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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 314944

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

DIANA S. SHELBY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

RESPONSE BRIEF OF RESPONDENT

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I. INTRODUCTION

To protect public health and safety, Respondent Department of Health (Department) licenses and disciplines denturists in Washington. Appellant Diana S. Shelby, a licensed denturist, challenges a Department order disciplining her for five counts of "unprofessional conduct" in her denture work on a patient. Despite two expert opinions against her, Ms. Shelby denies any wrongdoing, and shows no concern for the harm caused the patient. The facts and law show that the Department's order against Ms. Shelby should be affirmed.

II. STATEMENT OF THE CASE

A. Denturist Licensing Law Overview

Washington denturists are licensed by the state under RCW 18.30. The licensing law intends to "assure the public's health" by upholding standards in the practice of denturism. RCW 18.30.005.

Under the Uniform Disciplinary Act (RCW 18.130), the Department investigates complaints against various licensed health care practitioners, including denturists, and may issue a Statement of Charges against them. RCW 18.130.090. A Statement of Charges alleges "unprofessional conduct" by a licensee. RCW 18.130.180. The licensee may request an adjudicative proceeding under RCW 34.05 to contest the charges. RCW 18.130.100. If unprofessional conduct is found, the

Department may impose sanctions against the licensee under RCW 18.130.160.

B. Discipline Of Diana S. Shelby

Appellant Diana S. Shelby is a licensed denturist under RCW 18.30. Dentures are removable appliances worn in the mouth to replace missing teeth.[1] Clerk's Papers (CP) at 391. This case involves a 58-year old woman (patient) who went to Ms. Shelby in March 2007. Ms. Shelby made upper dentures, which the patient wore from April to December 2007. CP at 393, ¶ 1.14; CP at 395, ¶ 1.20; CP at 597-99.

Dissatisfied with her dentures and with Ms. Shelby's treatment, the patient complained to the Department in February 2008. CP at 174-75. Following an investigation, the Department filed a Statement of Charges against Ms. Shelby. CP at 39-40. Ms. Shelby requested an adjudicative proceeding to contest the charges. CP at 50-53. The Department then amended the Statement of Charges. . CP at 226-27. It alleged that Ms. Shelby's treatment of the patient fell below the standard of care in five different ways. It further alleged that the treatment constituted "unprofessional conduct" under RCW 18.130.180(4), and justified the imposition of sanctions under RCW 18.130.160.

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[1] Making of a denture involves: (1) taking an impression of the mouth; (2) pouring a positive model using the impression; (3) constructing a wax form; (4) cooking the wax out of the model; (5) pressing acrylic into the model to replace the wax; and (6) binding the denture teeth into the acrylic. CP at 391, ¶ 1.4; CP at 664-67.

At the hearing, the patient testified about her continual problems with the denture's fit (CP at 601-02); problems eating (CP at 601-02); pain and discomfort (CP at 607-09); fractures in the denture (CP at 603-04, 609); and teeth popping out (CP at 602-03). Two highly-qualified denturists testified that Ms. Shelby's treatment fell below the standard of care.

On December 23, 2009, following the hearing, the Department's Health Law Judge issued a Final Order, finding Ms. Shelby had committed "unprofessional conduct" as defined by RCW 18.130.180(4). CP at 389-401. The finding resulted from teeth 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. *Id.*

The Health Law Judge also imposed sanctions under RCW 18.130.160, including a two-year suspension of Ms. Shelby's denturist license; a $5,000 fine; and requiring a patient refund of the cost of the dentures. CP at 398, 447-49. Ms. Shelby petitioned for reconsideration of the Final Order. CP at 401-14. The Health Law Judge denied the reconsideration. CP at 442-49.

Ms. Shelby then petitioned for judicial review under RCW 34.05.542. On March 5, 2013, Judge Carrie Runge of the Benton

County Superior Court upheld the Department's decision. CP at 841-46. Ms. Shelby now appeals to the Court of Appeals. CP at 847-53.

