NO. 314944

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DIANA SHELBY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Diana S. Shelby, a denturist, began the process of providing a denture to Patient A on March 30, 2007 (CP 599). First, Shelby sold Patient A a temporary denture (CP 519). Then, Shelby provided care until December 4, 2007 (CP 563).

The normal useful life of a temporary denture is approximately six months (CP 344 {p. 17}, 392, 694, 721, 765). Beginning October 30, Shelby instructed Patient A to replace the temporary denture with a permanent denture (CP 532), but Patient A did not do so, because Patient A could not afford to pay for a permanent denture (CP 617).

The Health Services Consultant of the Denturist Program (Program), as designee of the Secretary of the Department of Health, brought an administrative proceeding against Shelby. The Program filed with the Department Amended Statement of Charges, requesting that the Department impose sanctions upon Shelby pursuant to RCW 18.130.160.

The pertinent allegations of the Amended Statement of Charges stated as follows:

> 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.

Based upon those charges, the Program alleged that Shelby "has committed unprofessional conduct in violation of RCW 18.130.180(4)" (Amended Statement of Charges). An administrative law judge (ALJ) concluded that Shelby had committed unprofessional conduct and imposed sanctions including suspension of her license to practice as a denturist "for a period of at least two years".

Shelby petitioned the superior court for judicial review of that decision. The superior court affirmed the decision of the ALJ. Shelby has now appealed to the Court of Appeals.

II. ASSIGNMENTS OF ERROR

A. Errors

The ALJ made the following errors:

1. Finding of Fact 1.12: "The Respondent's treatment of Patient A did not meet the denturist standard of care." (CP 392)

2. Finding of Fact 1.5: "If a denture is properly constructed, the pain and discomfort should subside after swelling has gone down." (CP 391)

3. Finding of Fact 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." (CP 391)

4. Finding of Fact 1.11: "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." (CP 392)

5. Finding of Fact 1.13: "A denture with a proper bite alignment should not cause pain and discomfort to the patient, after initial swelling subsides." (CP 393)

6. Finding of Fact 1.15: "After Patient A's swelling subsided, Patient A continued to suffer pain and discomfort." (CP 394)

7. Finding of Fact 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." (CP 394)

8. Finding of Fact 1.17: "The over-the-counter products did not alleviate the pain and discomfort associated with the improperly constructed denture." (CP 394)

9. Finding of Fact 1.18: "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." (CP 394)

10. Finding of Fact 1.20: "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." (CP 395)

11. Finding of Fact 1.21: "It was a violation of the denturist standard of care to instruct Patient A to continue to use a temporary denture..." (CP 395)

12. Finding of Fact 1.22: "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 395)

13. Finding of Fact 1.23. (CP 395)

14. Finding of Fact 1.24 to the extent that it implies that Respondent failed to meet the standard of care or lacked the necessary level of knowledge and skills. (CP 395)

15. Finding of Fact 1.25. (CP 396)

16. Finding of Fact 1.26: "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." (CP 396)

17. Conclusion of Law 2.3. (CP 396)

18. Conclusion of Law 2.5. (CP 397)

19. Conclusion of Law 2.6. (CP 397)

20. Conclusion of Law 2.7. (CP 397)

21. Entry of the Order.

22. Concluding that Shelby committed unprofessional conduct based upon findings of fact that were not proven by clear and convincing evidence.

23. Applying Tier B sanctions.

The superior court erred by affirming the decision of the ALJ.

B. Issues

1. When the standard of proof is clear and convincing evidence, what is the standard of review?

2. Under RCW 34.05.570(3)(a), was the order of the Department of Health a violation of Shelby's constitutional right to Due Process? This issue includes at least the following sub-issues:

A. Did the Program prove that Shelby committed unprofessional conduct by clear and convincing evidence?

B. Can an expert's opinion constitute clear and convincing evidence when that opinion is based upon false assumptions?

C. When a temporary denture performs adequately for its intended useful life, can a denturist be found to have committed unprofessional conduct based upon a conclusion that the temporary denture should have been of better quality?

D. Was there clear and convincing evidence of facts necessary to impose sanctions under Tier B of WAC 246-16-810?

III. STATEMENT OF THE CASE

A. Distinction between Occurrence Facts and Opinion Facts

Although the opinion of an expert can be called a fact, this brief will make a distinction between the facts of the occurrence and the opinions of experts. In this case, there was no significant dispute regarding the facts of the occurrence, which were as follows:

B. Facts of the Occurrence

Shelby was a denturist continuously from 1999 until December of 2009, when her denturist license was suspended as a result of this proceeding (CP 777). Before 1999, there was no requirement in the State of Washington of licensing for denturists, but Shelby practiced as a denture lab technician, constructing dentures, from approximately 1974 through 1984 (CP 777). Since 2005, Shelby has treated approximately 3,000 patients (CP 777).

Shelby began the process of providing a denture to Patient A on March 30, 2007 (CP 599). Patient A understood that this denture was temporary (CP 614). Patient A paid $413.25 for this temporary denture (CP 614). Patient A understood when she contracted for the temporary denture that she would need to replace it with a permanent denture after six to 10 months (CP 614).

On June 21, 2007, Shelby relined the temporary denture with a soft liner called Lynal (CP 562). At that appointment, Shelby also instructed Patient A regarding the proper use of the over-the-counter product Denturite (CP 798). Patient A disobeyed Shelby's instructions to use Denturite (CP 800).

Patient A testified that she "started having trouble" with the denture when she "would eat something, and a tooth would come out." (CP 530). Patient A said that the first broken tooth was on September 18, 2007 (CP 530). On October 30, 2007, another tooth of the denture broke off (CP 602). The denture had not lost "teeth" until the second tooth was lost on October 30, 2007 (CP 562).

