STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:	)	Docket No. 04-2009-L-0087
	)	
[APPELLANT'S NAME]	)	**REVIEW DECISION AND FINAL ORDER**
	)	
	)	
Appellant	)	Adult Protective Services

I. NATURE OF ACTION

1. The Department of Social and Health Services (Department) received an allegation of mental abuse by the Appellant of a vulnerable adult. After investigation and review, the Department determined the allegation of mental abuse was substantiated. The Appellant requested a hearing to contest the Department's substantiated finding of mental abuse. Administrative Law Judge Robert C. Krabill held a hearing on June 23, 2009. The Administrative Law Judge (ALJ) issued an Initial Order on July 17, 2009, affirming the Department's substantiated finding of mental abuse by the Appellant against a vulnerable adult.

2. The Appellant requested and was granted an extension of time in which to file a petition for review of the Initial Order. The Appellant filed a petition for review with the Board of Appeals (BOA) on December 4, 2009. Attached to the petition were a letter from a bank trust department and copies of an e-mail stream. The Appellant's petition for review reads as follows:

Petition for Review of Initial Decision

I strongly feel accusations against me for abuse of a vulnerable adult, my [RELATIVE], is extremely unfair and is being processed in an unjust manner. Accordingly I hereby respectfully appeal the 17 July 2009 administrative order of Administrative Judge Robert C. Krabill. The bases for the appeal are

(a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ, that affected the fairness of the hearing;

(b) The findings of fact are not supported by substantial evidence based on the entire record;

(c) The decision includes errors of law;

There are several points which I believe have clouded the picture so far:

A. My [RELATIVES] have been victims of an extremely unfortunate choice in the "fiduciary team" that has handled their finances. Most egregiously, [BUSINESS NAME 2] in a role of durable power of attorney for administration, has found itself unable to make useful financial projections. It has not helped that the agency has both said financial projections were not needed, but also they have used all forms of sophistry, evasion, and deception to justify their untenable position. Finally, last October (having since testified, "We didn't know what else to do.") they attacked me personally, including making a largely fabricated report to APS which has resulted in the case still in process before AOH. To put it simply, when I continued to press for a financial plan for my aging [RELATIVES], at the same time outlining the potentially grave situation ahead, [BUSINESS NAME 2] proceeded to "shoot the messenger", who unfortunately was me.

B. The consequences of both the failure to plan, and also the malfeasance of [BUSINESS NAME 2] staff as well as others who had taken on fiduciary roles has had devastating consequences for our family. My [RELATIVE] died in March., following a fall just before New Year's, ending his life with a loss of dignity which obviously troubled him deeply. My [OTHER RELATIVE]'s finances, which once seemed ample and certain, are now so shaky it seems likely she will outlive her now severely depleted resources and be forced to rely on charity. This very fact is proof that my concerns for my [RELATIVE]'s finances was appropriate and accurate. It may also be indicative of malfeasance on the part of [BUSINESS NAME 2].

C. I believe ALJ Krabill acted arbitrarily and capriciously in conduct of the hearing of my case in five ways.

   a. The hearing relied on tainted testimony, containing a great preponderance of untruths which were not contested.

   b. ALJ Krabill, both in the hearing and in his initial order, failed to give attention to and determine which of multiple causes might have upset my [RELATIVE], [NAME 1].

   c. The hearing ignored the testimony of [NAME 1] that he felt neither abused, nor to be the victim of an abusive relationship. Also, there was no witness in the hearing that gave testimony of abuse, except possibly the APS investigator who only gave theoretical and general evidence to support her initial findings.

   d. The hearing failed to pay attention to who yelled, and at the same time accused me incautiously and inaccurately of constantly yelling at my [RELATIVE]. Also, the superficiality of testimony, is underscored by the extremely small amount of evidence provided as to details of what any yelling might have been about. Moreover, the testimony was clear that my

[RELATIVE] also yelled and the ALJ failed to take into account the family dynamics that included raised voices.

e. The hearing was sadly ineffective in dealing with the complexity of the case brought before it. One reason the case became excessively complex was that there was a great deal of testimony which was inaccurate and unreliable. (It is my observation that it appears to take a great deal of effort to deal with self-interested, cover-up-motivated, fabricated testimony if it is "smoothly" delivered by persons presumed to be reputable and reliable.) A second problem is that much of the testimony delivered addressed accusations of financial exploitations which had already been dropped by APS. (Indeed, ALJ Krabill's initial order seems to base itself in large part on, these invalid and unsubstantiated accusations.)