III. ISSUES

1. Was preponderance of evidence the Department's burden of proof for proving unprofessional conduct by Ms. Shelby?

2. Was the Department's finding of unprofessional conduct by Ms. Shelby supported by substantial evidence in the record?

3. Were the sanctions imposed against Ms. Shelby for unprofessional conduct arbitrary and capricious?

IV. STANDARD OF REVIEW

Appellate review is of the agency decision, and not the lower court decision. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003). Ms. Shelby has the burden of demonstrating the invalidity of the Department's order. RCW 34.05.570(1)(a).

A. The Finding Of Unprofessional Conduct Must Be Upheld If Supported By "Substantial Evidence"

Ms. Shelby contests numerous findings of the Health Law Judge. 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." RCW 34.05.570(3)(e). Upholding a decision under the substantial evidence standard does not mean that the court would necessarily reach

the same decision of its own. Instead, substantial evidence means there is a "sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). The standard is "highly deferential" to the agency. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Unchallenged factual findings are verities on appeal. RAP 10.3(g); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

B. The Sanctions Must Be Upheld If They Are Not "Arbitrary And Capricious"

Ms. Shelby superficially contests the sanctions imposed under RCW 18.130.160 for the unprofessional conduct. Brief of Appellant (Br.) at 35-37. Agency sanctions are subject to only limited judicial review. They must be accorded "considerable judicial deference" because they are "peculiarly a matter of administrative competence." *In re Disciplinary Action of Brown*, 94 Wn. App. 7, 16, 972 P.2d 101 (1999). An agency order may be reversed on judicial review if the order is "arbitrary and capricious." RCW 34.05.570(3)(i). This standard applies to agency sanctions, and means that they may be overturned only if "willful and

unreasoning action, without consideration and in disregard of facts and circumstances." *Johnson v. Dep't of Health*, 133 Wn. App. 403, 414, 136 P.3d 760 (2006); *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995).

Moreover, in *Heinmiller*, the court held that the "harshness [of the sanction] . . . is not the test for arbitrary and capricious action." *Heinmiller*, 127 Wn.2d at 609. Instead, the court will consider the *process* under which the sanctions were imposed. Sanctions are not reversible as "willful and unreasoning" when the licensee received a "fair hearing" to present her arguments. *Id. See also In re Disciplinary Action of Brown*, 94 Wn. App. at 16-17; *Dep't of Health v. Yow*, 147 Wn. App. 807, 830, 199 P.3d 417 (2008).

V. ARGUMENT

A. Following The *Hardee* Decision, The Burden Of Proof In Denturist Cases Is Preponderance Of Evidence

On judicial review, there must be substantial evidence to meet the agency's applicable burden of proof. *In re Discipline Proceeding Against Marshall*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007). One burden of proof is "preponderance of evidence" which means "more likely than not." *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005). A higher burden of proof is "clear and convincing" which means "highly probable."

Ongom v. Dep't of Health, 159 Wn.2d 132, 136, 148 P.2d 1029 (2006). Ms. Shelby argues for the higher clear and convincing standard in disciplinary cases against denturists. Br. at 24-28. This argument is wrong.

In *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001), the court applied the clear and convincing standard to disciplinary cases against physicians. Similarly, in *Ongom*, the court applied the clear and convincing standard to cases against registered nursing assistants. Citing *Ongom*, the Health Law Judge found the clear and convincing standard also applied to cases against denturists like Ms. Shelby. CP at 396, ¶ 2.2.

However, following the Health Law Judge's decision, the court expressly overruled *Ongom* in finding that the lower preponderance standard applies to cases against home child care licensees. *Hardee*, 172 Wn.2d at 18. Hence, the higher clear and convincing standard has not been extended to any health care professionals other than physicians. Based on the reasoning in *Hardee*, the higher standard should not be extended to denturists cases.

