



**THE COMMONWEALTH OF MASSACHUSETTS
AUTO DAMAGE APPRAISER LICENSING BOARD**

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GOVERNOR

GILBERT W. COX Jr.
CHAIRMAN

CARL GARCIA
DAVID KRUPA, CPCU
JOSEPH COYNE
THOMAS MCCLEMENTS

Minutes of Meeting of the Board on August 6, 2014, Approved the Board on September 23, 2014 Motion of Board Member Joseph Coyne Second by Board Member Carl Garcia by a Vote of: 4-0, Chairman Cox abstained.

August 6, 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 June 11, 2014, was conducted by the Board.

A motion was made by Board Member Carl Garcia, seconded by Board Joseph Coyne to approve the minutes of the Board Meeting held on June 11, 2014. The motion passed by a vote of: 4-0, Chairman Cox abstained.

Report on the Part-II examination for motor vehicle damage appraiser license held on June 17, 2014.

Board Member Carl Garcia reported that the examination was very well attended with 71 people taking the examination. Approximately 20 people failed the examination. Mr. Garcia reported that the next examination would take place on August 26, 2014.

Discussion of amending the ADALB's regulation, 212 CMR 2.00 et seq.

Chairman Cox reported that the Board had concluded their discussions about the areas of proposed amendments to the Board's regulation. Chairman Cox requested the Legal Counsel to the Board, Michael D. Powers, provide advice about the next steps that the Board needs to pursue for amending the regulation.

Mr. Powers recounted that the Board had been in extensive discussions at the Board meetings dating back to December of 2013. The next step would be for the Board to set-down a list of areas that it would like to place on the agenda for a Special Public meeting of the Board wherein interested parties and the public could provide input.

Board Member McClements asked if interested parties would be allowed to appear before the Board at the Special Public meeting and submit their suggestions about possible amendments to the regulations.

Mr. Powers confirmed that the public would be allowed to submit suggestions to the Board and elaborated that any parties who may be affected by amendments to the Board's regulation would be notified, such as licensed motor vehicle damage appraisers, insurance companies doing business in Massachusetts, and licensed auto body shops.

Chairman Cox requested that Legal Counsel Powers review the Board's minutes and make a list of areas that were discussed at the Board's meeting during the past year about potential amendments to the Board's regulation. Mr. Powers informed Chairman Cox that he would review the Board's minutes from December of 2013 onward and make a list for the next Board meeting.

New Business

Board Member Coyne said that there was a recent issue that has been brought to his attention about licensed appraisers enforcing the provisions of the Chapter 26, Section 8G and the Board's regulation regarding the removal of a motor vehicle inspection sticker from a damaged motor vehicle where the licensed motor vehicle damage appraiser determines that the damaged motor vehicle is unsafe to operate. Mr. Coyne asserted that the Attorney General's Office had recently issued a fine of \$250,000 against an insurance company due to the failure of its licensed appraisers to remove inspection stickers when a damaged motor vehicle may have been unsafe to operate. Mr. Coyne informed the Board, and the public, that he has been getting inquiries from licensed appraisers about the application of the law. Mr. Coyne stated that when this law was first enacted in the early 1990s, the enforcement of it by licensed appraisers caused chaos throughout the industry. Local and state police were receiving complaints from owners of motor vehicles that licensed appraisers were wrongfully removing the inspection stickers from their vehicles leading to numerous motor vehicles being towed and upsetting many members of the general public.

Member Coyne said the law clearly spells out the requirement, but because of the resulting chaos, the registry of motor vehicles, acting pursuant to 540 CMR, created a form which is a three page letter that must be filled out by a licensed appraiser before an inspection sticker is removed from a motor vehicle. After the Registrar of Motor Vehicles sent out the form, the common practice in the industry was to ignore the enforcement of the law and the removal of inspection sticker by licensed appraisers ceased, until now. With the recent activity of the Office

of the Attorney General in fining the insurance company for its licensed appraisers' failure to follow the law, there is a concern in the industry about enforcing it. Mr. Coyne then read from part of M.G.L. c. 26, §8G, "Whenever an appraiser determines that a motor vehicle is damaged such that (a) it may no longer meet the safety standards established by the registrar of motor vehicles under section seven A of chapter ninety; or (b), it may no longer comply with the motor vehicle emission standards established by the commissioner of the department of environmental protection under section 142M of chapter one hundred and eleven, then the appraiser shall remove the certificate of inspection from the vehicle and no new certificate of inspection shall be issued for such vehicle unless, upon reinspection of the vehicle pursuant to section seven V of said chapter ninety by an approved inspection station, such vehicle meets said safety standards and is otherwise in compliance with motor vehicle emission standards." Mr. Coyne concluded that the law is very clear about the matter.

