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COURT OF APPEALS
DIVISION ONE

SEP 30 2010

NO.: 65448-9-I

DIVISION ONE OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

DEBORAH VINCENT, APPELLANT

v.

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES, RESPONDENT

BRIEF OF APPELLANT

DEBORAH VINCENT, PRO SE, APPELLANT
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~~FILED~~
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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ASSIGNMENTS OF ERROR

1. The Superior Court wrongly excluded the medical records because they were not part of the documents accepted by the Board of Industrial Insurance Appeals (BIIA) at the BIIA hearing that was being reviewed.

2. The Superior Court wrongly excluded the medical records even though they were included in the certified record filed in court by the BIIA.

3. The BIIA wrongly ruled, and the Superior Court wrongly agreed, that the medical records would have been excluded as hearsay if properly submitted.

4. The Superior Court orally concluded (although this conclusion does not specifically appear in the court's Findings of Fact, Conclusions of Law and Judgment) that the BIIA had decided the incident was not an assault. Report of Proceedings (RP) 7. In fact, the BIIA's Decision and Order contains no such ruling; it merely describes the incident. Decision & Order at 2, Clerk's Papers (CP) 8.

5. The Superior Court wrongly failed to consider the evidence of Ms. Vincent's lack of willfulness, and attempt to comply, when she submitted the medical records.

6. The Superior Court and the BIIA imposed the most extreme penalty, exclusion of testimony, without a showing of unconscionable conduct by Ms. Vincent.

STATEMENT OF THE CASE

To get compensation under the Crime Victims Compensation Act, Ms. Vincent has to produce the medical records that relate her injury to the assault that she says caused it. She has no alternative: without the records, she has no case. Objective evidence of excessive force is contained in the medical records, which were not read or considered at all, due to a mere procedural error.

She did submit the records in plenty of time to have them considered by both the BIIA and the opposing side, the Washington Attorney General's Office ("AG"). Yet because she did not know and thus did not follow the procedure of Evidence Rule 904, the BIIA imposed the extreme sanction of excluding them, thus destroying her case without reaching the merits. This flies in the face of court rulings that extreme sanctions should be reserved for parties who show willfulness or other unconscionable conduct. The Superior Court was presented with the willfulness issue but rubber stamped the BIIA's decision without addressing that issue.

A. Background

Ms. Vincent was grabbed by a police officer, who held her left wrist and upper arm, on September 12, 2005 (admitted by Department, Certified Appeal Board Record (CABR) at 9 *et seq.*, CP 136 *et seq.*). The officer placed Ms. Vincent in an aid car, which brought her to Harborview. Thereafter, she was found to have a hairline fracture of her left wrist in the area where the officer had grabbed her. CP 41.¹

Medical records from February 2009 indicate post-traumatic abnormalities, including possible prior trauma. CABR at 30-31, CP 158-159. Dr. Carl Adler ascribed symptoms she was suffering two years later to injuries sustained in September 2005. CABR at 35, CP 29. This is specifically referred to as “an injury to her left arm which was grabbed and twisted. This may result in both orthopedic as well as neurological problems . . . Indeed, in this case an initial X-ray showed a hairline

¹ Whether the officer used excessive force is another issue, which the BIIA didn't reach. It grounded its decision on a proximate cause analysis, i.e., that there was no evidence relating the injury to the incident. Decision & Order at 4, CP 9. (Ms. Vincent asserts that the evidence is in the records that were excluded.) Both the BIIA and the court described the incident without ruling whether Ms. Vincent's actions required her to be wrestled and handcuffed, and no such actions by her are apparent from their description. BIIA Decision & Order at 3, CP 8; and Findings of Fact, Conclusions of Law and Judgment at 2, CP 527. There may be reluctance to impute a crime to a policeman, but prosecution or prosecutability are not factors. WAC 296-30-010 (excerpt in Appendix) requires only bodily injury through “any harmful or offensive touching” inflicted by “extreme or outrageous conduct.” As the Victims' Advocate stated: “The evidence we require is much less stringent than that of the criminal justice system.” Carolyn House-Higgins, CP 12-13, quoted in Plaintiff's Trial Brief at 3, CP 509.

fracture to one of the bones in the left forearm, and an MRI showed an injury to the tendon in the elbow. . .” CABR at 36, CP 164.

As early as October 2005 an electromyography report indicated the patient complained of left arm numbness and weakness after an injury. The study found poor activation of two muscles due to pain in the elbow. CABR at 49, CP 177; see patient’s description of the assault, CABR at 50, CP 178. There are nearly 100 pages of medical records, which at times describe the assault as “significant,” and indicate a traumatic injury to Ms. Vincent’s dominant left arm, which continues to cause severe problems for her. Plaintiff’s Trial Brief at 3-4, CP 509-510.

B. Procedural History

Ms. Vincent filed a claim with the Department of Labor and Industries (“L&I”) on Jan. 31, 2008. Decision & Order at 2, CP 8. L&I denied the claim on Feb. 19, 2008, saying that it was not allowed under the Crime Victims Compensation Act and was not timely received. *Id.* On appeal, L&I issued a new order, Apr. 30, 2008, saying again that the claim was not allowed under the Act, and adding that it had not received sufficient evidence that a felony or gross misdemeanor had occurred. The “untimely receipt” part of the prior order was dropped. *Id.*

Ms. Vincent appealed that order to the BIIA, which agreed to hear the case. First she was directed to go to mediation, which she did on Aug.

4, 2008. She brought the medical records and gave them to the mediation judge, Frank Rekasis. Judge Rekasis gave them to Todd Hamilton, a paralegal with the AG. She thought she had submitted the records as required, and no one with the BIIA or the AG ever told her otherwise. CABR at 21-22, CP 149-150. She was *pro se* at both the mediation and the later hearing. She was advised only by Carolyn House-Higgins, a Victims Advocate with the State Department of Community, Trade and Economic Development, and by a lawyer who gave some advice but did not represent her. Ms. House-Higgins is not a lawyer. Plaintiff's Trial Brief at 5-6, CP 511-512.

More than four months went by. The BIIA hearing was held Jan. 6, 2009, and Ms. Vincent brought copies of the records with her. Arguments of both sides were heard, and the administrative judge gave her decision, based on lack of proof of proximate cause. At this point Ms. Vincent realized the judge did not have and had not seen the medical records, and she offered the copies she had with her. The AG objected because Ms. Vincent's case had already rested. The judge sustained the objection but advised her that she could submit a Petition for Review. She did so. The BIIA accepted review Apr. 9, 2009, but entered its Final Order Apr. 23, 2009, without revision. Superior Court Findings of Fact, Conclusions of Law and Judgment (hereinafter FOF/COL/J) at 2, CP 527.

Ms. Vincent then appealed to Superior Court. The medical records were before the court because they were part of the BIIA's certified record, and they were in that record because Ms. Vincent had submitted them attached to her Petition for Review to the BIIA. RP at 4. Nevertheless the court decided that the documents were "not a part of the Board's record" and declined to evaluate their content. FOF/COL/J at 3, CP 528; RP 3.

Ms. Vincent then took this appeal.

ARGUMENT

A. The Decision Below Is Reviewable

The appellate court reviews a trial court's exclusion of evidence for an abuse of discretion. *Hizey v. Carpenter*, 119 Wash.2d 251, 268, 830 P.2d 646 (1992). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An errant interpretation of the law is an untenable reason for a ruling. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

B. The Medical Records Were Reviewable

The judge at trial tentatively said the medical records were not part of the certified record, but did not rule; ultimately she based her decision on the statement that "when you reopen to allow things to be admitted, you also require that it meets with the evidentiary rules before it comes back into evidence." RP 8. In her written opinion, she specified how the records did not comply (i.e., they were untimely) and, additionally, decided they were not part of the BIIA's record. FOF/COL/J at 3, CP 528. She added another basis for denial: that they would have been excluded as hearsay (which was never discussed at trial). RP 8.

We challenge all three of these points, and we discuss two of them in this section. We leave the untimeliness issue for section C because it is intimately bound up with the argument against extreme sanctions.

Court Review Is Not Limited to Records Accepted by the BIIA

At trial, the AG argued as follows:

By simply attaching records to a petition for review and thereby making it part of the appellate [*sic*], the certified appellate board record does not automatically somehow allow those records to be considered by a reviewing court.

