

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

In the Matter of the Petition for Interim
Suspension Order Against:

AMTEK AUTO REPAIR
KEN QUOC NGUYEN, Owner,
Automotive Repair Dealer Registration
No. ARD 238482
Smog Check Station License
No. RC 238482
Lamp Station License No. LS 238482
Brake Station License No. BS 238482

KEN QUOC NGUYEN
Lamp Adjuster License No. LA 149625 –
Class A
Brake Adjuster License No. BA 149625 –
Class C
Advanced Emission Specialist Technician
License No. EA 149625

TUNG QUOC-HAI NGUYEN
Lamp Adjuster License No. LA 149337 –
Class A
Brake Adjuster License No. BA 149337 –
Class C
Advanced Emission Specialist Technician
License No. EA 149337

Respondents.

Case No. 79/12-15

OAH No. 2011091143

**ORDER GRANTING INTERIM
SUSPENSION ORDER**

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of
Administrative Hearings, heard this Petition for Interim Suspension Order on October 24,
2011, in Oakland, California.

Deputy Attorney General Shana A. Bagley represented petitioner Sherry Mehl, Chief
of the Bureau of Automotive Repair, Department of Consumer Affairs.

William Ferreira, Attorney at Law, represented respondents Ken Quoc Nguyen and Tung Quoc-Hai Nguyen, who were not present.

The matter was submitted on October 24, 2011.

FINDINGS OF FACT

Procedural History

1. On September 30, 2011, petitioner filed a petition for interim suspension order pursuant to Business and Professions Code section 494 and Health and Safety Code sections 44002, 44072.2 and 44072.10, subdivision (a). On that same date, the petition and notice of hearing were served by certified mail on respondents Ken Nguyen and Tung Nguyen.

Registrations and Licenses

AMTEK AUTO REPAIR

2. Respondent Ken Quoc Nguyen (Ken Nguyen), as owner of Amtek Auto Repair, holds the following registration and licenses issued by the Bureau of Automotive Repair (bureau), all of which have an expiration date of March 31, 2012:

- Automotive Repair Dealer Registration No. ARD 238482, issued in 2005.
- Smog Check Station License No. RC 238482, issued April 20, 2005.
- Lamp Station License No. LS 238482, Class A, issued August 1, 2005.
- Brake Station License No. BS 238482, Class C, issued August 1, 2005.

KEN QUOC NGUYEN

3. Respondent Ken Nguyen holds the following individual licenses issued by the bureau:

- Advanced Emission Specialist (EA) Technician License No. EA 149625, issued in 2004, with an expiration date of February 29, 2012.
- Lamp Adjuster License No. LA 149625, Class A, issued in 2009, with an expiration date of February 28, 2013.

- Brake Adjuster License No. BA 149625, Class C, issued in 2005, with an expiration date of February 28, 2013.

TUNG QUOC-HAI NGUYEN

4. Respondent Tung Quoc-Hai Nguyen (Tung Nguyen) holds the following licenses issued by the bureau:

- Advanced Emission Specialist (EA) Technician License No. EA 149337, issued in 2004, with an expiration date of October 31, 2012.
- Lamp Adjuster License No. LA 149337, Class A, issued in 2005, with an expiration date of October 31, 2013.
- Brake Adjuster License No. BA 149337, Class C, issued in 2005, with an expiration date of October 31, 2013.

Bureau Investigation

5. Petitioner offered declarations regarding the bureau's investigation and the findings of the investigation. The bureau initiated an investigation of respondents after receiving a consumer complaint involving lamp and brake certificates of adjustment issued by Tung Nguyen for a vehicle with brakes and headlights in an unsafe condition that should not have been certified.

6. On January 27, 2011, Rosa Ulloa, a bureau undercover operator, drove a 1997 Honda Accord to Amtek Auto Repair in San Jose, California. The brakes (both front rotors and both rear drums) on the Honda Accord were out of compliance and both headlights had been misadjusted outside specifications. Ulloa asked Ken Nguyen for lamp and brake certifications and a smog inspection.

After inspecting and performing work on the vehicle, Ken Nguyen issued lamp and brake certificates of adjustment and a smog check certificate. Upon subsequent inspection, the bureau determined that the lamp certificate of adjustment was proper because the headlights had been adjusted within specifications. However, the brake certificate of adjustment was not proper because only one of the four wheels had been removed during Nguyen's inspection and both front rotors and both rear drums remained out of compliance.

