

BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

RIPPER'S BODY SHOP, INC.;
GARY LESTER SIMMONS, PRESIDENT;
TERRESA RENE SIMMONS,
SECRETARY/TREASURER,

Automotive Repair Dealer Registration No.
ARD 220052,

Respondent.

Case No. 77/15-14274

OAH No. 2017060388

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 11 and 12, and October 23, 2017, in Sacramento, California.

Brian S. Turner, Deputy Attorney General, represented Patrick Dorais (complainant), Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs.

On September 11 and 12, 2017, Ripper's Body Shop, Inc. (respondent) was represented by Gary Lester Simmons, respondent's president. On October 23, 2017, respondent was represented by William D. Ferreira, Attorney at Law.

Evidence was received on September 11 and 12, and October 23, 2017. The record remained open to allow complainant to submit a cost declaration by November 6, 2017, and for respondent to submit a response by November 27, 2017. On November 6, 2017, complainant submitted a letter, which was marked for identification as Exhibit 9. Respondent did not submit a response to complainant's letter by the November 27, 2017 deadline.¹ The record closed, and this matter was submitted for decision on November 27, 2017.

¹ In response to an inquiry by OAH, respondent submitted a letter dated December 1, 2017, which has been marked as Exhibit N.

FACTUAL FINDINGS

1. On March 5, 2002, the Bureau issued Automotive Repair Dealer Registration Number ARD 220052 (registration) to respondent. Respondent's registration was in full force and effect at all times relevant to this matter. Respondent's registration will expire on January 31, 2018, unless renewed or revoked.

2. The Accusation against respondent arose out of an investigation the Yolo County District Attorney's Office conducted into body shops in Yolo County. In May 2015, a Bureau representative and an investigator from the Yolo County District Attorney's Office (D.A. Investigator) made a field visit to respondent's facility. The Bureau representative requested all records pertaining to the last 30 insurance claims/consumer vehicles respondent had repaired for over \$3,000. Complainant seeks to discipline respondent's registration, alleging that respondent defrauded two insurance companies by failing to complete all the repairs as set forth in the repair estimates for two of the 30 matters reviewed by the Bureau and the D.A. Investigator: a 2011 Kia Sportage (Kia) owned by consumer B.G., and a 2002 Subaru Impreza WRX (Subaru) owned by consumer J.S.

Evidence Re: Kia

3. With regard to the Kia, the Accusation alleged:

On or about August 6, 2015, the Bureau and the D.A. Investigator inspected B.G.'s 2011 Kia Sportage using an insurance estimate dated February 15, 2014, in the amount of \$10,005.52 that had been prepared by California Casualty Management Company as well as the repair records provided by Respondent. California Casualty Management had paid Respondent a total of \$9,755.52 for the repairs; B.G. had paid the \$250 deductible. The Bureau found that the vehicle had not been repaired as set forth in the insurance estimate. The total value of the repair Respondent failed to perform as estimated is approximately \$97.85.

4. Garrett McHenry is employed by the Bureau as a Program Representative I. Mr. McHenry was assigned to conduct the Bureau's investigation with regard to the Kia. In conducting the investigation, Mr. McHenry received the file the Bureau and the D.A. Investigator obtained relating to the Kia, including estimates and payments from California Casualty Management Company (California Casualty), B.G.'s insurance carrier.

5. When Mr. McHenry reviewed the insurance file with regard to the Kia, he found that there were multiple estimates. He also found two payments totaling \$9,755.52 made by California Casualty to respondent: (1) a payment in the amount of \$9,496.35, issued on February 13, 2014; and (2) a payment in the amount of \$259.17, issued on February 19, 2014. Mr. McHenry chose to work off what he believed was the most recent insurance estimate that matched California Casualty's two payments: Estimate I.D. No.

50000242622MW, dated February 15, 2014, (California Casualty Estimate), which indicated that the damage was assessed by California Casualty adjustor Mike Witt, and the total amount of the repairs respondent performed was \$10,005.52. One of the "manual entries" on the California Casualty Estimate was line item 11, which stated "reinfinish [sic] Impact bar." There was no dollar amount associated with this entry, but a "labor unit" of .9 was included.

6. When Mr. McHenry inspected the Kia, he reached the conclusion that line item 11 was not performed. Mr. McHenry signed a declaration dated September 15, 2015, which set forth his conclusions. As stated in his declaration, "Photo documentation was obtained during our inspection whereby a photo of the front bumper impact bar identified this part as not being painted. A semi flat black primer is present on this part instead." In his declaration, Mr. McHenry developed a chart, which showed the labor costs he believed respondent charged to perform this work. According to Mr. McHenry's declaration, respondent charged \$97.85 for the labor to perform line item 11.