RP 4. This makes it sound as if Ms. Vincent was doing something sneaky and underhanded by submitting the records for review. Indeed, she simply followed the instructions of the tribunal. She did not need to be sneaky because RCW 51.52.115 is explicit about what records a Superior Court may consider when reviewing a BIIA order:

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, **that offered before the board** or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That **in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court.** The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced.... (emphasis added)

In statutory interpretation, sometimes the word "or" really means "and," but not here. If this passage really meant "offered before the board *and* included in the record filed by the board," the evidence would of necessity be in the certified record and the passage would be superfluous.

That interpretation would also render nonsensical the reference to irregularities "not shown" in the record. Testimony on such irregularities is clearly allowed. Ms. Vincent charged irregularities in procedure, and the medical records were part of her supporting testimony, but they were not looked at.

Regardless of whether the records *had to be* in the certified record, the fact is that *they were included*. The BIIA itself submitted them to the court. Plaintiff's Trial Brief at 7, CP 532. Yet that testimony was not evaluated, nor did Ms. Vincent get a chance to testify orally, because the court accepted the BIIA's exclusion ruling on its face. FOF/COL/J at 3, CP 528. This ended the trial because it precluded the court from making independent findings. *McClelland v. ITT Rayonier, Inc.*, 65 Wn.App. 386, 390, 828 P.2d 1138 (1992) (superior court may substitute its own findings only if it finds that the board's findings and decision are incorrect). The plain language of RCW 51.52.115 was ignored.

The Records Were Not Automatically Hearsay Under BIIA Rules

Secondly, we challenge the statement, by both the court and the BIIA, that the records would have been thrown out as hearsay. BIIA hearings follow the evidentiary rules of Superior Court. To quote from the BIIA's own compilation of Rules and Practices:

WAC 263-12-125. Applicability of court rules.

Insofar as applicable, and not in conflict with these rules, the statutes and rules regarding procedures in civil cases in the superior courts of this state shall be followed.

WAC 263-12-115. Procedures at hearings.

...(4) Rulings. The industrial appeals judge on objection or on his or her own motion shall exclude all irrelevant or unduly repetitious evidence and statements that are inadmissible pursuant to WAC 263-12-095(5). All rulings upon objections to the admissibility of evidence shall be made in accordance with rules of evidence applicable in the superior courts of this state....

To put it concisely, BIIA hearings must follow Superior Court rules, including the Evidence Rules (ERs). They can't make up their own versions as they go. If the BIIA says certain documents are inadmissible as hearsay, it has to be able to point to an ER as a basis. But this it cannot do, because ER 904 governs this situation.

Certain specified kinds of documents that would be hearsay are in fact admissible under ER 904 provided the offeror jumps through certain hoops:

EVIDENCE RULE 904. ADMISSIBILITY OF DOCUMENTS

(a) Certain Documents Admissible. In a civil case, any of the following documents proposed as exhibits in accordance with section (b) of this rule shall be deemed admissible unless objection is made under section (c) of this rule:

(1) A bill, report made for the purpose of treatment, chart, record of a hospital, doctor, dentist, registered nurse, licensed practical nurse, physical therapist, psychologist or other health care provider, on a letterhead or billhead...

No serious argument has been made by anyone that the documents in question here do not fall under ER 904(a)(1). They are all reports, charts, records, etc., made for the purpose of treatment. CP 14-111, 151-242, 256-269. As such they are not hearsay: they are admissible provided they are submitted in the following manner:

(b) Notice. Any party intending to offer a document under this rule must serve on all parties a notice, no less than 30 days before trial, stating that the documents are being offered under Evidence Rule 904 and shall be deemed authentic and admissible without testimony or further identification, unless objection is served within 14 days of the date of notice, pursuant to ER 904(c). The notice shall be accompanied by (1) numbered copies of the documents and (2) an index, which shall be organized by document number and which shall contain a brief description of the document along with the name, address and telephone number of the document's author or maker. The notice shall be filed with the court. Copies of documents that accompany the notice shall not be filed with the court.

(c) Objection to Authenticity or Admissibility. Within 14 days of notice, any other party may serve on all parties a written objection to any document offered under section (b), identifying each document to which objection is made by number and brief description.

ER 904(b,c). So if Ms. Vincent had submitted the documents with the notice and the index, and the AG said nothing for 14 days, the documents would be before the BIIA judge, hearsay or not. If the AG did object, she

could still get the documents in by having the physicians authenticate them.

As it happened, the AG had the documents *for more than 4 months* and said nothing. If we elevate form over substance, well, then they didn't have to say anything because they weren't served with the notice and the index. But if we look closely at substance, we wonder: Is this substantial justice or is it "hiding the ball"?

The point of the above argument is not to imply that the documents should be deemed admitted, but to point out a shaky leg in the court's three-legged reasoning: that is, that they are not automatically inadmissible. Had Ms. Vincent not been lulled into inaction while the AG sat on the documents, she probably could have gotten them admitted.

C. Exclusion of Testimony Is an Extreme Sanction

In general, nonlawyers acting *pro se* are held to the same procedural standards as lawyers. If they make procedural missteps, the trial court has discretion to apply sanctions. However, that discretion is not unfettered. Case law has developed levels of sanctions corresponding to the level of culpability. Our argument here is that the level of sanction applied was over the top in comparison with the culpability, and that this is so obvious as to be unreasonable.

Our Supreme Court has held that to support imposition of one of the greater sanctions, the disobedient party's discovery violation must be "willful or deliberate" and must have "substantially prejudiced the opponent's ability to prepare for trial." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); see also *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn.App. 718, 737, 66 P.3d 1080, *review granted*, 150 Wn.2d 1017, 81 P.3d 119 (2003). A trial court's finding of fact that the party willfully failed to comply with a discovery order is reviewed for "clear error." *In re Golant*, 239 F.3d 931, 936 (7th Cir. 2001).

The sanction being reviewed in *Burnet* was exclusion of evidence. *Burnet, supra* at 487. The exclusion of testimony is an "extreme sanction." *In re Estate of Foster*, 55 Wn.App. 545, 548, 779 P.2d 272 (1989); *Golant, supra* at 937. The same sanction is being applied here. Explicit findings for the sanction are required, *Burnet, supra* at 494², but there are none here because the court never addressed the issue of culpability--although it was treated in the brief and argued at the hearing. Plaintiff's Trial Brief at 5, CP 509; RP at 2, 4-5, 8. However, with *Burnet* as precedent, the court's decision implies that (a) the AG was substantially

² The "reasons [for the choice of sanctions] should, typically, be clearly stated on the record so that meaningful review can be had on appeal.... [I]t must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed." *Id.*, cited in *Roberson v. Perez*, 123 Wn.App. 320, 337, 96 P.3d 420 (2004).

prejudiced and (b) Ms. Vincent acted willfully. See *Golant, supra* (court's finding is reviewed, whether implicit or explicit).

Ms. Vincent's Error Was Not Willful

It is an abuse of discretion to exclude testimony without a showing of (1) intentional nondisclosure, (2) willful violation of a court order, or (3) other unconscionable conduct. *Estate of Foster, supra*. A "willful" violation means a violation without a reasonable excuse. *Id.*, citing *Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 280, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985). When imposing a sanction, the court must consider the least severe sanction that will accomplish the purpose to be served by the imposition of the sanction--but not be so minimal that it undermines the purpose of discovery. The purpose of the sanction is to deter, punish, compensate, educate, and ensure that the wrongdoer does not profit from the violation. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 355-56, 858 P.2d 1054 (1993). When choosing a sanction, the court may consider the wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate. *Id.*

Neither *Fisons* factor seems to have been considered here. The AG failed to mitigate, but just sat on the documents for 4 months. The state is not prejudiced: no decision has been taken against it, and it has not

changed its position in any material way. Ms. Vincent intended to comply with the rules, and that is why she disclosed the information. She did not withhold anything and certainly did not profit by imperfect disclosure of information essential to her case. It was out of ignorance that she failed to observe the procedural form, relying (perhaps unwisely but not contumaciously) on the advice of a nonlawyer.

The BIIA's Own Instructions Were Misleading

The BIIA's instructions to parties could have contributed to Ms. Vincent's confusion. Their description of the mediation process states "Gather all documents that support your position and bring them to the mediation conference." Further down, the final instruction is "When a settlement cannot be reached, the case will be given to a hearings judge, who will schedule a formal hearing." "Mediation Conference," on <http://www.biiwa.gov/process.htm>, accessed 9/2/10 (copy in Appendix). Under "Frequently Asked Questions" the party is told "Once the appeal is granted, you should provide the new information during the mediation process." "BIIA FAQ" at http://www.biiwa.gov/frequently_asked_question.htm (copy in Appendix). Is it any wonder that a party reading these passages would think that "the case," consisting of all the supporting documents, having been put in the hands of the mediation judge, will be automatically turned over to the hearing judge?