The *Hardee* court held that, in applying the higher clear and convincing standard to cases against registered nursing assistants, the *Ongom* court misapplied the three procedural due process factors to be

weighed under *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The *Hardee* court identified the first *Mathews* factor as the "value of the property interest" at stake. *Hardee*, 172 Wn.2d at 15. The court held that registered nursing assistants do not have the same "time, expense, and education" invested in obtaining a license, as compared to the physician in *Nguyen*. *Hardee*, 172 Wn.2d at 16. Likewise, nor do denturists, as they need only complete two years of education, with a major course study in denturism. RCW 18.30.090. Because of their extensive education and training, physicians have a "unique" property interest among the various types of licensed health care professionals, justifying the higher standard of proof in cases against them. *Hardee*, 172 Wn.2d at 18. Denturists do not have the same unique property interest.

The *Hardee* court identified the second *Mathews* factor as the risk of "erroneous deprivation" of a license, and the "probable value . . . of procedural safeguards." *Hardee*, 172 Wn.2d. at 17. Under this factor, the court found that the lower preponderance standard is justified in cases against registered nursing assistants. *Id.* Likewise, it also is justified in cases against denturists.

Lastly, the *Hardee* court found that under the third *Mathews* factor, the costs to the state of conducting administrative cases justify the lower

preponderance standard in registered nursing assistance cases. *Id.* at 17-18. This cost analysis is equally true for cases against denturists, who do not have the same unique property interest possessed by physicians.

In conclusion, the lower preponderance standard applies to denturist cases.[2] In any event, the burden of proof is not determinative in Ms. Shelby's case because the Health Law Judge correctly found that the Department proved its case by the higher clear and convincing standard. As explained below, substantial evidence plainly supports the Department's decision, even under the higher standard.

B. Substantial Evidence Supports The Finding Of Unprofessional Conduct Against Ms. Shelby

The amended Statement of Charges makes five allegations of "unprofessional conduct" by Ms. Shelby in her treatment of the patient. CP at 226-27. Unprofessional conduct is "(i)ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed." RCW 18.130.180(4). The Health Law Judge's findings of unprofessional conduct, based on the five allegations, are supported by substantial evidence. In fact, Ms. Shelby musters no credible defense against any of the allegations.

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[2] For the record, the Department agrees with Chief Justice Madsen's concurrence in *Hardee* that *Nguyen* should be overruled, and that all professions should be subject to the lower preponderance standard. *Hardee*, 172 Wn.2d at 14-18.

1. As Alleged In The Statement Of Charges, Ms. Shelby Did Not Adequately Bind The Denture Teeth To The Denture Base, Causing Them To Repeatedly Break Off

The Health Law Judge found that the patient lost teeth because of improper construction of the denture, creating a weak bond between the acrylic and teeth. CP at 394, ¶ 1.18. As discussed below, this finding is supported by substantial evidence in the record, as found by the superior court. CP at 850.

The patient received her denture in April 2007. CP at 393, ¶ 1.14. At the hearing, the patient testified that in September, October, and November 2007, five teeth popped out. CP at 567-68. Ms. Shelby does not deny the teeth loss.

Two highly-qualified denturists, Vallon Charron, LD[3] (CP at 682) and Joseph Vize, LD[4] (CP at 740), testified that it is unusual for teeth to fall out of a denture. Mr. Charron offered three possible reasons for the

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[3] Mr. Charron is a licensed denturist with his own clinic in Tacoma. At the outset of the case, the Department asked Mr. Charron for his expert opinion on the complaint. In 12 years, Mr. Charron has worked on 18,000-20,000 dentures. He has been executive director, president, and board member of the Washington Denturist Association; and past vice president of the national association. He teaches denturism at Pierce College. CP at 627-31.

[4] Mr. Vize was the denturist who the patient saw after her unsuccessful treatment by Ms. Shelby. Mr. Vize has been involved with a denturist practice for about 20 years and has been licensed since 2003. He operates a clinic with offices in Pasco and Pendleton, Oregon. He also is president of the Washington Denturist Association. CP at 728-31.