D. There was an error in law, complicated by a characteristic of our family.

a. It has been quite common, over the years, to extend the register of emotions in our family to include yelling. At several points in the testimony this became clearly apparent, yet this reality was not considered in ALJ Krabill's decision.

b. I believe RCW 74.34.020 Definitions, 2,c "Mental abuse" has been incorrectly interpreted. The statute states:

> "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and *verbal assault that includes* ridiculing, intimidating, *yelling,* or swearing.

(Emphasis added.) While verbal assault may include yelling, yelling is not necessarily verbal assault under the definition. To hold that the existence of yelling proves verbal assault (and therefore mental abuse) appears to constitute a form of the logical fallacy entitled "affirming the consequent".

First, the meaning of the language shows that verbal assault is only mental abuse if it includes one of four things. *one of* which is yelling. (Verbal assault itself is not defined.) More importantly, however, "yelling" is not defined as abusive in itself. Yelling is abusive only when it is part of verbal assault. Thus, there may be yelling that is not verbal assault and is therefore not mental abuse.

E. Additional evidence has become available to me since the 23 June 2009 hearing which I believe should be considered. I therefore request that the following additional evidence be presented.

a. Documented evidence of. the malfeasance of the fiduciary team helping my [RELATIVES] prior to the end of 2008 has become available. The precipitous situation outlined above, and its consequence are now clear to outside observers. Specifically, the successor trustee of the family trust and the successor guardian of the estate of my [OTHER RELATIVE] is [BUSINESS NAME 1]. The attached Declaration of [NAME 2] indicates that my concerns were justified. From this can

be inferred that my [RELATIVE]'s distress was not from me but from the depletion of his assets-the very concern of mine that occupied much of our communication.

b. New evidence about a meeting in which I was alleged to have abused my [RELATIVE] has been examined. Charges surrounding this meeting, which had not been brought up prior to the hearing, were false. But more importantly, the attached e-mails describe why that meeting (at which both my [RELATIVE] and [OTHER RELATIVE] were present) was bound to be conflict-laden and dysfunctional. Additionally, it appears that the meeting's only real purpose may have been to generate an occasion in which to target me.

The above observations are based on over two hundred hours of sifting through testimony and exhibits from the 23 June 2009 hearing. Unfortunately this process has been less efficient than one would hope, due to loss of financial power on my part resulting from the expensive guardianship case initiated by [BUSINESS NAME 2] at the same time as the legal activities they directed against me.

Thank you in advance for your consideration of my petition and appeal, which I expect to complement in the near future with additional details. These details will include explicit references both to testimony and the exhibits presented to the hearing.

3. The Appellant requested and was granted a further extension to supplement his petition for review. The Appellant submitted a supplement to the BOA on December 24, 2009, which reads as follows:

COMES NOW the Appellant, [APPELLANT'S NAME] (hereafter "[APPELLANT'S NAME]" or "Appellant"), by and through his attorney, Gary A. Preble of Preble Law Firm, P. S., and submits this supplement to his Petition for Review dated and faxed to the Board on December 4, 2009. The Petition for Review is of the Initial Order of ALJ Robert C Krabill and dated July 17, 2009.

The ALJ in the Initial Order found and concluded that the Appellant had "mentally abused" - specifically, that he "harassed" and "verbally assaulted" - his 98-year-old [RELATIVE], [NAME 1], a vulnerable adult, according to the definition of "mental abuse" in RCW 74.34.020(2)(c). It is that conclusion to which [APPELLANT'S NAME] objects in this appeal, along with a number of Findings of Fact in support of the conclusion. [APPELLANT'S NAME] does not challenge that [NAME 1] was[1] a vulnerable adult.

The case is complicated by differing facts and perspectives and it will be important to review the whole record in order to properly understand the case.

