NO. 314944

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DIANA SHELBY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

REPLY BRIEF OF APPELLANT

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I. REPLY TO RESPONDENT'S "INTRODUCTION"

The Department's argument fails because the facts of the occurrence are as stated in pages 7 - 13 of Brief of Appellant. Although expert opinions are called facts, expert opinions are not the same kind of facts as the facts of the occurrence. Expert opinions that are not based upon the facts of the occurrence are invalid.

The Brief of Respondent does not present any real basis to question that the facts of the occurrence are as stated at pages 7 - 13 of Brief of Appellant. Instead, the Department presents a combination of general statements, false claims, and emotionalism in an attempt to obscure the facts of the occurrence.

The emotionalism begins in the "Introduction" of Brief of Appellant with the false claim, "Shelby...shows no concern for the harm caused patient." The Department gives no citation to the record to support that false claim because there is nothing in the record to support it.

II. REPLY TO RESPONDENT'S "STATEMENT OF THE CASE"

Department's Statement of the Case is not significant for what it does contain, but it is significant for what it does not contain. Most of what the Department said in its "Statement of the Case" is undisputed background information.

The Department's assertion that Charron and Vize are "highly-qualified" is not properly part of Statement of the Case because that is argument. However, it is

a fact that the qualifications of a dentist far surpass the qualifications of a denturist. Thus, the qualifications of Dr. Shannon far surpass the qualifications of Charron and Vize.

The Department repeatedly cites the "Findings of Fact, Conclusions of Law, and Final Order" as if the statements in it provide support for it. The Department argues that language in the Final Order supports the Final Order by stating, "The finding resulted from tooth falling out of the denture; misalignment of teeth; fracturing of the denture leading to harmful bacteria formation; and Ms. Shelby's failure to appropriately address the problems," then citing the Final Order (CP 389 - 401) as if the Final Order provided a factual basis for that assertion (Brief of Respondent, p. 3). The Final Order cannot be the substantial evidence to sustain the Final Order.

The significance of the Department's "Statement of the Case" is in what it did not contain. The Department has not disputed that the facts of the occurrence are as stated by Shelby in pages 7 - 13 of Brief of Appellant. The Department has not disputed that the word "when" in Finding of Fact 1.21 refers to the date of October 30 or later, as explained in pages 12 - 13 of Brief of Appellant.

Likewise, the Department's "Statement of the Case" contains no disagreement with appellant's "Statement of the Case" regarding the testimony of Charron, Vize, Shelby, and Dr. Shannon. However, the Department did attempt to

refute Shelby's "Statement of the Case" on those four witnesses in the "Argument" section of Brief of Respondent. Shelby will address the Department's assertions on these four witnesses in her reply to the Department's "Argument" section of Brief of Respondent.

III. REPLY TO RESPONDENT'S "ISSUES"

Shelby re-asserts that the issues are as stated by her on page 6 of Brief of Appellant.

IV. REPLY TO RESPONDENT'S "STANDARD OF REVIEW"

Shelby agrees that an order must be overturned when it is not supported by evidence that is substantial when viewed in light of the whole record before the court. However, the "substantial evidence" is different when the burden of proof is preponderance of the evidence than when the burden of proof is clear and convincing evidence, as argued at pages 29 - 34 of Brief of Appellant. The Department has not disputed Shelby's argument regarding the standard of review contained in Brief of Appellant at pages 29 - 34.

However, the Department now argues for the first time that the Health Law Judge committed error by deciding that the standard of proof in this case was clear and convincing evidence. The Department did not make that argument in the administrative proceeding nor in Superior Court.

RAP 2.5 indicates that generally arguments raised for the first time on appeal

will not be considered by the appellate court. The pertinent portions of RAP 2.5 provide as follows:

> **(a) Errors raised for the first time on review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a Constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented in the trial court if the record has been sufficiently developed to fairly consider the ground...

The Department did not discuss in its brief the problem raised by the fact that its argument regarding burden of proof is raised for the first time in the Court of Appeals. However, RAP 2.5 says that the appellate court will consider an argument raised for the first time on appeal as a ground for affirming the trial court, if the record has been sufficiently developed to fairly consider the ground.

This court should not consider this argument because the record has not been sufficiently developed to fairly consider it. This brief contains additional discussion of this issue in reply to the Department's "Argument" section of its brief.

Thus, the standard of review is whether there is sufficient "quantum of proof" to support the findings of fact of the Health Law Judge under the "highly probable" test that applies when the burden of proof is clear and convincing evidence, as explained at pages 29 - 34 of Brief of Appellant.