Board Member Krupa agreed that Mr. Coyne made some good points, but advised the Board to consider the controversy that the enforcement of the law created in the early 1990s and the outcry by consumers complaining that their inspection stickers were wrongfully seized.

Board Member McClements advised that there is a state statute that licensed appraisers are bound by, and asserted that it was for the safety of the public.

Board Member Garcia agreed that the state law mandated the action.

Board Member Krupa suggested that the Board write a letter to the Attorney General about the implementation of the law. Board Member Coyne agreed.

Chairman Cox suggested that the Board write a letter to the Attorney General inviting her to provide guidance as to the manner of implementing the law, or a letter to the Commissioner of Insurance about the issue.

Board Member McClements agreed to draft a letter for the Board's consideration.

Mr. McClements raised the issue about the Board's Advisory Ruling on defining the term "personal inspections" of motor vehicles by licensed appraisers [the Board's Advisory Ruling 2014-1 adopted by a vote of 4-0]. Mr. McClements questioned whether the Board could have an Advisory Ruling on the term "personal inspection" when the term was defined in the Board's regulation [212 CMR 2.00 et seq.].

Mr. Garcia pointed out that the Division of Insurance has issued a legal opinion about the matter as it applied to Metropolitan Insurance Company's Direct Payment Plan. Mr. Garcia questioned whether the Board would rescind the Advisory Ruling 2014-1.

Chairman Cox said that he would entertain a motion to rescind the Advisory Ruling.

Mr. McClements made a motion to "Retract the Boards Advisory Ruling defining personal inspection." The motion was seconded by Board Member Coyne.

Board Member Garcia declared that the Board had already made their decision and the current process is moving forward. When he writes an appraisal and sends it with the back-up

documentation and photographs to an insurance company, there is no further need for the insurance company to duplicate the entire process.

The Chairman called for a vote, and the motion failed by a vote of: 2-3, with Board Members McClements and Coyne voting in favor, Board Members Garcia, Krupa, and Chairman Cox voting against.

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.

Date for Next Meeting:

The Board Members agreed to set the date of the next meeting for September 23, 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 and to discuss the reputation and character of an applicant for a motor vehicle damage appraiser license and a series of complaints filed against licensed motor vehicle damage appraisers. At the beginning of the meeting members of the Board had been provided with copies of complaints that had been filed against several licensed motor vehicle damage appraisers by Commerce Insurance Company on July 22, 2014, and by the Alliance of Automotive Service Providers on July 28 and July 29, 2014. Th

e motion was made by Board Member Joseph Coyne to enter the executive session and, thereafter, return to the public session. The motion was seconded by Board Member McClements, the vote failed by a vote of: 2-3, Board Members Coyne and McClements voting in favor and Chairman Cox and Board Members David Krupa and Carl Garcia voted against.

Before the Board entered the executive session, Legal Counsel to the Board, Michael D. Powers, informed the members of the Board, and the general public attending the meeting, that there were two complaints that had been filed by the Commerce Insurance Company and the Alliance of Automotive Service Providers of Massachusetts that involved Board Member Carl Garcia's company. Mr. Powers reported that he had informed Mr. Garcia before the meeting about the complaints and Mr. Garcia stated that he would recuse himself from considering any of the complaints that had been filed by Commerce Insurance Company and the Alliance of Automotive Service Providers of Massachusetts and would leave the Board meeting when those complaints were addressed by the Board. Mr. Garcia announced to the other Board Members and the members of the general public that he would remain for the executive session, but only for the matter that involved an applicant for a motor vehicle damage appraiser license, and any matters not related to the complaints that were filed by the Commerce Insurance Company or AASP. Mr. Garcia said that he would leave the Board meeting after those matters were addressed by the Board and before any discussion was held about the complaints filed by the Commerce Insurance Company and the AASP.