A. Summary of Case:

[APPELLANT'S NAME] had received an MBA from [SCHOOL 1] and worked for [COMPANY 1] in [ANOTHER COUNTRY] for 15 years as systems engineer specializing in financial systems, specifically financial accounting and reporting, and had "quite a bit" of

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[1] [NAME 1] died on [DATE], 2009, and was therefore not alive at the time of the hearing on June 23, 2009. While not relevant *to* this appeal, it is [APPELLANT'S NAME]'s contention that his [RELATIVE]'s death was hastened by the stress of the actions in this matter of the department, and others who acted in concert with it, and by the disruption such actions caused in the life of his [RELATIVE] and their relationship.

expertise in accounting. 4:26:50, 5:12:28. His [RELATIVE], [NAME 1], had a distinguished career as an electrical engineer,[2] Finding 4.5, and had a significant estate. Finding 4.8, 4.6[3]

Contrary to the ALJ who stated in Finding 4.6 without citation to the record that [APPELLANT'S NAME] had "asserted himself in managing" their estate, [APPELLANT'S NAME] testified that his [RELATIVES], [NAME 1], 98, and [NAME 3], 97, asked him to help them in 2003 when his [RELATIVE 2] who had been doing the books died, 4:37, 4:32, 5:21:06. And in September, 2004, the [RELATIVES] told their three [RELATIVES] in an email that "after much consideration [they had] decided to have [APPELLANT'S NAME] [[APPELLANT'S NAME]] be the liaison with our financial planners. ... [APPELLANT'S NAME] has so far given us complete and accurate accounts of our finances and advice. With a Master's degree in Business Administration, he is capable and willing to give us the help we need now and in the future." Ex. B-5 [APPELLANT'S NAME] and his [RELATIVE] developed an accounting system that worked well for the needs of the [RELATIVES] and with which [NAME 1] was satisfied. 4:28 ff. [NAME 1] wanted to and did pay [APPELLANT'S NAME] for the time he spent working on his [RELATIVE]'s finances. 4:32

In March, 2006, [NAME 1] and [NAME 3] signed a power of attorney naming "[NAME 4] in her role as Executive Director of [BUSINESS NAME 2]" as Attorney-in-Fact over their finances, and named [APPELLANT'S NAME] as the alternate.[4] Ex 9 But as time went on, [APPELLANT'S NAME] felt that [BUSINESS NAME 2] was not able to competently manage his [RELATIVES]'s finances. Using an unqualified bookkeeper, [BUSINESS NAME 2] allowed the [RELATIVE]'s bank account to be overdrawn twice in one week. 4:32:30. In addition, [APPELLANT'S NAME] was dissatisfied that [BUSINESS NAME 2] was not making appropriate plans for his [RELATIVE]'s financial future. 3:56:45. [BUSINESS NAME 2] planned on funds to last for 18 months, 3:58-05, 3:09:50, 4:41:09, but [APPELLANT'S NAME] felt it should be longer. 4:49:00.

As a result of [APPELLANT'S NAME]'s concerns for his [RELATIVE]'s financial well-being, he spoke to his [RELATIVE] on a number of occasions, some of which included loud

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[2] He was an early television pioneer, the inventor of the first video game, and a professor of physics at [SCHOOL 2]. http://en.wikipedia.org/

[3] Inexplicably, but evidencing the bias or inattention of the ALJ, Finding 4.6 states in part without citation to the record that [APPELLANT'S NAME] began managing his [RELATIVE]'s "$1 million estate". Exhibit C was not admitted, but [APPELLANT'S NAME] showed the value of the estate in 2006 as $3.18 million. Ex C-1 While [APPELLANT'S NAME]'s position below is that Exhibit C and others should not have been excluded, it should be noted that ALJ Krabill himself cited Exhibit G in footnote 6 even though Exhibit G had not been admitted. 0:56:54

[4] Contrary to the clear language of the document, ALJ Krabill found that "[BUSINESS NAME 2] ([BUSINESS NAME 2]) held [NAME 1]'s durable power of attorney for purposes other than healthcare. [NAME 4] and [NAME 5] exercised [BUSINESS NAME 2]'s power of attorney." Finding 4.7 This finding is clear evidence that the ALJ was biased in favor of [NAME 4] and [NAME 5] such that he accepted their testimony as fact even when it was clearly wrong.

[NAME 4] testified at 3:47:37, "The office, my agency, [BUSINESS NAME 2], was the Durable Power of Attorney for financial affairs, for both [NAME 1] and [NAME 3]. ... And after I arrived [at [BUSINESS NAME 2]] the document specifies the Director of [BUSINESS NAME 2], as the entity, who did the..., the individual entity who acts as power of attorney, although the agency was named." And Exhibit 8-1, [NAME 4] and [NAME 5] stated under penalty of perjury that "[BUSINESS NAME 2] was named as the Durable Power of Attorney" for [NAME 1] and [NAME 3]."