One might say in hindsight that anyone reading the web site should know the instructions were summary. On the other hand, most laypersons would trust that the agency that put the instructions out there would include all information that was essential to the process. Nothing on the web site tells one that there is any barrier between the judges or that the documents must be submitted twice.

The BIIA's guidance pamphlet, "Your Right to Be Heard," gives a similar impression:

When a settlement cannot be reached, the mediation judge will gather information necessary to define and narrow the issues to be considered. The mediation judge may also make preliminary rulings which will control future proceedings in the appeal. However, the mediation judge will not make any decision resolving factual disputes without the parties' consent.

HEARING

When an appeal does not settle in mediation, it is assigned to a hearings judge. This judge will schedule and conduct hearings. Board hearings are like trials in Superior Court.

"Your Right to Be Heard," 2003, at 9-10 (copies in Appendix). Here we have the mediation judge making rulings that carry over to the hearing. Would it not then be a natural mistake to suppose that this is a more or less continuous process, when the instructions don't say otherwise?

The applicable WAC is referenced under "More Resources" on the BIIA web site. BIIA home page, <http://www.bia.wa.gov/> (excerpt in Appendix). The WAC too can be misleading to a layperson:

WAC 263-12-01501

Communications and filing with the board.

...(a) **Where to file.** All written communications, except those listed below, shall be filed with the board at its headquarters in Olympia, Washington.

Olympia is where Ms. Vincent filed her medical records, by giving them to the mediation judge.

... (c) **Sending written communication.** All correspondence or written communication filed with the board pertaining to a particular case, before the entry of a proposed decision and order, should be sent to the attention of the industrial appeals judge assigned to the case.

Id. The mediation judge was assigned to the case at the time she gave him the documents. The WAC doesn't specify "assigned to the case for the formal hearing."

D. An Appeals Court May Order Relief from a Judgment

An appeals court may reverse a Superior Court order that determines the action and prevents a final judgment or discontinues the action. RAP 2.2(a)(3); *Golant, supra* at 935. The order being appealed here discontinued the action by confining review to the record already considered by the BIIA.

Recognized grounds for equitable interference with a judgment include fraud, accident, mistake, and surprise. 47 AMJUR2d, "Judgments" at §719, Thomson Reuters 2000.

Excusable Neglect Justifies Relief

Washington additionally recognizes excusable neglect as grounds to vacate a judgment. CR 60(b)(1) ("Mistakes, inadvertence, surprise, excusable neglect...").³ Neglect is inexcusable when it is due to "a conscious decision, strategy or tactic." *S. Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety & Env't*, 101 Wn.2d 68, 677 P.2d 114 (1984). That is not what we have here. There is no way Ms. Vincent would have consciously decided to withhold information crucial to her case.

The courts consider diligence as a factor in a finding of excusable neglect. *Seek Sys., Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn.App. 266, 271, 818 P.2d 618 (1991). Ms. Vincent showed diligence by submitting the papers at the right place, to a judge of the correct tribunal, well before the hearing date. She showed diligence by seeking the advice of a Victims' Advocate and a lawyer, although she could not well afford to have the lawyer represent her.⁴ She followed the procedure as published in the tribunal's own guidelines and in the applicable WAC. See section C above, and Appendix. She succeeded in getting the

³ This is not a CR 60 action, in that no CR 60 motion was made below. However, the extent of the party's neglect is a factor in determining whether the party's mistake was partly due to extenuating circumstances, or whether the party's surprise was due to more than the party's own negligence.

⁴ Note that the Superior Court review was *In Forma Pauperis*, CP 121-122.

documents into the hands of the AG in plenty of time for the AG to object.⁵

Relief May Be Had for Any Other Reason Justifying Relief

If excusable neglect is not found here, the rule governing relief from judgment for "any other reason" authorizes vacation of judgments for matters affecting the regularity of the proceedings. CR 60(b); *State v. Keller*, 32 Wn.App. 135, 647 P.2d 35 (1982). This goes to what we are saying: that it was an irregularity for the court not to consider the graduated scale of penalties for not following the prescribed form.

The law favors resolution of cases on their merits. *Lane v. Brown & Haley*, 81 Wn.App. 102, 106, 912 P.2d 1040, *review denied*, 129 Wn.2d 1028, 922 P.2d 98 (1996). The spirit of our Supreme Court in this regard may be seen in this quote from *Burnet*:

The dissent concludes that the sanction imposed by the trial court was appropriate, preferring to interpret the civil rules for superior court in a way that facilitates what it describes as the "case management powers of the trial courts." Dissenting op. at 1048. While we are not unmindful of the need for efficiency in the administration of justice, our overriding [*sic*] responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. See CR 1. Because we believe it would be an injustice to deny Tristen Burnet's parents and her representatives an opportunity to present a potentially valid negligent credentialing

⁵ This raises a question whether the AG's paralegal was diligent in getting the documents to an AG attorney.

claim against Sacred Heart, the case should be remanded for a trial on that issue.

Id. at 498. Our position is that the statements about causation in the excluded medical records may show that the force applied by the officer was excessive. We believe that case management considerations should not override the chance to decide this question on the merits.

CONCLUSION

Medical records that may speak to whether excessive force caused Ms. Vincent's injuries were excluded from that analysis for reasons that elevated form over substance. Ms. Vincent's culpability in improperly submitting those records is low, and therefore she does not deserve the ultimate penalty that is being imposed on her.

PRAYER FOR RELIEF

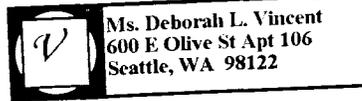
Ms. Vincent prays the Court for the following relief:

(1a) Find abuse of discretion and remand to the trial court to re-review the BIIA Decision and Order *de novo*, this time reviewing on the merits the *entire* certified board record, including Ms. Vincent's heretofore excluded medical records, which are to be deemed qualified per ER 904 because the Attorney General's office had them for more than 14 days without objecting; or

(1b) In the alternative, find abuse of discretion and remand to the trial court with the same instructions except that Ms. Vincent shall be required to qualify those records according to the procedure laid out in Evidence Rule 904; and

(2) Provide such other and further relief as the Court deems just and fitting.

Deborah Vincent

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Sept. 30, 2010

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STATE OF WASHINGTON

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APPENDIX

WAC 296-30-010

Definitions.

The following definitions are used to administer the crime victims compensation program:.....

Bodily injury: Any harmful or offensive touching, including severe emotional distress where no touching takes place when:

(1) The victim **is not** the object of the criminal act and:

(a) The distress is intentionally or recklessly inflicted by extreme or outrageous conduct;

(b) Caused the victim to have a reasonable apprehension of imminent bodily harm; and

(c) The victim is in the immediate vicinity at the time of the criminal act.

(2) The victim **is** the object of the criminal act and:

(a) The distress is intentionally or recklessly inflicted by extreme or outrageous conduct; and

(b) Caused the victim to have a reasonable apprehension of imminent bodily harm.....

The result of: The test used to define "the result of" used in RCW 7.68.070 (3)(a) is two-pronged. First, it must be determined that cause in fact exists, and second, it must then be determined that proximate cause exists.

(1) Cause in fact exists if "but for" the acts of the victim the crime that produced the injury would not have occurred.

(2) Proximate cause exists if, once cause in fact is found, it is determined that the acts of the victim:

(a) Resulted in a foreseeable injury to the victim;

(b) Played a substantial role in the injury; and

(c) Were the direct cause of the injury.

RCW 51.52.110

Court appeal — Taking the appeal.

Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board shall become final.

In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the department's records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county. In all other cases the appeal shall be to the superior court of Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer. The department shall, in all cases not involving a self-insurer, within twenty days after the receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. If the case is one involving a self-insurer, such self-insurer shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed to be at issue. In such cases the department may appear and take part in any proceedings. The board shall serve upon the appealing party, the director, the self-insurer if the case involves a self-insurer, and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record in such case. No bond shall be required on appeals to the superior court or on review by the supreme court or the court of appeals, except that an appeal by the employer from a decision and order of the board under *RCW 51.48.070, shall be ineffectual unless, within five days

following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay: PROVIDED, HOWEVER, That whenever the board has made any decision and order reversing an order of the supervisor of industrial insurance on questions of law or mandatory administrative actions of the director, the department shall have the right of appeal to the superior court.