7. On February 10, 2011, Peggy Guardanapo, a bureau undercover operator, drove a 1995 Honda Civic, on which the brakes (both front rotors and both rear drums) were out of compliance and both headlights had been misadjusted outside specifications, to Amtek Auto Repair. Guardanapo asked Tung Nguyen for lamp and brake certifications and a smog inspection.

After inspecting and performing work on the vehicle, Tung Nguyen issued lamp and brake certificates of adjustment and a smog check certificate. Upon subsequent inspection, the bureau determined that the lamp certificate of adjustment was not proper; the tamper indicators on the headlamp adjustment screws were broken, but the headlights were not adjusted within specifications. The brake certificate of adjustment was not proper because none of the wheels had been removed during Nguyen's inspection and both front rotors and both rear drums remained out of compliance.

8. The lamp and brake certificates of adjustment contain the following certification above the adjustor's signature:

All items above are of an approved type and I have performed the applicable inspection, adjustment, or repair as specified by the Bureau of Automotive Repair and the vehicle manufacturer, and in accordance with Title 13 and Title 16 of the California Code of Regulations, the Vehicle Code, and the Business and Professions Code. I hereby certify under penalty of perjury under the laws of the State of California that all statements made on this certificate are true and correct.

9. On March 3, 2011, Lance West, a bureau undercover operative, drove a 1999 Toyota 4 Runner from which the evaporative canister had been removed to Amtek Auto Repair. The evaporative canister is a required component of the emission control system for a 1999 Toyota 4 Runner. Removing the evaporative canister would prevent the vehicle from passing a California smog inspection. West took the vehicle to Amtek Auto Repair and asked for a smog inspection.

Tung Nguyen inspected and tested the vehicle, and he determined that it passed the visual inspection, functional check and tailpipe emissions test. In order to complete the visual inspection for this vehicle, the technician is required to verify that the evaporative canister is properly installed. The vehicle inspection report reflects that Nguyen entered "Pass" in the computer for the item "Fuel Evaporative Controls." Tung Nguyen also issued a smog check certificate. Tung Nguyen's entry was incorrect, and the smog check certificate Nguyen issued was improper. Re-inspection of the 1999 Toyota 4 Runner by the bureau revealed that the evaporative canister was still missing and that the vehicle should have failed the visual portion of the test as a result of the missing evaporative canister.

10. On March 16, 2011, Salvador Orozco, a bureau undercover operative, drove a 1995 Chevrolet Impala from which the PCV (positive crankcase ventilation) valve had been removed to Amtek Auto Repair. The PCV valve is a required component of the emission control system as evidenced by the vehicle's underhood label, and without it the vehicle could not pass a smog inspection. Orozco took the vehicle to Amtek Auto Repair and asked for a smog inspection.

Ken Nguyen inspected and tested the vehicle, and he determined that it passed the visual inspection, functional check and tailpipe emissions test. In order to complete the visual inspection for this vehicle, the technician is required to verify that the PCV valve is properly installed. The vehicle inspection report reflects that Nguyen entered "Pass" in the computer for the item "FCV." This entry was incorrect, and the smog check certificate Nguyen issued was improper.

11. The smog check vehicle inspection report, which includes the smog check certificate of compliance, contains the following certification above the technician's signature:

I certify, under penalty of perjury, under the laws of the State of California, that I performed the inspection in accordance with all bureau requirements, and that the information listed on this vehicle inspection report is true and accurate.

Respondents' Claims

12. In declarations submitted at the hearing, respondents claimed that the deficiencies found by the bureau were the result of "oversights or misunderstandings," and that they have taken steps to prevent future problems. With respect to the brake inspections, they claimed they were distracted because it was so busy in the shop. In his declaration Ken Nguyen admitted failing to remove all of the wheels during the brake inspection but claimed this was because he had road tested the vehicle and had tested the vehicle on the dynamometer, and it appeared to be operating properly. Ken Nguyen also stated, "We have learned our lesson in regards to brake inspections. We need to approach brake inspections more seriously and ensure they are properly performed according to law."

13. Ken Nguyen pointed out that he properly adjusted the headlights on the 1997 Honda Accord, and Tung Nguyen pointed out that he attempted to properly adjust the headlights on the 1995 Honda Civic. Respondents speculated that their equipment may not have been properly calibrated when the latter adjustments were made.