Board Member Coyne requested the four complaints that were filed by Commerce Insurance Company against licensed motor vehicle damage appraisers and the five complaints filed by AASP against licensed motor vehicle damage appraisers be heard at the public session of the Board. Legal Counsel to the Board, Michael D. Powers, informed Mr. Coyne and the other Board Members that the law provided the right of bare minimum due process for persons who have been granted licenses. Because allegations of violating state law have been made against the people named in the complaints and any potential discussion could involve the good names and reputations of the accused, the Board should first review the matter in the executive session to determine whether or not sufficient facts have been made to establish misconduct and any other relevant information about the allegations. If it is determined that a hearing should be held on the matter, the accused licensed appraisers should be notified of the same, specifying the allegations and provided an opportunity to appear before the Board and defend themselves. Chairman Cox asserted that the Board had already agreed to that procedure and it had been recently reaffirmed again by the Board [at the Board meeting that was held on June 11, 2014].

The General Counsel for the Division of Insurance, Robert Whitney, spoke at the meeting and reaffirmed that due process required an accused the right to be notified of charges brought against him and the opportunity to be heard. Mr. Whitney pointed out that a licensed appraiser has the right to defend his license and his ability to make a livelihood with it. Because any Board action taken by the Board at a public forum could have the impact on the appraiser's license, the Board must be mindful of the manner in which it proceeds on complaints brought against licensed appraisers.

Board Member Coyne made a motion that the complaints against the licensed appraisers brought by Commerce Insurance Company and AASP be heard in the public session. The motion was seconded by Board Member McClements.

A vote was taken on the motion and failed by a vote of 2-2, Chairman Cox and Board Member Krupa opposed with Board Members Coyne and McClements in favor. Board Member Garcia abstained from the motion.

Chairman Cox requested a motion to enter the executive session. Board Member Krupa made a motion to enter an executive session, the motion was seconded by Board Member Garcia. The motion passed by a vote of 3-2 with Chairman Cox, Board Members Krupa, and Garcia voting in favor and Board Members Coyne and McClements opposed.

Executive Session:

There was an applicant who indicated that he had a criminal conviction on his record. The Board questioned the applicant about the facts and circumstances surrounding the arrest. After being questioned by the Board a motion was made by Board Member Carl Garcia to approve the applicant to take the examination for licensed motor vehicle damage appraiser, the motion was seconded by Board Member Coyne, the motion passed by a vote of: 4-0 with Chairman Cox abstaining.

Board Member Garcia left the meeting and did not return to the meeting of the Board.

Complaint 2014-4

A motion was made to reconsider the Board's vote of June 11, 2014, wherein the Board voted 2-2 as to whether to move forward on the complaint against a licensed motor vehicle damage appraiser. At the June 11, 2014, Board Meeting, Board Member McClements made a motion to move forward with Complaint 2014-4, seconded by Board Member Garcia. At that meeting the motion failed by a vote of 2-2: Mr. McClements and Mr. Garcia in favor, Board Members Krupa and Coyne opposed. Because the vote lacked a majority vote of the Board, that motion failed.

Chairman Cox made the motion to reconsider the motion that was made at the June 11, 2014, Board Meeting, and it was seconded by Board Member McClements, the motion to reconsider the previous vote of the Board passed by a vote of 3-1, Board Member Krupa opposed the motion to reconsider. Board Member Garcia did not participate in the vote because he exited the Board Meeting before the vote was taken.

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 violate the regulation. Based on the facts of the complaint the licensed appraiser complained against, did negotiate the cost of paint and materials and hours.

Complaint 2014-4 asserted 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 requirement of 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. Board Member Coyne pointed out that 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 Coyne said that although he voted against going forward on this complaint at the previous Board Meeting, and he would consider

going forward with the matter now to once and for all resolve the matter and put an end to the issue.

Chairman Cox pointed out that the licensed appraiser complained against clearly negotiated in good faith with the other appraiser. He felt that good faith negotiation is what the regulation required and as long as the appraiser complied with the regulation there were no grounds to move forward on the complaint.

Chairman Cox made a motion to dismiss the complaint, seconded by Member David Krupa, the motion to dismiss passed by a vote of: 3-1, Board Member McClements voting against. Board Member Garcia had left the Board meeting at that time.

