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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IMPORTS PERFORMANCE et al., Petitioners and Appellants, v. DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR, Respondent and Respondent.	B228544 (Los Angeles County Super. Ct. No. BS124752)

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffee, Judge. Affirmed.

Kinsella Weitzman Iser Kump & Aldisert, Alan Kossoff for Petitioners and Appellants Imports Performance, Razmik Vartan, and Darryl Dean Rowe.

Kamala D. Harris, Attorney General, Gregory J. Salute, Supervising Deputy Attorney General, Terrence M. Mason, Deputy Attorney General, for Respondent Department of Consumer Affairs, Bureau of Automotive Repair.

INTRODUCTION

Razmik Vartan (Vartan), owner of and doing business as Imports Performance,[1] held an automotive repair dealer registration and smog check station license for Imports Performance. Vartan also held an advanced emission specialist (smog check) technician license. Darryl Rowe (Rowe), a mechanic at Imports Performance, also held an advanced emission specialist technician license. Respondent and respondent the Department of Consumer Affairs, Bureau of Automotive Repair (Bureau) conducted an undercover investigation of the smog check inspection and vehicle repair operations at Imports Performance. Following that investigation, the Bureau revoked Vartan's smog check station license probation for Imports Performance; revoked and stayed revocation of Rowe's advanced emission specialist technician license pending completion of four years' probation; and ordered Vartan, as owner of Imports Performance, and Rowe to pay $35,366.40 for the Bureau's costs of investigating and prosecuting the case. Imports Performance, Vartan, and Rowe (petitioners) filed a petition for writ of mandate or administrative mandamus to set aside the Bureau's decision. The trial court denied the petition, and petitioners appeal.

On appeal, petitioners claim that the Bureau used the wrong standard of proof in the revocation proceedings; insufficient evidence supports the Bureau's findings of smog test violations; and the Bureau levied excessive "discipline" in revoking Vartan's smog check station license, revoking and placing Rowe's advanced emission specialist technician license on probation, and ordering payment of $35,366.40 in costs. We affirm.

BACKGROUND

I. Facts

California's Smog Check Program requires most motor vehicles to pass a smog check inspection every two years upon registration renewal and when a vehicle's title is transferred. Such inspections are performed by licensed smog check technicians at

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1 "Vartan" and "Imports Performance" are generally used interchangeably.

licensed smog check stations and include tailpipe emissions, visual, and functional tests. A vehicle that fails any of these tests fails the overall inspection. A vehicle that passes a smog check inspection receives a certificate of compliance.

In August 1992, the Bureau issued to Vartan, owner of and doing business as Imports Performance, automotive repair dealer registration number AH 168479 and smog check station license number RH 168479. In August 2000, the Bureau issued to Vartan advanced emission specialist technician license number EA 142356. In 2003, the Bureau issued to Rowe advanced emission specialist technician license number EA 147729. By a decision effective February 18, 2005 (Case No. 79/02-116), the Bureau revoked and stayed revocation of Vartan's automotive repair dealer registration and smog check station license, placing the registration and license on three years' probation.[2] The Bureau's action was based on Imports Performance's failure to locate and correct in three undercover operations the Bureau's "inducements" that rendered vehicles incapable of passing smog inspections. Later in 2005, the Bureau conducted three additional undercover operations concerning the smog check inspection and vehicle repair services at Imports Performance, which operations are discussed below.

A. Undercover Operation No. 1

In July 2005, Daniel Woods (Woods), an employee in one of the Bureau's documentation laboratories, performed a smog check inspection on a 1992 Toyota Corolla owned by the Bureau. The inspection included a tail pipe emissions test and visual and functional inspection tests. The Corolla passed the smog check inspection. Woods then advanced the vehicle's engine ignition timing from the factory specification of 10 degrees before top dead center to 20 degrees before top dead center so that the engine ignition timing was 10 degrees out of factory specification and seven degrees

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[2] According to the Bureau's December 21, 2009, Decision After Remand From Superior Court, in 1997 Imports Performance's automotive repair dealer registration and smog check station license were revoked and placed on three years' probation in a prior disciplinary action.

beyond the Bureau's tolerance of three degrees out of factory specification. Woods performed another smog check inspection on the Corolla. This time, the Corolla failed the functional timing test because its engine ignition timing was 10 degrees out of factory specification. Woods placed a tamper seal on the engine to detect an adjustment of engine ignition timing.

On August 5, 2005, Otis Cowley (Cowley), a Bureau undercover operator, drove the Corolla to Imports Performance and requested a smog check inspection. Rowe told Cowley that the Corolla failed the inspection due to incorrect timing. Rowe said that it would cost about $200 to make the necessary repairs so that the vehicle would pass a smog check inspection. Cowley left Imports Performance with the Corolla.

On September 6, 2005, Woods again performed a smog check inspection on the Corolla, and the Corolla again failed the functional timing test. The engine ignition timing remained 10 degrees out of factory specification. The vehicle passed the remaining phases of the inspection. The tamper seal that Woods had placed on the engine remained intact.

On September 15, 2005, Cowley took the Corolla to Imports Performance to have the vehicle repaired. Rowe told Cowley that it would take about four hours to determine why the vehicle would not pass a smog check inspection. Later, Cowley called Imports Performance and was told that the Corolla was not ready and that the vehicle needed a throttle position sensor to pass the smog check inspection. When Cowley returned to Imports Performance, Rowe said that he had replaced the throttle position sensor and adjusted the timing so that the Corolla would pass a smog check inspection. Cowley paid $150 for the repairs and was given the throttle position sensor that had been replaced and a document that stated that the vehicle had passed an inspection and been issued a certificate of compliance. The entry on the vehicle inspection report for engine ignition timing was 11 degrees before top dead center, a position within the Bureau's degree of tolerance.

