

FILED

NOV 23 2010

CONSUMER PROTECTION DIVISION, \*  
OFFICE OF THE ATTORNEY GENERAL, \*  
STATE OF MARYLAND, \*

IN THE \*  
ADMINISTRATIVE HEARING PROCESS \*  
CONSUMER PROTECTION \*  

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Proponent, \*

DIVISION OF THE

v. \*

OFFICE OF THE

ATCL-MD, INC., \*  
T/A AROUND THE CLOCK LOCKSMITH, \*

ATTORNEY GENERAL

and \*

Case Nos. OAG-CPD-04-10-12113  
OAG-CPD-01-10-12108

JOSEPH M. HORTON, \*

CPD Case No. 10-013-184207

Respondents. \*

\* \* \* \* \*

**PROPONENT'S OPPOSITION TO RESPONDENTS' EXCEPTIONS**

Respondents' Exceptions ask the Agency to reject the Administrative Law Judge's ("ALJ's") findings of credibility and extensive findings of fact. In addition, Respondents' Exceptions misstate the legal basis for the ALJ's conclusions of law. They provide no persuasive legal basis for rejecting the factual findings and conclusions of law of the ALJ who had the opportunity to evaluate the witnesses during six days of testimony.

I. Respondents Challenge The ALJ's Determination Of Witness Credibility And Factual Findings.

Most of Respondents' exceptions are an undisguised effort to have the Agency reevaluate the evidence and witness credibility. They complain that the ALJ accorded undue weight to various consumer witnesses (Respondents' Exceptions I, II, V, VI at 3, 4, 8, 9, ) and disregard or give too little weight to Respondent Horton's testimony (*Id.*). They also ask the Agency to reevaluate the evidence relating to competitive rates. (Respondents' Exception VII). Thus, Respondents ask the Agency to ignore the extensive credibility findings by the ALJ who heard

the witnesses and had an opportunity to evaluate their demeanor and testimony in the context of documentary evidence.

The Court of Appeals in *Anderson v. Dep't of Public Safety and Correctional Services*, 330 Md. 187 (1993); and the Court of Special Appeals in *Dep't of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 282 (1994), have made it clear that the final decision maker, who has not observed the witnesses, should not make new credibility determinations where the ALJ's findings are largely based upon witness demeanor, as is the case here, without giving strong reasons.

ALJ Kimberly Farrell made very specific credibility findings. She "found the Proponent's live consumer witnesses to be credible. The witnesses represented every facet of Maryland's population. . . . Their stories had personal details to give them authenticity, but still echoed each other in the treatment they received from the Respondent." (Proposed Decision at 86). She continued, commenting on the testimony of a particular witness whose credibility Respondent Horton challenged. The ALJ noted, "In the end, the Respondent did not make the witness seem less credible; he simply diminished his own credibility by telling half-truths about what happened." (*Id.* at 87). When the ALJ discussed Mr. Horton's credibility, she concluded that "Respondent's testimony was relentlessly perjurious. . . . He was evasive. He was argumentative. He falsely maintained in the face of overwhelming evidence that he gave every single consumer multiple accurate estimates and that they never protested his outrageous charges until after he performed locksmith services for the quoted prices." (*Id.* at 90-91). In support of these findings, the ALJ cited numerous instances in the record that contradicted Mr. Horton's testimony including, but not limited to, his false statements regarding his background on his MySpace pages, his false statements concerning his company and its expertise, and his testimony

concerning his practices that was contradicted by virtually every consumer who testified at the hearing. (Id. at 90-91).

In Exceptions I, II, V and VI, Respondents argue that the ALJ “gave undue weight” to consumers and “disregarded” or “failed to properly accord due weight to Respondent’s testimony.” (Respondents’ Exceptions at 3, 4, 8, 9). Because each of these Exceptions would require the Agency to reevaluate the ALJ’s findings of credibility, the exceptions must be denied.