7. At the hearing, Mr. McHenry testified that when he visually inspected the Kia, the front reinforcement bar appeared to have an "e-coat type of paint covering," which he described as a "satin-like appearance" that was applied by the manufacturer. As Mr. McHenry explained, the "e-coat" is a protective electromagnetic coating applied by the manufacturer to help prevent rusting. Mr. McHenry believed that, based on his visual inspection, respondent did not paint that bar. He explained that the front bumper impact bar is underneath the front bumper and "very concealed." To photograph it, he had to lie on his back and point the camera up. He also touched the bar and found it did not have a smooth, glossy finish, which caused him to believe it was not painted. Mr. McHenry concluded that respondent had not performed line item 11, although it was paid to do so.

8. Mr. McHenry testified that he interpreted line item 11 to require respondent to apply a new glossy paint coat over the part. But he conceded that he did not contact California Casualty to determine whether his interpretation of line item 11 was correct. He also conceded that California Casualty's estimate did not include an entry showing that the insurance carrier paid for a clear-coat glossy finish.

9. Mr. Simmons testified that the repair work respondent performed on the Kia was significant and difficult, costing more than \$10,000. He disputed the only item of that repair work the Bureau found that respondent failed to perform – painting the front bumper impact bar. He testified that, when he obtained the part from the dealer, the e-coat on that part was green. He painted that part black. He submitted a series of photographs which showed a green front bumper impact bar being painted black. He explained that he took the photographs to document the work he performed for California Casualty. He asserted that respondent fully performed the work called for by the California Casualty Estimate to repair the Kia.

10. Mr. Simmons asserted further that he initially worked with George Ramos, a different California Casualty adjuster. Respondent completed all the repair work and released the Kia before Mr. Simmons received the California Casualty Estimate prepared by Mr. Witt, upon which Mr. McHenry relied. Mr. Simmons submitted copies of the emails,

estimates, supplements and invoices he exchanged with Mr. Ramos. Mr. Simmons testified that he could not come to a final agreement on repair costs with Mr. Ramos, because Mr. Ramos included in his estimate repairs that were not needed and failed to include repairs that were needed. Mr. Simmons believed that Mr. Witt added the manual entry for "reinish Impact bar" in the California Casualty Estimate to reach a final agreement on the amount that California Casualty was willing to pay respondent for the repairs.

Evidence Re: Subaru

11. The Subaru was owned by J.S., and insured by Liberty Mutual Fire Insurance Company (Liberty Mutual). J.S.'s Subaru was involved in an accident in January 2015, during which the Subaru's left front end was damaged. The Subaru was towed to respondent for repairs. The Accusation alleged that Liberty Mutual paid respondent \$3,607.26 to repair the Subaru in accordance with an estimate, and J.S. paid the \$500 deductible, but respondent failed to perform \$1,348.78 of the work set forth in Liberty Mutual's estimate.

12. Adam Marquez is employed by the Bureau as a Program Representative I. On August 6, 2015, Mr. Marquez inspected the Subaru using a copy of Liberty Mutual's Estimate Claim #031327503-01, dated February 2, 2015 (Liberty Mutual Estimate). The Liberty Mutual Estimate showed that the estimated gross total of repairs to the vehicle was \$4,107.28, less a \$500 deductible, for a net total of \$3,607.26. According to Mr. Marquez, the following repairs listed in the Liberty Mutual Estimate were not performed by respondent: (a) the left front fender was not refinished; (b) chip-guarding was not applied to the left front fender; (c) the left rear inner fender was not repaired; (d) the left rear inner fender was not refinished; and (e) the front crossmember was welded instead of replaced.

13. At the hearing, complainant submitted a declaration signed by J.S. and called J.S. to testify as a witness. In his declaration, J.S. asserted that he paid the \$500 deductible to respondent with his "ATM card." The declaration stated further that Mr. Simmons "had" J.S. sign a "Supplement 1," which J.S. "did not review thoroughly." The declaration also stated that J.S. did not agree for respondent or Mr. Simmons "to collect monies from Liberty Mutual for any items they paid for on my claim not repaired or replaced as per the Liberty Mutual estimate, including the crossmember and left fender panel refinish/repair."

14. J.S.'s testimony was not consistent with his declaration. He testified that he told the Bureau employees who "prepared" his declaration that he was not "100 percent sure" of a "couple of things" in it, but they assured him that "was fine." He also testified that the declaration was in "their words," not his, that it was "stretching," and that there were "a lot of things that are very concrete" in the declaration that he was "a little less concrete about." He testified further that there were "things" in his declaration that he could "not say for sure" he remembered. J.S. could not remember whether he paid the \$500 deductible. J.S. was not concerned that some of the repairs that were supposed to have been done were not. After respondent completed the repairs on the Subaru, it "looked just" as it had before the accident; there was no "visual difference." J.S. was "content" with the work that respondent performed on the Subaru.