On September 26, 2005, Woods performed a smog check inspection on the Corolla and the vehicle failed. During the functional timing test, Woods observed that

the engine ignition timing was set at 15 degrees before top dead center, a position outside of the Bureau's degree of tolerance. Woods's tamper seal was broken. Woods tested the throttle position sensor that had been returned and found it to be fully functional, internally clean, and without defects. Woods concluded that a new throttle position sensor had not been needed and could not have corrected a "misadjusted" engine ignition timing. Woods further concluded that a smog certificate should not have been issued for the Corolla while its engine ignition timing was advanced beyond Bureau tolerance.

B. Undercover Operation No. 2

During June and July 2005, Matthew Austin (Austin), an employee in one of the Bureau's documentation laboratories, inspected and marked various engine parts, including the throttle position sensor, in a 1988 Chevrolet Caprice owned by the Bureau. Austin found the parts to be in good condition. Austin also disassembled, inspected, and marked the vehicle's carburetor. According to Austin, the throttle position sensor is an internal part of the carburetor that is designed to be adjusted externally. Austin then performed a smog check inspection on the Caprice. The vehicle passed the inspection.

After the Caprice passed the smog check inspection, Austin placed two defects in the vehicle's computer system. First, Austin adjusted the throttle position sensor to 3.0 volts at idle (factory specification was .46 to .7 volts at idle), thus causing the engine to "run rich" and the vehicle to fail the tailpipe emissions portion of a smog check inspection. That condition also would cause the "service engine soon" warning lamp (also known as the "MIL" or "check engine light") to illuminate. Second, Austin rendered the service engine soon warning lamp inoperative by installing a burned out bulb. With a warning lamp in such a condition, the vehicle would fail the functional portion of a smog check. Austin performed another smog check inspection on the Caprice, and the vehicle failed because of excessive tailpipe emissions and a non-functioning service engine soon light.

On August 12, 2005, Maria Aleman (Aleman), a Bureau undercover operator, drove the Caprice to Imports Performance and requested a smog check inspection. Rowe

placed a probe in the vehicle's tailpipe and informed Aleman that the vehicle could not pass a smog check inspection because the exhaust had too much gas. Rowe told Aleman that it would cost $130 to "adjust" the Caprice so that it would pass a smog check inspection. Later that day, when Aleman called Imports Performance, Rowe told her that the vehicle's carburetor needed to be repaired at a cost of $450. Aleman authorized the carburetor repair.

On August 13, 2005, Rowe informed Aleman that the Caprice and been repaired and had passed a smog check inspection. On August 15, 2005, Aleman picked up the Caprice from Imports Performance. Aleman paid Rowe $450, and Rowe gave Aleman two vehicle inspection reports that showed that the Caprice had passed a smog check inspection. One of the reports, from "16 Minute Smog," included a certificate of compliance.

On August 17, 2005, Austin performed another smog check inspection on the Caprice. The vehicle passed the visual and tailpipe emissions portions of the test, but failed the "MIL/Check Engine Light" functional portion of the test. Based on an invoice, Austin believed that the carburetor had been removed from the engine, overhauled, and reinstalled. Austin inspected the carburetor and determined that it was not the carburetor he had documented earlier. According to Austin, the carburetor did not need to be replaced; the only service necessary to correct the defect in the carburetor was an adjustment of the throttle position sensor. Austin inspected the throttle position sensor and determined that it was not set to factory specification. The throttle position sensor had been adjusted to 1.0 volts at idle. Austin concluded that the vehicle should not have passed a smog check inspection and been issued a certificate of compliance because the service engine soon light was non-functional.

C. Undercover Operation No. 3

In September 2005, John Nelson (Nelson), an employee in one of the Bureau's documentation laboratories, inspected a 1988 Toyota pickup owned by the Bureau and performed a smog check inspection on the vehicle. The pickup passed the inspection.

Nelson then installed a defective #2 vacuum switch, a defect that would send an "improper wide open throttle signal to the computer, causing a rich fuel delivery." Nelson against tested the pickup and it failed the smog check inspection as a "gross polluter" due to excessive carbon monoxide and hydrocarbons.

On October 4, 2005, Jose Najar (Najar), a Bureau undercover operator, drove the pickup to Imports Performance and requested a smog check inspection. Rowe performed the inspection and informed Najar that the vehicle did not pass because it was discharging too much fuel out of the exhaust. Rowe told Najar that it would cost $65 to diagnose the problem. Najar left the vehicle at Imports Performance. Later that day, Najar spoke with Rowe who stated that the pickup's carburetor needed to be rebuilt and the mixture control solenoid needed to be replaced to enable the vehicle to pass a smog check inspection. The cost of the repairs would be $500. Najar authorized the repairs.

On October 5, 2005, Rowe called Najar, apparently after the rebuilt carburetor was installed and the mixture control solenoid was replaced, and informed him that the pickup still would not pass a smog test. Rowe stated that pickup's "mixture control unit" needed to be replaced. The prior $500 estimated cost of repair did not change. Najar authorized the repair.

On October 7, 2005, Rowe informed Najar that the pickup was a "gross polluter" and that he still was attempting to get the vehicle to pass a smog check inspection—the vehicle would pass the test at Imports Performance, but not at a "test-only" station. Later that day, Rowe informed Najar that the pickup had passed the smog check inspection. When Najar went to Imports Performance to pick up the vehicle, Rowe charged him an additional $60 to cover the cost of taking the pickup to a test-only station. Rowe gave Najar various documents including a vehicle inspection report from 16 Minute Smog with a certificate of compliance printed on it.