14. With respect to the smog inspection on the 1999 Toyota 4 Runner, respondents asserted that "most of the components that make up the EVAP system were present, indicating to the technician it was operating properly." Regarding the smog inspection on the 1995 Chevrolet Impala, Ken Nguyen claimed "this PCV valve is a very well hidden, small, and innocuous component, difficult to spot."

15. Respondents make their living in the auto repair business, and the suspension of their bureau-issued licenses would create a serious financial hardship for them and their families.

16. Respondents contend that the bureau's attempt to revoke their smog technician licenses improperly circumvents the usual progressive discipline process involving citations which give licensees an opportunity to take corrective action before an accusation is filed.

Respondents also assert that the subject proceeding is barred by res judicata and collateral estoppel because respondents have already defended against a prior action based on the exact same factual circumstances, and the administrative law judge issued decision on the merits in their favor.

LEGAL CONCLUSIONS

Interim Suspension Authority

1. The petition for interim order of suspension is brought pursuant to Business and Professions Code section 494, and Health and Safety Code sections 44002, 44072.2 and 44072.10, subdivision (a).

Business and Professions Code section 494, subdivision (a), provides an administrative law judge may, upon petition, issue an interim order suspending any licentiate or imposing license restrictions. The petition must include affidavits that demonstrate both of the following:

- (1) The licentiate has engaged in acts or omissions constituting a violation of [the Business and Professions Code] or has been convicted of a crime substantially related to the licensed activity.
- (2) Permitting the licentiate to continue to engage in the licensed activity, or permitting the licentiate to continue in the licensed activity without restrictions, would endanger the public health, safety or welfare.

The standard of proof required to obtain an interim order is preponderance of the evidence. (Bus. & Prof. Code, §494, subs. (c) &(e).)

An interim suspension order is of limited duration, remaining in effect only as long as the licensing board follows strict requirements to expeditiously afford the licensee a full hearing on the charges. Following issuance of the order, the board must file an accusation within 15 days. If the licensee files a notice of defense, a hearing must be held within 30 days and a decision issued within 30 days of submission of the matter.

2. Health and Safety Code section 44002 grants the director authority to enforce the provisions of the Motor Vehicle Inspection Program. Health and Safety Code section 44072.2 authorizes suspension, revocation or other disciplinary action against a licensee who

violates smog check laws, or commits any act involving dishonesty, fraud or deceit whereby another is injured.

Health and Safety Code section 44072.10 authorizes the temporary suspension of a smog check station or technician's license if the licensee's conduct would endanger the public health, safety or welfare before a full due process hearing could be held, and if there is reasonable evidence of fraud, tampering, intentional or willful violation of smog check laws, or a pattern or regular practice of smog check violations.

Automotive Repair Dealer Registration

3. Cause for discipline of Ken Nguyen's automotive repair dealer registration exists, with respect to the improperly issued lamp and brake adjustment certificates and smog certificates, under Business and Professions Code section 9884.7, subdivision (a)(1) (untrue or misleading statements).

4. Cause for discipline of Ken Nguyen's automotive repair dealer registration exists, with respect to the improperly issued brake adjustment certificates and smog certificates, under Business and Professions Code section 9884.7, subdivision (a)(4) (fraud).

5. Cause for discipline of Ken Nguyen's automotive repair dealer registration exists, with respect to the lamp adjustment certificate issued by Tung Nguyen, under Business and Professions Code section 9884.7, subdivision (a)(5) (gross negligence).

Smog Check Station License

6. Cause for discipline of Ken Nguyen's smog check station license exists, with respect to the improperly issued smog certificates, under Health and Safety Code section 44072.2, subdivision (a) (violations of smog check statutes or regulations), for violations of Health and Safety Code section 44015, subdivision (a)(1) (certificate issued for tampered emissions control system), and violations of California Code of Regulations, title 16, section 3371 (making false statements) and section 3373 (false station records).

Advanced Emission Specialist Technician Licenses

7. Cause for discipline of Ken Nguyen's advanced emission specialist technician license exists, with respect to the smog certificate he improperly issued, under Health and Safety Code section 44072.2, subdivision (a), for a violation of Health and Safety Code section 44032 (failure to perform tests of emission control devices and systems in accordance with section 44012), and a violation of California Code of Regulations, title 16, section 3340.42, subdivision (e)(1) (failure to properly conduct smog check visual inspection).

