue arbitration with the insurance company.

Mr. McClements asserted that insurance companies are not following the regulation and that the baseline adjustment is not being followed. Carriers are using the average price of the "totaled motor vehicle" sold at auction and they must use the salvage value of the motor vehicle.

Board Member Coyne stated that during the course of his business he contacts two salvage companies and gets the average price, and the insurance company must comply with this process. He believed that the regulation [211 CMR 133.05] stands as written.

Chairman Cox requested Board Legal Counsel Michael Powers to draft a letter for the Chairman to sign at the next Board meeting to Attorney Brodie requesting that she inform the Board who she is representing.

Board Member McClements stated that it did not matter who the attorney was representing, the Board should reply to the attorney.

Mr. Peter D'Agostino again requested to speak to the Board and Chairman Cox approved.

Mr. D'Agostino informed the Board there had been several items on the Board's past agendas about amending the Board's regulation. He asserted that, according to the minutes of the Board meetings, the Advisory Ruling [Advisory Ruling 2014-1] about personal inspections by motor vehicle damage appraisers appeared to be a temporary resolution of the matter until the Board amended its regulation.

He said that there was an issue about safety of motor vehicles when pictures of damage clearly showed damage that would affect the safe operation of the motor vehicle. The question arises that in this instance, if the consumer drives the motor vehicle and gets into an accident, he asked: Does an appraiser have liability and should this issue be focused on in the regulation?

Board Member Coyne responded that every licensed appraiser could be considered in violation of the regulation because of the failure to remove motor vehicle inspection stickers from damaged motor vehicles, because as a matter of standard business practice they are not removing the inspection stickers. He informed the Board, and members of the public attending the meeting, he had a letter from the Massachusetts Registrar of Motor Vehicles advising that a consumer's permission must be granted before the inspection sticker is removed by a licensed motor vehicle appraiser from a consumer's motor vehicle.

Board Member McClements pointed out that re-inspections of motor vehicles by licensed motor vehicle damage appraisers must be conducted physically. All supplemental requests must be re-inspected.

Board Member Garcia allowed that right now we have an advisory ruling about the definition of personal inspections, and questioned whether the Board needed to insert this into the regulation.

Mr. Coyne said that the Board was looking at the regulation and it was proceeding with the matter with a view of changing the regulation.

Mr. Garcia asserted, the Board should go back to the five page letter from the Commissioner [actually from the General Counsel for the Division of Insurance on behalf of the Commissioner], and review everything in that letter.

Board Member Coyne added that we all accept the fact that times have changed and pointed out that the last time that the Board changed the regulation it took years.

Chairman Cox requested a motion that the matter be placed on the agenda for the Special Public Meeting of the Board.

A motion was made by Board Member Coyne and seconded by Chairman Cox to "Take Advisory Ruling 2014-1 and move the matter to a public hearing to consider a change in the Board's regulation."

The motion failed by a vote of: 3-1. Board member McClements voting against, and Chairman Cox abstained.

Board Member Garcia expressed some confusion as to the subject matter of the Board's vote. He asserted that there are some inconsistencies between Advisory Ruling 2014-1 and the Board's

regulation as it provides for personal inspections by licensed motor vehicle damage appraisers. He requested the motion be reconsidered.

The Board voted to reconsider the previous motion. The motion to reconsider passed by a vote of: 3-1. Board Member Krupa voted no and Chairman Cox abstained.

The original item was re-voted to, "Take Advisory Ruling 2014-1 and move the matter [of the definition of personal inspection] to a public hearing to consider a change in the Board's regulation."

The motion passed by a vote of: 3-1. Board Member Krupa voted no and Chairman Cox abstained.

Jillian Zwien, Executive Director of the Alliance of Automotive Service Providers, requested to speak to the Board and Chairman Cox gave his consent. She read from the Board's minutes of a previous Board meeting wherein the Board addressed the time frames for supplemental appraisals and expedited supplemental appraisals. She said that there was an inconsistency in the time frames provided for in the regulation.

Board Member Coyne said that, 212 CMR 2.04(h) provides for a supplemental appraisal within three business days and that 212 CMR 2.04(i) provides for an expedited supplemental appraisal within two business days. Mr. Coyne felt that this provided for an inconsistency in the regulation and felt that the matter should also be placed on the Board's agenda for the Special Public Meeting.

