

MEMORANDUM

Attachment B

Date: April 13, 2018

To: Interested Parties

From: Patrick Dorais, Chief
Bureau of Automotive Repair (BAR)

Re: Proposed Adoption of Decision as Precedent
In the Matter of the Accusation Against:
Darryl Bone Contracting, Inc., dba Tony's Test and Repair,
Darryl Bone, President/Secretary/Treasurer
Adrian Miguel Martinez, Smog Check Repair Technician, Smog Check Inspector, and
Adrian Miguel Martinez, Owner, dba Tony's Smog Check (Respondents)
Bureau of Automotive Repair Case No. 79/16-152
Office of Administrative Hearings Case No. 2016120680

In accordance with Government Code section 11425.60, subdivision (b), the Bureau of Automotive Repair (Bureau or BAR) is recommending that paragraphs 3-11 of the Legal Conclusions portion of the above captioned Decision be designated as precedent because it contains legal determination as to the burden of proof necessary in the disciplinary smog check stations and technicians.

Rationale

Under Government Code section 11425.60, subdivision (b), an agency decision is appropriate for designation as a precedent decision if it contains a significant legal or policy determination of general application that is likely to recur.

The Legal Conclusions in this Decision are significant because they establish that the 2012 amendments to Title 16, California Code of Regulations, section 3340.28, do not affect the ruling in *Imports Performance v. Dept. of Consumer Affairs, BAR (2011) 20 I Cal. App. 4th 911*. Specifically, the new regulations replaced the former advanced emission specialist technician license (EA) with two separate and distinct licenses, a smog check inspector license (EO) and smog check repair technician license (EI).

In *Imports Performance*, Petitioners argued that the Bureau improperly applied the "preponderance of the evidence standard" when the "clear and convincing standard" was more appropriate. The court held that there is a clear distinction between an occupational license such as the advanced emission specialist technician license (EA) and a professional license such as a physician and that the appropriate burden of proof for an EA license was the "preponderance of the evidence standard."

The above captioned Decision, reinforces current law regarding the burden of proof required for an Accusation against a smog check inspector license (EO) or a smog check repair technician license (EI) is the preponderance of the evidence standard, and not the "clear and convincing standard."

Procedural Background

The above captioned case was heard before Administrative Law Judge, James Ahler in San Diego, California, on April 24 and 25, 2017. Judge Ahler prepared a Proposed Decision, which was adopted by the Director of the Department of Consumer Affairs on July 21, 2017, and which became effective on August 29, 2017.

Facts and Findings

In the current case, following an investigation relating to 12 smog inspections, the Bureau charged Respondents with improperly issuing smog certificates of compliance using an illegal method known as "clean plugging." The Decision found that Respondents engaged in clean plugging, fraud, dishonesty, making false representations, and violating provisions of the Motor Vehicle Inspection Program. The court concluded that even though the governing section, Title 16, California Code of Regulations, section 3340.28, was twice amended since the *Imports Performance* case was decided and those amendments added several provisions related to training, education and experience, they "did not transform the EO and EI licenses into professional licenses requiring the application of the clear and convincing standard of proof." Furthermore, the court concluded that the "preponderance of the evidence standard" applied in this case for discipline of the smog check inspector (EO) and smog check repair technician (EI) licenses.

Precedential Designation

The recommendation is that only the following portions of the Decision be designated as precedent:

Legal Conclusions - paragraphs 3 – 11

Conclusion

Based on the criterion set forth in Government Code section 11425.60, subdivision (b), and the significance of the Legal Conclusions 3-11 of this Decision, the Bureau recommends that these sections only, be designated as a precedent.

Attachments:
Adopted Decision, Bureau Case No. 79/16-152