239 F.3d 931 (7th Cir. 2001)

In re: Joseph H. Golant, Debtor.

Joseph H. Golant, Appellant,

v.

Abraham Levy, Appellee.

No. 00-1205

In the United States Court of Appeals, For the Seventh Circuit

February 12, 2001

Argued September 14, 2000

Appeal from the United States District Court for the Northern District of Illinois,
Eastern Division. No. 98 C 7452--James B. Moran, Judge.

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[Copyrighted Material Omitted]

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Before Cudahy, Easterbrook and Ripple, Circuit Judges.

Cudahy, Circuit Judge.

This case involves the latest wranglings in an ongoing dispute between Joseph Golant, a patent attorney, and Abraham Levy, an inventor and one of Golant's former clients. From 1984 to 1990, Golant provided Levy with legal services relating to a product known as the car shade, a folding device placed on the dashboard of a parked car to protect the car's interior from the sun. Levy ceased paying for Golant's services when Golant refused to provide him with more detailed billing records. As a result of Levy's refusal to pay, Golant filed a breach of contract claim against Levy in California state court in 1991. Levy cross-complained, alleging that Golant had overbilled him by \$1.5 million.

On March 21, 1996, Golant filed for Chapter 7 bankruptcy protection, 11 U.S.C. sec. 701- 766, before the California trial reached judgment. Levy, apparently worried that his cross-claim against Golant might be discharged in bankruptcy, filed a two-count adversarial complaint in Golant's bankruptcy proceeding on October 28, 1996. Count one of the complaint sought to deny Golant a general discharge of his debts under Section 727(a) of the Bankruptcy Code, 11 U.S.C. sec. 727(a). Count two sought to deny Golant a specific discharge of Levy's debt under Sections 523(a)(4) and (a)(6) of the Bankruptcy Code, 11 U.S.C. sec. 523(a)(4) & (6).

On Levy's motion, the bankruptcy court bifurcated the adversary proceedings and tried count one of Levy's complaint first. In December 1997, Golant appeared pursuant to a notice for deposition and document production that had been served on him by Levy. At that time, Golant refused to tender all of the requested documents. As a result, Levy filed a motion to compel production on March 17, 1998. Over Golant's objection, the bankruptcy court granted Levy's motion and, in an order dated April 23, 1998, required Golant to produce within seven days: (1) documents relating to his credit and debit cards, including evidence of payment of card balances, and (2) documents relating to Golant's prepetition legal services from January 1995 to December 1996, including time records, billing statements, account ledgers and client names and addresses.

While Golant did produce a number of his records, he did not fully comply with the April 23 order. For example, Golant failed to produce his bank statements; bank books and check registers; names and addresses of all of his clients; and documents showing the case numbers, captions and courts in which he represented clients. In addition, Golant tendered a list of 32 clients, but produced billing records for only 19 of them.

In response to Golant's failure to comply with the April 23 order, Levy filed his first motion for entry of judgment as a discovery sanction. The bankruptcy court denied this motion, but, in an order dated May 8, 1998, required Golant to comply with the April 23 order by May 22. The court also warned Golant that it might deny him a discharge of his debts as a discovery sanction if he continued to fail to comply with the April 23 order. Levy filed a second motion for entry of judgment on May 18, 1998, but the court continued this motion to May 27, apparently because Levy had filed it before Golant's time to comply with the April 23 order had expired. Ultimately, Golant did not comply with the discovery orders, and the court set an evidentiary hearing for May 29 to determine the extent of Golant's failure to comply.

At the evidentiary hearing, Golant admitted to creating or receiving time records; billing statements; monthly bank statements for the account used in his

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practice; deposit slips from deposits of funds into his law account; a ledger for recording fees received; check stubs showing deposits of fees received; and documents with case numbers, captions and courts in which Golant represented clients. However, Golant produced none of these documents, maintaining that they had, for the most part, already been produced. Golant, however, did admit to not producing billing statements for some clients from whom he received money shortly before bankruptcy, even though he was

required to produce these statements. Golant also admitted not producing documents evidencing payment of his credit card debts.

On September 8, 1998, the bankruptcy court entered a default judgment in favor of Levy on his adversary complaint as a discovery sanction under Federal Rule of Civil Procedure 37 (made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7037). The court discussed Golant's failure to comply with its discovery orders and noted that Golant's "persistent refusal to abide [by] the provisions of the Bankruptcy Code and Rules is frustrating to the court, to say the least." *Levy v. Golant (In re Golant)*, No. 96 B 007376, slip op. at 6 n.5 (Bankr. N.D. Ill. Sept. 8, 1998). The court further noted that "[t]here was no way that this Court could have tried this case . . . and no way that the court can try it now due to [Golant's] own actions and failures to act." *Id.* at 7. As a result of the sanction, Golant was denied a general discharge in bankruptcy. Golant appealed to the district court, which affirmed.

I

Before we address the merits of Golant's argument, we must determine whether we may properly exercise jurisdiction over this appeal. "[A] court of appeals has jurisdiction over a bankruptcy appeal only if the bankruptcy court's original order and the district court's order reviewing the bankruptcy court's original order are both final." *In re Rimsat, Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000) (and authority cited therein); see also 28 U.S.C. sec. 158(d).

We first consider the finality of the bankruptcy court's original sanction order. In the context of a bankruptcy proceeding, "[w]here an order terminates a discrete dispute that, but for the bankruptcy, would be a stand-alone suit by or against the trustee, the order will be considered final and appealable." *Rimsat*, 212 F.3d at 1044. Ordinarily, "a request for a declaration of nondischargeability is conceived as kicking off a separate, adversary proceeding within the framework of the overall bankruptcy proceeding, Bankruptcy Rule 7001(6), so that an order declaring the debt either dischargeable or not is a final, appealable order." *In the Matter of Marchiando*, 13 F.3d 1111, 1113-14 (7th Cir. 1994) (citing *In re Riggsby*, 745 F.2d 1153, 1154 (7th Cir. 1984)). Thus, had the bankruptcy court decided Levy's complaint on the merits, the court's order would easily qualify as the kind of final, appealable order over which we routinely exercise jurisdiction. However, the bankruptcy court did not decide Levy's complaint on the merits, and we must decide whether this wrinkle alters our jurisdiction.

In the bankruptcy context, most forms of discovery sanction had been considered final and appealable until *Rimsat* noted, without deciding, that this view may no longer be

tenable in light of *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999). See *Rimsat*, 212 F.3d at 1044 (discussing *In re Wade*, 991 F.2d 402, 406 (7th Cir. 1993)). In *Cunningham*, the Supreme Court ruled that an order imposing monetary sanctions upon an attorney in a civil case was not an immediately appealable final decision. 527 U.S. at 209-10. Thus, as noted by *Rimsat*, *Cunningham* might certainly be read to preclude the interlocutory review of monetary sanctions in bankruptcy cases as well.

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However, *Cunningham* cannot be understood to preclude the immediate review of the entry of default judgment, at least in the bankruptcy context. The entry of default judgment is simply much more "final"--effectively terminating a party's litigation in court--than the imposition of monetary sanctions, which merely alter the litigation's course. Indeed, we were unable to uncover any cases discussing how *Cunningham* might alter the long-held view that sanctions which completely eliminate the possibility of a decision on the merits--such as a default judgment or dismissal--are "final" for the purpose of appeal. See, e.g., *Ordower v. Feldman*, 826 F.2d 1569, 1573 (7th Cir. 1987) (order in civil case dismissing complaint for untimely service is "final"); *Aurora Bancshares Corp. v. Weston*, 777 F.2d 385, 386 (7th Cir. 1985) (order in civil case dismissing suit as a sanction for discovery abuse is "final"). Consequently, regardless of how *Cunningham* might apply to the review of monetary sanctions in a bankruptcy proceeding, *Cunningham* does not preclude the review of a sanction imposing a default judgment. Therefore, the bankruptcy court's order here is a final, appealable order.