On October 14, 2005, Nelson inspected the pickup and determined that the defective #2 vacuum switch that he had installed was still in place. The carburetor had been removed, disassembled, and adjusted. The vacuum hose to the ignition distributor vacuum advance had been modified by cutting a notch in it, thereby causing a vacuum

leak. Nelson determined that the ignition timing had been adjusted to eight degrees before top dead center which was eight degrees out of factory specification. When Nelson had prepared the vehicle for the undercover operation, the engine ignition timing was at its factory specification of top dead center.

Nelson performed a smog check inspection on the pickup. The vehicle failed the test as a gross polluter due to excessive carbon monoxide and hydrocarbon emissions and the modified vacuum hose to the ignition distributor. The vehicle also failed the functional timing portion of the test because its engine ignition timing was advanced eight degrees from factory specification. Nelson then replaced the defective #2 vacuum switch and the modified vacuum hose, adjusted the engine ignition timing to its factory specification, and performed another smog check inspection. The pickup passed the inspection. According to Nelson, the only repair the pickup had needed to pass a smog check inspection was replacement of the #2 vacuum switch. The disassembly and adjustment of the carburetor was unnecessary. According to Nelson, with a defective #2 vacuum switch, modified vacuum hose, and engine ignition timing eight degrees out of factory specification the pickup could not have passed a smog check inspection that was performed properly.

II. Procedure

In March 2007, the Bureau filed an Accusation and Petition to Revoke Probation (Accusation) against petitioners. The Accusation sought a decision temporarily or permanently invalidating automotive repair dealer registration number AH 168479, issued to Vartan doing business as Imports Performance; revoking or suspending probationary smog check station license number RH 168479, issued to Vartan doing business as Imports Performance; revoking or suspending advanced emission specialist technician license number EA 142356, issued to Vartan; revoking or suspending advanced emission specialist technician license number EA 147729, issued to Rowe; and ordering petitioners to pay the Bureau the reasonable costs of its investigation and enforcement.

In November 2008, following eight days of administrative hearings, the administrative law judge filed his proposed decision, which was adopted as the decision of the Director of the Department of Consumer Affairs (Bureau's Decision) on November 25, 2008. Pursuant to the Bureau's Decision, the Accusation was dismissed with respect to Vartan's automotive repair dealer registration number AH 168479; Vartan's smog check station license number RH 168479 was revoked; the Accusation was dismissed with respect to Vartan's advanced emission specialist technician license number EA 142356; Rowe's advanced emission specialist technician license number EA 147729 was revoked, with the revocation stayed pending Rowe's completion of four years' probation; and Vartan, as owner of Imports Performance, and Rowe were ordered to reimburse the Bureau the amount of $39,366.40 for the Bureau's investigation and prosecution costs.

On December 29, 2008, petitioners filed a petition for writ of mandate or administrative mandamus (Superior Court Case No. BS118421) with respect to the Bureau's Decision. Petitioners contended that the Bureau applied the wrong standard of proof, the Bureau's Decision was not supported by its findings, and the Bureau's findings were not supported by the evidence. The trial court, the Honorable James C. Chalfant, granted petitioners' writ petition and remanded the matter to the Bureau. With respect to the Bureau's Decision, the writ of mandate directed the Bureau "(1) to set aside and vacate the findings and conclusions in the Decision that Petitioners committed violations with respect to the check engine light on the 1988 Chevrolet Caprice; (2) to set aside and vacate the findings and conclusions in the Decision that Petitioners committed violations with respect to the timing on the 1988 Toyota Pickup; (3) to set aside and vacate the costs and discipline sections set forth in the Decision; (4) to reconsider and reassess the costs and discipline in the Decision in light of this Court's Judgment and Ruling."

On December 21, 2009, the Director of the Department of Consumer Affairs issued the Bureau's Decision After Remand From Superior Court (Bureau's Decision After Remand). The Bureau's Decision After Remand complied with the trial court's writ of mandate, expressly excluding from its findings and conclusions any violations

based on the 1988 Chevrolet Caprice's check engine light or the 1988 Toyota pickup's engine ignition timing.

As for discipline, the Bureau's Decision After Remand noted that the total number of sustained violations by Imports Performance and Rowe had not changed even excluding the violations based on the Caprice's check engine light and the Toyota pickup's engine ignition timing allegations. Accordingly, the discipline imposed under the Bureau's Decision After Remand did not change. As relevant here, the Bureau's Decision After Remand revoked Vartan's probationary smog check station license number RH 168479, and revoked and stayed revocation of Rowe's advanced emission specialist technician license number EA 147729 pending Rowe's completion of four years' probation.

As for costs, the Bureau noted in its Decision After Remand, as it had in its earlier Decision, that the Bureau requested $39,366.40 for its investigation and prosecution of the case. That amount consisted of $7,525.90 for investigative services; $225 for undercover vehicle preparation, documentation, and operation; and $31,615.50 in Attorney General fees. According to the administrative law judge, those costs were undisputed and deemed just and proper. The Bureau's Decision After Remand again noted that not all of the allegations in the Accusation had been proven, but the administrative law judge had not made an offset for the unproven allegations because they were part of the overall investigation and the prosecution of the case, and no separable efforts were made in connection with such unproven allegations. The Bureau's Decision After Remand then noted that the total number of sustained violations by Imports Performance and Rowe had not changed, even excluding the violations based on the Caprice's check engine light and the Toyota pickup's engine ignition timing allegations. Nevertheless, "in light of the Superior Court's ruling," the Director of Consumer Affairs reduced cost recovery by $4,000 for a total recovery of $35,366.40.

On January 19, 2010, petitioners filed a petition for writ of mandate or administrative mandamus (Superior Court Case No. BS124752) with respect to the

Bureau's Decision After Remand.[3] Petitioners contended that the Bureau failed to comply with the trial court's prior writ of mandate, the Bureau failed to apply the proper standard of proof, the evidence did not support the alleged violations, and the discipline and costs imposed were unfair and excessive.