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

There is no evidence that Shelby instructed Patient A to continue using the temporary denture after October 30. The testimony of Patient A shows that Shelby did not give such an instruction. Patient A testified as follows in her deposition:

Q. Okay. If we go to October 30, '07, you have another tooth repaired, this time tooth number 8.

A. Uh-huh.

Q. Now we're about seven months out -

A. Uh-huh.

Q. - from when the denture was first constructed or installed?

A: Yes.

Q. Then, looks like we go into November, there's some discussion about relining or a new denture being constructed. What do you know about that?

A. Yeah, she had talked to me about getting - either having that denture re-aligned or getting, making a new denture, or something like that. But at that time, because at that time of my year, my dad, as well as myself, were at the financial end of the road, so that's -

Q. Just didn't have the money?

A. Right. (CP 532)

Patient A testified similarly at the hearing, as follows:

Q. And isn't it a fact that the first repair, that is, with the tooth falling out didn't occur until September 18th of 2007? That's the first time you had a problem with a tooth coming out?

A. Basically, because -

Q. Well, I'm not asking why, the record shows and I think you've already testified -

A. Yeah.

Q. - that's when the tooth first fell out?

A. - Yeah.

Q. And now we're at about six months, aren't we?

A. No.

Q. We're not?

A. It wasn't - it wasn't six months.

Q. Well, the denture was installed in early April of '07, wasn't it?

A. April. Yeah.

Q. Okay. Well, the calendar - if I - I think we all operate on the same calendar. April to September, that's if you add up all those months, that's six months?

A. I guess you're right.

Q. Now, didn't she tell you when the teeth started to come out, you said another one came out in November, another one in December, that it either needed to be relined or you needed to replace it with a permanent denture and you refused because you didn't have the money to buy a permanent denture?

A. At that time, no, I didn't. (CP 616)

One of the Program's experts, Vallon Charron, admitted that Shelby's

treatment record says that Patient A was ready for reline or complete upper denture (CP 683). Patient A did not obey Shelby's instruction because Patient A did not have the financial ability to pay for either service (CP 532, 616). In January, 2008, Patient A purchased a permanent denture from Joseph Vize for a price of "a little over $1,000" (CP 544).

Shelby offered the relining option only in the event that Patient A could not afford a new denture (CP 805). She said, "Something needs to be done for people who can't afford a new denture." (CP 805). When Shelby was asked whether the relining would be intended to make the temporary denture into a permanent denture, she answered, "No, just to get by with until they can afford a new denture." (CP 805). Shelby's prices were $250 for a reline and $900 for a new denture (CP 805).

On February 4, 2008, Patient A wrote a letter to Shelby threatening to complain to the Department of Health unless Shelby paid Patient A a "refund" (CP 564). However, the amount of money that Patient A demanded was $770 rather than a refund of the $413 that Patient A had paid Shelby (CP 557, 620). When Shelby declined to pay the $770 to Patient A, then Patient A made a complaint to the Department of Health (CP 620). Patient A testified that Vize told Patient A to complain to the Department of

Health (CP 540), but Vize denied it (CP 767).

C. Significance of Finding of Fact 1.21 in the Light of the Undisputed Facts of the Occurrence

Finding of Fact 1.21. states as follows:

> 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 (CP 395).

Finding of Fact 1.21 vaguely refers to a time when the judge decided that it was a violation of the standard of care to instruct Patient A to continue to use a temporary denture. That time was "when" three different events had all happened, as follows: "(1) the denture was a poor fit; and (2) it fractured and lost teeth; and (3) the pain and discomfort...could not be alleviated..."

The record shows that "when" the denture "lost teeth" was October 30, 2007 (CP 532). The denture lost a tooth, not teeth, on September 18 (CP 530). "Teeth" had not been lost until a second tooth was lost on October 30 (CP 562). There is no evidence that, before October 30, the denture was a "poor fit" or that it had fractured. Thus, the earliest date to which the "when" of Finding of Fact 1.21 could have referred was October 30.

Interpreting Finding of Fact 1.21 in conjunction with the undisputed facts results in a conclusion that the beginning of what the ALJ said was unprofessional conduct was on October 30, 2007. This brief previously gave details regarding the fact that Shelby never instructed Patient A to continue to use the temporary denture after October 30.

D. Vallon Charron Opinions

1. Issue of original quality of the denture. Charron testified, in effect, that the quality of the temporary denture was adequate to comply with the standard of care by testifying to the following:

a. Until June 21, 2007, Shelby did not violate the standard of care (CP 670, 673). This means that Charron approved of the temporary denture.

b. Charron testified that it was a violation of the standard of care not to remove the soft liner and replace it with a temporary hard liner on September 18, 2007 (CP 679). Parenthetically, it is important to note that the ALJ rejected this opinion by not making a finding of fact that Shelby breached the standard of care by failing to replace the soft liner with a temporary hard liner. The significance of this testimony is the implication that Charron had the opinion that the quality of the temporary denture was adequate at least until September 18, 2007.

c. Charron's criticism of the denture was not as to the original quality of the denture, but as to his contention that the standard of care required Shelby to remove the soft reliner and replace it with a temporary hard liner (CP 688). The "soft liner" that Shelby installed in the denture on June 21, 2007, is called Lynal (CP 704).

d. Charron testified that the denture became inadequate because it was used too long with the temporary soft liner rather than because of any violation of the standard of care in the original manufacture of the temporary denture (CP 686). Charron testified that in order to have complied with the standard of care, Shelby should have offered to remake the denture at the price that she would normally charge for relining the denture (CP 692). The reason Charron gave for his opinion was that the denture became inadequate by the time the fractures occurred and that the reason why the fractures occurred was because Shelby did not remove the Lynal (soft temporary liner) and replace it with a hard liner by September 18 (CP 691). Charron said, "The fractures only occurred because the practitioner did not take proper steps to put a more permanent or semi-permanent temporary liner in this...Instead of a soft liner, it should have been a hard liner." (CP 691) The significance of this testimony is the implication that there was no violation

of the standard of care in the original manufacture of the temporary denture.