15. On February 10, 2015, J.S. signed a three-page "Supplement #1" on all three of its pages. Supplement #1 described changes respondent made to the Liberty Mutual Estimate. As set forth in Supplement #1, the "Grand Total-All supplements" was "\$745.99)." One of J.S.'s signature was under the following statement:

NO REPAIR OR REFINISH WORK DONE AT OWNERS
REQUEST FOR SAVINGS, CREDIT BACK TO CUSTOMER
-3.5 BDY -0.4 REF.

(Capitalization in original.)

16. Mr. Simmons testified about the process respondent follows when negotiating repairs with insurance carriers. According to Mr. Simmons, after receiving a damaged vehicle, respondent issues an initial estimate regarding the needed repairs. The insurance adjuster then inspects the damaged vehicle and issues the insurance carrier's estimate. Respondent and the insurance carrier then "lock in" the estimated repair amounts. According to respondent, once the estimate is "locked," there can be no further changes to that estimate. Respondent then tears down and inspects the vehicle. As respondent does that, it makes any "real world" changes that may be needed to the locked estimate through supplemental estimates.

17. Mr. Simmons explained that he "locked in" the Liberty Mutual Estimate. Supplement #1 identified the changes that respondent made to the Liberty Mutual Estimate, which were approved by J.S.

18. Mr. Simmons pointed to the information set forth in the Liberty Mutual Estimate and Supplement #1 regarding the crossmember. Line item 12 in the Liberty Mutual Estimate stated:

Crsmbr, Front Susp LIKE KIND & QUALITY
LKQ Northern California [telephone number]
[Address]
Quote # [], Stock # [], CD

The Liberty Mutual Estimate included a price of "\$195.00 + 25.00" and 6.4 hours of labor. Mr. Simmons testified that LKQ was a junkyard, and that the Liberty Mutual adjuster had called LKQ and found a junkyard part to replace the damaged crossmember in the Subaru. The Liberty Mutual Estimate authorized payment of \$195 plus a 25 percent mark-up and 6.4 hours of labor to replace the crossmember. Mr. Simmons testified that when he tried to order the part referenced in the Liberty Mutual Estimate, it was not available. When he was unable to obtain a replacement crossmember, he prepared Supplement #1 to reflect that the crossmember would be repaired, and not replaced.

19. Line item 7 in Supplement #1, which related to the crossmember, stated:

FRONT SUSPENSION, W/O WRX STI – CROSSMEMBER

(S1) Switch from Replace Front Crossmember to R&I Front Crossmember & REPAIR & WELD MAIN ENG/SUSP CRADEL [*sic*]

(Capitalization and bolding in original.)

Mr. Simmons explained that “R&I” meant “remove and install.” According to Mr. Simmons, this change indicated that respondent would remove and repair the crossmember, and showed the amounts that would be credited back to Liberty Mutual.

20. Mr. Simmons testified that he talked to J.S. about the changes made to the Liberty Mutual Estimate as shown in Supplement #1. When they discussed the repairs, J.S. asked, “What if we don’t fix the fender.” According to Mr. Simmons, J.S. did not want to repair the fender because he was going to put bigger tires and flares on the Subaru. Mr. Simmons told J.S. that it was up to him if he chose not to do the entire repair. Mr. Simmons testified that he and J.S. made changes to the repairs, including eliminating some of the cosmetic work on the fender, in order to achieve savings for J.S. The “-3.5 BDY -0.4 REF” in Supplement #1 showed that the labor hours in the Liberty Mutual Estimate were reduced by 3.5 hours for body work and .4 hours for painting. The total amount credited back under Supplement #1 was \$745.99. This amount included an approximately \$200 shortage that respondent did not ask Liberty Mutual to pay. As calculated on Supplement #1, the final amount to be paid by Liberty Mutual after the \$745.99 credit was granted, was \$3,607.26, the amount Liberty Mutual agreed to pay in the Liberty Mutual Estimate. J.S. signed Supplement #1 to indicate his approval and allow respondent to move forward with the repairs.

21. Mr. Simmons conceded that he did not do the repairs to the Subaru alleged in the Accusation: (a) the left front fender was not refinished; (b) chip-guarding was not applied to the left front fender; (c) the left rear inner fender was not repaired; (d) the left rear inner fender was not refinished; and (e) the front crossmember was welded instead of replaced.