On August 26, 2010, the trial court, the Honorable David P. Yaffe, denied petitioners' writ petition. The trial court stated that the discipline imposed on Vartan's smog check station license probation and Rowe's advanced emission specialist technician license was based on petitioners' failure to correct defects the Bureau created in three undercover automobiles and the unnecessary repairs petitioners made to two of the vehicles. The trial court observed that Judge Chalfant's ruling on petitioners' prior writ petition vacated only two findings in the Bureau's Decision—the findings related to the check engine light in the Caprice and the engine ignition timing in the Toyota pickup—and remanded the matter to the Bureau to reconsider the penalties and costs imposed on petitioners in light of the vacated findings. The trial court found that the Bureau had complied with Judge Chalfant's judgment and writ of mandate. The Bureau had imposed a new decision that effectively stated that the penalties imposed would remain the same with the two findings vacated. In expressly rejecting petitioners' argument that the Bureau violated Judge Chalfant's judgment, the trial court concluded that the Bureau's Decision After Remand did not discipline petitioners with respect to the Caprice's check engine light or the engine ignition timing on the Toyota pickup and that the Decision After Remand disciplined petitioners for other violations with respect to those vehicles. The trial court rejected petitioners' remaining contentions as attempts to relitigate issues decided by Judge Chalfant in connection with petitioners' first writ petition.

On September 10, 2010, the trial court entered judgment denying petitioner's writ petition. On November 2, 2010, petitioners timely field their Notice of Appeal.

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[3] Petitioners originally filed the writ petition under the same Superior Court case number as their prior writ petition (Superior Court Case No. BS118421), but were ordered to file the new writ petition under a new case number.

DISCUSSION

I. Standards of Review

"'In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]' [Citation.]" (*Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1217.)

We review for abuse of discretion an administrative agency's revocation of a license. (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 691-692; *Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1343, 1347 ["'The propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency, and its decision may not be disturbed unless there has been a manifest abuse of discretion. [Citations.]' [Citation.]"].) "'Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed.' [Citations.] This rule is based on the rationale that 'the courts should pay great deference to the expertise of the administrative agency in determining the appropriate penalty to be imposed.' [Citation.]" (*Hughes v. Board of Architectural Examiners, supra,* 68 Cal.App.4th at p. 692.)

II. Standard of Proof

Petitioners contend that the Bureau improperly applied the preponderance of the evidence standard of proof in revoking and staying revocation of Rowe's advanced emission specialist technician license and in revoking Vartan's smog check station license probation. Petitioners contend that the proper standard of proof was clear and convincing evidence.

In their argument concerning the proper standard of proof, petitioners do not distinguish between the status of Rowe's advanced emission specialist technician license and the status of Vartan's smog check station license. At the relevant times, Rowe's

advanced emission specialist technician license was in good standing while Vartan's smog check station license was on probation. We conclude that the same preponderance of the evidence standard of proof applies to the revocation of Rowe's license and Vartan's license probation. We note that there is no indication in the record as to the standard of proof used by the Bureau. The parties assume that the Bureau used the preponderance of the evidence standard.

A. Revocation of Rowe's Advanced Emission Specialist Technician License

"Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115.) In determining the proper standard of proof to apply in administrative license revocation proceedings, courts have drawn a clear distinction between professional licenses such as those held by doctors (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856), lawyers (*Furman v. State Bar* (1938) 12 Cal.2d 212, 229), and real estate brokers (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457), and nonprofessional or occupational licenses such as those held by food processors (*San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894) and vehicle salespersons (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318-319.) Proceedings to revoke professional licenses apply the clear and convincing evidence standard of proof while proceedings to revoke nonprofessional or occupational licenses apply the preponderance of the evidence standard of proof.

The "sharp distinction between professional licenses, on the one hand, and . . . nonprofessional licenses, on the other, supports the distinction in the standards of proof applicable in proceedings to revoke these two different types of licenses. Because a professional license represents the licensee's fulfillment of extensive educational, training and testing requirements, the licensee has an extremely strong interest in retaining the license that he or she has expended so much effort in obtaining. It makes sense to require that a higher standard of proof be met in a proceeding to revoke or suspend such a license. The same cannot be said for a licensee's interest in retaining a [nonprofessional] license." (*San Benito Foods v. Veneman, supra,* 50 Cal.App.4th at p. 1894.)

Although an applicant for an advanced emission specialist technician license must complete certain coursework (Cal. Code Regs., tit. 16, § 3340.28, subd. (b)(3)) and pass an examination (Cal. Code Regs., tit. 16, § 3340.29), such requirements are not similar to the "extensive educational, training and testing requirements" necessary to obtain a professional license. (*San Benito Foods v. Veneman, supra,* 50 Cal.App.4th at p. 1894.) Accordingly, an advanced emission specialist technician license is a nonprofessional or occupational license and proceedings to revoke such a license are governed by the preponderance of evidence standard of proof.

Petitioners rely on *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602 for the proposition that the Bureau should have used the clear and convincing evidence standard of proof because that standard is used in actions to revoke a contractor's license and the requirements to obtain a contractor's license are comparable to or less stringent than those to obtain a "smog license." Petitioners' reliance is misplaced. Although the Supreme Court noted that the administrative law judge "issued a proposed decision finding 'clear and convincing evidence beyond a reasonable certainty' to sustain the charges" (*id.* at p. 605), the propriety of the administrative law judge's use of that standard of proof was not at issue in the case. Instead, the case concerned the proper interpretation of a statute under which the contractor was charged. (*Id.* at pp. 606-609.)