V. REPLY TO RESPONDENT'S "ARGUMENT"

A. Reply to Respondent's Argument on Burden of Proof.

Hardee v. DSHS, 172 Wn.2d 1, 256 P.3d 339 (2011), decided that the burden of proof for a disciplinary action against a daycare provider is preponderance of the evidence. Moreover, by overruling *Ongom v. Dep't of Health*, 159 Wn.2d 132, 148 P.2d 1029 (2006), the *Hardee* decision also decided that preponderance of the evidence is the standard of proof when the Department takes action to revoke a nursing assistant's registration. However, the *Hardee* decision approved opinions that decided that the burden of proof remains clear and convincing evidence when the Department seeks to punish a doctor, an insurance agent, or an engineer. *Hardee*, 172 Wn.2d at 9.

Hardee left open the question of what the burden of proof will be when action is taken against licensees other than a child care facility, nursing assistant, doctor, insurance agent, or engineer. Thus, the Department's assertion that *Hardee* provides that the burden of proof for an action against a denturist will be preponderance of the evidence is not necessarily correct.

If this court reaches the question of what the appropriate burden of proof is for an action against a denturist, this court must consider the factors that were listed in *Hardee*, at 172 Wn.2d 10, as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through

> the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.
> *Hardee*, 172 Wn. 2d at 10.

It is because of the necessity of applying those standards that this court should refuse to consider the Department's argument about burden of proof because it is raised for the first time in this court. There is nothing in the record to provide a basis to decide how to apply to this case the standards that the Supreme Court set forth in the *Hardee* opinion.

If the Department would have raised this argument at the administrative level, then Shelby would have had the opportunity to present evidence regarding how much investment of time and money is necessary to obtain a denturist's license. No such evidence was presented because the Department agreed at the administrative level that the burden of proof was clear and convincing evidence. It would be unfair for this court to release the Department from its agreement.

If this court decides to consider the Department's argument regarding burden of proof, then this court should rule in favor of Shelby on this issue. The reason is because the Department has the burden of convincing this court that the Health Law Judge committed error. The record does not contain anything to show whether a denturist's license is more similar to the license of an insurance agent, engineer, or doctor or more similar to the license of a health care facility or a nursing assistant.

B. Reply to Respondent's Argument that Substantial Evidence Supports the Decision of the Health Law Judge.

Shelby believes that this court would commit error if this court uses the normal "substantial evidence" standard of review that is utilized when the burden of proof is preponderance of the evidence. Shelby also asserts that the evidence is not sufficient to support the decision of the Health Law Judge even under that less stringent standard of review.

The Department has attempted to support the decision of the Health Law Judge by citing excerpts of testimony out of context. In doing so, the Department attempts to distract this court from the foundational legal principles that apply to analyzing the evidence.

First, the evidence must be considered as a whole. Citing RCW 34.05.570(3)(e), the Department admits that an order will be overturned when it "is not supported by evidence that is substantial when viewed in light of the whole record before the court." See page 4 of Brief of Respondent. Thus, the excerpts of testimony that the Department cites are not sufficient to uphold the decision of the Health Law Judge. Instead, the record, viewed as a whole, must provide substantial evidence in order to uphold that decision.

Second, the Department has not refuted several of the arguments in Brief of Appellant. These include the following: (1) absence of a finding of fact equals an

adverse finding on that issue; (2) findings of facts must be adequate to support the judgment; (3) an expert opinion must be based upon the facts of the occurrence in order to be valid. As a corollary, any expert opinion that is not based on the facts of the occurrence cannot constitute substantial evidence.

C. Discussion of the False Claims in Brief of Respondent.

1. False claim that Shelby was responsible for the patient's continued use of the temporary denture after it began to wear out. The only sources of evidence for the facts of the occurrence are the patient's testimony, Shelby's testimony, and Shelby's treatment records. Any assertion as to the facts of the occurrence must be supported by a citation to one of those three sources in order to be valid. Page 8 of Brief of Appellant stated as follows:

> At the appointment to fix the broken tooth on October 30, Shelby told Patient A to replace the temporary denture with a permanent denture or have the temporary denture relined and Patient A understood these instructions (CP 532, 617, 683, 806).
>
> There is no evidence that Shelby instructed Patient A to continue using the temporary denture after October 30. The testimony of Patient A shows that Shelby did not give such an instruction. Patient A testified as follows in her deposition:

Then, the testimony of the patient, first at her deposition, then again at the hearing, pertaining to this issue, is set forth verbatim on pages 9 - 10 of Brief of Appellant. The Brief of Respondent did not attempt to refute this evidence in its Statement of the Case, but it asserted in the Argument section that Shelby was

responsible for the fact that the temporary denture was not replaced when it should have been, as follows:

a. "Ms. Shelby allowed the patient to continue using the denture until the patient left her care in December 2007." (Brief of Respondent, p. 16). The Department did not cite any reference to the record to support that statement. There is nothing in the patient's testimony, Shelby's testimony, or Shelby's records to support that statement. On the contrary, all of the evidence from those three sources on this issue, taken as a whole, can lead only to the conclusion that Shelby instructed the patient beginning on October 30, 2007, to replace the temporary denture with a permanent denture (CP 532, 617, 683, 806). Moreover, Shelby repeated the instruction at least twice after October 30. First, she sent a reline postcard on November 8 (CP 806, line 2; CP 134, entry of 11/8/07). Second, Shelby gave this instruction at the appointment of November 27, 2007 (CP 806, lines 13 - 14; CP 134, entry of 11/27/07).

b. "Yet, in September, Ms. Shelby did not offer to do anything until the end of November (CP at 806). Ms. Shelby cannot defend a long delay..." (Brief of Respondent, p. 18.) CP 806 does not contain any such statement. Shelby's treatment record for September 18, 2007, does not contain any such statement (CP 133).

c. "Ms. Shelby allowed the defective temporary denture to remain in use far too long..." (Brief of Respondent, p. 21). The Department makes no citation to the

record for this falsehood. The patient did not have any significant problems with this denture until approximately December 4, 2007 (CP 533 - 534, 134). This was more than a month after Shelby had begun on October 30 to tell the patient to replace the temporary denture (CP 532, 617, 683, 806). There was no testimony that the standard of care required Shelby to instruct the patient to replace the temporary denture before October 30.

2. False claim that Shelby violated the standard of care by offering the patient the option of relining the temporary denture. (Brief of Respondent, pp. 18 - 19). This false claim has two components. First, the Department denies the undisputed fact that Shelby offered this treatment option only in the event that the patient could not afford to pay for a new denture. Finding of Fact 1.19 stated as follows:

> In November 2007, the Respondent offered two prices to Patient A to construct a permanent denture: 1) Reline the temporary denture into a permanent denture; or 2) construct a new permanent denture. The Respondent offered a less expensive price for the reline option. The Respondent offered the reline option due to Patient A's financial situation. (Emphasis added)

The Department did not challenge Finding of Fact 1.19. The Health Law Judge found that Shelby offered the reline option only because the patient did not choose to pay for a new denture. The reason why the Health Law Judge so found is because the evidence on this point was undisputed. At CP 805, lines 15 - 17, Shelby so testified.

The Department asserted, in effect, that Finding of Fact 1.19 is erroneous

based upon Shelby's testimony, at CP 806, lines 17 - 19, that Shelby "had no idea that [the patient] had money problems." This attempt to challenge Finding of Fact 1.19 fails because Shelby's lack of knowledge regarding the patient's "money problems" does not change the fact that Shelby offered the relining option only in the event that the patient could not afford the new denture.

The second part of this false claim is the Department's false assertion that there is testimony that Shelby's offering of the relining option, as an alternative if the patient could not afford a new denture, was a violation of the standard of care. This point was covered in detail in Brief of Appellant on pages 15 - 16 with respect to Charron, citing CP 694 - 695. The Department did not attempt to contradict the explanation that was given in Brief of Appellant at pages 15 - 16 of Charron's testimony on this issue. Instead, the Department three times cited the findings of fact and one time cited the Superior Court's Memorandum Decision as if those documents were evidence (Brief of Respondent, p. 16).

I did not find any testimony of Vize on this issue. In summary, there is no evidence that Shelby violated the standard of care by offering the relining option, given the fact that this option was only in the event that the patient could not afford a permanent denture.

3. False claim, "At the hearing, the patient testified that in September, October, and November 2007, five teeth popped out (CP 567 - 568)." (Brief of

Respondent, p. 10). CP 567 - 568 does not support this false claim. It is not testimony. It is part of the Complaint Form. Moreover, CP 567 - 568 does not say what the Department claims that it says, because it does not give any date for when "3 more teeth come out of the denture". Third, the Department is attempting to obfuscate the fact that the patient admitted in her testimony that her statement in the complaint form contained errors.

Testimony regarding the patient's errors in her complaint form is contained throughout her cross-examinations by Mr. Rettig at CP 517 - 544 and CP 611 - 624. Because the patient admitted that her complaint form contained errors, it was misleading for the Department to cite the complaint form without explaining that it contains errors.

There is no doubt that one tooth came off of the denture approximately on September 18. There is no doubt that one tooth came off of the denture approximately on October 30. The patient claims that three more teeth came off of the denture "around the end of December" (CP 603, lines 4 - 5). That is not five teeth coming off in September, October, and November.