Ms. Shelby alleges Mr. Vize's testimony was driven by his desire to eliminate her as a competitor. Br. at 22. No evidence supports this allegation. The Department called Mr. Vize because he treated the patient following Ms. Shelby's unsuccessful treatment, and his testimony was subject to cross examination.

patient's teeth not binding to the acrylic and falling out: (1) lack of a diatoric (dimple) in the teeth; (2) the teeth were too smooth; and (3) a manufacturing defect in which the wax was not completely boiled out of the impression. CP at 677-78. He testified that tooth loss is not expected in a temporary denture. CP at 688. Mr. Vize testified about the manufacturing defect. CP at 741-42. He further testified that a possible cause for the teeth loss was Ms. Shelby's failure to clean off the "separator film" from the underneath side of the tooth. CP at 741. He also found that the denture was too porous. CP at 742.

Ms. Shelby admitted that teeth will not pop out when "put in correctly." CP at 804. Regarding the patient's tooth loss, she acknowledged a possible manufacturing defect in her laboratory. CP at 817. But she also claimed that the patient's "changing bite" may have put pressure on the teeth, causing them to pop out. CP at 817. Mr. Vize refuted this testimony by noting that when teeth pop out "cleanly" (as opposed to shearing or breaking), as did the patient's teeth, the cause is an improper chemical bond to the acrylic. CP at 824. Mr. Vize further testified that the patient's remaining natural teeth were undamaged, indicating that bite pressure did not cause teeth to pop out. CP at 824. On redirect, Ms. Shelby did not rebut Mr. Vize's testimony. CP at 832-35.

Ms. Shelby relies on the testimony of a dentist, Dr. Michael Shannon. Br. at 27-28. Dr. Shannon has not done denture work in his 34 years of practice. CP at 720. He testified that all the patient's teeth fell out of the temporary denture "well after" six months of being installed. CP at 488. He suggested that a major reline or replacement of a temporary denture "normally" would occur after six months. CP at 488-89. The implication is that temporary dentures become susceptible to tooth loss as time passes.

Dr. Shannon's opinion was properly rejected on several counts. First, he has no experience in making dentures, and his opinion about the acceptability of tooth loss on temporary dentures was not shared by Mr. Charron or Mr. Vize, or even by Ms. Shelby. Secondly, Dr. Shannon had the facts wrong, as the September and October tooth loss *was* within six months of placement of the temporary denture. Finally, he admitted that tooth loss "usually" should be preventable throughout the use of a temporary denture. CP at 717.

As stated, the Health Law Judge accepted the opinions of Mr. Charron and Mr. Vize that the tooth loss was caused by faulty construction of the denture. He rejected Dr. Shannon's opinion that tooth loss was excusable given the temporary nature of the denture. As the superior court noted (CP at 852), a reviewing court is "not entitled to

weigh either the evidence or the credibility of witnesses." *In re Welfare of Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973). Instead, the court simply "determines whether there exists the necessary quantum of proof" to support the challenged finding. *Id.* The testimony of Mr. Charron and Mr. Vize supports the challenged finding on the tooth-loss allegation.

2. As Alleged In The Statement Of Charges, Ms. Shelby Poorly Constructed The Denture, Causing Malocclusion

Malocclusion occurs when the upper and lower teeth do not align properly in the mouth. CP at 736-37, 748. The Health Law Judge found that the patient's denture teeth "did not properly align," causing "pain and discomfort" and making it difficult for her to eat or to wear the denture. CP at 394, ¶ 1.16. As discussed below, this finding is supported by substantial evidence in the record, as found by the superior court. CP at 850.

During the Department's investigation, Mr. Vize reported that the patient had a "severe" malocclusion when she came to him in December. CP at 195. He testified that Ms. Shelby had failed to correct the malocclusion. CP at 736-39, 761-62. Ms. Shelby's own expert, Dr. Shannon, testified that Ms. Shelby should have monitored the occlusions. CP at 722. Mr. Vize further testified that steps to correct the problem could have included occlusion grinding, installing a temporary

liner, or repositioning the teeth through a "jump" procedure. CP at 736-39. According to Mr. Vize, the patient's trouble eating and wearing the denture (CP at 609-11) would have been attributable to the malocclusion. CP at 736.