A motion was made by Board Member McClements to place this matter on the agenda for the Special Public Meeting and was seconded by Board Member Garcia. The motion passed by a vote of: 4-0 with Chairman Cox abstaining.

Date for Next Meeting:

The Board Members agreed to set the date of the next meeting for August 6, 2014 at 9:30AM. Chairman Cox said that at the next Board Meeting added to the agenda would be the discussion of amending the Board's regulation 212 CMR 2.00 et seq.

Chairman Cox announced that he would entertain a Roll-call vote to enter the executive session to discuss the reputation and character of an applicant for a motor vehicle damage appraiser license and a complaint filed against licensed motor vehicle damage appraiser. The motion was made by Board Member Garcia to enter the executive session and seconded by Board Member Krupa, the vote passed: 5-0.

Executive Session:

There was an applicant who indicated that he had a criminal conviction on his record. Because the application was only provided the night before the Board's meeting it was determined to notify the applicant that the matter would be heard at the next Board meeting to provide the applicant the opportunity to appear at the executive session and discuss the matter with the Board.

Chairman Cox informed the Board Members that he could not remain for the entire executive session, because he was running on a deadline for transportation and informed the members that he had his cell-phone available and said they could call him on it, if he was needed by the Board.

Legal Counsel to the Board Michael Powers informed Chairman Cox and the other Board Members present that Chairman Cox could not vote on any Board items by his cell-phone. Chairman Cox exited the Board meeting.

Complaint 2014-4

Board Member Krupa reasserted that based upon his review of the complaint the licensed motor vehicle damage appraiser did not violate the Board's regulation. Mr. Krupa asserted that the Board's function is to determine whether a licensed appraiser committed conduct that violates the Board's regulation, and in this case the appraiser did not violated the regulation.

The complaint stated that there was an original offer from the insurance company's appraiser for \$20 per paint hour for paint and materials, after negotiation the insurance company's appraiser agreed to increase the offer to \$27 per paint hour for paint and materials. After further negotiation the insurance company's appraiser increased the offer to \$30 per paint hour for paint and materials. The complainant demanded \$37 an hour as provided for in the Mitchell Guide.

Board Member McClements felt that the appraiser from the insurance company was duty bound to use the Mitchell Guide or other similar manual. When the two appraisers were unable to agree on the hourly rate for the paint and materials, and the formula of dollars times hours was not accepted by the auto body repair shop, then the insurance company was bound to use the Mitchell Guide or similar manual.

Board Member Coyne disagreed and noted the regulation first requires negotiation among the parties, once the parties enter into negotiations over the price with respect to paint, paint materials, body materials and related materials, and the formula of dollars times hours, the regulation [212 CMR 2.04(e)] is met. The regulation does not require the use of the Mitchell Guide merely because the parties disagreed over the negotiated price. The use of the Mitchell Guide is only required when the parties fail to negotiate at all. Negotiating the price appears in the first part of the regulation, ["The appraisers representing the insurance company and the registered repair shop selected by the insured to do the repair shall attempt to agree on the estimated cost for such repairs. The registered repair shop must prepare an appraisal for the purpose of negotiation."]. Board Member Coyne emphasized that the language about the use of the Mitchell Guide appears **after** this language. Mr. Coyne concluded that, in this instance there was a meaningful negotiation between the parties and a complaint against the licensed appraiser should not go forward.

Board Member Garcia observed that this type of issue of negotiating over the price of paint and materials and labor is a serious one that is affecting the industry.

Board Member McClements made a motion to move forward with Complaint 2014-4, seconded by Board Member Garcia. The Board then voted: Mr. McClements and Mr. Garcia in favor, Board Members Krupa and Coyne opposed. The motion failed by a vote of: 2-2.

Adjournment:

A motion to adjourn the meeting was made by Board Member Coyne, a second was provided by Mr. Garcia and the motion carried by a vote of: 4-0. Chairman Cox was not present for the vote to adjourn the meeting of the Board, having exited during the executive session. Whereupon, the Board's business was concluded.

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