4. False claim, "Ms. Shelby admitted that teeth will not pop out when 'put in correctly' (CP at 804)". (Brief of Respondent, p. 11). Shelby did not make any such statement at CP 804. To the contrary, on page 804, Shelby testified that the teeth were installed correctly. Since Shelby knew that teeth came out of this denture,

it is clear that Shelby was testifying, in effect, that teeth can come out of a denture even if it is made correctly. Shelby denied what the Department said she admitted.

5. False claim, "He [Dr. Shannon] has no experience in making dentures..." (Brief of Respondent, p. 12). Brief of Appellant, page 27, gives the citation to CP 455 - 459 regarding Dr. Shannon's training and experience with the manufacture of dentures, including his experience in doing it himself. CP 720 also has some discussion of Dr. Shannon's experience, including his statement, "I used to have to do all of the components of the denture and I had my own commercial lab." Dr. Shannon was involved with fitting approximately 40 dentures in the past year before he testified, which would be typical for him (CP 482).

As a dentist, Dr. Shannon has the responsibility of supervising denturists who make dentures at his direction (CP 459), in the same way that a doctor supervises a nurse or a lawyer supervises a legal secretary. It is absurd for the Department to suggest that a dentist lacks knowledge about how to make dentures. Certainly, neither Charron nor Vize asserted this. The record is clear that Dr. Shannon is fully knowledgeable about the manufacture of dentures.

6. False claim, "He [Dr. Shannon] admitted that tooth loss 'usually' should be preventable throughout the use of a temporary denture. CP at 717." (Brief of Respondent, p.12). At CP 717, Dr. Shannon used the word "usually" only once, when he testified as follows:

> "Teeth can pop out because they're just - it's not made in the strength and to the level that a permanent denture would be. So, it can happen, but usually they can be replaced without too big of an issue and can be maintained through the time that they're used as a temporary denture."

Clearly, Dr. Shannon testified that teeth can pop out of a temporary denture that has been properly constructed (CP 716, line 3). Clearly, Dr. Shannon has testified that a tooth that has popped off of a denture "usually...can be replaced without too big of an issue and can be maintained through the time that they're used as a temporary denture." (CP 717). The Department misrepresented Dr. Shannon's testimony.

7. False claims: (1) "This action was criticized by her own expert, Dr. Shannon, who testified that the denture should have been replaced in September. CP at 722." (Brief of Respondent, p. 16). (2) "Her expert, Dr. Shannon, testified that the denture should have been replaced at that point [September], in order to avoid fracturing that promoted harmful bacteria growth (CP 722, 724)." (Brief of Respondent, p. 18). At CP 722, Dr. Shannon testified that the useful life of this temporary denture would end in "October or September". It is a misrepresentation to claim that Dr. Shannon testified "September", when he actually testified "September or October". Moreover, this misrepresentation is even worse when Dr. Shannon's testimony on this issue is taken as a whole.

This line of questions continued to the next page. At CP 723, line 11, Dr.

Shannon testified that a permanent denture should have been installed in October. At that point, Dr. Shannon's previous testimony of "September or October" was amended to "October".

Considering Dr. Shannon's testimony as a whole, the opinion that Dr. Shannon expressed regarding when the temporary denture should have been replaced is best characterized as "approximately October". This is partly because, at CP 718, Dr. Shannon said, "Eight months would be the outer limit" in answer to a question about the normal useful life of a temporary denture.

Moreover, Dr. Shannon testified that Shelby complied with the standard of care in all aspects of her treatment of this patient (CP 469 - 470, 716). Dr. Shannon gave that opinion with knowledge of Shelby's treatment records (CP 721) and the patient's deposition (CP 465). Taking Dr. Shannon's testimony as a whole, Dr. Shannon did not criticize Shelby in any way. The Department's claim that Dr. Shannon criticized Shelby's treatment is a misrepresentation of Dr. Shannon's testimony.

8. False claim, "September and October tooth loss was within six months of placement of the temporary denture." (Brief of Respondent, p. 12). The temporary denture was placed in the patient's mouth on April 17, 2007 (CP 793). One tooth, not "teeth", came off five months later on September 18, but there was no testimony that the September 18 occurrence constituted unprofessional conduct. "Teeth" had

not come off of the denture until the second tooth came off of the denture in the occurrence of October 30, 2007, which was more than six months after placement of the temporary denture. Likewise, there was no testimony that the occurrence of October 30 constituted unprofessional conduct by Shelby.

9. False claim, "Yet, in September, Ms. Shelby did not offer to do anything until the end of November. CP at 806." (Brief of Respondent, p. 18). Even if Shelby's testimony on CP 806 is taken out of context, still that testimony was misrepresented by the Department. Incidentally, if the patient would have replaced the temporary denture at the end of November, this would have been prior to any fractures of the denture.