As noted, however, it is not enough for the bankruptcy court's order to be final; the district court's decision on appeal must be final as well. "[A]n order is considered 'final' for purposes of 28 U.S.C. sec. 158(d) when it 'finally determines' one creditor's position" *In the Matter of Gould*, 977 F.2d 1038, 1041 (7th Cir. 1986). A creditor's position has been finally determined when there is no need to remand a case to the bankruptcy court for further significant proceedings with regard to that creditor. See *In the Matter of Lopez*, 116 F.3d 1191, 1192 (7th Cir. 1997); *In the Matter of Riggsby*, 745 F.2d 1153, 1155 (7th Cir. 1984). Thus, "in cases like ours where the bankruptcy court is affirmed, 'the affirmance [is] a final decision appealable to us.'" *In the Matter of Weber*, 892 F.2d 534, 538 (7th Cir. 1989) (quoting *In re Fox*, 762 F.2d 54, 55 (7th Cir. 1985)). Here, then, it is only important that there be no more significant proceedings in prospect between *Levy* and *Golant*. Because the district court affirmed the bankruptcy court, no such proceedings appear to remain. The district court decision in this case, therefore, is final.

Lastly, we note that there is good reason, beyond the technical application of precedent, for entertaining this appeal. Were we to postpone this appeal until all issues in bankruptcy have been decided, there would be considerable doubt about those matters presumably involved in such proceedings as may remain in bankruptcy because the valuation of creditors' claims against Golant and the valuation of Golant's estate both depend upon which, if any, of Golant's debts may be discharged. As we stated in *Reichman v. United States Fire Ins. Co.*:

We tolerate [bankruptcy] appeals in part because of the need to tie up the many subsidiary matters that litter the road to the distribution of assets in bankruptcy. A court cannot wait until the end of the case to allow the appeal, because final disposition in bankruptcy (the plan, distribution, and discharge) depends on prior, authoritative disposition of subsidiary disputes. The separable disputes that can be handled as individual cases may be dealt with as they arise, the better to advance the end of the whole bankruptcy case.

811 F.2d 1112, 1116 (7th Cir. 1987); see also *Gould*, 977 F.2d at 1041. Accordingly, for these reasons, we properly have jurisdiction over this appeal and may review the bankruptcy court's imposition of sanctions on Golant.

II

Golant disputes (1) the factual findings underlying the bankruptcy court's decision to sanction him; (2) the choice of sanction; and (3) several miscellaneous matters. We address, and reject, Golant's arguments in turn.

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We first address Golant's disagreement with the bankruptcy court's conclusion that he violated the court's discovery orders. When a court enters default judgment as a discovery sanction--a severe penalty that effectively terminates a party's ability to prevail on the merits--the court must find that the party against whom sanctions are imposed displayed willfulness, bad faith or fault. See *Ladien v. Astrachan*, 128 F.3d 1051, 1056 n.5 (7th Cir. 1997); *Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997); cf. *Fox v. Commissioner*, 718 F.2d 251, 255 (7th Cir. 1983) (sanction of dismissal appropriate only when total failure to respond to discovery requests). While we strongly encourage courts to make this finding explicitly, we may infer it, if necessary, from the sanction order itself. See *Rimsat*, 212 F.3d at 1047. The court's finding, whether implicit or explicit, is reviewed for clear error. *Melendez v. Ill. Bell Tel. Co.*, 79 F.3d 661, 670-71 (7th Cir. 1996).

Here, the bankruptcy court did not explicitly state that Golant evidenced willfulness, bad faith or fault. However, even a cursory reading of the court's sanction order shows that the court found, at least implicitly, that Golant's conduct met this standard. The court noted that it had repeatedly ordered Golant to comply with Levy's discovery request, and that Golant had not done so. For example, Golant produced only 19 billing records when his own list of clients indicated that he had at least 32 clients. Golant even admitted to failing to produce numerous documents. This, and other similar violations of the court's discovery orders, compelled the bankruptcy court to remind Golant that he was "not only a 'debtor' under the Bankruptcy Code, but also a lawyer who has the ethical obligations of the legal profession." *Levy v. Golant (In re Golant)*, No. 96 B 007376, slip op. at 6 n.5 (Bankr. N.D. Ill. Sept. 8, 1998). Further, the court concluded that, from its review of the record, Golant's "failure to comply stems from the fact that if he were to comply he would, in effect, sink himself." *Id.* at 8. It is clear, then, that the bankruptcy court adequately found that Golant acted willfully and in bad faith in failing to comply with the court's discovery orders.

Golant offers nothing to rebut the above conclusions. Golant argues, as he did in both lower courts, that he in fact complied with the court's production order—an odd claim to make since he admitted at his evidentiary hearing that he had failed to comply fully.^[2] It is true that Golant did produce a fair number of documents in response to Levy's request, and this appears

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to be essentially his defense. As noted, however, Golant also failed to produce many important documents. For example, Golant acknowledged representing approximately 32 clients, yet billing records from only 19 clients were produced in response to the bankruptcy court's order. When queried at oral argument about the 13 missing billing records, Golant could only reply that "it is unknown where the rest of them are, but, again, the record is unclear as to what happened to the rest." Golant needs to do more than merely assert that the location of the relevant records is unknown if he wishes to persuade us that he did indeed comply with the bankruptcy court's production orders.

Golant also takes issue with the bankruptcy court's choice of sanction. The entry of sanctions under Rule 37 is reviewed for an abuse of discretion. See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *Salgado v. General Motors Corp.*, 150 F.3d 735, 739 n.5 (7th Cir. 1998). Under this standard of review, "an appellant faces an uphill battle in seeking to reverse an award of sanctions by the district

court." *Langley v. Union Elec. Co.*, 107 F.3d 510, 513 (7th Cir. 1997). Appellants find the task of securing reversal of sanction awards so difficult at least in part because we do not require the lower court to select the least severe sanction. See *Melendez v. Ill. Bell Tel. Co.*, 79 F.3d 661, 672 (7th Cir. 1996). This does not mean, however, that a court possesses unfettered discretion to impose sanctions upon a recalcitrant party. Instead, "the sanction selected must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction." *Salgado*, 150 F.3d at 740; see also *Sherrod v. Lingle*, 223 F.3d 605, 612 (7th Cir. 2000). Particular attention must be paid to this limitation on a court's discretion when a court dismisses a cause outright (or, as here, enters default judgment)--a sanction to be used "only in extreme situations." *Webber v. Eye Corp.*, 721 F.2d 1067, 1069 (7th Cir. 1983).

Here, a default judgment against Golant is the only adequate sanction. On April 23, the bankruptcy court ordered Golant to comply with Levy's discovery requests. On May 8, Golant was still withholding the requested documents, and the court once again ordered Golant to produce these documents. This time, the court also provided Golant with notice that it would consider imposing sanctions against him-- including entering judgment denying him discharge--if he persisted in neglecting to comply with the orders.^[3] In spite of this notice, Golant continued to defy the orders, failing to turn over many of the required documents. As a result of Golant's actions, the bankruptcy court found that "[t]here was no way that this Court could have tried this case . . . and no way that the court can try it now due to [Golant's] own actions and failures to act." *Levy v. Golant (In re Golant)*, No. 96 B 007376, slip op. at 7 (Bankr. N.D. Ill. Sept. 8, 1998).

In spite of Golant's protestations, we fail to see how the bankruptcy court could have come to any other conclusion. Golant was ordered twice to comply with the bankruptcy court's production order. In spite of a warning regarding the severity of possible sanctions, Golant continued to ignore the bankruptcy court's order. Where a debtor in bankruptcy refuses to be completely forthright with information regarding his financial dealings and resources--information that is of paramount importance to an efficient and fair bankruptcy proceeding--the bankruptcy court is left with little recourse but to enter default judgment against the debtor. Accordingly,

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the sanction imposed on Golant, although severe, was appropriate.

Golant also argues that the sanctions violate his due process rights. In order to satisfy due process, Rule 37 sanctions must be just and relate to the claim at issue. See

Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxities of Gunee, 456 U.S. 694, 707 (1982). Golant does not contest the fact that his sanction related to the claim at issue. However, he argues that his sanction was unjust because the bankruptcy court failed to adequately investigate Levy's assertion that Golant had not complied with the bankruptcy court discovery orders. Golant's argument is unconvincing. As noted, Golant was provided with several opportunities to comply with Levy's discovery requests, and the bankruptcy court was not clearly erroneous in concluding that he failed to do so. In addition, Golant was allowed to testify at the evidentiary hearings preceding his Rule 37 sanction. As a result, he was afforded ample opportunity to present his side of the story to the bankruptcy court. Thus, Golant's due process rights were not violated.