Specifically, Respondents except to the conclusion that they violated § 13-301(1) when Mr. Horton gave inaccurate estimates or told consumers that he could not give estimates. Exceptions I and II. All of Proponent’s consumer witnesses testified that they did not receive accurate estimates. The ALJ credited their testimony and did not credit Mr. Horton’s testimony that he gave each consumer accurate estimates. (Proposed Decision at 86-92). Thus, the ALJ concluded that Respondents made misleading and deceptive statements to consumers.

The issue with regard to the § 13-301(1) violation is not whether Respondents were obliged to give estimates, as Respondents would have it, but whether they gave false estimates or falsely told consumers that they could not give estimates. It is also irrelevant that consumers may have signed documents after the service was provided. Even when some consumers signed documents titled “Estimate,” the ALJ credited the consumers’ testimony that they did not sign the documents until after the service was provided. Thus, Respondents’ Exceptions I and II, seeking to modify the conclusion that Respondents violated § 13-301(1) when Mr. Horton gave inaccurate estimates or told consumers that he could not give estimates, must be denied.

Respondents’ Exception V must be denied for similar reasons. The ALJ believed the fifteen, independent consumer witnesses, each of whom testified that Respondents advised them that they would be reimbursed by their insurance carriers. The ALJ found that this advice was

part of Mr. Horton's manipulative practices and designed to persuade consumers to sign the sales receipts and credit or debit card slips. The ALJ's conclusion that Respondents' misrepresentations about insurance were deceptive is supported by substantial evidence.

Respondents except to the ALJ's conclusion that Respondents were responsible for consumers' confusion about Respondents' relationship with Pop-A-Lock. The ALJ's conclusion is based on her evaluation of the evidence. She found that Respondents were aware that misleading information on the Internet linked Pop-A-Lock to Respondents and, rather than cure consumer confusion, Respondents "actively created the impression of an association with Pop-A-Lock in the way he answered business calls," by his MySpace account name "popalockjoe," and by the design of his van, which used the same color scheme as his competitor, Pop-A-Lock. (*Id.* at 76). The ALJ's decision on this issue is supported by substantial evidence. Mr. Horton's contradictory testimony, that the ALJ discredited, does not provide a basis for modifying the ALJ's decision.

Respondents' Exception VII regarding the promise of competitive rates must be rejected because it also seeks to reweigh the evidence. The ALJ simply did not believe Mr. Horton's testimony that his rates were justified by the burden of being on call 24/7. She relied instead on the testimony of several locksmiths showing that they too offered 24 hour service seven days a week and Respondents' rates far exceeded other Maryland locksmiths' rates. It is clear that the claim of competitive rates is not mere puffery. Every single consumer who testified for Proponent complained about Respondents' rates. The price of the service mattered to these consumers. Whether they actually relied on the Internet claim of "competitive rates" is not relevant. To prove a violation of § 13-301(1), Proponent need only show that Respondents' claim of competitive rates had the "capacity" or "tendency" to deceive or mislead consumers. A

claim that rates are competitive can be misleading when actual rates are far out of line with competitors' rates.

II. The ALJ's Conclusions That Respondents' Supplies Fees And List Prices For Hardware Were Misleading Are Supported By Substantial Evidence.

In Exceptions III and IV, Respondents ask the Agency to reject the ALJ's conclusions that Respondents' supplies and hardware fees were misleading and deceptive. Respondents argue that Proponent is attempting inappropriately to regulate Respondents' prices. This argument misunderstands the ALJ's factual findings and reasoning.

The ALJ concluded that it was misleading for Respondents to call one of their fees a "supplies fee" when the fee had nothing to do with supplies they used. Respondents gave a couple of explanations for these fees: They were intended to cover general overhead or, alternately, were a designated percentage of the total bill. (Respondents' Exceptions at 7; Proposed Decision at 73). The ALJ concluded, however, that neither explanation had any basis in fact. There was no support for Respondents' claim that the fees covered depreciation costs, and the math did not bear out Mr. Horton's claim of a designated percentage. (*Id.* at 72-73; *see, also*, Proponent's Exhibit 49). In sum, the ALJ did not believe Mr. Horton.