2. Issue of giving Patient A the option of relining. In direct examination, Charron testified that it was a violation of the standard of care for Shelby to offer relining as an option (CP 684). That testimony was referring to the appointment on November 18 (CP 683). Charron testified that the standard of care required Shelby to offer Patient A only one option on November 18, 2007, which was a new denture (CP 684).

However, on cross-examination Charron admitted that this testimony was based on the assumption that Patient A could afford to pay for a new denture (CP 694). Charron admitted that it was within the standard of care for Shelby to offer to reline the temporary denture, because Patient A might be able to afford to pay for relining the temporary denture, but not be able to afford paying for a new permanent denture (CP 695).

Charron was asked whether the standard of care permits a denturist to offer a patient a reline to "provide the patient with some relief for a temporary denture that was expiring in terms of its useful life, so the patient could get by for some period of time until they could acquire the financial wherewithal to have a permanent denture made..." (CP 694). Charron agreed that this would be within the standard of care (CP 694).

Then, Charron was asked, "That's exactly what happened in this case;

isn't it?" His answer was, "Yes." (CP 695). Finding of Fact 1.19 was correct in stating, "The Respondent offered the reline option due to Patient A's financial situation." (CP 394).

3. Issue of fractures. Charron testified that the denture fractured "because the patient was asked to have a soft temporary liner in this denture far beyond its date to be removed." (CP 686). This quotation contains two different assertions. First, the correct assertion that the fracture occurred because Patient A continued to use the temporary denture beyond its useful life. Second, the incorrect assertion that Shelby asked Patient A to do so (CP 532, 617, 683, 806). Patient A violated Shelby's instruction by continuing to use this denture beyond its useful life (CP 532, 617, 683, 806).

Charron testified that Shelby violated the standard of care because the temporary denture fractured (CP 691). However, that opinion is inconsistent with the fact that the fracture did not occur until after Patient A disobeyed Shelby's instruction of October 30 to replace the temporary denture (CP 532, 617, 683, 687, 806).

4. Issue of teeth coming out of denture. Charron testified that there was a violation of the standard of care because three teeth (teeth #3, #4, and #9) came out of the denture after December 4 (CP 676). When Charron

testified that "these teeth" were not "binded" to the denture according to the standard of care at CP 678, "these teeth" referred to the three teeth that came off of the denture after December 4.

Charron did not testify that Shelby violated the standard of care because of the tooth that popped off on September 18 or because of the tooth that popped off on October 30. At CP 676, lines 20 - 21, Charron testified that he would not testify whether there was any problem with the manufacturing process because of tooth #11 coming off the denture on September 18. By the same reasoning, Charron also could not have expressed any opinion regarding tooth #8 coming off the denture on October 30.

When tooth #11 came out of the denture on September 18, Shelby replaced it at no charge (CP 562, 804). When tooth #8 came out of the denture on October 30, then Shelby replaced it at no charge (CP 562, 804). Charron did not testify that there was any violation of the standard of care by Shelby with regard to these occurrences.

It is not possible that Shelby could be guilty of unprofessional conduct with regard to the teeth that came out of the denture after December 4, 2007, because this was more than a month after Shelby first instructed Patient A to

replace this temporary denture with a permanent one (CP 532, 617, 683, 806). Charron claimed that he could determine from looking at this temporary denture that teeth #3, #4, and #9 were not properly affixed to the denture (CP 677). Dr. Shannon, an expert with qualifications superior to the qualifications of Charron, said it is impossible to make that determination without seeing the denture at the beginning (CP 488). He also said that the quality of the denture complied with the standard of care (CP 486).

All experts agreed that the normal useful life of a temporary denture is approximately six months (CP 344 {p. 17}, 694, 765). The ALJ so found (Finding of Fact 1.9, CP 392). Because teeth #3, #4, and #9 stayed in place for more than eight months, it is unbelievable to suggest that teeth were not bound to a denture in accordance with the standard of care based upon the fact that those teeth popped out of it after the end of its useful life.

5. Issue regarding Denturite. Charron testified that Shelby violated the standard of care by using Denturite along with Lynal (CP 700). That testimony was contradicted not only by Dr. Shannon (CP 717) and by Shelby (CP 800), but also by Vize (CP 765). When Vize was asked about the use of Denturite in conjunction with Lynal, Vize testified, "That's routine." (CP 765). Charron admitted that he was not familiar with Denturite

(CP 699). The ALJ rejected Charron's testimony on this issue by failing to enter a finding of fact that the use of Denturite and Lynal together was a violation of the standard of care.

Charron testified that Shelby should have removed the soft reline on September 18, then replaced it with a hard liner (CP 679). However, he retracted this testimony at CP 681, line 20, when he admitted, "I can't speak to that exactly - according - because I don't see the denture at this time."

6. Issue of eating problems. Charron admitted that it is common for patients to have eating difficulties "throughout the time that they have the temporary denture" (CP 689). Charron said that it "causes him concern" if a patient has eating problems from May through January (CP 690). That opinion is irrelevant because there is no evidence that Patient A had eating problems from May through January.

This brief has previously discussed the evidence that Patient A had no abnormal problems with this denture until at least October 30. After October 30, the reason that Patient A had minor problems with chewing is because Patient A did not obey Shelby's instruction to replace it. This brief has previously discussed the evidence that Shelby so instructed Patient A beginning on October 30.