The testimony on CP 806 shows that Shelby sent a reline postcard on November 8 (CP 806, lines 1 - 2) and that the patient "was ready for a reline" and "we could have started anytime thereafter" on October 30, 2007 (CP 806, lines 3 - 8). Moreover, Brief of Appellant, at page 8, stated as follows:

> At the appointment to fix the broken tooth on October 30, Shelby told Patient A to replace the temporary denture with a permanent denture or have the temporary denture relined and Patient A understood these instructions (CP 532, 617, 683, 806).

The Department offered no references to the record to refute this fact. Then, continuing at page 8 of Brief of Appellant, Shelby asserts, "There is no evidence that Shelby instructed Patient A to continue using the temporary denture after October 30." Shelby then quotes testimony from the patient on pages 9 - 10 on this issue.

Brief of Appellant asserted that there was no testimony that the standard of care required Shelby to give the patient a free denture. The Department did not dispute that assertion.

10. False claim, "The patient...endured conditions that promoted bacteria growth, leading to a candida infection and endangering her health." (Brief of Respondent, p. 20). The Department did not cite the record to support this statement. At CP 822, Mr. Rettig objected to an attempt by Vize to make this diagnosis and the Health Law Judge sustained that objection. Even if the record contains any such testimony, it is insufficient to support this allegation for at least the following reasons:

First, denturists are not qualified to make any medical diagnosis (CP 696). Second, even a doctor cannot diagnose candida without having a report from a medical laboratory that shows the results of testing a specimen from the patient (CP 724). Third, the Health Law Judge did not enter any finding of fact that there was a candida infection. Moreover, the Health Law Judge sustained an objection to such testimony by Vize (CP 822). Thus, if there was any factual issue regarding candida, the judge found against the Department on this issue.

Because the patient was not referred to a doctor, it is wrong for the Department to assert that the patient's health was in danger. If the patient's health would have been in danger, Vize would have committed unprofessional conduct by

failing to refer her to a doctor.

11. False claim that the patient "struggled with her denture for about eight months". (Brief of Respondent, p. 23). The Department did not cite the record to support this claim. It was undisputed that there were no problems with this denture from its installation on April 17 until September 18. See the facts that were explained in Brief of Appellant at pages 7 - 12.

On September 18, there was an occurrence when a tooth fell off the denture and was replaced by Shelby at no cost. This happened again on October 30. These two isolated occurrences cannot properly be termed "struggling with the denture".

At the patient's appointment with Shelby on November 27, 2007, the treatment record does not indicate that the denture had any cracks (CP 134). Shelby's testimony about this appointment does not indicate that the denture had any cracks (CP 806).

CP 532 - 536 contains testimony from the patient regarding when the significant problems started with the denture. In summary, the patient testified that the cracks in the denture started approximately December 4, 2007 (CP 532 - 533).

The lack of testimony from the patient of having any significant problems with the denture is consistent with the fact that the patient did not make any appointments with Shelby between June 21 and November 27, except for the two appointments for the two occurrences when a tooth popped off the denture.

Because the patient did not obey Shelby's instruction to replace the temporary denture, the patient began to "struggle" with it approximately in early December. This "struggle" then lasted until the patient obeyed Shelby's instruction. She finally did obey that instruction in January.

12. False claim, "Ms. Shelby's own expert, Dr. Shannon, testified that Ms. Shelby should have monitored the occlusions. CP at 722." (Brief of Respondent, p. 13). Every claim by the Department that Dr. Shannon criticized Shelby's treatment of the patient is false. Dr. Shannon testified that Shelby complied with the standard of care (CP 345, pp. 19 - 20; CP 469 - 470; CP 716; CP 719).

At CP 722, Dr. Shannon said that one of the things that a denturist should do is monitor occlusion while the patient is using a temporary denture. Combining Dr. Shannon's opinions that Shelby complied with the standard of care and that the standard of care requires monitoring occlusions, the conclusion is that Dr. Shannon thought that Shelby did monitor the patient's occlusions adequately.

The Department's assertion that Dr. Shannon said that Shelby "should have monitored the occlusions" is false. The truth is that Dr. Shannon testified that Shelby did monitor the patient's occlusions, taking Dr. Shannon's testimony as a whole.

D. Reply to Respondent's Argument on Finding of Fact 1.18.

The last sentence of Finding of Fact 1.18 (CP 394) says that the cause of the teeth falling out of the denture was improper construction. Regardless of which

standard of review is applied, Brief of Appellant explains why there is no substantial evidence to support the last sentence of Finding of Fact 1.18. See Brief of Appellant, pages 13 - 18, 20 - 23, and 41.

The issue of teeth coming out of the denture consisted of three different occurrences. Occurrence number one was when tooth #11 broke off the denture on September 18, then Shelby replaced it without charge (CP 133). Occurrence number two was when tooth #8 came off the denture on October 30, then Shelby replaced it without charge (CP 602, 133). Occurrence number three was when teeth #3, #4, and #9 came off the denture "sometime in late December" (CP 603).

