**State of Rhode Island and Providence Plantations**
**DEPARTMENT OF BUSINESS REGULATION**
***Commercial Licensing Division***
**1511 Pontiac Avenue**
**Cranston, Rhode Island 02920**

| | | |
|---|---|---|
| **ALLSTATE INSURANCE COMPANY, COMPLAINANT,** | : | |
| **v.** | : | **DBR No. 07-I-0180** |
| **DEAN AUTO BODY, INC, RESPONDENT.** | : | |

# DECISION

Hearing Officers: Michael P. Jolin, Esq. and Elizabeth Kelleher Dwyer, Esq.

Hearing Held: February 4, 2009

Appearances:

For Complainant: Thomas A. Pursley, Esq.

For Respondent: William A. Gosz, Esq.

## I.
## INTRODUCTION

This matter came before the Department of Business Regulation ("Department") as the result of a complaint filed by Allstate Insurance Company ("Allstate") against Dean Auto Body, Inc. ("Dean" or "Respondent"). Respondent is licensed and operating as an automobile body repair shop pursuant to R.I. Gen. Laws § 5-38-4(b). The complaint alleges that Dean engaged in conduct that violated R.I. Gen. Laws §§ 5-38-10(7). Section 5-38-10(7) provides that the Department may suspend or revoke a license "[f]or having indulged in any unconscionable practice relating to the business as an automobile body repair shop".

## II.
## JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 5-38-1 *et seq.*, 42-14-1 *et seq.*, and 42-35-1 *et seq.*

## III.
## ISSUE PRESENTED

Whether or not Respondent engaged in any unconscionable practice in violation of R.I. Gen. Laws § 5-38-10(7) and if so, whether or not such violation(s) warrants an administrative sanction against its license.

## IV.
## MATERIAL FACTS AND TESTIMONY

The complaint filed against Dean involved the repair of a vehicle owned by Joel Morrissette ("Morrissette"). Morrissette's vehicle was damaged on March 23, 2006 in a sideswipe collision and subsequently brought to Respondent's shop for repair. Morrissette brought a third party claim against Greenwich Insurance ("Greenwich"). Greenwich hired Robert Lupoli, a motor vehicle damage appraiser licensed pursuant to R.I. Gen. Laws § 27-10.1-1 *et seq*, to prepare an appraisal of the damage to the vehicle. Mr. Lupoli issued an appraisal (hereinafter referred to as "the Appraisal"), which was admitted into evidence at the hearing as Exhibit 2, which indicated that Morrissette's vehicle had sustained $4,772.64 in damage consisting of $2,672.60 in labor costs, $1,492.49 in replacement parts and $607.64 in "other" costs.

After completion of the Appraisal, Dean began to repair the damage. Morrissette was not provided with a copy of the Appraisal, nor did he inquire or was he informed as to how his

vehicle would be repaired.[1] As the repairs were being done, Greenwich informed Morrissette that it was denying the claim. As a result a claim was made to Allstate, Morrissette's insurance company.

When the work was completed Dean faxed a request to Allstate to direct payment to Morrissette in the sum of $4,772.64, less Morrissette's deductible. The fax, which was introduced as Exhibit 7, was sent to the Allstate claims department and stated "please find appraisal as requested on 2004 Dodge truck owned by Joel Morrissette. Please send check under collision coverage less deductible." The fax asked that the check be made payable to Morrissette. Since the Appraisal had been done by another insurance company, Allstate sent a representative named Dwayne Yovan to Dean to confirm that all of the repairs in the Appraisal had been made. Yovan was met by Bob Gabrielle ("Gabrielle")[2] the Dean shop manager. As they were walking to the vehicle Mr. Gabrielle indicated that Dean did not replace the left quarter panel as provided for by the Appraisal. Yovan went through the Appraisal in Gabrielle's presence line by line and noted that 24 items on the Appraisal had not been completed in the repair done by Dean. Based on his inspection of the vehicle, Yovan estimated that the repairs actually done by Dean to Morrissette's vehicle totaled $2,466.08. The price difference between the Appraisal and the repairs actually done was attributable to the repair rather than the replacement of parts.

