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STATE OF WASHINGTON
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NO. 90783-8

SUPREME COURT OF THE STATE OF WASHINGTON

DIANA SHELBY,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

DEPARTMENT OF HEALTH ANSWER TO STATEMENT FOR JUDICIAL REVIEW

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I. INTRODUCTION

To protect public health and safety, Respondent Department of Health (Department) licenses and disciplines denturists in Washington. Petitioner Diana Shelby is a licensed denturist. The Department disciplined Ms. Shelby on five counts of "unprofessional conduct" in her denture work on a patient. The disciplinary action has been upheld by a Department health law judge, a superior court judge, and the Court of Appeals.

Ms. Shelby now petitions for review in this Court, alleging a lack of substantial evidence under the proper standard of review to support the finding of unprofessional conduct against her. Her allegations are without merit, and no grounds exist under RAP 13.4(b) for this Court to accept review of the case. Review should therefore be denied.

II. COUNTERSTATEMENT OF THE CASE

Washington denturists are licensed by the Department under RCW 18.30 for the purpose of assuring the public's health and providing a mechanism for consumer protection. RCW 18.30.005. Ms. Shelby is a licensed denturist under RCW 18.30. Dentures are removable appliances worn in the mouth to replace missing teeth. Clerk's Papers (CP) at 391. This case involves a 58-year old woman ("patient") who went to

Ms. Shelby in March 2007 for upper dentures. which she wore from April to December 2007. CP at 393, 395, 597-99.

While wearing the dentures, the patient had continuing problems with the denture's poor fit (CP at 600-01); problems eating (CP at 601-602); pain and discomfort, (CP at 603-604); fractures in the denture (CP at 603-04); and teeth popping out of the denture (CP at 602-603). Ms. Shelby failed to correct the problems with the denture. CP at 138-39, 174-75.

Ms. Shelby eventually sought care from another denturist, Joseph C. Vise, in December 2007. In a letter to the Department, Mr. Vize detailed the "construction" problems with the denture. CP at 195. He stated that the patient "was left to struggle with the uncomfortable, non-retentive, repeatedly-breaking denture until she could no longer bear it." *Id.* He fitted the patient with a new denture that worked well for her. CP at 196, 610, 754-55.

Because of the problems with the dentures and Ms. Shelby's failure to correct them, the patient complained to the Department in February 2008. CP at 174-75. Under the Uniform Disciplinary Act, RCW 18.130, the Department may take action against licensed health professionals who engage in unprofessional conduct. After investigating a complaint of unprofessional conduct, the Department may issue a

Statement of Charges against a licensee if the Department determines that the charges in the complaint are substantiated. RCW 18.130.090; 18.130.180 (listing types of unprofessional conduct).

Following an investigation, the Department filed a Statement of Charges and an Amended Statement of Charges against Ms. Shelby. Appendix (App.) at 1-2.[1] The amended charges allege that Ms. Shelby's treatment of the patient fell below the standard of care in five ways:

> A. Respondent did not adequately bind the denture's teeth to the denture base, causing them to repeatedly break off;
>
> B. Respondent poorly constructed the denture, causing malocclusion;
>
> C. Respondent did not adequately address the porous nature of the denture's acrylic which:
>
> 1. Caused multiple fractures during the treatment period.
> 2. Made the denture susceptible to bacteria, subjecting the patient to the risk of illness.
>
> D. Respondent left soft temporary liners in the patient's mouth too long, which made them susceptible to bacteria, subjecting the patient to the risk of illness;
>
> E. Respondent 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.

App. 1.

---

[1] Following the action against Ms. Shelby, the law was changed to make the Denturist Board – and not the Department – the disciplinary authority for actions against denturists. Laws of 2013, ch. 171.

The Statement of Charges further alleged that Ms. Shelby's treatment of the patient constituted "unprofessional conduct" under RCW 18.130.180(4) which means "incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk of injury to the patient." App. at 2. Ms. Shelby requested an adjudicative proceeding to contest the charges.

At the hearing, the patient testified about the continuing problems with the denture's fit, problems eating, pain and discomfort, fractures in the denture, and teeth popping out. CP at 602-604.

In addition, two highly-qualified denturists testified that Ms. Shelby's treatment of the patient fell below the standard of care. Val Cherron (CP at 677-78) and Joseph Vise (CP at 741-42) testified about the manufacturing defects that caused the teeth to unexpectedly fall out. CP at 677-78. Mr. Vize testified about the patient's "severe" malocclusion (teeth misalignment). CP at 195, 736-39, 761-62. Mr. Cherron (CP at 679-81, 686, 688, 691, 708) and Mr. Vize (CP at 196) testified about the tooth fractures that allowed for harmful bacteria buildup. Both testified that Ms. Shelby failed to take appropriate steps to correct the problems.

Following the hearing, the Department's Health Law Judge (HLJ) entered a Final Order, finding that Ms. Shelby had committed

"unprofessional conduct" as defined by RCW 18.130.180(4). App. at 3-15. As a result, the HLJ imposed sanctions against Ms. Shelby under RCW 18.130.160, including a two-year license suspension, a $5,000 fine, and restitution. App. at 12.[2]

Ms. Shelby then petitioned for judicial review under RCW 34.05.570. On March 5, 2013, Judge Carrie Runge of the Benton County Superior Court upheld the HLJ's order. App. at 16-20. Ms. Shelby appealed this decision. On September 4, 2014, in an unpublished opinion, the Court of Appeals, Division III, upheld the HLJ's order. App. at 21-49 (Slip Opinion). Ms. Shelby now seeks review in this Court.

III. ISSUE

For reasons stated in Section IV, there are no grounds under Rules of Appellate Procedure (RAP) 13.4(b) for the Court to accept review of this case. However, if review were accepted, the issue would be:

> Does substantial evidence support the health law judge's finding of unprofessional conduct against Ms. Shelby?

IV. ARGUMENT

RAP 13.4(b) governs whether a petition for review should be accepted. It states:

---

[2] In her petition for review, Ms. Shelby does not directly contest the sanctions but instead argues that the underlying findings of fact are unsupported by substantial evidence.

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals;

(3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Though Ms. Shelby's petition for review does not cite to RAP 13.4(b), her arguments appear to rely on grounds (3) and (4). Petition (Pet.) at 7-8. The Court should not accept review under either ground.

A. There Is No Significant Question Of Constitutional Law Because the Health Law Judge Applied the Clear and Convincing Evidence Burden of Proof

Ms. Shelby alleges that the Court of Appeals "failed to review the administrative record according to the standard of review that is required in cases where a constitutional right is threatened." Pet. at 7. More specifically, she alleges that the Court of Appeals failed to "examine the record and determine whether there is a sufficient 'quantum of proof' to support the HLJ's Findings of Fact under the 'highly probable' test that

applies when the burden of proof is clear and convincing evidence." Pet. at 13. As explained below, this allegation is without merit.

Upon judicial review, an agency decision will be upheld when supported by "evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). Substantial evidence means substantial evidence that is necessary to meet the agency's burden of proof. *See In re Estate of Reilly*, 78 Wn.2d 623, 639, 479 P.2d 1 (1970); *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). *Ancier v. Dep't of Health Med. Quality Assurance Comm.*, 140 Wn. App. 564, 572-73 n.12, 166 P.3d 829 (2007).

In reviewing the evidence, the Court of Appeals properly recognized that the substantial evidence test applied. Slip Op. at 5; App. at 25. The court exhaustively reviewed the evidence, and gave detailed reasoning for upholding the HLJ's findings against Ms. Shelby. Slip Op. at 8-23; App. at 28-43.

Despite the court's thorough review of the evidence, Ms. Shelby argues that the Court of Appeals somehow erred by not correctly applying the "clear and convincing" standard under the substantial evidence test. The Court of Appeals properly rejected her argument that a heightened burden of proof somehow alters the substantial evidence test. Slip Op. at 6-7; App. at 26-27.

It is hard to understand the basis for Ms. Shelby's complaint. The HLJ applied the clear and convincing burden of proof to the case against Ms. Shelby, based on this Court's opinion in *Ongom v. Dep't of Health*, 159 Wn.2d 132, 136, 148 P.3d 1029 (2006) (applying clear and convincing standard to licensing action against a nursing assistant). App. at 10. Clear and convincing is the standard favored by Ms. Shelby.

Following the HLJ's decision in *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 18, 256 P.3d 339 (2011), this Court expressly overruled the *Ongom* holding that allegations against a licensed nursing assistant must be proven by clear and convincing evidence, meaning that the lesser preponderance of the evidence standard applies. *Id.* The clear and convincing standard has been applied *only* to actions against healthcare professionals who are licensed physicians. *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001). The Department therefore believes that the lower burden of proof should apply to cases against denturists.

In any event, the burden-of-proof issue is not relevant because the HLJ found against Ms. Shelby under the *heightened* clear and convincing standard. And the Court of Appeals upheld the order under the very same standard:

> We have already determined that the 16 findings of fact to which Ms. Shelby assigns error are supported by substantial evidence, bearing in mind the clear and convincing standard applied by the health law judge.

Slip Op. at 23; App. at 43. In summary, the Court of Appeals, in finding against Ms. Shelby, applied the substantial evidence test under the clear and convincing standard. Ms. Shelby has no grounds to complain about this approach. This issue provides no reason for this Court to accept review under RAP 13.4(b)(3).