Ms. Shelby's defense is baseless. Although not testifying herself that the patient had a pre-existing malocclusion, Ms. Shelby claims that Mr. Vize believed a malocclusion was "present" when the patient "first came to" her. Br. at 23. That is factually incorrect. He actually testified that the patient's malocclusion would have existed starting from the time the dentures were installed by Ms. Shelby. CP at 736. In her brief, Ms. Shelby claims that Mr. Vize's criticism of the malocclusion is invalid because he did not know the patient's bite prior to the extraction of her teeth. Br. at 23. However, this claim was made by neither Ms. Shelby nor Dr. Shannon at the hearing, and was actually refuted by Mr. Vize, who testified that a denturist always should attempt to correct any denture malocclusion, *regardless* of the patient's pre-extraction bite. CP at 736.

In summary, the undisputed evidence is that a severe malocclusion existed in the patient's bite, and Ms. Shelby did not attempt to correct the problem, resulting in pain and discomfort to the patient.

3. As Alleged In The Statement Of Charges, Ms. Shelby Did Not Adequately Address The Porous Nature Of The Denture's Acrylic Which: (1) Caused Multiple Fractures During The Treatment Period, And (2) Made The Denture Susceptible To Bacteria, Subjecting The Patient To The Risk Of Illness

The Health Law Judge found that the denture fractured due to the porous nature of the acrylic. CP at 395, ¶ 1.20. He also found that fractures promote the buildup of bacteria on the denture and in the patient's mouth. CP at 393, ¶ 1.12. As discussed below, these finding are supported by substantial evidence, as found by the superior court. CP at 851-52.

Mr. Charron testified that the denture was badly fractured in several places. CP at 686. He testified that the fractures occurred because the "soft lining" in the denture was left in too long (CP at 686, 691, 708) and the denture base was too thin. CP at 688. He concluded that the fracture showed Ms. Shelby's treatment was below the standard of care. CP at 688. He also testified that fractures made the denture ill-fitting and caused formation of harmful bacteria. CP at 688. Mr. Vize noticed the fractures when he examined the patient in December 2007. CP at 196. He testified that the "pale color" of the denture showed that the acrylic was too porous. CP at 822-23.

Ms. Shelby allowed the patient to continue using the denture until the patient left her care in December 2007. This action was criticized by her own expert, Dr. Shannon, who testified that the denture should have been replaced in September. CP at 722. He explained that the fractures were the "perfect hiding place for bacteria." CP at 724. Ms. Shelby did not deny that the denture fractured, or that the fractures promoted bacteria growth and could cause illness.

4. As Alleged In The Statement Of Charges, Ms. Shelby Left Temporary Liners In The Patient's Mouth For Too Long, Which Made Them Susceptible To Bacteria, Subjecting The Patient To Risk Of Illness

"Relining" is the process of resurfacing the tissue side of a denture with new base material. CP at 83. The Health Law Judge found that a temporary denture should be relined and made permanent only when the denture is properly constructed in the first place. CP at 392, ¶ 1.11. He found that a temporary denture should resist fracture and tooth loss. CP at 392-93, ¶ 1.12. He found that the problems with the patient's temporary denture could not be fixed with a reline. CP at 395, ¶ 1.22. He found that the on-going problems created discomfort for the patient and promoted bacteria build-up that risked her health. CP at 396, ¶ 1.25. As discussed below, these findings are supported by substantial evidence, as found by the superior court. CP at 851-52.

Mr. Charron testified that to accommodate the swelling of tissue that occurs after pulling of the natural teeth, dentures are initially constructed too large. CP at 670. He noted that, throughout her care over eight months, Ms. Shelby had the patient use a "soft temporary liner" (denturite) to strengthen the tissue at the denture base. CP at 671. He stated that by September, the patient's soft temporary liner at least should have been removed and replaced by a "hard temporary liner" in places where the tissues had healed. CP at 679. According to Mr. Charron, leaving in the soft liner beyond two to three months in a fracturing denture allowed for harmful bacteria build-up. CP at 679-81. He stated that Ms. Shelby's failure to timely remove the soft liner was below the standard of care. CP at 708.