Petitioners rely on *Owen v. Sands* (2009) 176 Cal.App.4th 985 for the proposition that license disciplinary proceedings apply two different standard of proof—the preponderance of the evidence standard applies to citation proceedings and the clear and convincing evidence standard applies to suspension and revocation proceedings. Petitioners' reliance on this case is not justified. In *Owen v. Sands*, a licensed contractor challenged a citation he was issued concerning work he performed on a private residence. (*Id.* at pp. 988-989.) The issue on appeal was whether the clear and convincing evidence standard that courts had applied in certain license suspension and revocation proceedings (doctor, attorney, and real estate licenses) also applied in a citation proceeding. (*Id.* at p. 989.) The Court of Appeal held that the preponderance of the evidence standard applies in citation proceedings. (*Id.* at pp. 989-990.) The court did not hold that the clear and

convincing evidence standard applies to license suspension or revocation proceedings generally or to a proceeding to suspend or revoke a contractor's license specifically.

B. Revocation of Vartan's Smog Check Station License Probation

Although the standard of proof to revoke a professional license is clear and convincing evidence, the standard of proof to revoke the probation of a professional license is preponderance of the evidence. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1435, 1441 [revocation of a dentist's license probation].) Even if a smog check station license is a professional license, an assumption we do not accept,[4] a proceeding to revoke the probation of such a license is subject to the preponderance of the evidence standard of proof and not the clear and convincing evidence standard of proof. (*Ibid.*)

Petitioners argue that the clear and convincing evidence standard should apply to the revocation of Vartan's smog check station license because Imports Performance's liability could only have been based on Rowe's conduct and "the standard of proof for Rowe was clear and convincing evidence." Even if petitioners' vicarious liability theory is correct, and the standard of proof for revoking a smog check station license is the standard of proof used for revoking an advanced emission specialist technician license, petitioners' argument fails because, as we held above, the standard of proof for revoking Rowe's license was preponderance of the evidence.

III. Petitioners' Violations

Petitioners contends that 15 of the 18 violations that the Bureau found in its Decision After Remand were based on the undercover vehicles' inability to pass smog

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[4] Proceedings to revoke a license to operate a long term health care facility (Health & Saf. Code, § 1428, subd. (e)), to operate a substance abuse treatment facility (Health & Safe. Code, § 11834.37, subd. (b)), and to operate a child day care facility (Health & Saf. Code, § 1596.887, subd. (b)) all are subject to the preponderance of the evidence standard of proof.

check inspections. Petitioners contend that in finding these violations, the Bureau improperly considered the alleged violations concerning the Caprice's check engine light and the Toyota pickup's engine ignition timing despite Judge Chalfant's writ of mandate directing the Bureau to set aside and vacate its findings and conclusions with respect to those alleged defects. Petitioners contend that each of the undercover vehicles was able to receive a certificate of compliance and that petitioners properly repaired the undercover vehicles.

A. Corolla

1. Smog check

In the administrative proceedings, Rowe claimed that he adjusted the engine ignition timing on the Corolla to 11 degrees before top dead center, a position out of factory specification but within the Bureau's degree of tolerance. The Bureau found that Rowe adjusted the engine ignition timing to 15 degrees before top dead center, a position out of factory specification and outside of the Bureau's degree of tolerance. Petitioners contend that the Bureau improperly relied on the dismissed timing allegation concerning the Toyota pickup to find that Rowe improperly adjusted the engine ignition timing on the Corolla.

In paragraph 15 of the Decision After Remand, the Bureau found that Rowe adjusted the Corolla's engine ignition timing to 15 degrees before top dead center. Paragraph 15 stated, "The briefs contained considerable argument concerning whether Respondent Rowe, after replacing the TPS [throttle position sensor], adjusted the ignition timing to 11 degrees before top dead center (BTDC), which would have been a correct adjustment within factory specifications, or to 15 degrees BTDC, which would have been an incorrect adjustment. Respondent Rowe adjusted the ignition timing on September 15, 2005. The Bureau ran its final smog inspection on the vehicle on September 26, 2005. Although what actually occurred between those dates was not directly established by either party, the Bureau's reading of 15 degrees BTDC at the time of its final smog inspection is more persuasive because Bureau personnel tested the Corolla with two

separate timing lights, one of which was incapable of error except for being completely non-functional, and both of which were calibrated twice annually."

Having found that Rowe adjusted the Corolla's engine ignition timing to 15 degrees before top dead center, the Bureau noted that its finding was supported by the fact that a similar timing discrepancy occurred with the Toyota pickup three weeks later. Rowe was certain that he had adjusted the Toyota pickup's engine ignition timing to within factory specifications. The Decision After Remand found that such substantially similar facts permitted a reasonable inference that Rowe misadjusted the engine ignition timing on the Corolla.

The Bureau improperly referenced the vacated finding that petitioners committed a violation with respect to the adjustment of the Toyota pickup's engine ignition timing. Such reference, however, was harmless because the Decision After Remand independently had found that the Bureau established that Rowe adjusted the Corolla's engine ignition timing to 15 degrees before top dead center.

2. Repairs

a. Ignition timing

Petitioners contend that the Bureau erred in finding that Rowe adjusted the Corolla's engine ignition timing to 15 degrees before top dead center because he had 35 years of experience, a plethora of experience with Toyota vehicles, and the latest tools and equipment. Rowe also had never been disciplined, he was absolutely positive he set the timing to 11 degrees, and his "timing was consistent with the vehicles' emissions."