22. Mr. Simmons did not inform Liberty Mutual of the changes that were made in the Liberty Mutual Estimate by Supplement #1 and approved by J.S. Mr. Simmons did not seek or receive approval from Liberty Mutual to make the changes in the Liberty Mutual Estimate effectuated by Supplement #1. Mr. Simmons believed that it was the customer who authorized the repairs on a vehicle, and if respondent needed to make a change in the method of repair, it was the customer who approved it. Respondent asserted that after he obtained J.S.’s authorization, he performed all repairs reflected in the Liberty Mutual Estimate, as changed by Supplement #1. He was paid the same amount as was authorized by Liberty Mutual in the Liberty Mutual Estimate: \$3,607.26. J.S. did not pay the \$500 deductible.² Mr. Simmons disputed that respondent was paid for any work that was not performed. Mr. Simmons believed that respondent did not need Liberty Mutual’s permission to make the

² Mr. Simmons asserted that respondent does not accept payment by debit cards, contrary to J.S.’s assertion in his declaration that he paid the \$500 deductible with his ATM card.

changes to the Liberty Mutual Estimate reflected in Supplement #1 because respondent did not charge Liberty Mutual “anything extra.”

23. The Liberty Mutual Estimate included the following remark:

SUPPLEMENTAL NOTICE

All supplements require prior approval by a Liberty Mutual Representative. Please email your supplement to [telephone number; email address] and include the supplement estimate, photos, invoices and location of the vehicle (at shop or with customer). The subject line should include the claim #. You may also fax the supplement to [telephone number] or call in the supplement to [telephone number].

ATTENTION

WE RESERVE THE RIGHT TO REFUSE OR DENY ANY
SUPPLEMENT NOT REQUESTED PRIOR TO REPAIRS
BEING COMPLETED.

(Capitalization in original.)

Discussion

Allegations Re: Kia

24. Complainant failed to offer sufficient evidence to establish that respondent engaged in any fraud with regard to the Kia. Complainant alleged that of the \$10,005.02 in total repairs approved in the California Casualty Estimate, respondent failed to perform one manually-entered item to “reinish Impact bar,” whose value complainant estimated to be approximately \$97.85. The Bureau assumed this manual entry meant that respondent was required to paint the front bumper impact bar. But complainant did not call any witnesses from California Casualty or offer any other evidence to confirm that the Bureau’s assumptions about this manual entry were correct. Respondent offered correspondence and documents exchanged with California Casualty that cast too much doubt about the purpose of the manual entry to accept complainant’s assumptions without supporting testimony from the insurance carrier.

25. In addition, complainant failed to establish that respondent did not paint the front bumper impact bar. Mr. Simmons submitted photographs which indicated that he painted that part during the course of the repair work. While complainant questioned the legitimacy of Mr. Simmons’ photographs, the photographs’ date stamps supported Mr. Simmons’ testimony. Mr. Simmons’ assertion that he took photographs during repairs in order to substantiate the work he performed to the insurance carrier was credible.

26. In sum, complainant failed to offer adequate evidence to demonstrate that respondent charged California Causality for approximately \$97.85 in labor he did not perform. Consequently, complainant's fraud charge with regard to respondent's repairs of the Kia cannot be sustained.

Allegations Re: Subaru

27. Complainant submitted sufficient evidence to establish that respondent engaged in fraud with regard to the repairs it performed on the Subaru. The Accusation alleged that respondent did not perform five specified repair items listed on the Liberty Mutual Estimate. During the hearing, Mr. Simmons admitted that respondent did not perform those five listed items.

28. In the Accusation, complainant alleged that J.S. paid the \$500 insurance deductible. At the hearing, complainant offered J.S.'s declaration in support of this allegation. But J.S.'s testimony was not consistent with his declaration. He could not remember whether he paid the \$500 deductible. J.S.'s testimony at hearing was so equivocal that no weight can be given to either his declaration or his testimony.

29. Mr. Simmons' testimony that: (a) J.S. did not pay the deductible; (b) J.S. and respondent agreed that some of the cosmetic work on the fender listed in the Liberty Mutual Estimate would not be performed; and (c) J.S. approved and signed Supplement #1, which eliminated that cosmetic fender work and changed the work to be performed on the crossmember from replacement to repair was credible. Mr. Simmons admitted that he did not seek or obtain the approval of Liberty Mutual for the changes made in Supplement #1 to the repair work Liberty Mutual authorized in the Liberty Mutual Estimate.