Mr. Vize testified that, under Ms. Shelby's care, the patient had applied multiple layers of denturite to the denture base, which was both unsanitary and contrary to the manufacturer's instructions to remove the material before reapplying. CP at 821-22. Mr. Vize noted that when he examined the patient in December, she complained of a "white growth" in her mouth, which was "red and inflamed" with "candida infection." CP at 822, 195. Ms. Shelby never refuted this evidence.

Ms. Shelby admitted that a hard reline would have been possible in September because the patient's tissue was "healing rapidly." CP at 805.

Her expert, Dr. Shannon, testified that the denture should have been replaced at that point, in order to avoid fracturing that promoted harmful bacteria growth. CP at 722, 724. Yet, in September, Ms. Shelby did not offer to do anything until the end of November. CP at 806. Ms. Shelby cannot defend the long delay, and does not dispute the associated health risks.

Ms. Shelby claims that she told the patient to replace the temporary denture with a permanent one. Br. at 46. However, as late as November, Ms. Shelby continued offering the patient *either* a hard reline or a new denture (CP at 683), even though the denture was fractured and teeth were popping out. Mr. Charron testified that a hard reline (instead of a new denture) was hardly an option because a hard reline would not have corrected the serious problems with the temporary denture. CP at 684.[5] Mr. Vize agreed. CP at 748, 753.

Ms. Shelby offered no credible justification for offering to reline a defective denture. Indeed, the testimony is undisputed: there was no justification, as the patient would have been foolishly paying to "fix" a denture that was beyond repair.

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[5] Ms. Shelby asserts that Mr. Charron testified that a reline would be proper if the patient cannot afford a new permanent denture. Br. at 15. This assertion is a mischaracterization of his testimony. He testified that, *assuming* a temporary denture still had "useful life," a reline could be appropriate until such time as a patient could afford a new permanent denture. CP at 684. He further testified that it would be inappropriate to reline a defective denture. CP at 694.

Ms. Shelby's "excuse" for offering a reline in September and November – that the patient could not afford a new denture (Br. at 15) – is not supported by the evidence. In fact, Ms. Shelby admitted that until December she had "no idea that [the patient] had money problems." CP at 806. In any event, regardless of the patient's money problems, Ms. Shelby's offer, through November, to reline the defective denture (instead of informing the patient of the necessity for a new one) cannot be justified under any circumstance.

Finally, to counter Ms. Shelby's assertions that the problems were the patient's fault, it should be noted that in January 2008, Mr. Vize constructed a new permanent denture that has worked well for her. CP at 610-11, 754-755.

5. As Alleged In The Statement Of Charges, Ms. Shelby Failed To Offer And/Or Provide Services Of A Nature Or In A Manner That Resolved The Above Problems Or Met The Standard Of Care

As discussed above, the Health Law Judge found that Ms. Shelby failed to resolve the malocclusion, the teeth falling out, or the fracture problem. He found these problems could not have been corrected by Ms. Shelby's instructions for the patient to apply over-the-counter liner products. CP at 395, ¶ 1.21. He found that a "temporary" denture must be durable enough to resist fracture, loss of teeth, and bacterial build-up,

while being used by the patient. CP at 392-93, ¶ 1.12. Ms. Shelby presented no explanation for why these types of problems are acceptable for a temporary denture. Consistent with the testimony of Mr. Charron and Mr. Vize, the Health Law Judge found that Ms. Shelby's treatment of the patient was below the standard of care, and caused her pain and discomfort. CP at 395, ¶ 1.23.

6. The Health Law Judge Properly Concluded That Ms. Shelby Had Committed "Unprofessional Conduct" Under RCW 18.130.180(4)

The Health Law Judge concluded that Ms. Shelby had committed "unprofessional conduct," which is defined by RCW 18.130.180(4) as "(i)ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed." CP at 396, ¶ 2.3.