In sustaining an administrative body's action, a reviewing court determines whether the body's findings of fact are supported by substantial evidence. (See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514 (*Topanga*.) In making that determination, the reviewing court resolves reasonable doubts in favor of the administrative findings and decision. (*Ibid.*)

In his declaration filed in the administrative proceeding, Woods stated that he inspected the Corolla on September 26, 2005, and observed that the vehicle's engine

ignition timing was set at 15 degrees before top dead center. The Bureau accepted Woods's reading because he tested the Corolla with two separate timing lights, one of which was incapable of error except for being completely non-functional, and both of which were calibrated twice annually. Such evidence is sufficient to support the Bureau's finding that Rowe improperly adjusted the Corolla's engine ignition timing. (*Topanga, supra,* 11 Cal.3d at p. 514.)

b. Throttle position sensor

Rowe testified that he replaced the throttle position sensor because he believed it "probably [had] an internal problem." In his declaration, Woods stated that he tested the throttle position that Rowe removed from the Corolla and found it to be fully functional, internally clean, and without defects. Woods's statement in his declaration is substantial evidence that Rowe unnecessarily replaced the throttle position sensor. (*Topanga, supra,* 11 Cal.3d at p. 514.)

B. Caprice

1. Smog check

Petitioners contend that the Bureau improperly relied on the allegation that the Caprice could not pass a smog check inspection because it had a burned out check engine light in violation of Judge Chalfant's writ of mandate directing the Bureau to set aside and vacate its findings and conclusions with respect to that alleged defect. The Bureau did not rely on the check engine light allegation to find a violation.

Citing paragraph 37 of the Decision After Remand, petitioners contend that the Bureau "erroneously found, based on the check engine light, that 'No smog certificates should have been issued for this vehicle." Paragraph 37 provided, "On or about August 17, 2005, the Bureau performed another ASM Smog Check inspection on the 1988 Chevrolet Caprice. The vehicle failed the check engine light (MIL) functional portion of the test. No smog certificates should have issued for this vehicle. . . . [T]he TPS was not adjusted to factory specifications. The existing carburetor only need[ed] to be adjusted

which could have been done externally." Prior to paragraph 37, however, paragraph 18 of the Decision After Remand provided in relevant part, "[T]he following statement contained within paragraph 37, should not be incorporated as factual findings herein, since there is insufficient evidence to sustain such a finding: 'The vehicle failed the check engine light (MIL) functional portion of the test." Thus, the Bureau complied with Judge Chalfant's directive and did not consider the check engine light defect in finding a violation with respect to the Caprice.

2. Repairs

Before Aleman took the Caprice to Imports Performance, Austin disassembled and inspected the vehicle's carburetor. Austin then adjusted the throttle position sensor, an internal part of the carburetor, to a position out of factory specification thus causing the engine to "run rich" and the vehicle to fail the tailpipe emissions portion of a smog check inspection. After Rowe inspected the Caprice, he told Aleman that the vehicle's carburetor needed to be repaired at a cost of $450. When the Caprice was returned to Austin, he determined that Rowe had replaced the entire carburetor. In his declaration in the administrative proceeding, Austin stated that the entire carburetor did not need to be replaced; the only service necessary to correct the defect in the carburetor was an adjustment of the throttle position sensor.

Petitioners contend that there was a dispute over whether the proper repair to the carburetor was replacing the entire carburetor or merely adjusting the throttle position sensor. The Bureau failed to show, petitioners contend, that the proper repair was an adjustment of the throttle position sensor. Austin's statement in his declaration is substantial evidence that Rowe unnecessarily replaced the Caprice's entire carburetor and that the only repair necessary to correct the defect in the carburetor was an adjustment of the throttle position sensor. (*Topanga, supra,* 11 Cal.3d at p. 514.)

C. Toyota Pickup

1. Smog check

Citing paragraph 26 of the Decision After Remand, petitioners contend that the Bureau improperly relied on the adjustment of the Toyota pickup's engine ignition timing to find a violation. Paragraph 26 of the Decision After Remand stated that the Bureau established the truth of paragraph 50. Paragraph 50 provided, "On or about October 14, 2005, the Bureau performed another ASM Smog Check inspection on the 1988 Toyota Pickup. The vehicle failed the inspection as a gross polluter and the vehicle failed the functional timing portion of the test. No smog certificates should have issued for this vehicle. The carburetor did not have to be rebuilt and the defective #2 vacuum switch was still in place. The vacuum hose to the ignition distributor vacuum advance had been modified by cutting a notch in it causing a vacuum leak."

Notwithstanding paragraphs 26 and 50, paragraph 30 of the Decision After Remand makes clear that the Bureau did not sustain any allegations based on the alleged improper adjustment of the pickup's engine ignition timing. Paragraph 30 stated in relevant part, "[T]he Superior Court found insufficient evidence to show that it was Respondent Rowe, and not the other third party to whom Imports Performance sent the pickup to be smogged (16 Minute Smog), who was the one responsible for the altered timing on the Toyota pickup. Thus, there can be no finding that Respondent Rowe was the one responsible for incorrectly adjusting the timing on the Toyota pickup, and no violations can be sustained against Respondent Rowe the for altered timing on the Toyota pickup."

Petitioners also contend that the trial court erred in finding that the Bureau did not discipline them with respect to the vacated finding on the Toyota pickup's engine ignition timing but instead disciplined them with respect to other violations involving the pickup. The trial court did not err. The Bureau found petitioners' unnecessarily rebuilt the carburetor and failed to replace the defective #2 vacuum switch.

2. Repairs

Nelson rendered a #2 vacuum switch defective by cutting a notch measuring between .25 and .375 inches wide in a part of its wiring. That defect would send an "improper wide open throttle signal to the computer, causing a rich fuel delivery." In his declaration in the administrative proceeding, Nelson stated that he installed the defective #2 vacuum switch in the pickup. When the pickup was returned to Nelson, he determined that the defective #2 vacuum switch that he had installed was still in place.