Allstate issued a check directly to Morrissette for $1,900 for the cost to repair to his vehicle minus his $500 deductible. Morrissette brought that check to Dean and signed it over to them. Morrissette did not pay the deductible and Dean has not requested that he do so.

[1] Mr. Morrissette did not testify at the hearing but he had been deposed and subject to cross examination earlier in the proceeding. The transcript of that deposition was entered into evidence as Exhibit 1 and statements in this decision concerning Mr. Morrissette's testimony are taken from that deposition.

[2] At the time of the hearing Mr. Gabrielle was deceased. Dean's counsel did not advocate that this fact prevented Dean from proving or disproving any fact it deemed necessary to its defense.

Morrissette indicated that he was satisfied with the repairs to his vehicle which were done by Dean. Neither Morrissette nor Dean challenged the amount of this payment.

Betty Ann Palmisciano, the office manager for Dean, testified that the file does not contain any document showing the work which Dean actually performed or any agreement that Dean would perform less than the work set forth in the Appraisal. She indicated that unless there is an agreement with the customer to do otherwise Dean will normally do the work called for in the Appraisal. In addition to the auto body work, Dean provided Morrissette with a new "tonneau cover" or truck liner. The tonneau cover was purchased by Dean from Bald Hill Dodge for $337.50.

Morrissette testified that when he brought his car to Dean for repair he had a conversation with Mr. Gabrielle about his old truck liner and Mr. Gabrielle said that "…he might have one in stock that he could put on the truck." Morrissette was never told that Dean was not going to do the repairs as set forth in the Appraisal. Morrissette did not agree that Dean could do less than the work in the Appraisal and Morrissette would take the remaining damage value in cash or in exchange for the truck liner. The first time Morrissette was told that all of the repairs in the Appraisal were not made was when he was contacted by Allstate. When asked about turning the check from Allstate over to Dean, Morrissette responded "it wasn't my money. I just planned on turning it right over to the auto body shop."

## V. STANDARD OF REVIEW

The complainant in an administrative hearing is required to prove its case by a preponderance of the evidence. *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989); *Parker v. Parker*, 238 A.2d 57, 60 (R.I. 1968). In this case Allstate bears

the burden for establishing that it is more likely than not that Respondent conducted itself in a manner that violated R.I. Gen. Laws § 5-38-10.

## VI. DISCUSSION

There is very little dispute about the facts in this case. It is undisputed that:

- Dean submitted the Appraisal to Allstate with a request for payment to Morrisette;
- Dean had not done all of the work detailed in the Appraisal in the repair of the vehicle;
- Dean had repaired some areas of the vehicle when the Appraisal provided for full replacement of the part;
- Dean did not have an agreement with or authorization from the owner of the vehicle to do less work than was called for in the Appraisal.

Deans' defense is that since the full amount of the Appraisal was never paid by Allstate, there is no proof as to whether Dean would have retained all of the money or paid part of the money to Morrissette. As the Department has established previously,

> *The insurer's obligation is to pay the damages suffered by the insured or third party claimant* as a result of contract (first party) or liability of its insured (third party)... *The insured or claimant, however, is not required to have all of the work performed on his or her vehicle or to have the exact work designated in the appraisal done at all*... These decisions have nothing to do with the insurer as the insurer is liable to pay for the damages suffered, not to determine how the payment will be utilized.