B. Ms. Shelby's Desire to Have This Court Reweigh the Evidence in Her Case Does Not Present an Issue of Substantial Public Interest

Ms. Shelby contends that review should be accepted because of "substantial public interest in the issue of whether substantial evidence supports an administrative decision that revokes or suspends a professional license." Pet. at 8. She claims that she did nothing wrong in her treatment of the patient. Pet. at 3-7.

However, the Benton County Superior Court (App. at 16-20) and Court of Appeals (Slip Op. at 7-23; App. at 27-43) thoroughly reviewed the evidence, and concluded that the HLJ's findings are supported by substantial evidence. Ms. Shelby now requests this Court to conduct a *third* judicial review of the evidence. Whether substantial evidence supports a fact-specific decision, involving a single licensee, is not a

matter of substantial public interest, and therefore is not grounds for this Court to accept review under RAP 13.4(b)(4).

V. CONCLUSION

Based on the foregoing, the Department of Health respectfully requests the Court deny Ms. Shelby's petition for review.

RESPECTFULLY SUBMITTED this 16 day of October, 2014.

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Attorney General

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PROOF 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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☒ US Mail Postage Prepaid via Consolidated Mail Service
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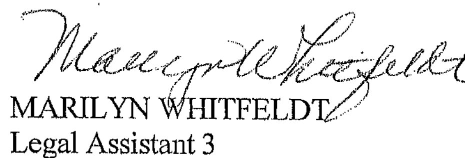
☐ ABC/Legal Messenger
☐ Hand delivered by _______________

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

DATED this 16th day of October, 2014, at Olympia, WA.



MARILYN WHITFELDT
Legal Assistant 3

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
SECRETARY OF HEALTH

FILED
JUN 22 2009
Adjudicative Clerk

In the Matter of

DIANA S. SHELBY
Credential No. DENR.DN.00000253

Respondent

No. M2008-118779

AMENDED STATEMENT OF CHARGES

The Health Services Consultant of the Denturist Program (Program), on designation by the Secretary of Health (Secretary), makes the allegations below, which are supported by the evidence contained in case no. 2008-125186. The patient referred to in this Amended Statement of Charges is identified in the attached Confidential Schedule.

1. ALLEGED FACTS

1.1 On October 21, 1999, the state of Washington issued Respondent a credential to practice as a denturist. Respondent's credential is currently active.

1.2 From on or about March 30 through on or about December 4, 2007 *(treatment period)*, Respondent provided denture services to Patient A that did not meet the standard of care for the state of Washington for reasons, including but not limited to:

A. Respondent did not adequately bind the denture's teeth to the denture base, causing them to repeatedly break off;

B. Respondent poorly constructed the denture, causing malocclusion;

C. Respondent did not adequately address the porous nature of the denture's acrylic which:

1. Caused multiple fractures during the treatment period.
2. Made the denture susceptible to bacteria, subjecting the patient to the risk of illness.

D. Respondent left soft temporary liners in the patient's mouth for too long, which made them susceptible to bacteria, subjecting the patient to the risk of illness;

E. Respondent 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.

ORIGINAL

0-00000226

2. ALLEGED VIOLATIONS

2.1 Based on the Alleged Facts, Respondent has committed unprofessional conduct in violation of RCW 18.130.180(4), which provides in part:

> **RCW 18.130.180 Unprofessional conduct.** The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:
>
> ...
>
> (4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed;
>
> ...

2.2 The above violation provides grounds for imposing sanctions under RCW 18.130.160.

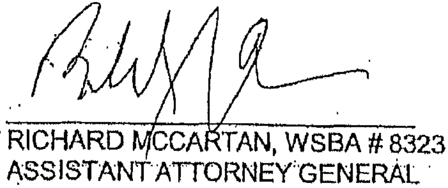
3. NOTICE TO RESPONDENT

The charges in this document affect the public health, safety and welfare. The Health Services Consultant of the Program directs that a notice be issued and served on Respondent as provided by law, giving Respondent the opportunity to defend against these charges. If Respondent fails to defend against these charges, Respondent shall be subject to discipline and the imposition of sanctions under Chapter 18.130 RCW.

DATED: June 19, 2009.

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
SECRETARY OF HEALTH

KIRBY PUTSCHER
HEALTH SERVICES CONSULTANT



RICHARD MCCARTAN, WSBA # 8323
ASSISTANT ATTORNEY GENERAL

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In the Matter of:	
DIANA S. SHELBY, Credential No. DENR.DN.00000253, Respondent.	Master Case No. M2008-118779 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

APPEARANCES:

Respondent, Diana S. Shelby, by
Rettig, Osborne, Forgette, Attorneys at Law, per
Deihl R. Rettig, Attorney at Law

Department of Health Denturist Program (Program), by
Office of the Attorney General, per
Richard McCartan, Assistant Attorney General

PRESIDING OFFICER: Christopher Swanson, Health Law Judge

A hearing was held in this matter on August 7, 2009, September 22, 2009, and September 30, 2009, regarding allegations of unprofessional conduct. Credential Suspended.

ISSUES

Did the Respondent commit unprofessional conduct as defined by RCW 18.130.180(4)?

If the Program proves unprofessional conduct, what are the appropriate sanctions under RCW 18.130.160?

SUMMARY OF PROCEEDINGS

At the hearing, the Program presented the testimony of the Respondent, Diana S. Shelby; Val Cherron; Joseph Vize; and Patient A. The Respondent testified on

her own behalf and presented the testimony of Patient A and Dr. Michael Shannon.

The Presiding Officer admitted the following Program exhibit:

Exhibit P-1: Excerpts from the investigative file.

The Presiding Officer admitted the following Respondent exhibits:

Exhibit R-1: May 28, 2008 letter to Mary Creely;

Exhibit R-2: Copy of the Respondent's office chart;

Exhibit R-3: February 4, 2008 letter from Patient A to the Respondent, and the Respondent's February 11, 2008 response;

Exhibit R-4: Technical documents entitled "Immediate Dentures";

Exhibit R-5: Technical documents entitled "Repairs";

Exhibit R-7: Video deposition/transcript of Dr. Michael Shannon;

Exhibit R-8: Three page response to the specific allegations set forth in the Amended Statement of Charges; and

Exhibit R-9: Deposition transcript of Charlene Coleman with the exception of page 29 line 24 through page 30, line 15.[1]

I. FINDINGS OF FACT

1.1 The Respondent was granted a credential to practice as a denturist in the state of Washington on October 21, 1999.

INTRODUCTION

1.2 In March 2007, Patient A visited the Respondent's denture clinic for the purpose of obtaining dentures due to the extraction of a number of teeth. From

[1] A portion of this exhibit was excluded as irrelevant.

March 2007 through December 2007, the Respondent provided denture services to Patient A. The Respondent's treatment of Patient A did not meet the denturist standard of care.

THE DENTURE CONSTRUCTION PROCESS

1.3 Dentures are a removable full or partial upper or lower dental appliance to be worn in the mouth to replace missing natural teeth. RCW 18.130.010(2).

1.4 Under the denture construction process, dentures are constructed by:

1.4.1. taking impressions of the patient's mouth;

1.4.2. pouring a positive model using the impressions;

1.4.3. constructing wax form to eyeball or feel for fit;

1.4.4. cooking out the wax out of the model;

1.4.5. pressing acrylic into the model; and

1.4.6. binding in the denture teeth to the acrylic.

DENTURIST STANDARD OF CARE

1.5 Pain and discomfort is common when a denture is first seated, especially directly after teeth have been extracted due to normal swelling of the mouth. If a denture is properly constructed, the pain and discomfort should subside after swelling has gone down.

1.6 If a denture is constructed properly, the patient should be able to leave the denture in most of the day and use the denture for eating.

1.7 If a denture is improperly constructed from the outset, it is the obligation of the treating denturist to remedy the situation (including construction of a new denture if

necessary) at no cost to the patient regardless of the period of time that has passed since the denture was first seated.

1.8 A temporary denture, in contrast to a permanent denture, contains a soft liner. Following the expiration of the temporary denture, a permanent denture containing a hard liner should be constructed.

1.9 A temporary denture should only be used for three to six months, with a maximum life of eight months. The length of time in which a temporary denture is usable depends upon the circumstances, including the comfort of the temporary denture to the patient.

1.10 Sometimes, a temporary denture can be relined into a permanent denture by removing the soft temporary liner and installing a permanent hard liner. In other situations, a temporary denture is discarded and a new permanent denture is constructed.

1.11 In order for a practitioner to meet the denturist standard or care, a temporary denture should only be relined into a permanent denture if the denture is properly constructed from the outset, or if improperly constructed, the improper construction can be remedied. Offering a patient the option of relining a problem temporary denture into a permanent denture when the problems associated with the denture cannot be remedied; does not meet the denturist standard of care.

1.12 The standard of care for construction of a denture, including a temporary denture, requires the denture to be durable. A properly constructed denture should be durable enough to resist fracture, loss of denture teeth during normal wear, and resist

the buildup of bacteria and debris. If a denture is not formed properly during the denture construction process, the denture acrylic may be weakened due to porosity and/or there may be a weak bond between the denture acrylic and the denture teeth. As a result, the denture teeth may fall out, the denture may fracture, and the susceptibility to the buildup of bacteria and debris on the denture and in the patient's mouth may be increased. Each of these conditions may cause pain and discomfort, and reduce oral hygiene.