7. Issue of whether standard of care required giving Patient A a free denture. At CP 694, Charron testified that a denturist is not obligated to construct a permanent denture for a patient without being paid for it. At CP 709, he testified that Shelby had an obligation, free of charge, to remove the temporary liner and replace it. At CP 710, he denied saying that. Then, he testified, "I'd have to take out that temporary liner because it was my choice to put it in." (CP 710).

In summary, Charron did not clearly express any opinion regarding what, if anything, the standard of care required Shelby to do without being paid for it. However, it is clear that Charron did not claim that Shelby was required to give Patient A a new permanent denture for free (CP 694).

E. Joseph Vize Opinions

1. Lack of Foundation. Vize did not read Patient A's testimony (CP 757). Vize did not read Shelby's treatment records (CP 764).

Vize' direct testimony regarding his opinions begins at CP 733. The only foundation laid for his testimony was what he observed and what he claimed that Patient A told him. This included an alleged statement by Patient A that the denture was intended to permanent (CP 734). Vize did not show any awareness of what happened during the course of treatment of

Patient A from March 30 until December 4, 2007.

2. Incorrect Assumptions. Vize' testimony is rife with incorrect assumptions. Vize made so many incorrect assumptions that it is difficult to identify all of them. Many of his incorrect assumptions are interrelated. His incorrect assumptions include the following:

a. Vize' incorrectly assumed that this denture was intended to be permanent (CP 734).

b. Vize incorrectly assumed that the performance of the denture was inadequate for the entire time that Patient A used it. Because his testimony is rife with this incorrect assumption, it is misleading to reference any particular page. This incorrect assumption is at the heart of all of his testimony from CP 734 through CP 770.

c. In contrast to the fact that Shelby handled every complaint that Patient A presented to her (CP 345 {p. 19}, 534, 807), Vize assumed that Shelby did not address these problems (CP 748, 769).

d. Although Shelby instructed Patient A on October 30 to replace the temporary denture with a permanent denture (CP 532, 617, 683, 806), Vize incorrectly assumed that Shelby did not do anything to address the problems that began to develop in November (CP 739).

e. Vize incorrectly assumed that Shelby had completed treating Patient A (CP 748). Actually, Shelby had given Patient A treatment options neither of which had yet been followed by Patient A (CP 532).

f. Vize' testimony does not show any awareness of the "Facts of the Occurrence" that were presented in Section III. B. of this brief.

3. Bias. Shelby was Vize' only competition in the Tri-Cities metropolitan area (CP 756). Vize was motivated by a desire to eliminate his competition (CP 474). The fact that Vize testified against Shelby without knowing the facts of the case supports the theory that Vize' testimony was motivated by his desire to eliminate his competition.

4. The ALJ rejected Vize' claim that Shelby should have done a "jump procedure". Vize claimed that the standard of care required Shelby to have done a "jump procedure" (CP 751). Vize claimed that if a "jump procedure" had been done, Patient A could have used the denture "a little bit longer if her finances simply did not allow" her to buy a new denture (CP 751).

Vize testified that the "jump procedure" would have prevented teeth from popping out of the denture (CP 752). Vize did not claim that a "jump procedure" would have prevented the denture from fracturing (CP 752). The

ALJ rejected Vize' testimony regarding the claim that a "jump procedure" should have been done by failing to enter a finding of fact in support of it.

5. Some of Vize' testimony favored Shelby. Regarding a tooth coming out of the denture on September 18 and a second tooth coming out of the denture on October 30, Vize agreed that "mistakes can be made and teeth can come out." (CP 743). Vize said that the standard of care requires that if a tooth pops out, the denturist puts it back in without charge (CP 743). That is exactly what Shelby did (CP 804). Vize did not claim that the standard of care regarding these instances required anything more.

Vize agreed that malocclusion was present when Patient A first came to Shelby (CP 736). He agreed that it is common to have malocclusion with temporary dentures (CP 737). Vize admitted that he did not know what the pre-extraction bite was for Patient A (CP 761). He admitted that he did not know whether the temporary denture replicated Patient A's natural bite (CP 762).

Vize disagreed with an opinion expressed by Charron that it was improper to use Lynal and Denturite in combination. Specifically, Vize admitted that he had previously made this statement:

> "Tissue shrinkage and, therefore, looseness of the immediate denture is common after extractions. There is usually some

> provider-recommended method; either replacement of the tissue conditioner or use of over-the-counter product for the patient to follow until the denture can be relined or remade in about six months after the extractions." (CP 765 -766)

In the previous question and answer, it was established that the over-the-counter product being referred to in this quotation was Denturite, as recommended by Shelby to this patient (CP 765). Vize finished this portion of his testimony by saying, "That's routine." (CP 766).

Two other important concessions were contained in the testimony quoted above. First, that the useful life of a temporary denture is approximately six months. Second, that after approximately six months, the denture can be relined or remade.

Vize did not testify that the standard of care required Shelby to provide Patient A with a new permanent denture for free (CP 751). This is important because of the error that the ALJ made in entering Finding of Fact 1.22.

Regarding this issue, Vize was asked what he thought Shelby should have done, given the fact that Patient A could not afford a new denture (CP 749). Then, after an objection, Vize was asked the question again (CP 751). Vize never answered that question. Instead, Vize gave a long unresponsive answer (CP 751).