Petitioners contend that the Bureau failed to prove that the #2 vacuum switch was defective because Nelson did not seal the ends of the cut wire and they showed that it was possible that if a single strand of the "stranded" wire made contact with the metal frame of the vacuum switch, a signal could have been generated. The Bureau found credible Nelson's testimony in the administrative proceeding that "no wire strands extended beyond the insulation that could have come into contact with the frame. Therefore, the likelihood of such occurrences was de minimis." Nelson's statement in his declaration and testimony are substantial evidence that the #2 vacuum switch was defective, thereby justifying discipline. (*Topanga, supra*, 11 Cal.3d at p. 514.)

IV. Discipline and Costs

Petitioners contend that the revocation of Vartan's smog check station license and Rowe's advanced emission specialist technician license and the order that Vartan and Rowe pay $35,366.40 for the Bureau's costs of investigating and prosecuting the case are "unfair and clearly excessive." The Bureau did not err in revoking Vartan's smog check station license probation or in revoking and staying revocation of Rowe's advanced emission specialist technician license, and properly ordered Vartan and Rowe to pay the Bureau the reasonable costs of its investigation and prosecution of the case.

A. Discipline

Vartan contends that the revocation of his smog check station license probation was excessive because Imports Performance had been an Automobile Association of

America (AAA) approved facility; a number of Imports Performance's customers testified as to the quality of his work and his honesty; he was active in his community; he had an insignificant record of prior discipline with the Bureau; and there was no finding that he had engaged in dishonest, fraudulent, or deceitful acts. Rowe contends that the revocation of his advanced emission specialist technician license was excessive because a number of Imports Performance's customers testified as to the quality of his work and his honesty; he had never before been the subject of Bureau discipline; he had "an outstanding resume, impeccable reputation, and extensive experience"; and there was no finding that he had engaged in dishonest, fraudulent, or deceitful acts.

In revoking Vartan's smog check station license probation, the Bureau considered Imports Performance's current and prior violations of the Motor Vehicle Inspection Program and the fact that Vartan had been disciplined twice before for violations of smog check inspection and testing and was "currently on probation for improper acts." The Bureau also took into account the high marks Imports Performance received from AAA in customer satisfaction. The Bureau ruled that revocation of Vartan's smog check station license would ensure the protection of the public's health, safety, and welfare. (See *San Benito Foods v. Veneman, supra,* 50 Cal.App.4th at p. 1893 ["'The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners.' [Citation.]"].) Moreover, the Bureau did not revoke Vartan's automotive repair dealer registration, thus allowing Vartan to continue to operate Imports Performance as a vehicle repair business, if not as a smog check inspection business. The Bureau's revocation of Vartan's license was not a manifest abuse of its discretion. (*Williamson v. Board of Medical Quality Assurance, supra,* 217 Cal.App.3d at p. 1347; *Hughes v. Board of Architectural Examiners, supra,* 68 Cal.App.4th at pp. 691-692.)

In reaching its decision with respect to Rowe's advanced emission specialist technician license, the Bureau noted that Rowe worked on all three undercover vehicles and the Bureau found that he committed 10 violations. The Bureau ruled, however, that

because Rowe had no prior history of discipline and had extensive Automotive Service Excellence certifications, the public's health, safety, and welfare would be protected by imposing a stayed revocation of Rowe's license and four years of probation. By staying revocation of Rowe's license, the Bureau enabled Rowe to continue to perform smog check inspections, if not at Imports Performance. Having properly considered the aggravating and mitigating factors in reaching its decision, the Bureau did not manifestly abuse its discretion in disciplining Rowe's license. (*Williamson v. Board of Medical Quality Assurance, supra,* 217 Cal.App.3d at p. 1347; *Hughes v. Board of Architectural Examiners, supra,* 68 Cal.App.4th at pp. 691-692.)

B. Costs

Under Business and Professions Code section 125.3 (section 125.3), subdivision (a),[5] an entity bringing a license or probation revocation proceeding may recover the reasonable costs of its investigation and prosecution of the case. A certified copy of the actual costs is prima facie evidence of the reasonable costs of investigating and

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[5] Section 125.3, subdivision (a) provides, in relevant part, "Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department [of consumer affairs] . . . , upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case."

prosecuting the case. (§ 125.3, subd. (c)[6].) The Bureau submitted a certified copy of its actual costs of investigating and prosecuting the case.[7]

Petitioners contend that the assessment of $35,366.40 for the Bureau's costs of investigating and prosecuting the case is "unfair and clearly" excessive because the Bureau did not apply a pro rata reduction of costs that took into account the charges and issues on which petitioners prevailed. In support of this contention, petitioners note that the Bureau sought to revoke four licenses and prevailed only as to two licenses. In addition, as to the two licenses that the Bureau revoked, the Bureau failed to prove all of the supporting allegations. Finally, petitioners prevailed as to two issues in their initial writ petition.

Section 125.3, subdivision (a) allows an entity bringing a license or probation revocation proceeding to recover from a license holder found to have committed a violation or violations the reasonable costs of its investigation and prosecution of the case. Section 125.3 does not require an administrative law judge to award costs on a pro rata basis taking into account the charges and issues on which the prosecuting entity did not prevail. Petitioners do not cite any authority in support of their pro rata award theory. In its Decision After Remand, the Bureau noted that not all of the allegations in the Accusation had been proven, but the administrative law judge had not made an offset for the unproven allegations because they were part of the overall investigation and the prosecution of the case, and no separable efforts were made in connection with the

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6 Section 125.3, subdivision (c) provides, "A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General."

7 The initial certified copy of actual costs consisted of $7,525.90 for investigative services; $225 for undercover vehicle preparation, documentation, and operation; and $27,823.50 in Attorney General fees for a total of $35,574.40. Thereafter, the Attorney General submitted a certified copy of its fees reflecting $32,879.50 in fees.

unproven allegations. Accordingly, the Bureau did not err in ordering Vartan and Rowe to pay the Bureau's reasonable costs of investigation and prosecution in the amount of $35,366.40.