1.13 Generally, the standard of care for construction of a denture, including a temporary denture, requires that the bite of the denture align with the patients natural teeth. A denture with a proper bite alignment should not cause pain and discomfort to the patient, after initial swelling subsides. In some instances, a practitioner may construct a denture to correct for a patient's misaligned teeth/jaw. In this situation, a patient may suffer additional pain and discomfort as the patient's jaw gets accustomed to the new alignment.

PATIENT A

1.14 In March 2007, impressions of Patient A's teeth were made by the Respondent. The Respondent used the impressions to construct a temporary denture. Patient A's temporary upper denture was seated on April 17, 2007. At that time, Patient A was told that the denture would need to be replaced by a permanent denture in approximately six months. At that time, Patient A contracted with the Respondent for a temporary denture only.

1.15 After the denture was seated, Patient A suffered the usual pain and discomfort suffered by patients receiving new dentures following the extraction of teeth. After Patient A's swelling subsided, Patient A continued to suffer pain and discomfort.

1.16 The denture, as constructed, did not properly align with Patient A's teeth. The pain and discomfort associated with the misalignment made it difficult to wear the denture for short periods of time, and made it difficult to eat.

1.17 The Respondent attempted to assist Patient A in making the denture more comfortable by advising Patient A to purchase over-the-counter products to provide a better denture fit. The over-the-counter products did not alleviate the pain and discomfort associated with the improperly constructed denture.

1.18 On September 18, 2007, one of the denture teeth fell out of the denture acrylic. Later, on October 30, 2007, a second denture tooth fell out of the denture acrylic. On both occasions, the Respondent attempted to repair the denture. Following termination of the Respondent's treatment of Patient A, a third denture tooth fell out. The cause of the teeth falling out was improper construction of the denture from the outset due to an improper bond between the denture acrylic and the denture teeth.

1.19 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.

1.20 On December 4, 2007, Patient A sought treatment from a different denturist to correct the problems with her denture. When the denture was presented to the new denturist, it was fractured. The denture was fractured due to the porous nature of the denture acrylic. This was caused by improper construction of the denture from the outset.

1.21 It was a violation of the denturist standard of care to instruct Patient A to continue to use a temporary denture when the denture was a poor fit, it fractured and lost teeth, and the pain and discomfort associated with the denture could not be alleviated by the denturist or by the Patient using over-the-counter products.

1.22 The problems with the denture as constructed could not be remedied by repairing the denture. The Respondent should not have offered to reline the denture since the reline would not have corrected the problems with improper construction. Under the denturist standard of care, the Respondent should have constructed a new denture for Patient A at no cost to the patient. This should have occurred without regard to the life of the original temporary denture.

1.23 The Respondent's failure to meet the denturist standard of care in her treatment of Patient A caused patient harm by causing pain and discomfort to Patient A over an extended period of time. The harm to Patient A was moderate in nature.

1.24 The Respondent's failure to meet the denturist standard of care resulted from lack of knowledge or skills rather than an intention to provide substandard treatment.

1.25 The Respondent's failure to meet the denturist standard of care in her treatment of Patient A, created unreasonable risk of additional pain and discomfort through increased susceptibility to the buildup of bacteria and debris on the denture and in the patient's mouth.

1.26 Although Patient A complained to the Respondent about pain and discomfort, Patient A's communications were inconsistent. At times, Patient A told the Respondent that she was satisfied with the Respondent's services. However, under the denturist standard of care, the Respondent should have been able to detect the problems with the denture while treating Patient A without relying solely on the patient's inconsistent communications.

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health (and by designated authority, the Presiding Officer) has jurisdiction over the Respondent and the subject of this proceeding. Chapter 18.130 RCW.

2.2 The standard of proof in a professional disciplinary hearing is clear and convincing evidence. *Ongom v. Dept. of Health,* 159 Wn.2d 132 (2006), cert. denied 127 S. Ct. 2115 (2007).

2.3 Based upon Findings of Fact 1.1 through 1.26, the Program proved with clear and convincing evidence that the Respondent committed unprofessional conduct as defined in RCW 18.130.180(4), which states:

> Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct,

provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed;

2.4 In determining appropriate sanctions, public safety must be considered before the rehabilitation of the Respondent. RCW 18.130.160.

2.5 WAC 246-16-800 through WAC 246-16-890 (emergency rules effective January 1, 2009) apply to this case.[2] WAC 246-16-810 provides the sanction schedule for practice below standard of care. Tier B of the sanction schedule applies where there is patient harm or risk of severe patient harm.[3] The sanction schedule adequately addresses the conduct in this case.

2.6 The aggravating factors in this case are: 1) multiple violations of the denturist standard of care; and 2) the extended period in which the patient suffered under the pain and discomfort. The mitigating factor in this case is: 1) the lack of intention to harm the patient.

2.7 Based upon the aggravating and mitigating factors, the conduct falls in the lower end of Tier B of the sanction schedule. Therefore, based upon these factors and Findings of Fact 1.1 through 1.26, the Respondent's credential should be suspended for at least two years. Prior to any petition for reinstatement, the Respondent shall demonstrate competency to practice as a denturist.

[2] The emergency rules are employed in this case because the Amended Statement of Charges was issued on June 19, 2009 (prior to the August 22, 2009 effective date for the permanent rules).
[3] Tier A of the sanction schedule applies to minimal patient harm. Tier C applies to severe patient harm. The patient harm in this case was neither minimal nor severe.

III. ORDER

3.1 Suspension. The Respondent's license to practice as a denturist in the state of Washington is SUSPENDED for a period of at least two years.

3.2 Return of Credential. The Respondent shall present her credential to the Department of Health Denturist Program within ten days of receipt of this Final Order.

3.3 Refund. The Respondent shall refund to Patient A (and/or any other person or entity who paid on Patient A's behalf) all fees the Respondent charged with respect to her treatment of Patient A. The Respondent shall provide the Department of Health, Denturist Program with:

a. Within 30 days of the effective date of this Final Order, a full accounting of fees charged in relation to such treatment; and

b. Within 45 days of the effective date of this Final Order, proof of payment to Patient A (or payor) of a refund for all such fees charged.

Failure to refund the fees charged Patient A (and/or other payor) and to provide the Department of Health Denturist Program with an accounting and proof of payment within the specified times shall be a violation of this Final Order.

3.4 Fine. The Respondent shall pay a fine to the Department of Health, Denturist Program in the amount of $5,000.00, which must be received by the Program within two years of the date of entry of this Agreed Order. The fine shall be paid by certified or cashier's check or money order, made payable to the Department of Health Denturist Program.

3.5 Reinstatement. The Respondent may seek reinstatement of her credential in two years from the date of this Final Order. Prior to petitioning in writing for reinstatement, the Respondent shall meet all relevant regulatory requirements for credentialing at the time of petition and must provide proof that she has taken and passed the clinical denturist examination within one year prior to filing the petition.

3.6 Change of Address. The Respondent shall inform the program manager and the Adjudicative Service Unit, in writing, of changes in her residential and/or business address within 30 days of such change.

3.7 Assume Compliance Costs. The Respondent shall assume all costs of complying with all requirements, terms, and conditions of this Final Order.

3.8 Failure to Comply. Protecting the public requires practice under the terms and conditions imposed in this Final Order. Failure to comply with the terms and conditions of this Final Order may result in suspension and/or revocation of the Respondent's license after a show cause hearing. If the Respondent fails to comply with the terms and conditions of this Final Order, the Secretary of Health may hold a hearing. At that hearing, the Respondent must show cause why her credential should not be suspended. Alternatively, the Secretary of Health may bring additional charges

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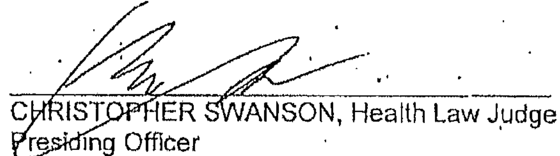
of unprofessional conduct under RCW 18.130.180(9). In either case, the Respondent will be given notice and an opportunity for a hearing on the issue of non-compliance.

Dated this 23 day of December, 2009.



CHRISTOPHER SWANSON, Health Law Judge
Presiding Officer

CLERK'S SUMMARY

Charge	Action
RCW 18.130.180(4)	Violated.

NOTICE TO PARTIES

This Order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration.** RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this Order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Department of Health Denturist Program
P.O. Box 47863
Olympia, WA 98504-7863

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Adjudicative Service Unit does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at http://www.doh.wa.gov/hearings.

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR BENTON COUNTY

DIANA SHELBY, Petitioner, vs. WASHINGTON STATE DEPT. OF HEALTH Respondent.	)	NO. 10-2-00641-6 MEMORANDUM DECISION AND ORDER

FACTS:

The occurrence facts are largely undisputed. Patient went to Diana Shelby for a temporary denture. Patient received her temporary denture on April 17, 2007. Patient was told her temporary denture would need to be replaced by a permanent denture in approximately 6–12 months. On September 18, 2007, one of the denture teeth fell out. Additionally, on October 30, 2007, a second denture tooth fell out. Ultimately, the patient obtained a permanent denture from Joseph Vize. Additional facts are found in the record.

ISSUE:

#1. Whether substantial evidence supports the Department's finding that Diana Shelby committed unprofessional conduct by clear, cogent, and convincing evidence? This court is mindful that Ms. Shelby bears the burden of showing that the agency decision was incorrect. RCW 34.05.570(1)(a) and RCW 34.05.570(3)(e).

#2. Whether Ms. Shelby demonstrates that the sanctions imposed by the HLJ under RCW 18.130.160 are arbitrary and capricious?