Golant lastly makes two miscellaneous arguments. First, Golant appears to argue that the bankruptcy court showed "undue bias" towards him. The greater part of Golant's "undue bias" argument is merely a complaint that the bankruptcy court ruled against him on several matters. Without other evidence, we will not find bias merely because a party loses on the merits. See *In the Matter of Huntington Commons Assocs.*, 21 F.3d 157, 158 (7th Cir. 1994) (challenged actions of bankruptcy judge that consisted of judicial rulings and ordinary admonishments were not sufficient to show deep-seated and unequivocal antagonism that would render fair judgment impossible). However, Golant also premises his "undue bias" argument upon his belief that the bankruptcy court allowed "unsupported statements from Levy's counsel"-- apparently, counsel's argument that Golant did not fully produce the ordered documents--to become evidence. Golant cites a string of inapposite cases in support of his argument, of which *Chicago Ridge Theatre Ltd. v. M&R Amusement*, 855 F.2d 465 (7th Cir. 1988), is illustrative. In *Chicago Ridge Theatre*, we reversed the district court's grant of judgment in favor of the defendants because the grant was based upon expert testimony that had not been introduced into evidence. In that case, we found that the unintroduced testimony of the defendants' expert witnesses violated the plaintiff's due process rights. *Id.* at 469. From our holding in *Chicago Ridge Theatre*, Golant appears to reason that the allegations of Levy's counsel should have been introduced into evidence and subjected to cross-examination. However, Golant's argument goes too far. Here, Levy's counsel were merely advocating their client's position--not providing a form of expert testimony--and the trial court was not required to place counsel's statements into evidence. The district court was required only to look at the documents produced by Golant to ascertain whether he had complied with the court's production orders. The district court did so and, as already noted, committed no error in determining that Golant failed to comply with its orders.

Golant lastly disputes the bankruptcy court's order against him for costs. That issue is not properly before this court. The bankruptcy order from which Golant appeals makes no mention of costs and, in fact, states that "[t]he only order that will be entered will be striking [Golant's] pleadings, specifically his amended answer to the amended complaint, and denying the Debtor's discharge." *Levy v. Golant* (In re Golant), No. 96 B 007376, slip op. at 9 (Bankr. N.D. Ill. Sept. 8, 1998). The district court memorandum and order in this case notes that Golant's cost objections are "the subject of a different appeal." *Levy v. Golant*, No. 98 C 7452, slip op. at 1, 1999 WL 1144913 (N.D. Ill. Dec. 10, 1999) Consequently, we express no opinion with regard

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to Golant's objection to the costs imposed upon him.

IV

For the foregoing reasons, the decision of the district court is
Affirmed.

Notes:

^[1]We are aware that it is not always clear how far a court's discretion extends when imposing a sanction of dismissal or default judgment under Rule 37. See *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1381 (7th Cir. 1993). Many of our decisions, at least implicitly, require a finding of willfulness, bad faith or fault to support a dismissal order. See, e.g., *Rimsat*, 212 F.3d at 1046-47; *Ladien v. Astrachan*, 128 F.3d 1051, 1056 n.5 (7th Cir. 1997); *Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997). However, other decisions do not. See, e.g., *Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998) (requiring that dismissal be supported only by "clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing.") (citation omitted). Regardless of the proper standard, we find that Golant's conduct satisfies even the toughest standard--the finding of willfulness, bad faith or fault--and thus find that the bankruptcy court did not abuse its discretion in this respect.

^[2]However, it is worth noting that Golant's defense is not as meritless as Levy's counsel would have us believe. For example, Levy's counsel allege that Golant "admitted that as a part of his law practice, he created, maintained, and/or received the following documents, all of which were ordered produced in the April 23rd and May 8th orders: (i) time records" Appellee's Br. at 8. However, a close look at the May 29, 1998 transcript of proceedings shows that while Golant admitted to creating time records, he also stated that he did not keep his time records beyond the time necessary to create his bills for the time recorded in those records. May 29, 1998 Tr. at 18. It is thus misleading, and not helpful to this court, to insinuate that Golant should somehow have turned over his time records even though he did not, as part of his usual business practice, retain them.

^[3]The bankruptcy court thus provided Golant with the due warning necessary under *Ball v. City of Chicago*, 2 F.3d 752, 755 (7th Cir. 1993) (requiring court to provide plaintiff's counsel with due warning prior to dismissing case as a sanction for failure to prosecute); see also *Spain v. Bd. of Educ.*, 214 F.3d 925, 929-30 (7th Cir. 2000) (applying *Ball* to Rule 37 sanctions).

Mediation Conference

After an appeal is granted, a mediation conference will be held in most cases. A mediation conference is an informal meeting of the parties with a mediation judge.

- All parties will receive a notice indicating the date, time, and location of the conference.
- The conference may be held in person or by telephone.
- Mediation is not a hearing – witnesses will not be called to testify. An attorney is not required, although the assistance of an attorney may be helpful.
- The mediation judge may schedule further conferences, if needed.

Advantages of Mediation

- The advantage of mediation is that the parties are able to discuss the appeal in a relaxed, confidential, and informal setting.
- If a settlement can be reached in mediation, the parties avoid the uncertainty, expense, and delay of a formal hearing.

The Mediator's Role

- The mediator will not decide the outcome of the appeal, but will discuss options for settling the appeal.
- The mediator can speak to parties privately. This process allows the mediator to meet separately with each party to explore settlement options.
- The mediator may look at the information supporting a party's position and may suggest what additional information may be necessary.

- The mediator cannot give legal advice, but will answer questions about the process.

It is important for the parties to come prepared to the mediation conference.

- Look at the Department decision that was appealed. Consider what it would take to settle the appeal.
- Gather all documents that support your position and bring them to the mediation conference.
- Bring the Jurisdictional History (yellow sheets sent with the order granting the appeal). This is a summary of the history of the case. Be ready to discuss whether this history is correct.

What happens if the appeal is resolved?

An appeal can be resolved in two ways:

- The party that filed the appeal can voluntarily dismiss the appeal.
- The parties can agree on a settlement.

The Board will then issue either an Order Dismissing Appeal or an Order on Agreement of Parties.

What happens if the appeal is not resolved?

When a settlement cannot be reached, the case will be given to a hearings judge, who will schedule a formal hearing. To ensure confidentiality, the mediator is not allowed to discuss the case with the hearings judge....

Frequently Asked Questions (FAQs)

This page contains answers to frequently asked questions about the appeal process at the BIIA. Click on a question for the answer. To view or print all the FAQs, click on the "Expand All" link.

What is the difference between the BIIA and the Department?

Among other things, the Department of Labor and Industries (Department) is the state agency that administers the workers' compensation fund. The Department determines what benefits are to be provided to an injured worker.

The Board of Industrial Insurance Appeals (Board) is a separate state agency that is independent from the Department.

It is the Board's function to review the Department's determinations when there is an appeal by interested parties. The Board operates like a court to decide the case.

Where do I file my appeal?

By state law you must file your appeal at our main office in Olympia, Washington (Filing an Appeal). In Olympia, we have a staff assigned to process your appeal in the most efficient manner possible. Our new appeals unit is dedicated to preparing your case for resolution and is there to assist you. [See RCW 51.52.050; WAC 263-12-01501(1)(a)]

Did you get my appeal?

When the Board receives your notice of appeal, a docket number is assigned and a Notice of Receipt of Appeal is mailed to each party the next working day. If you do not receive a Notice of Receipt of Appeal, you may call us at (360) 753-6823 to speak with a Judicial Appeals Analyst in our new appeals section.

How many days does the Department have to respond to an appeal once it has been filed with the Board?

In workers' benefits appeals, the Department must respond by either:

- Sending its record to the BIIA, which permits the appeal to proceed; or
- Changing or reversing the order under appeal; or
- Advising the BIIA that they will reconsider their decision.

The BIIA has 60 days to decide whether the appeal will be granted. The Department must respond to the appeal within this time frame.

May I have a copy of the appeal?

When the appeal is granted, we will send you a copy of the appeal with the Order Granting Appeal. If you would like a copy of the appeal sooner, please call us at 360-753-6823.

An appeal has just been filed. I have additional information that may not be in the Department's file. Should I send it to the Board?

No. The Board does not need any additional information to make the decision to grant or deny the appeal. Once the appeal is granted, you should provide the new information during the mediation process....