DISPOSITION

The judgment is affirmed. The Bureau is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IMPORTS PERFORMANCE et al., Petitioners and Appellants, v. DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR, Respondent and Respondent.	B228544 (Los Angeles County Super. Ct. No. BS124752) ORDER MODIFYING OPINION AND GRANTING REQUEST FOR PARTIAL PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on November 10, 2011, be modified as follows:

1. This opinion, formerly unpublished, is now certified for publication with the exception of the **Background** and **Discussion, part III.**

2. On page 2, under Introduction, line 5, the sentence beginning with Respondent, the words "and respondent" should be deleted and the words **here and in the proceeding below,** inserted in their place.

3. On page 2, under Introduction, line 9, after the word probation, drop a footnote which reads as follows: **At the time of the investigation, Vartan's smog check station license was subject to probation.**

4. On page 2, on the last line of the second paragraph after the word "costs," add the words **for investigation and prosecution of the case.** Also omit the words "We affirm."

5. On page 2, after the second paragraph, insert a paragraph that reads as follows: **In the published portion of this opinion we determine that the Bureau correctly used the preponderance of the evidence standard of proof and did not err in imposing discipline and costs.**

6. On page 12, under **Standard of Proof**, the fourth line of the first paragraph after the word Petitioners, change the word "contend" to **argue.**

7. On page 13, second line, we omit the remainder of the paragraph beginning with the words "We conclude" and substitute the following: **Although there is no indication in the record as to the standard of proof used by the Bureau, the parties all assume that the Bureau used the preponderance of the evidence standard of proof. As discussed below, we conclude that the same preponderance of the evidence standard of proof applies to the revocation of Rowe's license and to the revocation of Vartan's license probation.**

8. On page 13, the first paragraph under subparagraph A, is revised to read as follows: **"Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115.) In determining the proper standard of proof to apply in administrative license revocation proceedings, courts have drawn a distinction between professional licenses such as those held by doctors (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856), lawyers (*Furman v. State Bar* (1938) 12 Cal.2d 212, 229), and real estate brokers (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457) on the one hand, and nonprofessional or occupational licenses such as those held by food processors (*San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894) and vehicle salespersons (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318-319), on the other hand. In proceedings to revoke professional licenses, the decision makers apply the clear and convincing evidence standard of proof, while in proceedings to revoke nonprofessional or occupational licenses, the decision makers apply the preponderance of the evidence standard of proof.**

9. On page 14, at the end of the fifth line after the citation to *San Benito Foods* drop a footnote that reads as follows: **A "professional" is "[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency." (Black's Law Dictionary (9th ed. 2004) 1329; see Garner, A Dictionary of Modern Legal Usage (2d. ed. 2001) 699 [the word profession "has been much debased of late . . . ."]**

10. The last paragraph on page 14 which ends at the top of page 15 is revised as follows**: Petitioners cite *Owen v. Sands* (2009) 176 Cal.App.4th 985 for the proposition that in license disciplinary proceedings two different standards of proof are applied—the preponderance of the evidence standard to citation proceedings and the clear and convincing evidence standard to suspension and revocation proceedings. Petitioners' reliance on this case is not justified. In *Owen v. Sands,* a licensed contractor challenged a citation he was issued concerning work he performed on a private residence. (*Id.* at pp. 988-989.) The issue on appeal was whether the clear and convincing evidence standard that courts said should be applied in certain license suspension and revocation proceedings (doctor, attorney, and real estate licenses) also applied in a citation proceeding. (*Id.* at p. 989.) The Court of Appeal held that the preponderance of the evidence standard applies in citation proceedings. (*Id.* at pp. 989-990.) The court did not hold that the clear and convincing evidence standard applies to license suspension or revocation proceedings generally or to a proceeding to suspend or revoke a contractor's license specifically.**

11. On page 15, first paragraph under subparagraph B, second line, the word "probation" should be italicized.

12. On page 15, second paragraph under subparagraph B, on the fourth line the sentence beginning with the word "Even" should be revised as follows**: Even if petitioners' vicarious liability theory is correct and the standard of proof for revoking a smog check station license is the standard of proof used for revoking Rowe's advanced emission specialist technician license, petitioners' argument fails**

because, as discussed above, the standard of proof for revoking Rowe's license is preponderance of the evidence.

13. The footnote at the bottom of page 15, fourth line after the word "are" the word **explicitly** should be added.

14. On page 21, the first paragraph under Section IV should be revised as follows: **Petitioners contend that the revocation of Vartan's smog check station license probation, the revocation and stay of revocation of Rowe's advanced emission specialist technician license, and the order that Vartan and Rowe pay $35,366.40 for the Bureau's costs of investigating and prosecuting the case are "unfair and clearly excessive." Because the trial court did not err in upholding the Bureau's revocation of Vartan's smog check station license probation or in revoking and staying revocation of Rowe's advanced emission specialist technician license, the Bureau order that Vartan and Rowe pay the Bureau the reasonable costs of its investigation and prosecution of the case was justified.**

15. On page 22, first full paragraph, 12th line down, change the name "Vartan" the second time it is mentioned to **him**.

16. On page 22, the second to the last line on the page, after the word "vehicles" add a comma.

17. On page 24, at the end of the first full paragraph, after the word "petition," add the following: **, in which the trial court had set aside certain findings and conclusions and remanded the matter to the Bureau.**

18. On page 24, on the last line of the page, before the footnotes, after the word "no," add the words **distinct and.**

There is no change in judgment.

MOSK, J. KRIEGLER, J.