ISSUE #1:

The Amended Statement of Charges set out five alleged facts that provide for an alleged violation of unprofessional conduct. See AR 189 – 190. The Health Law Judge found each of the alleged facts were proven by clear, cogent and convincing evidence and made a conclusion of law that Ms. Shelby committed unprofessional conduct and imposed sanctions (AR 353 – 365).

The five SOC allegations against Ms. Shelby are set forth and discussed below.
#1) The HLJ found that Ms. Shelby did not adequately bind the denture teeth to the denture base, causing them to repeatedly break off.

As pointed out by the Department, two highly-qualified denturists testified that it is unusual for teeth to fall out of a denture. Ms. Shelby admitted it was unusual for two teeth to come out. AR 767. Ms. Shelby also testified that her clients do not regularly have teeth pop out, although, tooth repairs are common, though, not necessarily on her dentures. AR 781 – 782. Ms. Shelby also acknowledged a possible manufacturing defect in her laboratory. AR 781. Both denturists addressed the issue of manufacturing defect as a cause of the teeth popping issue. Dr. Shannon did address the tooth popping issue. Dr. Shannon's opinion was that teeth can pop out of a temporary denture because the temporary denture is not made in the strength and to the level that a permanent denture is made. AR 681.

The HLJ apparently accepted the testimony of the denturists, Vallon Charron and Joseph Vize, over the testimony of Dr. Shannon. Ms. Shelby claims in her briefing that the testimony of a dentist should be accepted over that of a denturist who has far less education than a dentist. This court is mindful that I am not to substitute my opinion for that of the HLJ on issues of weight and credibility of witnesses.

Additionally, Dr. Shannon admitted that he sent out all of his denture work to be completed by a denturist, specifically, Ms. Shelby. It is apparent that the HLJ gave more weight to the testimony of the denturists, who actually perform the work, as opposed to Dr. Shannon, who sends out his denture work to one denturist. In my opinion, that is the prerogative of the HLJ, much like a jury can determine the weight and/or credibility to give to any witness, including an expert witness.

Given the testimony related to the issue of teeth popping, I find that there was substantial evidence in the record to support the HLJ's factual finding that Diana Shelby did not adequately bind the denture teeth to the denture base.

#2) The HLJ found that the denture was poorly constructed causing malocclusion. I have reviewed the record and adopt the discussion advanced by the Department at page 7, lines 4 – 23, of the Department of Health's Memorandum Opposing Petition for Judicial Review. In my opinion, there is substantial evidence in the record to support the HLJ's factual findings on this issue.

#3) The HLJ found that Ms. Shelby did not adequately address the porous nature of the denture's acrylic which caused multiple fractures during the treatment period and made the denture susceptible to bacteria.

There is no dispute, the denture, at issue, had fractures. What is disputed is the cause of the fractures.

Diana Shelby denied that the color of the denture base had anything to do with the porosity or weakness of the denture base. AR 777. Further, she testified that all denture acrylic now contains an antimicrobial agent that inhibits growth of bacteria. AR 778. Beyond these points, Ms. Shelby did not further address the porous nature of the denture acrylic. Regarding the fractures, which she admitted were present, Ms. Shelby blamed the patient and denied a concern of bacteria on the denture. AR 782.

Dr. Shannon indicated that the denture was beyond its useful life and in its state of breakdown is obviously going to have voids in it and fractures and so on, creating a perfect hiding place for bacteria. AR 685, 688. While Dr. Shannon did not believe the correct term of usage for the acrylic denture base was "porous", he did agree that temporary dentures, by their nature, are made with a thinner denture base. AR 443,683. Dr. Shannon also indicated that he does not personally make dentures, has not done so for about 34 years, rather, he relies on the denturist to make the dentures, and he exclusively relies on Diana Shelby whom he has known for over 20 years. AR 425 – 429, 684.

Joseph Vize, who is a denturist and makes dentures, noted the porous nature of the denture made by Diana Shelby and indicated that the significantly porous denture makes the denture base weak and susceptible to hygiene issues. AR 706 – 707. Further, he testified that the pale color of the denture base is indicative of air incorporated into the acrylic base. Additionally, Mr. Vize concluded that the porosity of the denture base would weaken the denture allowing less force to break and/or fracture the denture. AR 786 – 787.

Val Charron while not addressing the porous nature of the denture base, did testify that the soft temporary liner would be expected to peel away from the artificially thin denture base and allow bacteria to infiltrate. AR 643.

While the denturist's opinions differed on the basis/causes of the bacteria and fractures, nonetheless, they both conclude that the denture in question did not meet the standard of care.

Here, the experts do not differ on the fact that the denture in question had fractures and was susceptible to bacteria growth. They do, however, differ on the cause of the fractures and the susceptibility of the denture to bacteria. Dr. Shannon blamed the fractures on the fact that the denture itself was beyond its useful life. Mr. Vize claimed the fractures and bacteria were the result of the porous nature of this particular denture. Mr. Charron believed the thin base of this temporary denture and the soft temporary liner resulted in the fractures and collection of bacteria.

Once again, this issue appears to be more about the HLJ's assessment of the weight and credibility of the expert witnesses. Shelby claims that the opinions of inferior expert witnesses cannot constitute clear and convincing evidence, unless there is particular reason to reject the testimony of the superior expert. See Amended Brief of Plaintiff at pg. 33, line 7. However, this

argument is not supported by citation to case law. I am mindful of the potential bias of witness Joseph Vize who is in direct competition with Ms. Shelby. See AR 720.

This court is mindful that I sit in the position of an appellant tribunal in this proceeding. The language of *In Re Sego, 82 Wn.2d 736, 513 P.2d 831(1973),* cited by Ms. Shelby regarding burden of proof, is equally applicable here with regards to this court's function: "As an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are. Our duty, on review, is to determine whether there exists the necessary quantum of proof to support the trial court's findings of fact and order."

From my review of the record, there was substantial evidence in the record to support the HLJ's factual determination on this issue.

4) The HLJ concluded that Diana 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.

Diana Shelby's testimony did not refute the above. In fact, Shelby offered no justification for offering a relign of a defective denture.

Dr. Shannon opined that the denturist should have transferred the patient into a permanent denture sometime in September or October. In his opinion, that was the correct option for the patient. Additionally, Dr. Shannon recognized that the state of the breakdown of the denture in question, with its fractures and voids, is a perfect hiding place for bacteria. AR 688.

Dr. Shannon's testimony then did not conflict with Val Charron's testimony. Mr. Charron testified that you do not leave a patient with a soft temporary relign for more than six months because of the risk of bacteria formation. AR 643-6. Furthermore, Mr. Charron testified it would be below the standard of care in this case to reline the denture, as the reline would not correct the problems that this denture had in the first place. AR 648.

Joseph Vize's testimony was in agreement with Val Charron's testimony. Joseph Vize testified that the denture was so far below the standard of care that relining the denture in its condition would not be appropriate. AR 712. While Joseph Vize testified that a jump procedure would have been an alternative to a permanent denture, there is no factual finding that the HLJ agreed with this testimony. On the other hand, Vize's testimony, in light of the other testimony, supports the HLJ's factual findings on this issue.

5) Finally, the HLJ concluded that Ms. Shelby failed to offer services of a nature or in a manner that resolve the above problems or met the standard of care.

The HLJ found that the problems associated with the patient's temporary denture could not have been corrected by Ms. Shelby's instructions to the patient to apply over-the-counter liner products. This factual finding is supported by substantial evidence in the record by the

denturists. I adopt the argument of the Department at pgs. 10 – 11, of the DOH's memorandum opposing judicial review.

In conclusion, from my review of the record, substantial evidence supports the HLJ's factual findings and the conclusion that Ms. Shelby committed unprofessional conduct.

ISSUE #2:

With regards to the HLJ's imposition of sanctions against Ms. Shelby, I find those sanctions should be upheld. I adopt the reasoning set forth in the Department of Health's Memorandum Opposing Judicial Review at pages 12 – 15. I cannot say that the HLJ's sanctions were arbitrary and capricious.

ORDER

For the above reasons, I am affirming the Department of Health's findings of fact, conclusions of law, and sanctions.

DATED this 5th day of March, 2013.

Carrie Runge

Carrie Runge, Judge

FILED
SEPTEMBER 4, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DIANA S. SHELBY, Appellant, v. WASHINGTON STATE DEPARTMENT OF HEALTH, Respondent.	)	No. 31494-4-III UNPUBLISHED OPINION

SIDDOWAY, C.J. — Diana Shelby, a licensed denturist, appeals the outcome of an administrative proceeding against her by the Washington State Department of Health, which was affirmed by the Benton County Superior Court. She assigns error to 16 findings of fact and 4 conclusions of law, and contends that the evidence was insufficient to support the tier of sanctions imposed by the health law judge. We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

Diana Shelby became a licensed denturist under chapter 18.30 RCW in 1999.

In February 2008, one of Ms. Shelby's former patients filed the following complaint with the Washington State Department of Health:

> During the 6 to 7 months that I had Ms. Shelby's "temporary" denture I had first 1 tooth come out after 3½ months of wear. After about a

> week after the 1st tooth came out a 2nd tooth came out. Ms. Shelby fixed both times. Because the 2 teeth came out so easily I went to another denturist. While at First Choice Dentures a crack in the denture was discovered. I then took the denture back to Ms. Shelby & she fixed it. While I was waiting until the first of the year so my Dad would have enough money to get my permanent denture[,] I had 3 more teeth come out of the denture & a large crack appeared. So I decided to get my new denture from 1st Choice Denture & I asked for my money back from Ms. Shelby. She refused.
>
> I am sending you pictures of the infearior [sic] material & or job that she did. I'm also sending you the letter that she wrote me in return, instead of sending me a refund. She basicly [sic] accused me of being stupid & [Joseph] Vize of stealing clients. For most of the time that I had Ms. Shelby's denture I was unable to use it due to teeth coming out & or cracks recurring while eating.