Vize' last answer summarized Vize' position (CP 769). He said that he was not criticizing Shelby for what Shelby did, but for what Vize thought that Shelby did not do. He stated as follows:

> Dentures are like any other product that are manufactured. Mistakes can happen. Things can go wrong. Sometimes things do not turn out right despite the best intentions and efforts of the person providing the work. But when that happens, there has to be some remedy. There has to be some action taken by the practitioner. It doesn't matter whether it's a denturist or a dentist or a prosthodontist. Something has to be done to correct that. And it just wasn't done. So, that's kind of where the rubber meets the road here. I mean it just - those things were not done. You know, you can make a mistake - and *the other point that I want to make is it's the entirety of the situation. And any one of those things by themselves, okay, maybe if something was done to correct that*, but, man, all of them together. I mean, I'm just - I'm really shocked. That's all I can say (CP 769). (emphasis added)

This brief has previously explained that Vize' assertion that "nothing was done" was incorrect because of false assumptions that he made. The undisputed facts of the occurrence require the rejection of Vize' false accusation in the above quotation that Shelby did not do anything to address the problem of the temporary denture wearing out. When that false accusation is removed from the above quotation, the result is that Vize retracted his previously stated opinion that Shelby violated the standard of care. It is not valid to take any allegations of Vize out of the context of his

entire testimony.

F. Diana Shelby Opinions

Shelby testified that she complied with the standard of care (CP 793). Shelby also gave the following uncontroverted factual testimony, in addition to what has been discussed previously: (1) Patient A did not use Denturite, in violation of Shelby's instructions to do so (CP 800). (2) Patient A had a class III bite at the beginning of Shelby's treatment (CP 787). (3) Neither Charron nor Vize could have known that Patient A began this process with a class III bite (CP 810). (4) The class III bite required Shelby to design the temporary denture in the way that she did (CP 787).

Regarding the color of a denture, Shelby said that a denturist can purchase many different shades of acrylic, from clear to "dark and almost purple", and then the denturist can add yellow and brown and orange and blue (CP 813). For this reason, it is not possible to determine anything about the quality of a denture from its color (CP 813).

Shelby explained that the teeth that came out of the denture on September 18 and October 30, "were the exact two teeth that were way out of alignment with the other teeth, of her natural teeth", and that is why those two teeth came out, and not because of any issue regarding bonding (CP 803).

G. Dr. Michael Shannon Opinions

Michael Shannon, D.M.D., a dentist, testified that Shelby complied with the standard of care (CP 469, 716). Dr. Shannon has been continuously licensed to practice dentistry since 1976 (CP 455). His training included training regarding the entire process of fitting patients with dentures (CP 458). In the early years of his dental practice, he did the work of a denturist by making his own dentures for his patients (CP 459).

Dr. Shannon testified that the normal life of a temporary denture is six months (CP 344 {p. 17}, 467). He said, "Certainly, yeah," in answer to a question of whether he would expect a temporary denture to experience breakdown if it is used "much beyond six months, eight months, ten months, a year." (CP 467). He testified that this breakdown of a temporary denture includes fractures and teeth falling out of it (CP 467). He said that the problems that Patient A had with this temporary denture were normal and that Shelby responded adequately to these problems (CP 469).

Dr. Shannon also attacked the credibility of Vize (CP 474). He said that Vize has made it clear that he wants to put Shelby out of business (CP 474), that Vize has a habit of creating trouble (CP 470), and that the only basis for the complaint that Vize made against Shelby was to obtain a

competitive advantage in the marketplace (CP 474). Dr. Shannon also provided a list of some of the incorrect assumptions that Vize made (CP 488).

IV. ARGUMENT

A. Statutory Basis

RCW 34.05.570 governs judicial review of administrative proceedings such as the one that is the subject of this appeal. The pertinent portions of that statute provide as follows:

> (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> (a) The order...is in violation of constitutional provisions on its face or as applied;
>
> ...

The Due Process Clause of the United States Constitution requires proof by clear and convincing evidence of facts that would justify the order. *Nguyen v. State*, 144 Wn.2d 516, 29 P.3d 689 (2001); *Ongom v. Dept. of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006). Although the ALJ gave lip service to this requirement, the ALJ did not actually follow it. Thus, the decision violated Shelby's constitutional right to practice her chosen profession.

B. Standard of Review

In Re Estate of Reilly, 78 Wn.2d 623, 479 P.2d 1 (1970), made a fundamental policy decision regarding the standard of review in cases where the burden of proof is clear and convincing evidence. The court did not allow the trial judge discretion to decide whether the evidence was sufficient to satisfy that burden of proof. Instead, the court made an independent determination of whether the trial judge was correct in determining that the evidence was sufficient to be clear and convincing.

In order for a factual determination to be sustained on appeal when the burden of proof is clear and convincing, the evidence must be more substantial than when the burden of proof is a preponderance. The existence of some evidence in support of the decision of the trial judge is not necessarily sufficient to justify affirming the decision when clear and convincing proof is required. *In Re Estate of Reilly, supra*, said, "Evidence which was 'substantial' to support a preponderance may not be sufficient to support the clear, cogent, and convincing requirements..."

Similarly, appellate review of factual findings by the trial court has also been more stringent in cases involving constitutional rights. See *State v. Huston*, 71 Wn.2d 226, 428 P.2d 547 (1967). This case has both a requirement of proof by clear and convincing evidence and involvement of

a constitutional right.

The majority opinion in *In Re Estate of Reilly, supra,* is 65 pages long. Approximately 60 pages contain a detailed analysis of the facts. The Supreme Court reversed the decision of the trial court despite the existence of substantial evidence that supported it. See the dissent for a presentation of substantial evidence that supported the factual determination of the trial judge.