I. Complaints filed against licensees:

Complaints filed on behalf of Commerce Insurance Company Dated July 22, 2014:

- a) Complaint 2014-5;
- b) Complaint 2014-6;
- c) Complaint 2014-7;
- d) Complaint 2014-8;

Complaints filed by the Alliance of Automotive Service Providers dated July 28, 2014:

- e) Complaint 2014-9;
- f) Complaint 2014-10;
- g) Complaint 2014-11;
- h) Complaint 2014-12;
- i) Complaint 2014-13.

The Legal Counsel to the Board, Michael D. Powers, provided copies of the complaints, copies of the Direct Payment Plan that had been filed with the Division of Insurance by Geico Insurance Company, a letter from Geico detailing their plan, and a letter from Robert Whitney, General Counsel of the Division of Insurance approving the Direct Payment Plan. Mr. Powers provided a summary of the main factual elements of the complaints and the applicable law. Paragraph 5 of the complaints filed by Commerce Insurance Company contained the same allegations against each licensed appraiser. After reviewing the factual allegations of the complaints and the applicable law, Mr. Powers raised the question as to whether there were insufficient facts to support a violation of the law. Mr. Powers pointed out that although the complaints allege violations of the Board's enabling act and regulation, the complaints lacked specific facts that the licensed motor vehicle damage appraisers violated those laws. The gravamen of the complaints is that Commerce Insurance Company disagrees with Geico's Direct Payment Plan that had been filed with the Division of Insurance and whether the plan as filed and followed by Geico Insurance Company violates the law, which is an issue left to the Commissioner of Insurance.

The General Counsel of the Division of Insurance, Robert Whitney, addressed the Board. The complaint filed by AASP was sent to Mr. Whitney and Mr. Whitney informed the Board that he

had reviewed the complaints and that all of them questioned the Direct Payment Plan that had been submitted by Geico Insurance Company which had been approved by the Division of Insurance. He informed the Board that the conduct of licensed motor vehicle damage appraisers was the sole issue for the Board's determination. He asserted that, whether or not the Board agreed with elements of Geico's Direct Payment Plan, the sole issue to determine was whether the complaints contained sufficient factual allegation to issue a complaint against the licensed appraisers complained against, and that when contemplating action that could lead to a suspension or revocation of a person's license, or a fine, the Board must review the factual allegations and applicable law to determine if sufficient facts exist to move forward with a complaint against a licensee. Because such an action could affect a person's license and ability to make a living the law provides that such a person is entitled to bare minimum due process. After he reviewed the complaints he questioned whether there were insufficient facts to support the violation of the Board's enabling statute, M.G.L. c. 26, §8G and its regulation, 212 CMR 2.00 et seq.

Mr. Coyne said that Commerce Insurance Company's complaint alleged that Geico Insurance Company had been provided a waiver which required them to have a minimum number of referral shops in various geographic regions in the Commonwealth and felt that Geico should be required to have the minimum of auto body referral shops in each geographic areas as provided for in the regulation.

Mr. Whitney responded that, indeed Geico Insurance Company was provided with such a waiver for a temporary period of one year, because Geico had asserted in its filings that at this time they did not have sufficient motor vehicle insurance business in the Commonwealth to allow for coverage in all of the geographic areas. Mr. Whitney asserted that Geico's waiver was only temporary and would be reviewed at the end of the waiver period. Mr. Whitney pointed out that the issue of Geico receiving a waiver from the Division of Insurance had nothing to do with whether Commerce Insurance had alleged sufficient specific facts to support issuing a complaint against the named licensed motor vehicle damage appraisers.

Mr. Coyne stated that he had first-hand knowledge that Geico Insurance Company was operating a drive-in claim center at an auto-body shop located in Dorchester, Massachusetts in violation of the law.

Mr. Whitney replied if indeed that was happening then a complaint could be brought on those specific facts that Mr. Coyne had knowledge of. Nevertheless, the complaints that have been filed have not provided the specific facts that would support issuing complaints on those grounds against the licensed appraisers named in the complaints.

The Board then decided to first read the complaints and materials that had been provided to them by Legal Counsel to the Board Michael D. Powers, and then discuss the complaints at the next executive session of the Board.

Adjournment:

A motion to adjourn the meeting was made by Board Member Coyne, a second was provided by Mr. Krupa and the motion carried by a vote of: 4-0. Board Member Garcia 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).