Clerk's Papers (CP) at 174-75.

Following an investigation, the department filed a statement of charges of unprofessional conduct against Ms. Shelby, alleging that teeth had not been adequately bound to the patient's denture base, causing them to break off repeatedly, and that the porous nature of the denture's acrylic caused multiple fractures during the treatment period. Ms. Shelby requested a hearing to contest the charges.

Before the hearing, the department amended its statement of charges to identify the following five respects in which it alleged that Ms. Shelby's treatment of the patient fell below the standard of care of a Washington denturist:

> [1] Respondent did not adequately bind the denture's teeth to the denture base, causing them to repeatedly break off;
>
> [2] Respondent poorly constructed the denture, causing malocclusion;

> [3] Respondent did not adequately address the porous nature of the denture acrylic which:
>
> > [c]aused multiple fractures during the treatment period [and] [m]ade the denture susceptible to bacteria, subjecting the patient to the risk of illness;
>
> [4] Respondent left soft temporary liners in the patient's mouth for too long, which made them susceptible to bacteria, subjecting the patient to the risk of illness; [and]
>
> [5] Respondent 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.

CP at 372.

A hearing was held over three days, at which the department called four witnesses: Ms. Shelby; the patient; Val Cherron, a denturist retained by the department as an expert; and Joseph Vize, the patient's treating denturist following her treatment by Ms. Shelby. Ms. Shelby testified on her own behalf, questioned the patient further, and called as her own expert witness, Dr. Michael Shannon, a dentist with training in denture construction.

Having heard the evidence and argument, the health law judge concluded that the department had proved that Ms. Shelby committed unprofessional conduct based on findings (among others) that the cause of teeth falling out of the denture was its improper construction due to an improper bond between the denture acrylic and the denture teeth; that the cause of fractures in the denture was also its improper construction, due to the porous nature of the denture acrylic; that "[i]t was a violation of the denturist standard of care to instruct [the patient] to continue to use a temporary denture when the denture was a poor fit, it fractured and lost teeth, and the pain and discomfort associated with the

denture could not be alleviated by the denturist or by the [patient] using over-the-counter products"; and that

> [t]he problems with the denture as constructed could not be remedied by repairing the denture. [Ms. Shelby] should not have offered to reline the denture since the reline would not have corrected the problems with improper construction. Under the denturist standard of care, [Ms. Shelby] should have constructed a new denture for [the patient] at no cost to the patient. This should have occurred without regard to the life of the original temporary denture.

CP at 395. The health law judge imposed a two-year suspension of Ms. Shelby's denturist license, a $5,000 fine, and required Ms. Shelby to refund all fees she had charged the patient for treatment.

Ms. Shelby's motion for reconsideration was denied, after which she petitioned for judicial review. After the Benton County Superior Court upheld the department's final order, Ms. Shelby filed this appeal.

ANALYSIS

I. *Standard of Review*

Well settled law governs our review of the decision of an administrative agency. We review the decision from the same standpoint as the trial court, and apply the exclusive bases for relief from agency orders in adjudicative proceedings set forth in the Administrative Procedure Act (APA), chapter 34.05 RCW, directly to the record before the agency. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006). We will grant relief from the health law judge's order only if

we find one of the defects identified in RCW 34.05.570(3) as warranting relief. *Lewis County*, 157 Wn.2d at 498. The party asserting the invalidity of agency action has the burden of demonstrating error. RCW 34.05.570(1)(a).

Ms. Shelby challenges the health law judge's order as unsupported by substantial evidence as required by RCW 34.05.570(3)(e), which provides for relief where "[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court." Where an agency decision is challenged on that basis, we must determine "whether there is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011) (internal quotation marks omitted) (quoting *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008)).

The substantial evidence standard is highly deferential to the agency fact finder, and requires us to view the evidence in the light most favorable to the prevailing party in the highest administrative fact finding forum below. *Arco Prods. Co. v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Deference is given to the trier of fact regarding witness credibility or conflicting testimony and we do not weigh the evidence or substitute our judgment. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 831-32, 256 P.2d 1150 (2011). We need not be persuaded of the truth or correctness of an agency's findings, only that any fair-minded person could have ruled as

the agency did in light of the evidence. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

The health law judge treated the department's proceeding as implicating a significant property interest on Ms. Shelby's part in her denturist license, and for that reason held the department to a burden of proving its charges by clear, cogent, and convincing evidence. *Bang D. Nguyen v. Dep't of Health, Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 29 P.3d 689 (2001). The department did not object to the heightened standard.[1] When finding unprofessional conduct, an administrative agency may use its experience and specialized knowledge to evaluate and draw inferences from the evidence. RCW 34.05.452(5); *In re Disciplinary Proceeding Against Brown*, 94 Wn. App. 7, 13-14, 972 P.2d 101 (1998).

Ms. Shelby argues that the clear and convincing standard applied by the health law judge implicates a corresponding duty on our part to make an "independent determination

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[1] For the first time on appeal, the department argues that *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 9, 256 P.3d 339 (2011) has since made clear that the clear and convincing standard applies to only those license revocation proceedings in which the value of the property interest at stake requires a heightened standard of proof as a matter of due process, that not all occupations require an identical personal investment, and that not all state-granted credentials constitute a professional license. The department now submits that Ms. Shelby's investment of "'time, expense, and education'" in her denturist license is insufficient to require the heightened burden of proof and that we may apply a preponderance of evidence standard in reviewing the record. Br. of Resp't at 8 (quoting *Hardee*, 172 Wn.2d at 16). We will not entertain a challenge for the first time on appeal to an assertedly too-high burden of proof applied without objection below. RAP 2.5(a).

of whether the trial judge was correct in determining that the evidence was sufficient to be clear and convincing," relying on *In re Estate of Reilly*, 78 Wn.2d 623, 479 P.2d 1 (1970), a case involving a will contest. Br. of Appellant at 29. Washington courts have declined to accept the invitation to "fashion a new and higher standard of review for appeals in medical disciplinary proceedings." *Ancier v. Dep't of Health, Med. Quality Assurance Comm'n*, 140 Wn. App. 564, 572-73 n.12, 166 P.3d 829 (2007). The standard of appellate review has been established by the legislature. "Appellate courts do not reweigh the evidence but are limited to assessing whether that evidence was adequate to satisfy the applicable burden of proof below"—in this case, clear and convincing evidence. *Id.*

Ms. Shelby assigns error to a number of findings of fact and conclusions of law, and contends that the evidence was insufficient to support the tier of sanctions imposed by the health law judge. We first address her challenges to specific findings and conclusions and then turn to her challenge to the sanctions.

II. *Challenged Findings and Conclusions*

The health law judge organized his findings of fact into sections; Ms. Shelby assigns error to findings included in his introduction, in the "denturist standard of care" section, and in the section addressing Ms. Shelby's treatment of the complaining patient. We address the challenged findings by section.

A. Introductory Finding

Finding 1.2. Ms. Shelby assigns error to the statement in finding 1.2 that "[t]he Respondent's treatment of Patient A did not meet the denturist standard of care." CP at 391. This overarching finding in the introduction is supported by the health law judge's more specific findings as to the relevant standard of care and as to Ms. Shelby's acts and omissions. The specific findings were addressed in the next several sections of the health law judge's findings, which we examine below.

B. "Denturist Standard of Care" Findings

To determine whether Ms. Shelby's treatment complied with the standard of care of a denturist treating patients in Washington, the health law judge first had to determine the applicable standard of care, which he did in his findings 1.5 through 1.13.

Findings 1.5, 1.6, and 1.13. In challenging findings 1.5, 1.6, and 1.13, Ms. Shelby argues that if taken literally, each is "an insignificant general statement." Br. of Appellant at 38-40. They can be taken literally. None of these findings purports to address whether Ms. Shelby *met* the standard of care. Ms. Shelby does not argue that findings 1.5, 1.6, or 1.13 incorrectly state the standard of care of a Washington denturist.

Finding 1.11. Ms. Shelby challenges finding 1.11's statement that "[o]ffering a patient the option of relining a problem temporary denture into a permanent denture when the problems associated with the denture cannot be remedied[ ] does not meet the

denturist standard of care." CP at 392. She argues that "[n]o expert testified that this violated the standard of care." Br. of Appellant at 39.

Ms. Shelby is mistaken; the testimony of two experts supported this important finding. Mr. Cherron testified:

> Q. And in November, did she give the patient two options?
> A. Again, gave her two options. To either reline this denture or make a new one.
> Q. Okay. And that would be the hard reline?
> A. The laboratory-formed hard reline that would not have the ability to have bacteria sneak underneath the two materials.
> Q. Or a new denture?
> A. Or a new denture.
> Q. Okay. Do you believe that both options would be appropriate in this case?
> A. No.
> Q. And why is that?
> A. A reline of this denture would not correct the problems that it has at this point. A reline would not appropriately bind the teeth to the new denture base. A reline only replaces the tissue side of the material or where the temporary material had been placed. It does not have anything—a reline does not have anything to do with where the teeth are formed, the acrylic itself. That procedure is called a rebase.
> Q. Would often a reline at that point be in violation of the standard of care?
> A. I believe it falls below the standard of care.
> Q. And what was the appropriate option at that point?
> A. To only make a new denture.