At page 639, the majority stated as follows:

> As pointed out elsewhere in this opinion, the contestants had the burden of proving by clear, cogent, and convincing evidence that either the testatrix lacked testamentary capacity to make her will or that it was the product of undue influence by some other person.
>
> The dissenting opinion quotes two sentences from *In Re Kleinlein's Estate*, 59 Wn.2d 111, 366 P.2d 186 (1961), to the effect that this court's sole power is to ascertain whether the findings are supported by substantial evidence. We have no quarrel with this statement, but when read in context with the facts of Kleinlein it has no relevance to the issue before us. The statement was made in connection with consideration of the issue of testamentary capacity and must be read as a part of the further statement by the court that the findings by the trial court that the testatrix lacked testamentary capacity was
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> > ...abundantly supported by the proofs and, indeed, any other conclusion would be preposterous.
> >
> > The autopsy confirmed the opinion of the attending physician that Mrs. Kleinlein

> suffered from senile dementia. The brain tissue had so far dissolved that only twenty-five per cent of the gray matter remained. The classical findings of senile dementia were confirmed by the Post mortem examination. (p. 113, 366 P.2d p. 187.)

> Therefore, this court reached a proper result even under the clear, cogent, and convincing test. Evidence which was "substantial" to support a preponderance may not be sufficient to support the clear, cogent, and convincing requirements with which we are faced. (emphasis added)

This was a clear statement that the majority rejected the contention of the minority that a normal standard of review should be applied to the factual determinations of the trial court in cases in which the burden of proof is clear and convincing evidence. The factual determination of the trial judge was reversed even though there was substantial evidence to support it.

In Re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973), held that clear and convincing evidence is required to sustain an order permanently depriving a parent of custody. The court said that requiring clear and convincing evidence is the equivalent of saying that the ultimate fact must be shown to be highly probable. Concerning the scope of review, the court stated the following, at p. 739 - 740:

> We are firmly committed to the rule that a trial court's findings of fact will not be disturbed on appeal if they are supported by "substantial evidence". (Citation omitted) Nevertheless, evidence that may be sufficiently "substantial"

> to support an ultimate fact in issue based upon a "preponderance of the evidence" may not be sufficient to support an ultimate fact in issue, proof of which must be established by clear, cogent, and convincing evidence. See *In Re Estate of Reilly (supra)*. Thus, the question to be resolved is not merely whether there is "substantial evidence" to support the trial court's ultimate determination of the factual issue but whether there is "substantial evidence" to support such findings in light of the "highly probable" test. (emphasis added)
>
> 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. (Citation omitted) 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 of permanent deprivation.

In Re Sego cited with approval *In Re Reilly's Estate, supra*. Then, the court said that its duty "is to determine whether there exists the necessary quantum of proof to support the trial court's findings of fact". The trial court was affirmed only because the Supreme Court independently determined that the evidence was substantial enough to meet the clear and convincing standard.

In *State v. Huston, supra*, the Supreme Court also engaged in a more stringent review of the factual determination of the trial court. This time, it

was because of the need to protect constitutional rights. The court stated as follows, at p. 231 - 232:

> While we are not required to search the record for errors not clearly assigned, the review of a case where a confession is involved presents the reviewing authority with a delicate problem. The trial court has already made a factual determination based upon conflicting evidence. Normally, it is not the proper function of the appellate court to review such findings when supported by credible evidence. (citation omitted)
>
> Yet, we must not blindly accept such findings, particularly where constitutional rights are involved. (emphasis added) In *State v. Hoffman*, 64 Wn.2d 445, 392 P.2d 237 (1964), we said:
>
> > Although we will and do attach significant weight to findings of fact upon disputed issues arising under Rule 101.20W, supra, we cannot blindly and conclusively accept such as indisputably establishing the pertinent facts. It is our duty and obligation, where basic constitutional rights are involved, to carefully review the record brought before us and determine therefrom whether the bounds of due process requirements have been exceeded. (citations omitted) We are mindful, in this respect, that it is not our function to re-evaluate the credibility of the witnesses testifying. (citation omitted) Our prime concern is that it be convincingly evident from the record that constitutional privileges have not been abused. Strained findings of fact, predicated upon translucent or sophisticated evidence, cannot stand. (emphasis added)

Thus, the standard of review in this case requires the Court of Appeals to examine the record and determine whether there is sufficient "quantum of proof" to support the ALJ's Findings of Fact under the "highly probable" test that applies when the burden of proof is clear and convincing evidence.

C. Absence of a Finding of Fact Equals an Adverse Finding on that Issue

The absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against the party on that issue. Among the many cases so holding are the following:

1. *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn.App. 541, 222 P.3d 1217 (2009). At p. 563, the court said, "...key to the Association's charge of retaliation is Granato's alleged statement at the May 27 meeting that he would terminate Rummel if the Association did not withdraw the Dahl ULP." This issue was disputed. The Court of Appeals ruled against the Association because "the examiner did not enter a finding that Granato threatened to terminate Rummel if the Dahl complaint was not withdrawn." (at p. 563).

2. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001). The plaintiff argued that Betty Handly was an agent for a corporation. That issue was disputed and the plaintiff had the burden of proof

on it. There was no finding of fact on the issue. The court said, at p. 524, "...The absence of a finding of fact is to be interpreted as a finding against him." Thus, the plaintiff lost on that issue.

3. *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn.App. 692, 754 P.2d 1262 (1988). The plaintiff argued that the trial court committed error by concluding that the defendants were not liable for fraud. The trial court did not make findings of fact regarding some of the elements that are necessary to establish fraud. At p. 702, the court stated, "In the absence of a finding of fact on a disputed matter, the appellate court will imply a finding against a party having the burden of proof on that issue." Thus, the court concluded that the plaintiff had failed to prove all of the facts necessary to establish fraud.

Here, there was an absence of a finding of fact in favor of the Program regarding several of the theories that both Vize and Charron presented in their testimony. This was the equivalent of a finding of fact against the Program on those claims.