Under RCW 18.130.180(4), based on the five allegations, the Department did prove "incompetence, negligence, or malpractice" by Ms. Shelby. Moreover, the Department also proved "injury" or "unreasonable risk of harm" to the patient. Indeed, the undisputed facts show that the patient suffered pain and discomfort; had difficulty eating; could not wear her denture; and endured conditions that promoted bacteria growth, leading to a candida infection and endangering her health.

In rebuttal, Ms. Shelby repeatedly claims she did nothing wrong because the patient's dentures were only "temporary" and not meant to last more than six months beyond April 2007. This breezy attempt to explain away all the problems is a red herring. As explained above, tooth loss, malocclusion, and the bacteria buildup should not occur, even with a temporary denture. Moreover, Ms. Shelby allowed the defective temporary denture to remain in use far too long, and incompetently proposed the option of relining, which would not have corrected the serious problems with the denture.

As explained above, the Health Law Judge's findings of unprofessional conduct must be upheld if they are supported by "substantial evidence." Highly deferential to the agency, the test is met whenever the evidence, taken as a whole, is sufficient to convince a fair-minded person of its correctness. The evidence against Ms. Shelby easily passes this test, and the findings should be affirmed.

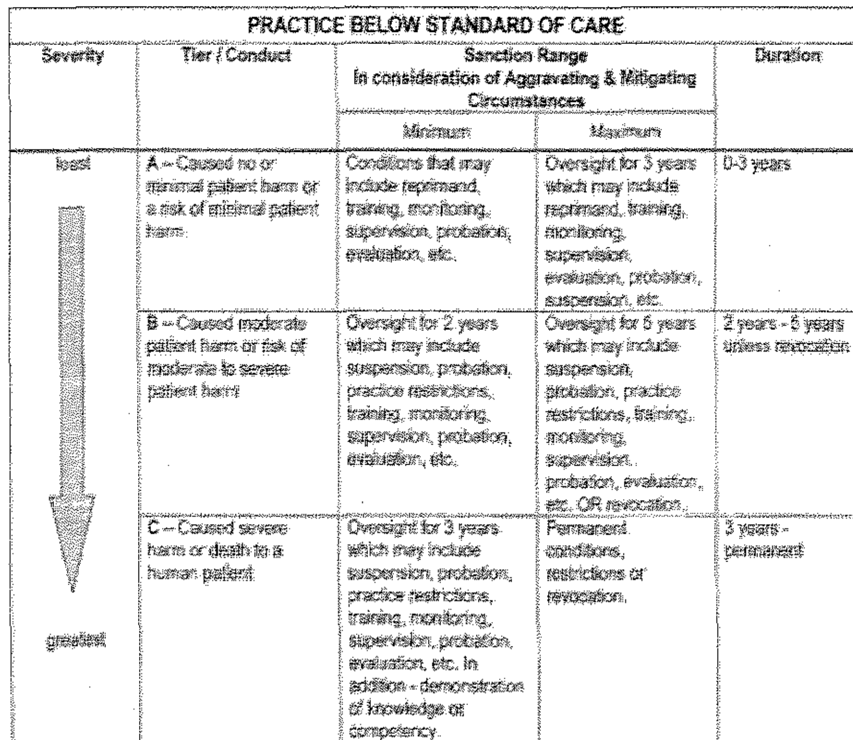
C. The Sanctions Against Ms. Shelby Should Be Upheld

The sanctions against Ms. Shelby were authorized by statute. The two-year license suspension was authorized by RCW 18.130.160(2). The $5,000 fine was authorized by RCW 18.130.160(8). The refund to the patient was authorized by RCW 18.130.160(11). Contrary to

Ms. Shelby's argument, the sanctions were also authorized by Department rules.