CP at 683-84.

Mr. Vize testified:

> Q. I believe you testified that the reline of this denture in December would have been unthinkable?

> A. I'm shocked that that was even offered to the patient given the severe problems with this denture. The fact that she would—I mean, you know, even if she was doing it for free, it wouldn't solve the problem. But the fact that she's willing to take another two hundred and fifty dollars from this patient, it wouldn't have solved any problem. Again, it's like I said, the analogy that I used about putting tires on a car going to a junk yard. I mean, why bother. I mean it's unusable. A reline, it would make it fit better, but that's not going to solve the bite problem. It's not going to solve the appearance issues. It's not going to solve the occlusion issues. It's not going to solve the porosity issues. It's not going to solve the teeth popping out. So, I mean, I don't know what good that really would have done her. I'm really surprised that that was even suggested.

CP at 753.

The testimony of the two experts is substantial evidence supporting finding 1.11.

C. Findings Specific To "Patient A"

Findings 1.15 and 1.16. The disciplinary proceeding was based on Ms. Shelby's treatment of the single complaining patient, referred to in the findings and conclusions as "Patient A." Ms. Shelby challenges the statement in finding 1.15 that "[a]fter Patient A's swelling subsided, Patient A continued to suffer pain and discomfort." CP at 394. She challenges the statement in finding 1.16 that "[t]he pain and discomfort associated with the misalignment made it difficult to wear the denture for short periods of time, and made it difficult to eat." *Id.* She argues that the patient "had no pain and discomfort after the initial swelling had subsided, until after the temporary denture wore out in November, 2007" and "there is no evidence that after the initial normal period of adjustment, Patient A had any difficulty wearing the denture for short periods of time or [that the denture]

made it difficult to eat, until after the denture had worn out approximately on October 30, 2007." Br. of Appellant at 40-41.

Two witnesses testified to the patient's pain and discomfort: the patient herself, and Mr. Vize, based on statements the patient made to him. Mr. Vize's testimony about the patient's statements during treatment was admissible. The rules of evidence serve as guidelines in administrative hearings but the APA gives presiding officers latitude to admit evidence not admissible under those rules if, in the judgment of the presiding officer "it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."[2] Even the evidence rules recognize statements that are made for the purpose of medical diagnosis or treatment as an exception to the hearsay rule. ER 803(a)(4).

Mr. Vize testified:

> A. She was having difficulties with a denture that had been made by another practitioner and she was unable to use it and she was seeking relief.

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[2] RCW 34.05.452 provides, in relevant part:
(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.
(2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

Q. And what were her complaints made to you?
A. The general essence of it was—is that she had a denture that was unusable and she was unable to function with it. And you could refer back, or if you'd prefer that I do, back to this letter in the notes. She just basically stated that the denture was unusable, was the essence of it.
Q. And do you recall what made it unusable for her?
A. As far as what the patient stated or what ...
Q. Yes.
A. The patient stated that she was having problems with poor fit, repeated breakage. She stated that she found it very difficult to eat and function with the appliance. She said speaking was very difficult relating to the poor fit. And far and by large, she just didn't wear it.

CP at 733-34 (alteration in original).

The patient testified:

And—but I still continued to have problems with fit and the—the soreness in my mouth. And I kept having sore spots and she would go in and try to fix the denture. And at first I used like Poligrip and stuff like that, and then eventually she told me that to get some of that Denturite, and put on—on the denture to help cushion and help the fit. And I did that, and she also, the first time before she—I did it, she put the Denturite in the denture at first. And after maybe about two, three months that we've been continually having problems with the fit of the denture. And with the rubbing on my gums and—and stuff.

CP at 601.

Elsewhere, she testified:

Q. Okay. During this—during this time that you had the denture for approximately 12 months, how did it affect your ability to—to eat food?
A. Very poorly. I was unable to eat solid foods. I was—had to eat very soft foods and when I could have my denture in, and there was a lot of times that I couldn't even have my dentures in my mouth.
Q. And why was that?

A. Because of it hurting.
Q. So would you take it out at night or during the day?
A. I took it out at night, yes.
Q. Would you have it out during the day?
A. Pardon?
Q. Would you have it out during the day?
A. Sometimes.
Q. Okay. And what kind of—describe any feelings you have while trying to chew food.
A. Pardon?
Q. Describe what it was like to chew food.
A. Difficult. Very difficult. They would hurt or they would move. Or they just—just didn't work—
Q. Okay.
A. —properly.
Q. Did it alter your diet?
A. Yes.
Q. And what kind of diet did you have [to] go on?
A. Well, I—like I said, I was eating soft foods, I couldn't eat meat of any kind. I'd even have trouble eating hamburger.
Q. Okay.
A. And I was basically eating oatmeal and scrambled eggs and things like that that you didn't have to chew.

CP at 607-09.

Ms. Shelby focuses on the patient's statements made to her during the course of treatment, which the health law judge found were inconsistent, with the patient telling Ms. Shelby at times that she was satisfied with her treatment. *See* finding 1.26. Nonetheless, the testimony of other competent witnesses supports the health law judge's finding that the patient suffered pain and discomfort even after the initial swelling had subsided, making it difficult for her to wear the denture and difficult to eat.

Ms. Shelby also challenges the statement in finding 1.16 that "[t]he denture, as constructed, did not properly align with Patient A's teeth." CP at 394. She concedes that Mr. Vize testified that the denture, as constructed, did not comply with the standard of care, but she discounts his testimony as "invalid." Br. of Appellant at 40. This is evidently because Mr. Vize did not review her testimony or Ms. Shelby's treatment records but relied instead on what the patient told him about her care. While Mr. Vize was certainly subject to cross-examination, the fact that he relied upon what the patient told him does not make his testimony invalid.

She also argues that Mr. Vize's opinion alone could not meet the clear and convincing standard because "[a]n expert with superior education and training (Dr. Shannon), as well as two other denturists (Cherron and Shelby), contradicted this finding of fact." *Id.* at 41. It was for the health law judge to determine whose testimony was credible and persuasive, and he had no obligation to consider how many witnesses held a given opinion.

Mr. Vize testified that malocclusion was present when he saw the patient and would have been present from the time the denture was installed. He testified that while the degree of malocclusion was "not the worst that I've seen by any means," he "would term it severe." CP at 736. In later summarizing respects in which he believed the denture fell below the standard of care, he included his opinions that "the occlusion is incorrect" and "[t]he bite relationship is incorrect." CP at 748. Substantial evidence

supports the finding that the denture as constructed did not properly align with the patient's teeth.

Finding 1.17. Ms. Shelby challenges the finding that "[t]he over-the-counter products did not alleviate the pain and discomfort associated with the improperly constructed denture." CP at 394. Ms. Shelby argues that the evidence showed that the patient did not follow Ms. Shelby's instruction to use Denturite.

It was Ms. Shelby's position that the patient did not follow her instructions about using Denturite, but the patient never testified to that effect; the patient testified "I did everything that she would tell me to do," and elsewhere, "[E]ventually she told me that to get some of that Denturite, and put on—on the denture to help cushion and help the fit. And I did that." CP at 601. Regardless of whether the patient followed Ms. Shelby's directions or not, the evidence established that the patient's use of over-the-counter products did not alleviate her pain and discomfort, as demonstrated in addressing findings 1.15 and 1.16, above. And while not directly related to this finding or Ms. Shelby's challenge to it, both Mr. Cherron and Mr. Vize criticized Ms. Shelby's recommendation that the patient use Denturite after Ms. Shelby installed a Lynal liner on the denture, because of the risk of bacterial accumulation and infection. *See* CP at 671-72, 821. Substantial evidence supports the finding.

Finding 1.18. Ms. Shelby challenges the finding that "[t]he cause of the teeth falling out was the improper construction of the denture from the outset due to an improper bond between the denture acrylic and the denture teeth." CP at 394.

Mr. Cherron testified that "[i]t's uncommon for teeth to pop out when they're manufactured properly" and, when asked about whether the patient's teeth were manufactured properly, testified that it was "very predictable" that the three teeth that the patient was required to have repaired would pop off the denture base. CP at 676-77. Explaining to the health law judge while handling one of the teeth, he testified that "[t]his tooth has not been prepared to the point where it was going to properly bind" and pointed out a couple of problems with its preparation. CP at 677. Later, he testified:

> I've delivered ten thousand dentures in my over ten years of experience. I've delivered fifteen hundred to two thousand immediate dentures just like this. Of all those cases, I could quote you two or three that the teeth pop out. And it's a mistake I've made. And when that happens, I remake the denture or at a minimum I replace all of the pink part with a product called a rebase. And what that does is it stabilizes the whole denture base. Refit it to the patient's mouth, so it doesn't have discomfort or rocking and it reinserts the teeth into the denture base, so they don't pop out any longer.

CP at 706.