Included among the claims of the Program that were rejected by the ALJ by a failure to enter findings of fact in favor of the Program on these issues were the following: (1) Vize' opinion that the standard of care required

Shelby to do a "jump procedure"; (2) Charron's opinion that it was negligent to use Denturite and Lynal together; (3) Charron's opinion that the standard of care required Shelby to remove the Lynal; and (4) Charron's opinion that Shelby violated the standard of care by using the denture for too long with the temporary soft liner.

D. WAC 246-16-810 Defines Levels of Unprofessional Conduct and Corresponding Sanctions

Attached hereto as Appendix 1 is a correct copy of the relevant portion of WAC 246-16-810. The reason that I have attached it, instead of quoting it, is because it is in the form of a chart.

E. Findings of Fact Must be Adequate to Support the Judgment

In *State v. Jones*, 34 Wn.App. 848, 664 P.2d 12 (1983), the defendant was found guilty of attempted robbery and simple assault in a bench trial. The convictions were reversed because the findings of fact were inadequate for the appellate court to determine whether the trial court had found the facts necessary to support the convictions. The trial court's findings included the following:

> That, beyond a reasonable doubt, on 10 February 1982, Jerry Lee Jones did unlawfully attempt to take personal property from Marjorie Aust. This taking was against her will and by the use or threatened use of force to her person. The

> respondent is guilty of attempted robbery in the second degree contrary to RCW 9A.56.210 and RCW 9A.56.190.
> ...
>
> That, beyond a reasonable doubt, on 10 February 1982, Jerry Lee Jones did unlawfully strike and kick Jimmy Brockway, contrary to RCW 9A.36.040. The respondent is guilty of simple assault.

The Court of Appeals held that these purported "findings of fact" were actually conclusions of law. The Findings of Fact in this case should be viewed in comparison to the decision in *State v. Jones, supra.*

F. Expert Opinion Must be Based Upon the Facts of the Occurrence

The opinion of an expert must be based upon the facts of the case in order to be valid. *Riccobono v. Pierce County*, 92 Wn.App. 254, 966 P.2d 327 (1998); *Safeco Ins. Co. v. McGrath*, 63 Wn.App. 170, 817 P.2d 861 (1991); and *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn.App. 569, 719 P.2d 569 (1986).

Almost all of the testimony of Vize is invalid because almost all of his testimony is based upon incorrect assumptions about the facts of the occurrence. The details of this have been discussed previously in this brief under subsection III. E.

Some of the testimony of Charron is invalid because of not being

based upon the facts of the occurrence. The details of this have been discussed previously in this brief in subsection III. D.

G. Errors in the Findings of Fact

Finding of Fact 1.12: "The respondent's treatment of Patient A did not meet the denturist standard of care." For reasons previously stated in this brief, this finding of fact is erroneous. There was no substantial evidence to support the charge that the denture was of inadequate quality. There was no substantial evidence to support the charge that Shelby violated the standard of care in her treatment of Patient A after the temporary denture was installed. Shelby provided a temporary denture that lasted longer than its expected useful life. In doing so, she complied with the standard of care.

Finding of Fact 1.5: "If a denture is properly constructed, the pain and discomfort should subside after swelling has gone down." If this finding of fact is taken literally, then it is an insignificant general statement. If the ALJ was trying to say that the pain and discomfort of Patient A did not subside after the initial normal period of discomfort that is expected with a new denture, there is no evidence to support that. After the initial period of discomfort, Patient A had no abnormal problems with the denture at least until October 30, 2007. If the ALJ was trying to say that pain and discomfort

of a patient proves that a denture was not properly constructed, there is no evidence to support that.

Finding of Fact 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." If this finding of fact is taken literally, then it is an insignificant general statement. If the ALJ was trying to say that the Program proved that the denture was constructed improperly by proving that Patient A had trouble with it after it wore out, then this finding of fact would be invalid because no expert testified that having trouble with a denture necessarily proves that the denture must have been constructed improperly.

Finding of Fact 1.11: "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." This finding of fact is erroneous because Shelby offered this option only in the event that Patient A could not afford to purchase a new permanent denture. No expert testified that this violated the standard of care. Finding of Fact 1.11 is inconsistent with the last sentence of Finding of Fact 1.19.

Finding of Fact 1.13: "A denture with a proper bite alignment should not cause pain and discomfort to the patient, after initial swelling subsides."

If this finding of fact is taken literally, it is an insignificant general statement. If the ALJ is trying to say that Patient A having pain and discomfort after the temporary denture wore out proves that the temporary denture did not have a proper bite alignment, there is no evidence to support that.

Finding of Fact 1.15: "After Patient A's swelling subsided, Patient A continued to suffer pain and discomfort." There is no evidence to support this finding of fact. Patient A had no pain and discomfort after the initial swelling had subsided, until after the temporary denture wore out in November, 2007.

Finding of Fact 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." Regarding the first sentence, Vize testified that the denture, as constructed, did not comply with the standard of care, but this brief has previously explained that this testimony was invalid. Moreover, Vize ended up retracting that testimony.

Even if Vize would have expressed a valid opinion in support of this finding of fact, his opinion alone would be insufficient to provide the "quantum of proof" to satisfy the clear and convincing burden to sustain this

finding of fact. An expert with superior education and training (Dr. Shannon), as well as two other denturists (Charron and Shelby), contradicted this finding of fact.

Regarding the second sentence of Finding of Fact 1.16, 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 made it difficult to eat, until after the denture had worn out approximately on October 30, 2007.

Finding of Fact 1.17: "The over-the-counter products did not alleviate the pain and discomfort associated with the improperly constructed denture." This finding of fact is erroneous in its implied assertion that Shelby's advice to use Denturite did not help Patient A. In fact, Patient A did not follow Shelby's instruction to use Denturite.