30. Respondent argued that J.S.'s approval of Supplement #1 was sufficient to change the scope of the repair work set forth in the Liberty Mutual Estimate, and that respondent was not required to notify Liberty Mutual of the changes or obtain Liberty Mutual's approval. In support of its position, respondent asserted that there are no BAR laws or regulations that require an automotive repair dealer to obtain the approval of an insurance carrier before making changes to an insurance estimate. Instead, Business and Professions Code section 9884.9 requires only the prior approval of the customer, which respondent obtained from J.S.³ Respondent also argued that if Liberty Mutual believed it was defrauded, its remedy was to pursue civil action against respondent or seek criminal prosecution under Penal Code section 551.⁴ Respondent argued further that complainant did not establish that

³ Business and Professions Code section 9884.9, in relevant part, provides:

(a) The automotive repair dealer shall give to the customer a written estimated price for labor and parts necessary for a specific job. No work shall be done and no charges shall accrue before authorization to proceed is obtained from the customer.

⁴ Penal Code section 551, in relevant part, provides:

Mr. Simmons had the *mens rea* for respondent to be found guilty of fraud, and that respondent could not be found guilty of defrauding Liberty Mutual if respondent accepted only the amount set forth in the Liberty Mutual Estimate, and performed work of equal or greater value.

31. Respondent's arguments were not persuasive. Although complainant did not point to any specific statutes or regulations that require an automotive repair dealer to obtain the approval of an insurance carrier before making changes to an insurance estimate, Business and Professions Code section 9884.7, subdivision (a)(4), the fraud statute alleged in the Accusation, does not limit the persons against whom an automotive repair dealer may commit fraud to only the dealer's customers. Instead, it is applicable generally to any "conduct that constitutes fraud."

32. The Liberty Mutual Estimate sets forth the total amount of the repair work that Liberty Mutual authorized respondent to perform. That total amount was \$4,107.26. Liberty Mutual deducted from this amount the \$500 deductible it expected J.S. to pay. It agreed that it would pay the remaining \$3,607.26. Liberty Mutual's agreement to pay this remaining amount was predicated on the understanding that respondent would perform all the repair work described in the Liberty Mutual Estimate and that J.S. would pay his \$500 share of that work. Respondent agreed to reduce the total amount of the repair work it would perform so that J.S. would not have to pay the deductible. Respondent's reducing the amount of repair work without notifying Liberty Mutual, while still accepting the full amount Liberty Mutual agreed to pay in the Liberty Mutual Estimate, constituted fraud on Liberty Mutual.

33. Respondent's Supplement #1 reduced the repair work on the Subaru to the amount Liberty Mutual agreed to pay respondent in the Liberty Mutual Estimate. That Estimate notified respondent that all supplements required the "prior approval" of Liberty Mutual. The communications respondent had with California Casualty regarding the Kia repairs, which respondent submitted at hearing, demonstrated that respondent was aware that any changes made in an estimate through the supplement process had to be approved by the insurance carrier. This evidence establishes that Mr. Simmons had the requisite *mens rea* in this matter to support a finding of fraud against respondent. Complainant established that respondent engaged in fraud by accepting payment from Liberty Mutual when it did not perform all the repair work listed in the Liberty Mutual Estimate.

(b) Except in cases in which the amount of the repair or replacement claim has been determined by the insurer and the repair or replacement services are performed in accordance with that determination or in accordance with provided estimates that are accepted by the insurer, it is unlawful for any automotive repair dealer, contractor, or employees or agents thereof to knowingly offer or give any discount intended to offset a deductible required by a policy of insurance covering repairs to or replacement of a motor vehicle or residential or commercial structure.

Respondent's Other Defenses

34. Respondent submitted a trial brief that raised numerous affirmative defenses, including agency misconduct, mistake, accord and satisfaction, equitable estoppel, novation, impossibility of performance, unreasonable difficulty or expense, and frustration of purpose. Respondent did not establish that any of these defenses were applicable or persuasive.

35. Respondent also argued that the BAR worked with the D.A. Investigator in an effort to find fraud, and that the allegations made in this proceeding were not the result of any consumer or insurance carrier complaints. Whatever may have been the impetus for the Accusation in this matter is not relevant. Complainant offered sufficient evidence to establish the allegations against respondent relating to the Subaru.

36. Respondent raised further concerns about the process by which insurance carriers develop estimates and pay automotive repair dealers for repairs. These concerns are beyond the scope of this proceeding.