When Mr. Vize was asked his opinion why the patient's teeth were popping out, he testified:

> A. There can be a variety of causes. Technically speaking, the most common cause of an acrylic tooth popping out—I want to make clear the designation—these are acrylic teeth in this denture. Acrylic teeth should be very, very solidly bonded to the denture base. The

> teeth are made of a material called polymethylmethacrylate, PMMA, for short. The pink denture base is made from a material called PMMA, polymethylmethacrylate. A molymer (phonetic) is used. It's a solvent. And what happens when a denture is processed is the solvent, the molymer, chemically bonds the tooth to the base. An analogy would be pipe dope on a PCV pipe. And when a practitioner processes a denture, the most common cause—to answer your question, the most common cause of the tooth popping out is the separator film. It's not cleaned off of the underneath side of the tooth by scrubbing it. That can happen. An oversight can happen. There are other things that are clearly present with the denture. The other most common cause is improper curing of the denture, trying to cure the denture too fast.
>
> Q. And what do you mean by curing?
>
> A. Dentures—when the denture base material, the pink stuff that you see on the denture, when I refer to it as the base, that's what I'm referring to, the pink stuff, that has to go through a process of curing. Most commonly a hot-water bath. And the most common procedure is to cure it at a lower temperature of 163 degrees for nine hours and boiling for the last thirty minutes. So, a total of nine and a half hours. But when you cure a denture too quickly, if you're in a rush, sometimes it's dropped directly into boiling water and it flash cures the material, which leads to a poor bond between the tooth and the base. And porosity in the denture base itself, which this also displays.

CP at 740-41. He testified that the denture manufactured for the patient by Ms. Shelby was "not the worst that I've seen, but I would say it's significantly porous," later testifying that "[a] porours denture base like this shouldn't be allowed to leave the office" and that it "[a]bsolutely" could be a cause of teeth popping out. CP at 743.

Finding 1.20. Ms. Shelby challenges the finding that "[t]he denture was fractured due to the porous nature of the denture acrylic. This was caused by improper construction of the denture from the outset." CP at 395. She argues only that "[t]he

reasons why this finding of fact is erroneous were discussed previously in this brief." Br. of Appellant at 42.

A word search reveals that Finding 1.20 is not discussed elsewhere in the brief. We will not consider assignments of error that are unsupported by legal argument and relevant authority. RAP 10.3(a)(6); *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). We also note, however, that Mr. Vize testified that the denture was "significantly porous" and that although fractures are common, the porosity of this denture in particular would weaken it, meaning that less force would be needed in order for it to break. CP at 743.

Finding 1.21. Ms. Shelby challenges the finding that "[i]t was a violation of the denturist standard of care to instruct Patient A to continue to use a temporary denture when the denture was a poor fit, it fractured and lost teeth, and the pain and discomfort associated with the denture could not be alleviated by the denturist or by the Patient using over-the-counter products." CP at 395. She argues that there was no evidence she instructed the patient to wear the denture after October 30 and no testimony that the standard of care required her to stop wearing the denture before October 30.

The patient acknowledged that at an October 30 appointment, Ms. Shelby told her that the temporary denture needed to be relined or replaced. But there was ample evidence that the problems predated October 30 and that Ms. Shelby continued to perform repairs with a view to the patient's continuing to use the temporary denture,

contrary to the denturist standard of care. See the discussion of findings 1.11, 1.15, and 1.16.

Finding 1.22. Ms. Shelby challenges the finding that "[t]he problems with the denture as constructed could not be remedied by repairing the denture. The Respondent should not have offered to reline the denture since the reline would not have corrected the problems with improper construction. Under the denturist standard of care, the Respondent should have constructed a new denture for Patient A at no cost to the patient. This should have occurred without regard to the life of the original temporary denture." CP at 395.

She argues that "[t]he reason why the first sentence is erroneous has been discussed previously in this brief." Br. of Appellant at 42. She provides no further explanation or direction. Here again, we will not consider assignments of error that are unsupported by legal argument and relevant authority. We note, however, that the evidence previously discussed in connection with findings 1.11, 1.15, and 1.16 supports the first sentence of the finding.

Ms. Shelby argues that the remainder of the finding is erroneous "because no expert testified that [Ms.] Shelby was required to give Patient A a new denture for free." *Id.* But finding 1.7, which Ms. Shelby did not challenge and which is therefore a verity on appeal,[3] states, "If a denture is improperly constructed from the outset, it is the

[3] Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

obligation of the treating denturist to remedy the situation (including construction of a new denture if necessary) at no cost to the patient regardless of the period of time that has passed since the denture was first seated." CP at 391-92. The remainder of finding 1.22 is supported by finding 1.7.

Finding 1.23. Ms. Shelby challenges the finding that "[t]he Respondent's failure to meet the denturist standard of care in her treatment of Patient A caused patient harm by causing pain and discomfort to Patient A over an extended period of time" and that "[t]he harm to Patient A was moderate in nature." CP at 395.

Yet again, she argues that the reasons why the first sentence is erroneous are addressed previously in her brief—argument that is, again, insufficient under our rules. We have previously addressed the sufficient evidentiary support for the health law judge's findings that the patient experienced pain and discomfort from the ill-fitting denture and that the denture constructed did not meet the denturist standard of care.

As to the remainder of the finding, she argues "there was no evidence to support the assertion that the degree of 'harm' to Patient A was 'moderate' "; that "moderate" is a technical word that means medium in degree, and "[t]here is no evidence that Patient A had *any* diagnosed problem caused by this denture, much less any problem that reached the level of moderate." Br. of Appellant at 43 (emphasis added).

"Moderate" is a term used to describe a tier of harm considered in imposing sanctions under the sanction schedule for "practice below the standard of care" found at

WAC 246-16-810. "Moderate" is not defined by agency regulations and Ms. Shelby provides no authority in offering her definition. But the State does not dispute that "medium in degree" is a commonly understood meaning of "moderate."

Sufficient evidence supports a finding that Ms. Shelby's practice caused moderate harm to the patient. The health law judge could reasonably find that continued pain, difficulty eating and speaking, and being forced to change a patient's diet to soft foods, qualify as moderate harm. Additionally, there was evidence that the patient was subjected to a moderate or severe *risk* of harm because the extended use of Lynal as a soft liner (coupled with application of Denturite) created a condition under which bacteria could build up and put the patient at a risk of infection. *See* finding 1.25. The health law judge did not err in finding that the patient suffered moderate harm.

Findings 1.24 and 1.25. Ms. Shelby challenges findings 1.24 and 1.25, which reiterate her violation of the standard of care, for "reasons . . . previously discussed in this brief." Br. of Appellant at 43-44. The insufficiency of this type of argument has been previously discussed in this opinion.

Finding 1.26. Ms. Shelby challenges the health law judge's finding 1.26 that, while the patient's communications to Ms. Shelby were inconsistent, "under the denturist standard of care, the Respondent should have been able to detect the problems with the denture while treating Patient A without relying solely on the patient's inconsistent communications." CP at 396. She contends that there is no evidence to support implied

assertions that she (1) failed to detect the problems with the denture and (2) relied solely on the patient's inconsistent communications.

Mr. Vize testified that problems with the denture included malocclusion, the denture base was incorrect in that it is severely or significantly porous, the denture did not fit correctly, the denture was not aesthetically pleasing, and the denture was "simply unusable." CP at 748. Mr. Cherron testified that problems with the denture included obvious fractures that would continue due to a failure to put a hard liner in the denture and teeth that had popped out and would continue to pop out because of an error in its manufacture.

The health law judge's finding that Ms. Shelby failed to detect the problems is supported by the expert evidence that identified those problems coupled with Ms. Shelby's continuing denial that any problem existed. We defer to the health law judge's weighing of the evidence and credibility determinations. He found that the problems did exist, but that Ms. Shelby failed to recognize them.

The finding that Ms. Shelby relied solely on the patient's communications is supported by Ms. Shelby's testimony; her defense to the charges was, and continues to be, that if the patient had complaints, she never communicated them to Ms. Shelby. *See, e.g.*, CP at 807 (agreeing that she had a "friendly amicable pleasant relationship" with the patient and "never knew" that the patient was not satisfied). The finding that the patient's reports to Ms. Shelby were inconsistent was supported by the testimony of the patient and

Mr. Vize to the effect that the patient had reported some problems to Ms. Shelby. Here again, what the patient told Mr. Vize about her prior treatment by Ms. Shelby was admissible.

D. Challenged Conclusions of Law

Ms. Shelby challenges the health law judge's conclusions of law on the grounds that the State did not prove its charges by clear and convincing evidence, renewing her argument that Dr. Shannon was a "superior expert" and arguing that the fact that Mr. Cherron and Mr. Vize were not in complete agreement in their opinions weakened the State's case. She again argues that there was no proof of harm beyond "minimal" harm. Her assignments of error to the conclusions of law also refer to "reasons . . . discussed previously in this brief," which, in light of RAP 10.3(a)(6), we will not attempt to divine.

We have already determined that the 16 findings of fact to which Ms. Shelby assigns error are supported by substantial evidence, bearing in mind the clear and convincing standard applied by the health law judge.

As to the conflicting opinions by experts, we have already discussed the fact that credibility determinations are for the health law judge to make, not us. *See Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 35, 226 P.3d 263 (2010).

Finally, we have already determined that the finding of "moderate" harm is supported by substantial evidence.

The health law judge found that Ms. Shelby did not adequately bind the teeth to the denture, causing them repeatedly to break off (finding 1.18). He found that the denture was poorly constructed causing malocclusion (findings 1.13, 1.16). He found that Ms. Shelby failed to adequately address the porous nature of the denture (finding 1.20). His findings support the charge that Ms. Shelby left the liners in the patient's mouth for too long, making them susceptible to bacterial accumulation and the risk of infection (finding 1.25). He found that the only solution to the repeated problems consistent with the denturist standard of care was for Ms. Shelby to construct a new denture for the patient at no cost, which Ms. Shelby failed to do (finding 1.22). The health law judge's findings support his conclusion that Ms. Shelby committed unprofessional conduct.