Supplies are not what is commonly understood as general overhead, and the ALJ found that these "supplies fees" bore no relation to any supplies used in the service. Consumers who testified about the supplies fees they were charged explained that they did not know what the fee was for (Proponent's Proposed Findings of Fact ¶¶282, 319), and that the supplies were reusable (*id.* at ¶362). Locksmith witnesses testified that other Maryland locksmiths do not charge separately for supplies or overhead. (*Id.* at ¶¶416, 433-434, 442). The ALJ drew the reasonable inference that the fees were simply added to each sales receipt to increase Respondents' profits and were, therefore, deceptive. (Proposed Decision at 73). The ALJ's conclusion that the fees

were misleading and deceptive is supported by substantial evidence in the form of Mr. Horton's testimony, testimony of consumers and other locksmiths and Respondents' sales receipts.

The ALJ also found that Respondents' sales receipts were misleading and deceptive when they identified a "list price" that bore no relation to the manufacturer's or distributor's list price for the hardware. The term "list price" ordinarily carries the meaning of a "manufacturer's suggested retail price" (investorwords.com); "the price which the manufacturer recommends that the retailer sell the product" (Wikipedia.org); or "a basic published or advertised price, often subject to discount" (answers.com). Respondents' "list price" was none of these. Mr. Horton testified that what he termed "list price" on his sales receipts was his own "list price," not a published or advertised price and not the manufacturer's price. He also explained that it was nothing more than the price he would like to charge. It bore no relation to the distributor's list price or the price that he paid for the hardware. (Proponent's Exhibit 59).

From this evidence, the ALJ drew the inference that Respondents' list price reflected what he "thought he could get out of any particular consumer" and was "designed to deceive consumers by creating the illusion that they received a bargain from Respondent when from an objective standpoint they were still overcharged for the item." (Proposed Decision at 72). In fact, both Respondents' so-called list price and his actual charge for hardware frequently greatly exceeded the manufacturer's or distributor's list price, misleading consumers to believe they received a discount. (*Compare* Proponent's Exhibit 49 and Proponent's Exhibit 59).

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Although Respondents' Exceptions relating to their supplies fees and hardware costs mention only the ALJ's findings under § 13-301(1), they are also important to the ALJ's finding that Respondents' practices were unfair. The ALJ found that Respondents' practices satisfy the test for unfairness because "they caused substantial injury to consumers who ended up paying far

more than they would have paid for any other locksmith in the State of Maryland to perform services for them[;] the injury is not avoidable by consumers[; and] the injury is not outweighed by any offsetting benefits to consumers or to competition.” (Proposed Decision at 96). Thus, even if Respondents’ excessive and unwarranted supplies fees and hardware costs did not meet the definition of deception contained in § 13-301(1), they were nevertheless unfair and a violation of § 13-303.

There is substantial evidence in the record to support the ALJ’s inferences and other factual findings with respect to both the “supplies fees” and the hardware “list prices.”

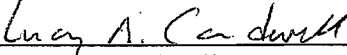
Respondents’ use of these terms was misleading and deceptive.


III. Respondents Misunderstand The Decision In *State v. Cottman Transmission Systems*.

Respondents’ Exception VII misstates the holding in *Cottman* and its application here. The ALJ did not hold that every merchant has a duty to provide an estimate and that a failure to do so would be deceptive. (Respondents’ Exceptions at 12-13). Rather, her decision is carefully tailored to the facts here. Mr. Horton testified that he was able to give consumers accurate estimates of the cost of his services, and that it would be important for consumers to know in advance what it would cost. As the ALJ noted, “This [cost] information was critical to consumers as the Respondent himself acknowledged in his testimony.” (Proposed Decision at 71). It was especially important for Respondents to disclose their cost information because their prices greatly exceed the prices of other locksmiths. (*Id.* at 65, 78, 91).

For the reasons stated above, Proponent asks that Respondents' Exceptions be denied.

Respectfully submitted,

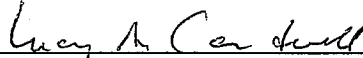
  
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CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of November, 2010, a copy of the foregoing Opposition to Respondents' Exceptions was served, via first class mail, on:

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