Brief of Appellant explained why the record does not contain substantial evidence that any of these three occurrences constituted unprofessional conduct by Shelby. Brief of Respondent does not contain any references to testimony of the patient, testimony of Shelby, or Shelby's treatment records to refute what the Brief of Appellant said on these occurrences.

Instead, the Department relied on testimony that generally teeth do not fall off of a denture (Brief of Respondent, p. 10). Generalizations are insufficient to prove unprofessional conduct. No expert testified that unprofessional conduct is automatically proven by a tooth falling off of a denture.

The Department also relied on testimony as to possible reasons why teeth can fall off of a denture (Brief of Respondent, pp. 10 - 11). Testimony as to possibilities

is not substantial evidence.

The Department also relies upon false claims (1) "at the hearing, the patient testified that in September, October, and November 2007, five teeth popped out"; (2) "Ms. Shelby admitted that teeth will not pop out when 'put in correctly'"; (3) "He [Dr. Shannon] admitted that tooth loss 'usually' should be preventable through the use of a temporary denture"; (4) "This action was criticized by her own expert, Dr. Shannon, who testified that the denture should have been replaced in September"; (5) "September and October tooth loss was within six months of placement of the temporary denture"; (6) "Yet, in September, Ms. Shelby did not offer to do anything until the end of November"; and (7) "He [Dr. Shannon] has no experience in making dentures".

The Department also relies on testimony by Vize at CP 742 to the effect that Vize claimed that he could determine from looking at the worn out denture that it was not manufactured correctly. That testimony is invalid because Vize did not base his testimony upon the facts of the occurrence. Vize incorrectly assumed that the denture was intended to be permanent (CP 734). Vize never showed any awareness that this denture performed adequately for longer than its useful life of six months.

Because the denture performed adequately for longer than its intended useful life, it is impossible that it could have been "too porous". Instead, Vize incorrectly assumed that this denture was intended to be permanent (CP 734). Vize also

incorrectly assumed that the performance of the denture was inadequate for the entire time that the patient used it. That incorrect assumption is shown repeatedly throughout his testimony at CP 734 - 770.

The Department also relied upon its claim that Shelby "acknowledged a possible manufacturing defect in her laboratory" at CP 817. Shelby's testimony at page 817 - 818 regarding this issue is only a general discussion of possibilities. Shelby did not make any admission of unprofessional conduct. On the contrary, Shelby testified that she complied with the standard of care.

Brief of Respondent, p. 11, makes the argument, "Ms. Shelby did not rebut Mr. Vize's testimony." Nothing could be further from the truth. Shelby's testimony, taken as a whole, clearly rejects every opinion of Vize that was negative to Shelby. The Department attempts to mislead by focusing attention only at CP 832 - 835, as if it were necessary for Shelby to again reject all of Vize' opinions in that portion of her testimony. It is obvious that her testimony on those pages was limited to a particular issue.

The last sentence of Finding of Fact 1.18 is error. The reasons why this finding of fact cannot stand were summarized in Brief of Appellant, page 41.

E. Reply to Respondent's Argument on Finding of Fact 1.16.

Finding of Fact 1.16 is not supported by substantial evidence. Shelby explained in Brief of Appellant, at pages 13 - 15, that Charron testified that there was

no unprofessional conduct by Shelby regarding the original manufacture of the denture. The Department does not attempt to dispute this.

The only expert who testified that the denture, as constructed, did not comply with the standard of care was Vize. This testimony by Vize was invalid because it was not based upon the facts of the occurrence. Moreover, it appears that Vize ended up retracting that testimony. This was explained by Shelby in Brief of Appellant at pages 20 - 26.

The Department says that Vize' letter (CP 195) said that the patient had severe malocclusion, but actually Vize' letter said that the denture "was in severe malocclusion". If the denture "was in severe malocclusion" in December, it was because it had worn out.

Shelby cannot rightfully be blamed for the patient's continued use of the worn out denture at the time of Vize' examination of December 4, 2007, because Shelby had repeatedly told the patient to replace the temporary denture beginning October 30, 2007. Vize blames Shelby based upon his false assumption that Shelby had instructed the patient to continue using the worn out temporary denture (CP 747 - 748).

The Department relies on Vize' testimony at CP 736 - 739 and 761 - 762. This testimony elaborates Vize' criticism of Shelby based upon the false premise that Shelby was responsible for the fact that the patient was continuing to use the

temporary denture (CP 747 - 748). These opinions are invalid because they are not based upon the facts of the occurrence.