III. *Challenge to Sanctions*

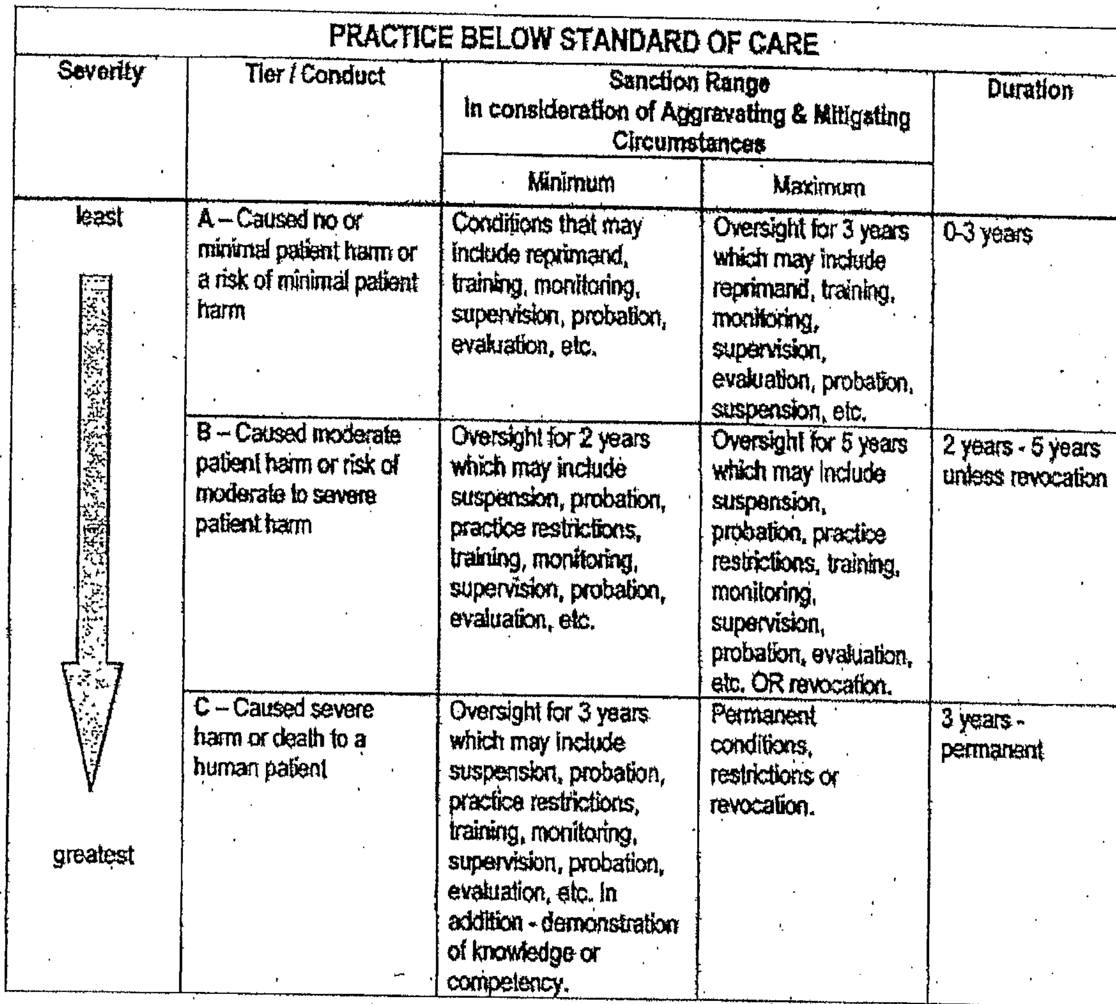
Finally, Ms. Shelby challenges the sanctions imposed by the health law judge.

The Uniform Disciplinary Act (Act), chapter 18.130 RCW, governs the licensing and discipline of health care professionals, including denturists. RCW 18.30.135. It provides that "[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed" constitutes unprofessional conduct by any license holder covered by the chapter. RCW 18.130.180(4); *Brown*, 94 Wn. App. at 13. The Act provides for the development by the secretary of health of a uniform schedule of sanctions and provides that disciplining

authorities "shall" impose sanctions as directed by that schedule anytime they find that a license holder has committed unprofessional conduct. RCW 18.130.160, .390.[4]

The sanctions schedule adopted by the secretary that is to be applied where a license holder has been found to have practiced below the standard of care is set forth in WAC 246-16-810, which we reproduce below:

[4] As provided by RCW 18.130.390(2), the uniform sanctioning schedule was to be applied to all disciplinary actions commenced under the Act after January 1, 2009. The secretary was directed to use emergency rule-making authority to adopt rules taking effect by that date; emergency rules were adopted by Emergency Rule-Making Order WSR 09-01-188 (effective Jan. 1, 2009) and WSR 09-09-035 (effective May 1, 2009). The statement of charges against Ms. Shelby was filed on January 23, 2009, making the uniform sanctioning schedule applicable.



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

Once the appropriate sanctions schedule has been identified, the disciplinary authority charging a licensee with unprofessional conduct under the Act "identifies the severity of the unprofessional conduct and identifies a tier using the sanction schedule tier descriptions." WAC 246-16-800(3)(b). It then "identifies aggravating or mitigating factors," using a list provided by WAC 246-16-890. WAC 246-16-800(3)(c). It finally

"selects sanctions within the identified tier," with "[t]he starting point for duration of the sanctions [being] the middle of the tier range." WAC 246-16-800(3)(d).

Here, the health law judge found that Ms. Shelby's practice below the standard of care caused moderate harm or risk of moderate to severe harm, falling in Tier B. The midpoint for the duration of the sanctions imposed under Tier B is 3.5 years. The health law judge found two aggravating factors: that Ms. Shelby committed multiple violations of the denturist standard of care and that her unprofessional conduct occurred over an extended period of time.[5] It found one mitigating factor: the lack of intention to harm the patient. Based on the aggravating and mitigating factors, the health law judge concluded that "the conduct falls in the lower end of Tier B of the sanction schedule" and ordered that Ms. Shelby's denturist license be suspended for at least two years, allowing her to seek reinstatement two years from the date of his final order. CP at 397. He also imposed a $5,000 fine and ordered her to refund all fees that she charged the patient for treatment.

[5] The department points out that WAC 246-16-890 provides for several more aggravating factors that the health law judge could have applied: being an experienced denturist (WAC 246-16-890(2)(a)), offering no refund to the patient (WAC 246-16-890(3)(c)), not showing remorse for her conduct (WAC 246-16-890(3)(f)), and having been subject to prior discipline by the department (WAC 246-16-890(2)(b)). While we may affirm an agency decision on grounds not cited by the agency, *see Heidgerken v. Dep't of Natural Res.*, 99 Wn. App. 380, 388, 993 P.2d 934 (2000), we choose not to reach other grounds where the findings made by the health law judge are sufficient.

We accord considerable deference to an agency's determination of sanctions, as the appropriate sanction is peculiarly a matter of administrative competence. *Brown*, 94 Wn. App. at 16 (citing *State ex rel. Wash. Fed'n of State Emps. v. Bd. of Trustees of Cent. Wash. Univ.*, 93 Wn.2d 60, 68-69, 605 P.2d 1252 (1980)). Following the 2008 adoption of RCW 18.130.390, which directed the secretary of the department of health to develop schedules defining appropriate and consistent ranges of sanctions, a sanction that is imposed in accordance with the department's regulations and is based on findings of aggravating and mitigating circumstances supported by the record is well-nigh invulnerable to attack.

The health law judge in this case substantially followed the procedure for determining statutes required by the regulations; if anything, he was more lenient. The aggravating factors he found are supported by the evidence.[6] Ms. Shelby has not demonstrated any abuse of discretion.

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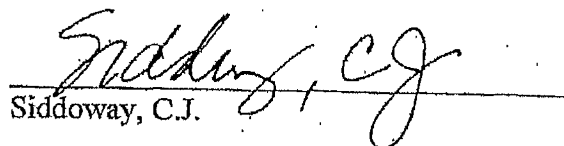
[6] Both Mr. Vize and Mr. Cherron testified to multiple violations of the denturist standard of care. And given what the health law judge found to be unprofessional conduct, the conduct began with the improper manufacture of the denture in or about March 2007 and continued until at least December 4, 2007, the last time Ms. Shelby saw Patient A. The misconduct may have continued to February 4, 2008 when Ms. Shelby refused to give Patient A a refund.

No. 31494-4-III
Shelby v. Wash. State Dep't of Health

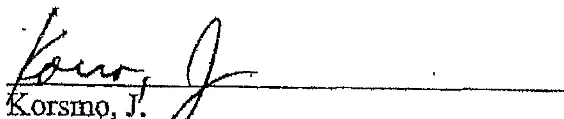
Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

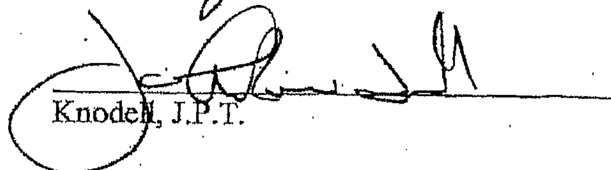


Siddoway, C.J.

WE CONCUR:



Korsmo, J.



Knodell, J.P.T.

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Case No.: 90783-8
Title: Department of Health Answer to Statement for Judicial Review

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