1. The Two-Year License Suspension Was Authorized By WAC 246-16-810

WAC 246-16-810 guides the Department in establishing the sanctions in a particular case. It states:



PRACTICE BELOW STANDARD OF CARE				
Severity	Tier / Conduct	Sanction Range In consideration of Aggravating & Mitigating Circumstances		Duration
		Minimum	Maximum	
least	A – Caused no or minimal patient harm or a risk of minimal patient harm.	Conditions that may include reprimand, training, monitoring, supervision, probation, evaluation, etc.	Oversight for 3 years which may include reprimand, training, monitoring, supervision, evaluation, probation, suspension, etc.	0-3 years
	B – Caused moderate patient harm or risk of moderate to severe patient harm	Oversight for 2 years which may include suspension, probation, practice restrictions, training, monitoring, supervision, probation, evaluation, etc.	Oversight for 5 years which may include suspension, probation, practice restrictions, training, monitoring, supervision, probation, evaluation, etc. OR revocation.	2 years - 5 years unless revocation
greatest	C – Caused severe harm or death to a human patient	Oversight for 3 years which may include suspension, probation, practice restrictions, training, monitoring, supervision, probation, evaluation, etc. In addition - demonstration of knowledge or competency.	Permanent conditions, restrictions or revocation.	3 years - permanent

Under this rule, the Health Law Judge imposed the "Tier B" sanctions because there was at least "moderate harm" or "the risk of moderate harm" to the patient. CP at 397, ¶ 2.5. Tier B allows suspension for up to five years. Hence, the two years for Ms. Shelby is authorized by WAC 246-16-810.

Ms. Shelby claims there was only "minimal harm," making applicable the Tier A[6] sanctions, which do not include license suspension. Br. at 43, 45. The minimal-harm claim should be rejected because she offers only a conclusory argument. Br. at 45. In reality, as explained above, the moderate harm or risk of moderate harm to the patient is very evident – and claiming otherwise is callous.

2. There Were "Aggravating" Factors Under WAC 246-16-890

WAC 246-16-890 lists "aggravating and mitigating factors" for the Department to consider in establishing the appropriate sanction in a particular case within the range of sanction authorized by law.

Under that rule, the Health Law Judge found two aggravating factors in Ms. Shelby's case. First, under WAC 246-16-890(1)(c), he found there were multiple violations by Ms. Shelby. Second, under WAC 246-16-890(1)(j), he found that the unprofessional conduct had occurred over an extended length of time. CP at 397, ¶ 2.6. Ms. Shelby claims that these two aggravating factors did not exist. Br. at 45. This claim should be rejected because, as explained above, there were five instances of unprofessional conduct, and the patient struggled with her denture for about eight months.

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[6] Ms. Shelby argues that Tier C should apply. Br. at 45. But she apparently meant Tier A, which applies when there is only "minimal harm" to the patient.

Moreover, a reviewing court may affirm an agency decision on grounds not cited by the agency. *Heidgerken v. Dep't of Natural Res.*, 99 Wn. App. 380, 388, 993 P.2d 934 (2000) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)). In addition to the two factors cited by the Health Law Judge, four other factors favored the imposition of the sanctions against Ms. Shelby. Having become licensed in 1999, she is an experienced denturist. WAC 246-16-890(2)(a). She offered no refund to the patient. WAC 246-16-890(3)(c). She has never shown any awareness of, or remorse for, her unprofessional conduct. WAC 246-16-890(3)(f). Lastly, she had been subject to prior discipline by the Department. WAC 246-16-890(2)(b). CP at 913-26.

In conclusion, as explained above, sanctions are subject to judicial review under the narrow "arbitrary and capricious" standard. The sanctions imposed were not arbitrary and capricious, as they were authorized by law, and Ms. Shelby had an opportunity to contest them in the adjudicative proceeding before the Health Law Judge. Hence, the sanctions must be upheld.

VI. CONCLUSION

Based on the foregoing, the Department of Health respectfully requests the court to uphold the challenged Health Law Judge decision against Ms. Shelby. The decision must be upheld because the findings of

unprofessional conduct are supported by substantial evidence, and the imposed sanctions are not arbitrary and capricious.

RESPECTFULLY SUBMITTED this 30th day of July, 2013.

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CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of July, 2013, at Olympia, Washington.

V. BURKS
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