Appropriate Discipline

37. The Bureau has adopted "Guidelines for Disciplinary Orders and Terms of Probation" (Disciplinary Guidelines). The Disciplinary Guidelines include recommended discipline for wrongful conduct, factors to be considered in mitigation and aggravation, and model disciplinary orders. The Disciplinary Guidelines set forth the following factors in aggravation to be considered: (a) prior warnings from BAR; (b) prior office conference(s) with BAR; (c) prior history of citations; (d) prior history of formal disciplinary action; (e) failure to permit BAR inspection of records; (f) evidence of abuse of mechanic's lien; (g) evidence of attempts to intimidate consumer; (h) evidence of negligent or willful improper repair work that endangers consumers; (i) evidence that the unlawful act was part of a pattern of practice; (j) failure to comply with a BAR request for corrective action/retraining; (k) currently on probation for improper acts; (l) failure to successfully complete prior probation; (m) failure to pay court judgment to victim; (n) violation of previous court order; and (o) evidence of any other conduct which constitutes fraud or gross negligence.

38. The Disciplinary Guidelines set forth the following factors in mitigation to be considered: (a) evidence that respondent implemented BAR's suggested resolution to a consumer complaint; (b) evidence of restitution to the consumer and/or correct repair of the consumer's vehicle; (c) evidence of voluntary participation in retraining for self or employees; (d) evidence of voluntary purchase of proper diagnostic equipment and manuals; (e) evidence of a medical condition that temporarily prevented respondent from exercising supervision and control over employees or others at the time of the violation; (f) absence of prior disciplinary action; (g) evidence that the violation was not part of a pattern or practice; (h) evidence of no loss to consumer and no damage to consumer's property; (i) evidence of retraining and has initiated steps to minimize recurrence; (j) evidence of resolution of all consumer complaints with a subsequent change in business practice; (k) evidence of substantial measures to correct its business practices and/or business operations so as to

minimize the likelihood of recurrence of the violation; and (I) evidence of any other conduct which would constitute a factor in mitigation.

39. At the hearing, the Bureau established that on April 26, 2013, the Bureau engaged in a proactive conference with Mr. Simmons to address concerns regarding a consumer complaint. There was insufficient evidence offered at the hearing to determine whether any of the issues addressed during that proactive conference were related to the issues alleged in this proceeding. Other than that one proactive conference, complainant did not offer evidence that any of the other factors in aggravation listed in the Bureau's Disciplinary Guidelines were relevant to this matter.

40. Respondent established that some of the factors in mitigation set forth in the Disciplinary Guidelines were applicable. Respondent has been licensed for 15 years. There was no evidence that the Bureau has ever cited or pursued disciplinary action against respondent prior to this proceeding. Complainant did not show that the violation established in this matter was part of a pattern or practice of wrongdoing. There was no evidence of loss to a consumer or damage to a consumer's property.

41. Respondent submitted a character reference from Joseph Escobar, which was admitted as administrative hearsay and has been considered to the extent permitted under Government Code section 11513, subdivision (d).⁵ Mr. Escobar is the Fleet Manager for the City of West Sacramento Police Department. He has known Mr. Simmons for approximately 12 years. He is aware of the allegations made against respondent in this proceeding. According to Mr. Escobar, respondent has repaired numerous vehicles for the West Sacramento Police Department. In doing so, Mr. Escobar believes that respondent has acted with "integrity," "honesty," and "ethical billing practices." The West Sacramento Police Department will "continue to endorse and do business with" respondent.

42. The Accusation against respondent arose out of a general investigation the Yolo County District Attorney's Office conducted into body shops in Yolo County. The Bureau and the D.A. Investigator reviewed 30 of respondent's files. They made allegations with regard to only two of those 30 files. Complainant established cause for discipline with regard to only one of those files. Complainant did not submit any consumer or insurance carrier complaints against respondent. Complainant did not submit sufficient evidence to establish that respondent has or is engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer.

⁵ Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

43. Complainant did not prove that respondent failed to perform \$1,348.78 in repairs on the Subaru as alleged in the Accusation. Instead, respondent's evidence showed that Supplement #1 accurately reflected the repairs made by respondent. Respondent also demonstrated that it accurately informed J.S. about the repairs made in his vehicle. But respondent committed fraud when it accepted payment from Liberty Mutual without giving notice of the changes made to the Liberty Mutual Estimate. When all the evidence is considered, complainant did not establish that revocation of respondent's registration is required to safeguard the public health, safety and interest. Instead, a three-day suspension and three years of probation under the terms and conditions set forth below are sufficient to ensure that the public is properly protected.

Costs

44. At the hearing, complainant submitted two cost declarations: (1) a declaration regarding investigative and other costs (Investigative Cost Declaration), which sought costs in the amount of \$23,107.35; and (2) a Certification of Prosecution Costs: Declaration of Brian S. Turner (Prosecution Cost Declaration), which sought prosecution costs in the amount of \$4,857.50.⁶

45. At the hearing, respondent objected to the Investigative Cost Declaration on the grounds that it failed to comply with the requirements of California Code of Regulations, title 1, section 1042, which in relevant part, provides:

(b) Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

The Investigative Cost Declaration did not describe the general tasks performed, the time spent on each task or the method of calculating the costs. Consequently, respondent's objection to it was sustained, but the record was left open to allow complainant to submit a cost declaration that complied with section 1042, subdivision (b)(1).