8. Cause for discipline of Tung Nguyen's advanced emission specialist technician license exists, with respect to the smog certificate he improperly issued, under Health and Safety Code section 44072.2, subdivision (a), for a violation of Health and Safety

Code section 44032 (failure to perform tests of emission control devices and systems in accordance with section 44012), and a violation of California Code of Regulations, title 16, section 3340.42, subdivision (e)(1) (failure to properly conduct smog check visual inspection).

Lamp and Brake Licenses

9. Cause for discipline of Tung Nguyen's lamp adjuster and brake adjuster licenses, exists under Business and Professions Code section 9889.3, subdivision (c), for violations of California Code of Regulations, title 16, section 3305, subdivision (a) (failure to properly inspect brakes or lamps), section 3316, subdivision (d)(2) (improper issuance of lamp adjustment certificate), and section 3321, subdivision (c)(2) (improper issuance of brake adjustment certificate).

10. Cause for discipline of Ken Nguyen's lamp station license, brake station license, and brake adjuster license, exists under Business and Professions Code section 9889.3, subdivision (c), for violations of California Code of Regulations, title 16, section 3305, subdivision (a), and section 3321, subdivision (c)(2).

Interim Suspension

11. The petition and supporting declarations allege facts and conditions which demonstrate that issuance of the interim suspension order is necessary to protect the public health, safety or welfare. Ken Nguyen's smog check station license, Ken Nguyen's advanced emission specialist license and Tung Nguyen's advanced emission specialist license are subject to temporary suspension for violations of the Health and Safety Code. An interim suspension of the lamp and brake licenses of Ken Nguyen and Tung Nguyen and a temporary suspension of the smog check license of Ken Nguyen is also justified. The pattern of violations under these licenses indicates a lax attitude about official certifications, and such an attitude poses a danger to the public health, safety and welfare.

12. With respect to the automotive repair dealer registration, respondent Ken Nguyen argues that the bureau cannot establish a danger to the public health, safety or welfare from allowing him to continue to operate under the registration because none of the alleged violations implicate the repair ability or diagnostic capabilities of the repair station. Respondent Ken Nguyen's contention is not persuasive. Although the acts and omissions committed by respondents did not directly involve the automotive repair dealer registration, they did involve dishonesty. Dishonesty cannot be compartmentalized and can reasonably be presumed to apply across all aspects of licensed operations. (See *Golde v. Fox* (1979) 98 Cal.App.3d 167, 176-178; *Windham v. Bd. of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 470.) Permitting respondent Ken Nguyen to continue to engage in licensed activities under the automotive repair dealer registration would therefore endanger the public health, safety or welfare.

Res Judicata & Collateral Estoppel

13. Respondents contend that the subsection petition for interim suspension order is barred by res judicata and collateral estoppel because an earlier petition for an interim suspension order filed by the bureau (*Amtek Auto Repair, et al.* OAH No. 2011080907), which was based on the same facts as the petition in this case, was denied.

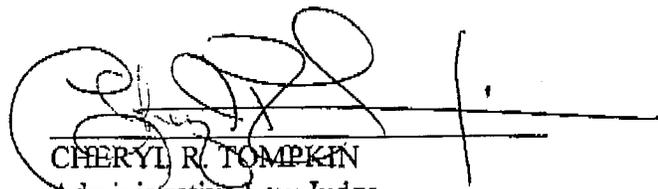
The doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*." (7 Witkin, Cal.Procedure (3d ed. 1985) Judgment, § 188, p. 621, original italics.) "Under the collateral estoppel or 'issue preclusion' effect of res judicata, a party is barred from raising an issue of fact or law if the issue was actually litigated and determined by a valid and final judgment in a previous proceeding, and the determination was essential to the judgment; the determination, in that instance, is conclusive in a subsequent action between the parties. (*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1290; (*People v. Sims* (1982) 32 Cal.3d 468, 477.))

No final judgment has issued in this case, only an interim order; therefore res judicata does not apply. Nor has there been a final determination on the merits of any individual issue; therefore collateral estoppel does not apply. The subject interim suspension order is not barred by collateral estoppel or res judicata.¹

ORDER

The petition for interim order of suspension is granted in its entirety.

DATED: October 31, 2011


CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings

¹ And see *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, in which the California Supreme Court recognizes that while res judicata rules are generally applicable to administrative orders, their enforcement is more flexible in the administrative context, and a qualified or relaxed set of rules concerning res judicata should be applied to much administrative action. (Id. at p. 1290)