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YOUR RIGHT TO BE HEARD



FIERCE COUNTY
LAW LIBRARY

BOARD OF INDUSTRIAL
INSURANCE APPEALS
STATE OF WASHINGTON



FIERCE COUNTY
LAW LIBRARY

If the Department does not reassume control of the appeal it remains at the Board. The appeal is then reviewed to make sure the Board has the right to hear the appeal and make a decision. If the Board finds that your appeal is not from a final decision of the Department, the Board will not have the right to hear the appeal. In that case it will issue an "Order Denying Appeal." This will not affect your right to appeal from any further decision of the Department.

If your appeal is filed within the time allowed by law and appears to be under the Board's jurisdiction, you will receive an "Order Granting Appeal." **AN ORDER GRANTING APPEAL DOES NOT MEAN YOU HAVE WON YOUR APPEAL OR THAT ANY RELIEF WILL BE GRANTED.** It simply means the Board agrees to hear your appeal and that further proceedings will be held.

REPRESENTATION BEFORE THE BOARD

When appearing before the Board you may represent yourself. You may bring someone with you to give you advice and support. At your request, this person will receive notice of all proceedings. You may also choose to be represented by a lay person (non-lawyer) or by a lawyer.

The Department of Labor and Industries will be represented by a member of the Attorney General's office at all proceedings in which it is a party. Self-insured employers are generally represented by private attorneys. If your case cannot be settled in mediation, it would be wise for you to consider hiring a lawyer who understands the laws concerning your case. Usually a lawyer will accept a case on a "contingent fee" basis. That is, the lawyer will charge a fee only if he or she is successful in getting additional benefits on appeal.



"What is a mediation conference?"

"How do I prepare for a mediation conference?"

"How can settlement be reached at mediation?"

THE MEDIATION CONFERENCE

After an appeal is granted, the first proceeding scheduled by the Board will probably be a mediation conference. A mediation conference is an informal gathering of the parties with a mediation judge. The conference may be held as a telephone conference call or a face to face meeting of the parties. The Board will send out notices to all concerned parties letting them know the type, location and time of the conference.

The main purpose of the mediation conference is to try to settle the appeal without a formal hearing. The role of the mediation judge is to assist the parties in reaching a mutually acceptable resolution. That assistance may be in the form of making informal contacts with one or all parties, providing information on relevant Board or appellate decisions or reviewing with parties the likelihood of success of the appeal. The judge will review the Department's claim file and any information which the parties may have. The mediation judge will look at the evidence supporting the requested relief and suggest what additional kinds of support may be necessary.

When notified to participate in a mediation or settlement conference, you will not need to bring witnesses. Testimony will not be taken. However, a record will be made to state the results of the conference.

It needs to be clear on the record whether or not the Board has authority to hear the appeal. You should therefore bring the copy of the historical and jurisdictional facts which will be sent with the notice advising you of the conference. This is a summary of the history of the case. You should be ready to discuss whether this history is correct.

You should bring any medical reports or other documents supporting your appeal. You should also be

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"Do I need an attorney?"

prepared to discuss the issues involved. Most importantly, you should be prepared to explain what it is you want.

Several different settlement options may be explored in mediation. All settlement discussions will be kept confidential. One possible method of settlement is to arrange for an examination of the worker by one or more doctors. This will be done at the Board's expense, but everyone must agree beforehand that the results of this examination will be binding on all parties.

An appeal can be settled by an agreement of all parties who participate in the process. The agreement must be supported by the law and facts which have been agreed to by the parties. Often a medical report will be enough for an agreement. Once a settlement is reached, the Board will issue what is called an "Order on Agreement of Parties." This order explains the terms of the settlement and directs the Department of Labor and Industries to take whatever action has been agreed to.

When a settlement cannot be reached, the mediation judge will gather information necessary to define and narrow the issues to be considered. The mediation judge may also make preliminary rulings which will control future proceedings in the appeal. However, the mediation judge will not make any decision resolving factual disputes without the parties' consent.

HEARING

When an appeal does not settle in mediation, it is assigned to a hearings judge. This judge will schedule and conduct hearings. Board hearings are like trials in Superior Court.

The original hearing in a workers' compensation case is held either in the county where the injury occurred or the county where the worker resides. When necessary, the location can be changed. Everyone involved will receive a notice listing the location, date, and time of the first hearing. The judge may continue the

hearing to another time. This allows all parties to have an equal chance to present their evidence.

The hearings judge will preside over the proceedings. Witnesses will be sworn and all testimony recorded by a court reporter. Evidence will be admitted under the rules of evidence used in Superior Court.



Under these rules, "hearsay" evidence such as a medical report is usually not acceptable. Instead, the doctor who prepared the report will have to testify.

There are two main differences between a Board hearing and a court trial. There is no jury at a Board hearing. Also, Board hearings are often held in public buildings, like libraries. Despite these differences, all participants are expected to conduct themselves in an orderly and courteous manner.

The person appealing the decision has the initial burden of presenting evidence. In cases where the Department is claiming that a worker has obtained benefits through fraud, the Department or self-insured employer must present evidence first.

The formal record established at the hearing will be the basis for any further decisions in the appeal process. If you have evidence in support of your appeal, this is the time it should be presented.

PROPOSED DECISION AND ORDER

When all hearings in an appeal are completed, the typed record of these hearings will be reviewed and a Proposed Decision and Order will be issued.

"What happens at a hearing?"

"How is my appeal decided?"

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"What happens if my appeal can't be settled in mediation?"



Board of Industrial Insurance Appeals

State of Washington

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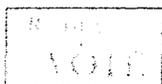
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Welcome



The Board of Industrial Insurance Appeals (BIIA) is an independent state agency. It is separate from the Department of Labor and Industries. The BIIA's purpose is to hear and decide appeals from decisions of the Department.

The purpose of this website is to provide useful information about the BIIA and the appeal process. You will find easy access to current laws, rules, and Significant Board Decisions.

News...

NOTICE OF RULE MAKING: The Board has adopted several changes to its rules of practice and procedure, WAC 263-12. These changes can be found at WSR 10-14-061 (<http://apps.leg.wa.gov/documents/laws/wsr/2010/14/10-14-061.htm>). Any questions concerning the rules should also be directed to J. Scott Timmons, Executive Secretary (360) 753-6823 or e-mail to timmons@biia.wa.gov

Attention
Court Reporters
and Attorneys!
New rules apply to cases scheduled for hearings after August 2, 2010. Please use the "e-filing" link to the right to familiarize yourself with the electronic deposition filing requirement.

2008 Judicial Survey Results



The headquarters, and principal office of the BIIA is Olympia, Washington. Our mailing address is:

Board of Industrial Insurance Appeals
PO Box 42401
Olympia WA 98504-2401

Office hours are 8 a.m. to 5 p.m., P.S.T., Monday through Friday, excluding legal holidays

Please send your questions or comments about this website to webmaster@biia.wa.gov

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RULE 2.2

DECISIONS OF THE SUPERIOR COURT THAT MAY BE APPEALED

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(2) (Reserved.)

(3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action....

AMERICAN JURISPRUDENCE

SECOND EDITION

A MODERN COMPREHENSIVE TEXT STATEMENT OF
AMERICAN LAW

STATE AND FEDERAL

COMPLETELY REVISED AND REWRITTEN
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Volume 47

JUDGMENTS §§463 to 855
to
JUVENILE COURTS AND
DELINQUENT AND DEPENDENT CHILDREN

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despite the procedural limitations embodied in court rules.⁷

b. Particular Grounds for Equitable or Independent Relief

§ 719 Overview of grounds, generally

Research References

West's Key Number Digest, Federal Civil Procedure ⇨2648; Judgment ⇨415 to 447(2)

Vacating or Opening Judgment by Confession on Ground of Fraud, Illegality, or Mistake, 91 A.L.R.5th 485

Recognized grounds for equitable interference with a judgment, when one, without his or her own negligence, has lost an opportunity to present a meritorious defense to an action, and the enforcement of the judgment so obtained against him or her would be against equity and good conscience, and there is no adequate remedy at law, include fraud,¹ accident,² mistake,³ and surprise.⁴ In particular, equity will not, except in rare and extreme cases, offer relief from a judgment rendered as the result of a mistake on the part of a party or the party's counsel, unless the mistake is unmixed with negligence.⁵

◆ **Caution:** Proceedings requesting relief from an otherwise final

Trust, 854 P.2d 167 (Colo. 1993); Hamilton v. Hamilton, 410 N.W.2d 508 (N.D. 1987); N.C. v. W.R.C., 173 W. Va. 434, 317 S.E.2d 793 (1984).