⁶ The Prosecution Cost Declaration requested only \$4,850 in costs. But the computer printouts show that the actual amount of costs being requested was \$4,857.50. The \$4,850 in the declaration was deemed to be a typographical error, and the correct amount being requested was deemed to be \$4,857.50.

46. On November 6, 2017, complainant submitted a letter, which stated that it was “not possible to reconstruct the BAR personnel’s time spent on this case in detail.” Complainant requested that its original Investigative Cost Declaration be admitted. Complainant’s request is denied. The original Investigative Cost Declaration includes charges of 265.5 hours for Program Representative I time and 59 hours of Program Representative II time for a total of \$23,107.35 in costs. There is no explanation of the tasks these representatives performed or the time spent on each task. In addition, the number of hours stated and the costs requested are out of proportion to the charges alleged in the Accusation. Consequently, respondent’s objection to the Investigative Cost Declaration must be sustained and no costs will be awarded for investigative costs.

47. Attached to the Prosecution Cost Declaration are computer printouts entitled “Cost of Suit Summary” and “Matter Time Activity by Professional Type.” These computer printouts describe the general tasks performed, the time spent on each task and the hourly rate charged in accordance with California Code of Regulations, title 1, section 1042, subdivision (b)(2). The time spent, the work performed and the costs requested in the Prosecution Cost Declaration are reasonable in light of the allegations set forth in the Accusation. Complainant’s request for costs is further addressed in the Legal Conclusions below.

LEGAL CONCLUSIONS

1. Business and Professions Code section 9880.2 provides:

Protection of the public shall be the highest priority for the Bureau of Automotive Repair in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

2. Business and Professions Code section 9884.7, in relevant part, provides:

(a) The director, where the automotive repair dealer cannot show there was a bona fide error, may deny, suspend, revoke, or place on probation the registration of an automotive repair dealer for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer.

[¶] ... [¶]

(4) Any other conduct that constitutes fraud.

[¶] ... [¶]

(c) Notwithstanding subdivision (b), the director may suspend, revoke, or place on probation the registration for all places of business operated in this state by an automotive repair dealer upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated and willful violations of this chapter, or regulations adopted pursuant to it.

3. Complainant failed to establish cause to discipline respondent's registration under Business and Professions Code section 9884.7, subdivision (a)(4), with regard to respondent's repairs of the Kia. (Findings 24 through 26.)

4. Complainant established cause to discipline respondent's registration under Business and Professions Code section 9884.7, subdivision (a)(4), with regard to respondent's repairs of the Subaru. (Findings 27 through 33.)

5. Complainant did not submit sufficient evidence to establish that respondent has or is engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer. (Finding 42.) Consequently, complainant did not establish cause to discipline respondent's registration under Business and Professions Code section 9884.7, subdivision (c).

6. As set forth in Findings 37 through 43, when all the evidence in this matter is considered in light of the Bureau's Disciplinary Guidelines, suspending respondent for three days and placing respondent's registration on probation for three years under the terms and conditions set forth below are sufficient to ensure that the public health, safety and welfare are adequately protected.

7. Pursuant to Business and Professions Code section 125.3, a licentiate found to have violated a licensing act may be ordered to pay the reasonable costs of investigation and enforcement of a case. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: (1) whether the licentiate has been successful at hearing in getting charges dismissed or reduced; (2) the licentiate's subjective good faith belief in the merits of his or her position; (3) whether the licentiate has raised a colorable challenge to the proposed discipline; (4) the financial ability of the licentiate to pay; and (5) whether the scope of the investigation was appropriate in light of the alleged misconduct.

8. As set forth in Finding 46, respondent's objection to complainant's Investigative Cost Declaration is sustained, and no costs are awarded for investigative costs, due to complainant's failure to comply with California Code of Regulations, title 1, section 1042, subdivision (b)(1). In addition, complainant did not establish that the scope of the investigation was appropriate in light of the alleged misconduct.

9. Complainant has sought \$4,857.50 in prosecution costs. (Finding 44.) These costs are reasonable in light of the allegations set forth in the Accusation. (Finding 47.) Applying the factors set forth in *Zuckerman*, respondent was successful in getting one of the two causes for discipline alleged in the Accusation dismissed and the requested penalty reduced. When all the relevant factors in *Zuckerman* are applied, reducing the prosecution costs to \$3,500 would be appropriate.