Finding of Fact 1.18: "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." The reasons why this finding of fact is erroneous have been discussed previously in this brief. In summary, there was no testimony that there was any violation by Shelby with respect to tooth #11 coming out on September 18 or tooth #8 coming out on October 30. The other three teeth did not come out of the denture until after it had worn out and Patient A had violated Shelby's instruction to replace it.

Finding of Fact 1.20: "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." The reasons why this finding of fact is erroneous were discussed previously in this brief.

Finding of Fact 1.21: "It was a violation of the denturist standard of care to instruct Patient A to use a temporary denture..." This finding of fact is erroneous because there was no evidence that Shelby instructed Patient A to use the temporary denture after October 30. No expert testified that the standard of care required Shelby to instruct Patient A to stop using the denture before October 30.

Finding of Fact 1.22: "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 Patient A. This should have occurred without regard to the life of the original temporary denture." The reason why the first sentence is erroneous has been discussed previously in this brief. The second sentence is erroneous because no expert testified that Shelby was required to give Patient A a new denture for free.

Finding of Fact 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." The reasons why the first sentence is erroneous have been discussed previously in this brief. Patient A experienced occasional minor pain and discomfort approximately from October 30, 2007, until she finally obeyed the instruction to purchase a new denture sometime in January, 2008. However, the reason was because Patient A continued to use the temporary denture after it wore out.

Regarding the second sentence, there was no evidence to support the assertion that the degree of "harm" to Patient A was "moderate". Moderate means medium. In the field of medicine and dentistry, the word moderate is a technical word. It is a diagnosis that a particular problem is medium in degree. There is no evidence that Patient A had any diagnosed problem caused by this denture, much less any problem that reached the level of moderate.

Finding of Fact 1.24, to the extent that it again asserts that Shelby failed to meet the standard of care. The reasons why that assertion is erroneous have been previously discussed in this brief.

Finding of Fact 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." The reasons why this finding of fact is erroneous have been previously discussed in this brief. If there ever was any "unreasonable risk", it occurred only because Patient A continued to use the temporary denture after it had worn out, in violation of Shelby's instructions.

Finding of Fact 1.26: "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." There is no evidence to support the implied assertion that Shelby failed to detect the problems. There is no evidence to support the implied assertion that Shelby was "relying solely on the patient's inconsistent communications."

Conclusion of Law 2.3 is erroneous because the Program did not supply the "quantum of proof" necessary to carry its burden of proving its charges by clear and convincing evidence. Even if Charron and Vize had expressed valid opinions and agreed with each other, their opinions could not constitute clear and convincing evidence, because those opinions were

contradicted by a superior expert, Dr. Shannon. The record does not supply any valid reason to reject Dr. Shannon's testimony.

The fact that Charron and Vize disagreed with each other made it even worse for the ALJ to accept any of their opinions over the opinions of Dr. Shannon. All of the mistakes made by Vize and Charron further weakened their testimony. The fact that they retracted some of their opinions further weakened their testimony. The ALJ made a mockery of the clear and convincing standard of proof by accepting any of the opinions of Charron or Vize over the opinions of Dr. Shannon.

Conclusion of Law 2.5: There was no proof of any harm to Patient A beyond the level of minimal. If Shelby would have violated the standard of care, it still would have been error to apply sanctions under Tier B of WAC 246-16-810.

Conclusion of Law 2.6: The reasons why the "aggravating factors" of Conclusion of Law 2.6 are erroneous have been discussed previously in this brief.

Conclusion of Law 2.7: The ALJ committed error by imposing sanctions under Tier B. If there would have been unprofessional conduct, the sanctions should have been imposed under Tier C. If the Court of Appeals

makes the mistake of deciding that the Program proved unprofessional conduct by clear and convincing evidence, then the Court of Appeals should remand this case to the Department with instructions to vacate the sanctions and then sanction under Tier C.

The other assignments of error regarding the ALJ have been previously covered in this brief. The superior court erred by affirming the decision of the ALJ.

H. Shelby Performed Adequately

Shelby provided Patient A with a temporary denture that performed adequately for its intended useful life. Shelby also provided Patient A with all the care necessary for that denture. The Program failed to prove otherwise, even by a preponderance standard, much less by a clear and convincing standard.

Therefore, every finding of fact and every conclusion of law that says otherwise is contrary to these undisputed facts. The testimony of Vize and Charron has made this case seem complicated, but actually it is simple. Patient A did not have any abnormal problems with this denture until after the expiration of its normal useful life. When the denture wore out, Shelby told Patient A to replace it with a permanent denture, but Patient A did not do so.

V. CONCLUSION

The Program did not prove any of the charges in the Amended Statement of Charges, even by a preponderance, much less by clear and convincing evidence. The Court of Appeals should reverse the decision of the Superior Court and remand this case to Superior Court with instructions to enter judgment for Shelby. Shelby should be awarded statutory costs.

DATED this 25th day of June, 2013.

DAVID R. HEVEL WSBA #6097

By David R. Hevel

Attorney for Appellant, Diana S. Shelby

CERTIFICATE

I certify that on June 25, 2013, I mailed, postage prepaid, a copy of the foregoing Brief of Appellant to Richard A. McCartan, Assistant Attorney General, P.O. Box 40109, Olympia, WA 98504-0109, and to Renee S. Townsley, Clerk, Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99201-1905.

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APPENDIX 1

PORTION OF WAC 246-16-810

PRACTICE BELOW STANDARD OF CARE				
Severity	**Tier / Conduct**	**Sanction Range In consideration of Aggravating & Mitigating Circumstances**		**Duration**
		Minimum	Maximum	
least  greatest	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
	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