The Department relies upon Vize' opinion that Shelby should have done something that Vize called a "jump" procedure. This opinion of Vize has the same problem that underlies all of Vize' testimony that is negative toward Shelby - based on incorrect assumptions about the facts of the occurrence. Moreover, the Health Law Judge rejected Vize' opinion that the standard of care required a "jump" procedure by failing to enter a finding of fact on it.

If Vize would have been aware of the facts of the occurrence, then Vize would have realized that the patient had no significant problems with this temporary denture until she had been wearing it more than seven months. If Vize had attempted to express the opinion that the denture was not manufactured in accordance with the standard of care in light of the facts of the occurrence, Vize would have been required to explain how a temporary denture not manufactured in accordance with the standard of care could perform adequately for more than seven months. The fact that Vize made no attempt to explain this is because Vize' testimony against Shelby was based upon false assumptions.

In summary, Charron did not testify that there was a violation of the standard of care regarding the original manufacture of the denture. Vize did so testify, but that testimony is invalid because it was based upon false assumptions. For these reasons,

Finding of Fact 1.16 is error.

There is no evidence in the record to support the second sentence of Finding of Fact 1.16. It is contrary to the facts of the occurrence. The patient did not have any significant problem with the denture until after the patient disobeyed Shelby's instruction to replace it.

F. Reply to Respondent's Arguments on Findings of Fact 1.20 and 1.12.

I made a mistake in the Brief of Appellant by referring to Finding of Fact 1.2 as Finding of Fact 1.12. That mistake is found both at page 3 and at page 38 of Brief of Appellant. Those references to Finding of Fact 1.12 were intended to be references to Finding of Fact 1.2.

Shelby does not disagree with Finding of Fact 1.12, but it contains only general statements about dentures. It does not provide a basis to sustain any of the conclusions of law or the Final Order. Finding of Fact 1.12 does not say that a denturist is automatically guilty of unprofessional conduct if a denture fractures or loses any teeth. If Finding of Fact 1.12 did say that, then it would not be supported by substantial evidence. The remainder of Finding of Fact 1.12 pertains to several different possibilities.

The last two sentences of Finding of Fact 1.20 are not supported by substantial evidence. Because it is undisputed that Shelby provided a temporary denture that lasted longer than its expected useful life, it is impossible that the

temporary denture could have been inadequate.

The Department's defense of Finding of Fact 1.20 is based upon the following false claims: (1) That Shelby was responsible for the patient's continued use of the temporary denture after it began to wear out and (2) "This action was criticized by her own expert, Dr. Shannon, who testified that the denture should have been replaced in September".

The Department also attempts to support Finding of Fact 1.20 with testimony of Charron at CP 686, 691, and 708. At CP 686, Charron said, "It's occurring because the patient was asked to have a soft temporary liner in this denture far beyond its date to be removed." This is a restatement of the false claim that Shelby was responsible for the patient's continued use of the temporary denture after it began to wear out.

On CP 691, Charron's first answer supports Shelby, because Charron admits that the denture base of a temporary denture is supposed to be "artificially thin to allow for swelling" and he admits that it can fracture because it is artificially thin. The other things that Charron said on CP 691 are invalid because they are based on the false claim that Shelby was responsible for the patient's continued use of the temporary denture after it began to wear out. Likewise, the testimony by Charron at CP 708 that was adverse to Shelby was based upon this same false claim.

The vague generalities of Finding of Fact 1.12 provide no support for the

Conclusions of Law or Final Order. Because this denture performed adequately for more than six months, we know that it was durable, that it resisted fracture, and that it resisted buildup of bacteria. No expert testified that the occurrences of the loss and replacement of a tooth on September 18 and October 30 were violations of the standard of care.

The beginning of Finding of Fact 1.23 is erroneous for all of the reasons that have been discussed this brief and Brief of Appellant. As for the second part of the first sentence, the phrase "extended period of time" has no definition, so there is nothing to argue. However, all of the pain and discomfort that the patient experienced was because of the patient's choice not to obey Shelby's instruction to replace the temporary denture.

There is no evidence to support the second sentence of Finding of Fact 1.23. There was no evidence that the patient suffered any harm that rose to the level of moderate. It is contrary to common sense to claim that a person would ever suffer more than mild pain by continuing to wear a worn out denture. If the pain went beyond mild, the patient would remove the denture from her mouth so that the pain would not reach the level of moderate.

G. Reply to Respondent's Arguments on Findings of Fact 1.11, 1.22, and 1.25.

Finding of Fact 1.11: The first sentence is only a general statement. The

second sentence is error because it is not supported by substantial evidence. The Department's attempt to defend the second sentence of Finding of Fact 1.11 is based upon the following false claims: (1) That Shelby was responsible for the patient's continued use of the temporary denture after it began to wear out and (2) that Shelby violated the standard of care by offering the patient the option of relining the temporary denture. These false claims were discussed at pages 9 - 13 of this brief.