ORDER

IT IS HEREBY ORDERED that Automotive Repair Dealer Registration No. ARD 220052, issued to respondent Ripper's Body Shop, Inc., is revoked, based upon Legal Conclusion 4. However, the revocation is stayed and respondent is placed on probation for three (3) years on the following terms and conditions:

1. **Actual Suspension.** Automotive Repair Dealer Registration No. ARD 220052, issued to respondent Ripper's Body Shop, Inc., is suspended for three (3) consecutive days beginning on the effective date of the Decision and Order.
2. **Posting of Sign.** During the period of suspension, respondent shall prominently post a sign or signs, provided by BAR, indicating the beginning and ending dates of the suspension and indicating the reason for the suspension. The sign or signs shall be conspicuously displayed in a location or locations open to and frequented by customers. The location(s) of the sign(s) shall be approved by BAR and shall remain posted during the entire period of actual suspension.
3. **Training Course.** Within 180 days of the effective date of this decision, respondent shall complete ordered coursework or training that is acceptable to BAR and relevant to the adjudicated violation. Respondent shall submit to BAR satisfactory evidence of completion of coursework or training within the timeline specified for completion of the ordered coursework or training.
4. **Obey All Laws.** During the period of probation, respondent shall comply with all federal and state statutes, regulations and rules governing all BAR registrations and licenses held by respondent.
5. **Quarterly Reporting.** During the period of probation, respondent shall report either by personal appearance or in writing as determined by BAR on a schedule set by BAR, but no more frequently than once each calendar quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.
6. **Report Financial Interests.** Respondent shall, within 30 days of the effective date of the decision and within 30 days from the date of any request by BAR during the period of probation, report any financial interest which any respondent or any partners,

officers, or owners of any respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

7. **Access to Examine Vehicles and Records.** Respondent shall provide BAR representatives unrestricted access to examine all vehicles (including parts) undergoing service, inspection, or repairs, up to and including the point of completion. Respondent shall also provide BAR representatives unrestricted access to all records pursuant to BAR laws and regulations.

8. **Tolling of Probation.** If, during probation, respondent leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction of California, respondent shall notify BAR in writing within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in California.

All provisions of probation other than cost reimbursement requirements, restitution requirements, training requirements, and that respondent obey all laws, shall be held in abeyance during any period of time of 30 days or more in which respondent is not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which respondent is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

9. **Violation of Probation.** If respondent violates or fails to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard may set aside the stay order and carry out the disciplinary order provided in the decision. Once respondent is served notice of BAR's intent to set aside the stay, the Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

10. **Maintain Valid License.** Respondent shall, at all times while on probation, maintain a current and active registration and/or license(s) with BAR, including any period during which suspension or probation is tolled. If respondent's registration or license is expired at the time the decision becomes effective, the registration or license must be renewed by respondent within 30 days of that date. If respondent's registration or license expires during a term of probation, by operation of law or otherwise, then upon renewal respondent's registration or license shall be subject to any and all terms and conditions of probation not previously satisfied. Failure to maintain a current and active registration and/or license during the period of probation shall also constitute a violation of probation.

11. **Cost Recovery.** Respondent shall pay the Bureau of Automotive Repair \$3,500 for the reasonable costs of the investigation and enforcement in this case. Respondent shall make such payment in accordance with a reasonable payment plan

approved by the BAR. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6) months before probation terminates. Respondent shall make payment by check or money order payable to the Bureau of Automotive Repair and shall indicate on the check or money order that it is for cost recovery payment for this case. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. BAR reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

12. **Completion of Probation.** Upon successful completion of probation, respondent's affected registration and/or license will be fully restored or issued without restriction, if respondent meets all current requirements for registration or licensure and has paid all outstanding fees, monetary penalties, or cost recovery owed to BAR.

13. **License Surrender.** Following the effective date of a decision that orders a stay of invalidation or revocation, if respondent ceases business operations or is otherwise unable to satisfy the terms and conditions of probation, respondent may request that the stay be vacated. Such request shall be made in writing to BAR. The Director and the BAR Chief reserve the right to evaluate the respondent's request and to exercise discretion whether to grant the request or take any other action deemed appropriate or reasonable under the circumstances. Upon formal granting of the request, the Director will vacate the stay order and carry out the disciplinary order provided in the decision.

Respondent may not petition the Director for reinstatement of the surrendered registration and/or license, or apply for a new registration or license under the jurisdiction of BAR at any time before the date of the originally scheduled completion of probation. If respondent applies to BAR for a registration or license at any time after that date, respondent must meet all current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to BAR and left outstanding at the time of surrender.

DATED: December 26, 2017

DocuSigned by:

Karen Brandt

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KAREN J. BRANDT

Administrative Law Judge

Office of Administrative Hearings