*Ray Stewart's Inc. v. Allstate Insurance Company,* DBR No. 03-I-0237, p. 3-4 (July 2, 2008) [emphasis added]

Dean and Morrissette could have entered into an agreement that Dean would do less than all of the work called for in the Appraisal and that the funds representing in the excess damage would be retained by Morrissette. However, the existence of such an agreement was flatly

denied by Morrissette and Dean has proffered no evidence that such an agreement existed. Dean's position is that Allstate would have to prove that Dean would not have turned the excess funds over to Morrissette in order for the behavior to constitute a violation of the statute. However, the right to have less damage repaired is the right of the insured not that of the auto body shop. Morrissette categorically denied ever having a conversation with anyone at Dean about doing less than all of the work listed in the Appraisal and there is no other evidence that such an agreement existed. In fact, Dean did not even prepare a document showing the work actually done which could be compared with the Appraisal.[3] Deans' argument ignores the fact that it never had the authority to do less work than called for in the Appraisal. The only person who has the right to make that Decision is the vehicle owner and he testified that he did not make such a Decision.

There was a great deal of testimony regarding Dean providing a "tonneau cover" or truck liner to the vehicle owner at no cost. There was no dispute that this was done. Ms. Palmisciano testified that Dean actually purchased the cover from an outside vendor for approximately $350. The vehicle owner testified that he was under the impression that Dean had it in stock and was volunteering to make a minimal repair for no charge. The implication of these discussions is an allegation that there was a *quid pro quo* that if Dean provided the cover it could retain the excess funds for work listed in the Appraisal but done for lower cost by Dean. The problem with this argument is that no evidence at all was introduced that such an agreement existed. Allstate satisfied its burden by introducing testimony of the vehicle owner that there was no agreement to do less than the work specified in the Appraisal. Introduction of evidence that the vehicle owner received something additional from Dean does not overcome this evidence and show an

[3] Although not raised by Allstate, the hearing officer notes that pursuant to R.I. Gen. Laws § 5-38-18, 5-38-29 and Commercial Licensing Regulation 4(8) Dean was required to prepare and maintain a repair bill.

agreement that Dean was authorized to do less work than specific in the Appraisal. This is especially true when the vehicle owner has testified that there was no such *quid pro quo*.

The parties closing briefs both address the issue of whether the Appraisal correctly reflected the necessary repairs to this vehicle. Allstate argues that the Appraisal overstated the necessary repairs and Dean argues that it did not. Since the vehicle was repaired and is no longer in its damaged state, whether the vehicle damage was correctly evaluated in the Appraisal can never be known. The testimony of Morrisette is that he is satisfied with the repairs which were made and no testimony was presented as to a diminution in value of the vehicle. As a result, the repairs that were done appear to have brought the vehicle back to pre-accident condition and no further funds are owed by Allstate. However, the hearing officer is unable to make a factual determination as to the Appraisal, nor is such factual determination necessary to resolve this regulatory matter.

With these factual conclusions, this case is virtually identical to that before the Department in *Allstate Insurance Company v. Leone's Atwood Collision Center and Auto Sales, LL,* DBR No. 06-L-0183 (May 19, 2009). In *Leone*, the Hearing Officer concluded that "unconscionable practice" as used in R.I. Gen. Laws § 5-38-10(7) means "some type of action taken by a licensee or an agent of a licensee that is unscrupulous or unjust. In other words, it is behavior that offends the conscience, or more simply put, is the wrong thing to do." *Leone, supra* at 15.

In *Leone* the Department found the evidence that the "...customer, did not authorize Leone to repair the car in the manner in which he did..." to be an unconscionable practice. *Id.* at 17. The only difference between the conduct of Dean and that of Leone is that in *Leone*, Allstate had actually paid the full amount of the Appraisal to the auto body shop whereas here Allstate

found that the repairs made did not meet the Appraisal before the actual payment. This distinction does not, however, change the analysis. While an insured may opt to be reimbursed for a loss in cash rather than by having his vehicle fully repaired, it is the insured's option not that of the auto body shop. The auto body shop may not make that decision for the insured and then bill the insurer as if the repairs had been fully made. Whether Dean would have retained the excess funds for itself or paid them to Morrissette is not determinative. The "unconscionable practice" is performing the repair other than in accordance with the Appraisal without the vehicle owners permission.