Finding of Fact 1.22: The first sentence is correct, but that finding does not support any conclusion of law. The second sentence is error because it is based solely upon a false claim by Vize that Shelby was responsible for the patient's continued use of the temporary denture after it began to wear out. Charron's testimony did not support the second sentence. See Brief of Appellant, pp. 15 - 16. The third sentence of Finding of Fact 1.22 is error because no expert testified that the standard of care required Shelby to give the patient a free denture.

Finding of Fact 1.25: This finding of fact is error because it is based upon the false claim that Shelby was responsible for the patient's continued use of the temporary denture after it began to wear out. The remainder of the Department's arguments in this section of Brief of Respondent are also based on this same false claim as well as the false claim that Shelby violated the standard of care by offering the patient the option of relining the temporary denture.

H. Reply to Respondent's Arguments on Findings of Fact 1.21 and 1.23.

Finding of Fact 1.21 was poorly written. It is vague. Substantial analysis of the record is required in order to determine what Finding of Fact 1.21 says. The key issue in analyzing Finding of Fact 1.21 is what date does the word "when" refer to? This analysis was provided at pages 12 - 13 of Brief of Appellant. The Department did not dispute it. There is no question that the beginning of what the Health Law Judge said was unprofessional conduct was not earlier than October 30, 2007.

At page 42 of Brief of Appellant, Shelby explained that Finding of Fact 1.21 cannot stand because there was no evidence that Shelby instructed the patient to use the temporary denture after October 30, nor was there any evidence that the standard of care required Shelby to instruct the patient to stop using the temporary denture before October 30. The Department did not refer to any testimony that would contradict this.

I. Reply to Respondent's Arguments on the Conclusions of Law.

Conclusion of Law 2.3 is erroneous for reasons that were summarized on pages 44 - 45 of Brief of Appellant. If this court commits the error of holding that the burden of proof is preponderance of the evidence, Conclusion of Law 2.3 is erroneous also under that standard. There is not any substantial evidence to support Conclusion of Law 2.3.

It is undisputed that Shelby did not violate the standard of care with respect

to the tooth that came off the denture on September 18 and was replaced at no cost by her or the tooth that came off the denture on October 30 and was replaced at no cost by her. It is undisputed that all of the other problems with the denture were caused solely by the failure of the patient to obey Shelby's instructions to replace the temporary denture with a permanent denture.

The Department attempts to sustain Conclusion of Law 2.3 with the false claim, "The patient...endured conditions that promoted bacteria growth, leading to a candida infection and endangering her health." See pages 19 - 20 of this brief for a response to that false claim. The Department also repeats its false claims that Shelby was responsible for the patient's continued use of the temporary denture after it began to wear out and that Shelby violated the standard of care by offering the patient the option of relining the temporary denture.

J. Reply to Respondent's Argument Regarding Sanctions.

Conclusion of Law 2.5 is erroneous because there was no evidence that the patient suffered any harm beyond the level of minimal. If the patient would have been experiencing harm to the level of moderate, the patient would have been referred to a doctor or a dentist. If Shelby would have committed unprofessional conduct, only the Tier A sanctions of WAC 246-16-810 would have been appropriate. Conclusion of Law 2.6 was erroneous for reasons that were fully explained in Brief of Appellant.

In support of the sanctions, the Department argues the false statement, "The patient struggled with her denture for about eight months." See the discussion of this false claim at pages 20 - 21 of this brief.

VI. CONCLUSION

The microscopic analysis of the testimony that is contained in the briefs makes this case appear more complicated than it is. These are the uncontroverted facts: The useful life of a temporary denture is approximately six months. The patient had no significant problems with the denture until the patient had used it for more than seven months. Shelby told the patient to replace the temporary denture when it began to wear out, but the patient did not obey that instruction until more than two months later. The minimal problems that the patient had after the denture began to wear out happened only because the patient did not obey Shelby's instructions to replace it. Therefore, the only legitimate conclusion is that Shelby did not commit unprofessional conduct.

DATED this 30th day of September, 2013.

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By David R. Hevel

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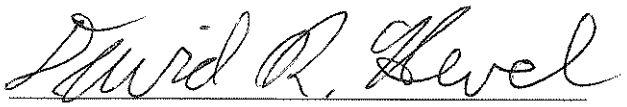
CERTIFICATE

I certify that on September 30, 2013, I mailed, postage prepaid, a copy of the foregoing Reply Brief of Appellant to Richard A. McCartan, Assistant Attorney General, P.O. Box 40109, Olympia, WA 98504-0109, and to Renee S. Townsley, Clerk, Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99201-1905.



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