⁷Hamilton v. Hamilton, 410 N.W.2d 508 (N.D. 1987).

[Section 719]

¹Bergin v. State, Dept. of Correction, 75 Conn. App. 591, 817 A.2d 136, 2003 WL 1084840 (2003); Borsheim v. O & J Properties, 481 N.W.2d 590 (N.D. 1992).

As to the nature of fraud supporting equitable relief from a judgment, see § 720.

As to relief from a judgment based upon a fraud upon the court, see §§ 728 to 733.

As to fraud as a ground for a motion seeking relief from a judgment, pursuant to a rule providing for such relief, as opposed to an independent action seeking relief from a judgment, see §§ 694 to 699.

²National Sur. Co. v. State Bank of

Humboldt, Neb., 120 F. 593 (C.C.A. 8th Cir. 1903); Bergin v. State, Dept. of Correction, 75 Conn. App. 591, 817 A.2d 136, 2003 WL 1084840 (2003); Forte Bros. Inc. v. Baalbaki, 569 A.2d 443 (R.I. 1990).

³National Sur. Co. v. State Bank of Humboldt, Neb., 120 F. 593 (C.C.A. 8th Cir. 1903); West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir. 1954); Nevada Indus. Development, Inc. v. Benedetti, 103 Nev. 360, 741 P.2d 802 (1987) (mutual mistake); Gillmor v. Wright, 850 P.2d 431 (Utah 1993) (mistake of fact); Egan v. Egan, 560 P.2d 704 (Utah 1977) (mistake of fact); Egan v. Egan, 560 P.2d 704 (Utah 1977) (mistake of fact).

⁴Bergin v. State, Dept. of Correction, 75 Conn. App. 591, 817 A.2d 136, 2003 WL 1084840 (2003); Forte Bros. Inc. v. Baalbaki, 569 A.2d 443 (R.I. 1990) (inadvertence, surprise, or excusable neglect).

⁵Bergin v. State, Dept. of Correction, 75 Conn. App. 591, 817 A.2d 136, 2003 WL 1084840 (2003).

judgment are scrutinized on the grounds on which they are restricted.⁶

An independent action is required, although the moving party must satisfy the substantive requirements as to the merits of its claim, and the provisions of a specific rule of procedure, evidence,⁸ and the applicable law, more so.⁹ Thus, one cannot, on the basis of newly discovered evidence, should have been discovered with diligence.¹⁰

There is authority that the grounds for relief from a judgment are those that existed at the time of the proceeding and relief from a judgment is not available for challenging a judgment. However, the courts generally give relief from a judgment on the basis of an action to unusual or extraordinary circumstances which would render it inequitable to give effect.¹⁴

§ 720 Fraud; intrinsic

Research References

West's Key Number Digest

⁶Layton v. National Sur. Co., 141 S.W.3d 760 (Tex. Christi 2004), reh'g overruled 2004(bill of review pursuant to rules).

⁷Johnson Waste Management, Inc. v. Waste Management, Inc., 611 F.2d 593, 29 Fed. Cl. 192, 53 A.L.R. Fed. 544 (5th Cir. 1979).

⁸Goland v. Central Bank of the Philippines, 607 F.2d 339 (D.C. Philippines Nat. Bank v. F. 2d 544, 5 Fed. R. Serv. Cir. 1961).

As to relief from judgment on rule and newly discovered evidence, see §§ 692 to 693.

⁹Johnson Waste Management, Inc. v. Waste Management, Inc., 611 F.2d 593, 29 Fed. Cl. 192, 53 A.L.R. Fed. 544 (5th Cir. 1979).

¹⁰Southeastern Colorado Serv. Dist. v. Cache Creek, 854 P.2d 167 (Colo. 1993);

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5 Conn. App. 591, 817 A.2d 136,
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tional Sur. Co. v. State Bank of
t, Neb., 120 F. 593 (C.C.A. 8th
); West Virginia Oil & Gas Co.
E. Breece Lumber Co., 213 F.2d
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rgin v. State, Dept. of Correc-
Conn. App. 591, 817 A.2d 136,
1084840 (2003).

judgment are scrutinized by the courts with extreme jealousy, and
the grounds on which interference will be allowed are narrow and
restricted.⁶

An independent action may be based on newly discovered evidence,⁷
although the moving party may be required to meet the same substan-
tive requirements as govern a motion for similar relief under the pro-
visions of a specific rule allowing for relief based on newly discovered
evidence,⁸ and the applicable standards may be as stringent if not
more so.⁹ Thus, one cannot maintain an independent action for relief
on the basis of newly discovered evidence where the information
should have been discovered before or during trial through reasonable
diligence.¹⁰

There is authority that an independent action may be based on any
of the grounds for relief from a judgment that were available in equity
at the time of the promulgation of the specific rule governing proce-
dure and relief from a judgment,¹¹ and that any other type of action
challenging a judgment must be considered a collateral attack.¹²
However, the courts generally limit equitable relief in an independent
action to unusual or exceptional circumstances,¹³ or circumstances
which would render it manifestly unconscionable that the judgment
be given effect.¹⁴

§ 720 Fraud; intrinsic and extrinsic fraud

Research References

West's Key Number Digest, Judgment ⇨441, 443(.5) to 443(3)

⁶Layton v. Nationsbanc Mortg. Corp., 141 S.W.3d 760 (Tex. App. Corpus Christi 2004), reh'g overruled, (Sept. 15, 2004)(bill of review pursuant to Texas rules).

⁷Johnson Waste Materials v. Marshall, 611 F.2d 593, 29 Fed. R. Serv. 2d 192, 53 A.L.R. Fed. 544 (5th Cir. 1980).

⁸Goland v. Central Intelligence Agency, 607 F.2d 339 (D.C. Cir. 1978); Philippine Nat. Bank v. Kennedy, 295 F.2d 544, 5 Fed. R. Serv. 2d 973 (D.C. Cir. 1961).

As to relief from judgment based on rule and newly discovered evidence, see §§ 692 to 693.

⁹Johnson Waste Materials v. Marshall, 611 F.2d 593, 29 Fed. R. Serv. 2d 192, 53 A.L.R. Fed. 544 (5th Cir. 1980).

¹⁰Southeastern Colorado Water Conservancy Dist. v. Cache Creek Min. Trust, 854 P.2d 167 (Colo. 1993); Lindey's, Inc.

v. Goodover, 264 Mont. 489, 872 P.2d 767 (1994); Carbon County v. Schwend, 212 Mont. 474, 688 P.2d 1251 (1984); VanMeter v. Warner, 178 W. Va. 368, 359 S.E.2d 596 (1987).

¹¹Large v. Hayes By and Through Nesbitt, 534 So. 2d 1101 (Ala. 1988); Hamilton v. Hamilton, 410 N.W.2d 508 (N.D. 1987).

¹²Large v. Hayes By and Through Nesbitt, 534 So. 2d 1101 (Ala. 1988).

¹³Anderson v. State, Dept. of Highways, 584 P.2d 537 (Alaska 1978); Southeastern Colorado Water Conservancy Dist. v. Cache Creek Min. Trust, 854 P.2d 167 (Colo. 1993); Hayashi v. Hayashi, 4 Haw. App. 286, 666 P.2d 171 (1983); VanMeter v. Warner, 178 W. Va. 368, 359 S.E.2d 596 (1987).

¹⁴Atwell v. Equifax, Inc., 86 F.R.D. 686 (D. Md. 1980).

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RULE 60

RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) ~~Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;~~

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

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Declaration of Service.

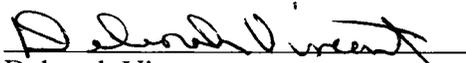
On this September 30th, 2010, I served a copy of this Brief to the attorney representing the Defendant/Respondent,

by personal delivery at the following address;

by email to the following e mail address;

Attorney for the Defendants, Lisa M. Roth, WSBA 19312,
Office of the Atty. General 800 5th Ave Ste 2000, Seattle, WA
98104-3188, Phone: (206) 389-3820,
email lisar1@atg.wa.gov.

Signed under penalty of perjury, under the laws of the State of Washington, at Seattle, Washington, this September 30th, 2010.


Deborah Vincent