Based on the facts presented in this matter and the factual conclusions drawn from the evidence as indicated below, the Hearing Officer concludes that Deans' conduct in this matter constituted an unconscionable practice pursuant to R.I. Gen. Laws § 5-38-10(7).

## VII.
## FINDINGS OF FACT

1. Respondent was hired by the owner of a damaged vehicle to make repairs to damage caused by a motor vehicle accident.

2. The vehicle owner was not provided with a copy of the Appraisal, nor was he informed by Respondent as to how his vehicle would be repaired.

3. The vehicle owner did not have an agreement with Respondent that Respondent would do less work than called for in the Appraisal.

4. Respondent faxed a request to Allstate to direct payment to the vehicle owner in the sum of $4,772.64, which was the amount of the Appraisal less the vehicle owner's deductible.

5. According to Allstate's inspection, twenty four items on the Appraisal had not been completed in the repair done by Respondent.

6. The price difference between the Appraisal and the repairs actually done is attributable to the repair rather than the replacement of parts.

7. Respondent did not maintain a repair bill as a result of this repair.

## VIII.
## CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter

2. Allstate established by a preponderance of the evidence that Respondent engaged in an unconscionable practice in violation of R.I. Gen. Laws § 5-38-10(7) by doing less than the work set forth in the Appraisal without the agreement of its customer and then submitting the Appraisal to Allstate with a request for payment of the Appraisal amount.

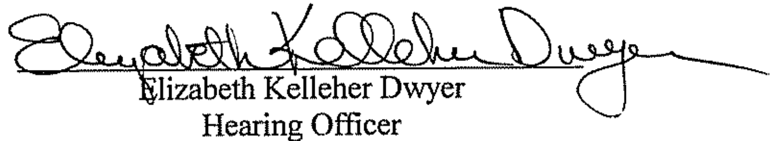
3. Respondent was required to complete and maintain a repair bill pursuant to R.I. Gen. Laws § 5-38-18, 5-38-29 and Commercial Licensing Regulation 4(8) but failed to do so.

## IX.
## RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Director of the Department of Business Regulation find that Respondent violated R.I. Gen. Laws § 5-38-10(7). The Hearing Officer recommends that Respondent have its license suspended for seven (7) days and pay an administrative penalty in the amount of one hundred dollars ($100) in accordance with the maximum fine allowed pursuant to R.I. Gen. Laws § 5-38-10.1. Alternatively, at Respondent's option, Respondent may pay a fine of two thousand five hundred dollars ($2,500)

in lieu of suspension and all other fines. Respondent will inform the commercial licensing division no later than thirty (30) days from the date of this decision which alternative it has selected.

Dated: November 3, 2009



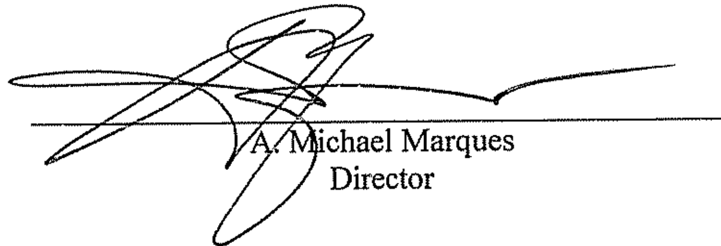
Elizabeth Kelleher Dwyer
Hearing Officer

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby

__✓__ ADOPT
______ REJECT
______ MODIFY

the Decision and Recommendation.

Dated: November 3d, 2009



A. Michael Marques
Director

**NOTICE OF APPELLATE RIGHTS**

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

**CERTIFICATION**

I hereby certify on this 4 th day of November 2009, that a copy of the within Decision was sent by first class mail, postage prepaid to:

Thomas A. Pursley, Esq.
Lynch & Lynch
45 Bristol Drive
South Easton, Massachusetts 02375

William A. Gosz, Esq.
380 Broadway
Providence, Rhode Island 02909

Sandra West