The document itself, after appointing [NAME 4] as stated above, went on to say "If [NAME 4] is unable or unwilling to serve, then my [RELATIVE], [APPELLANT'S NAME], is designated as successor Attorney-in-Fact." Ex 9-1. In other words, [NAME 4], not [BUSINESS NAME 2], and not the Director of [BUSINESS NAME 2], was the attorney in fact. If [NAME 4] was unable to serve, it was not [BUSINESS NAME 2] or some other person at [BUSINESS NAME 2] who would have been attorney in fact, but [APPELLANT'S NAME].

voices and yelling between them. As a result, [NAME 4] and [NAME 5] filed a Petition for a restraining order against [APPELLANT'S NAME]. Ex 8 Adult Protective Services investigated the matter and spoke with [NAME 1], who told the investigator that his [RELATIVE 3] "may have raised, his voice but it was nothing more than that." Ex 2-4 [NAME 1] said he was not afraid of [APPELLANT'S NAME]. Id. [NAME 1] said "I will just die if (my [RELATIVE 3]) can't come back, and that [APPELLANT'S NAME] was "just a swell guy" and that he missed him. Id. [NAME 1] declined assistance for a restraining order, said he wanted [APPELLANT'S NAME] to visit him and [OTHER RELATIVE], that there was no problem with [APPELLANT'S NAME] being involved in his finances, that [APPELLANT'S NAME] had not been pressuring him for information or control of his property, that [APPELLANT'S NAME] had been helpful and there have not been problems and that [APPELLANT'S NAME] "hasn't harassed me at all" and that he hadn't harmed his [OTHER RELATIVE]. Id. [APPELLANT'S NAME] was found by the Adult Protective Services to have committed mental abuse of [NAME 1] because he "yelled at and pressured a vulnerable adult about financial decisions which caused the vulnerable adult to be upset." Ex. 4-1 [APPELLANT'S NAME] felt the statements of [BUSINESS NAME 2], Ex 8 and the Petition for restraining order were done in retaliation for his complaining to [BUSINESS NAME 2] that they were not properly managing his [RELATIVE]'s assets and that they would be depleted during his [RELATIVE]'s lifetimes.

B. Legal Standards and Analysis:

The relevant legal standard is the definition of "mental abuse" in RCW 74.34,020(2)(c), and the issue in this case is whether [APPELLANT'S NAME] mentally abused his [RELATIVE], [NAME 1]. The quickest answer was provided by [NAME 1] himself. "No."

1. Standard of Review.

The standard of review in this matter is set forth in WAC 388-02-0600(3), as follows:

(3) In all other cases, the review judge may only change the initial order if:

(a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ, that affected the fairness of the hearing;
(b) The findings of fact are not supported by substantial evidence based on the entire record;
(c) The decision includes errors of law;
(d) The decision needs to be clarified before the parties can implement it; or
(e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record.

2. Mental Abuse.

(a) Statutory Definition

(2) "Abuse" means the willful action or inaction that **inflicts injury**, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or

mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings: ...

> (c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, **harassment**, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and **verbal assault** that includes ridiculing, intimidating, yelling, or swearing.

(b) The elements of mental abuse relevant to this case are therefore
- (1) willful action (mental abuse)
  - (a) harassment, or
  - (b) verbal assault
    - (i) that includes yelling
- (2) that inflicts injury
  - (a) injury is only presumed if the vulnerable adult cannot express or demonstrate harm

3. Required findings.

The department has the burden of proof in this case. "The absence of a finding on a material issue is presumed to be a negative finding against the party with the burden of proof. *Eggert v. Vincent*, 44 Wn. App. 851., 856, 723 P.2d 527 (1986), *review denied,* 107 Wn.2d 1034 (1987)." *Fettig* v. *Dep't of Soc. & Health Servs, 49 Wn. App. 466, 478, 74* P.2d 349 (1987).

(a) Procedural: In making his findings and conclusions, the ALJ is required to make findings on all "material issues of fact, law or discretion", RCW 34-05.061(3). In addition, "Any findings based substantially on credibility of evidence or demeanor of witness shall be so identified. The ALJ made no findings based on credibility of the evidence or demeanor of the witnesses. Since there was conflicting evidence, the state has not met its burden of proof because the ALJ made no findings on credibility. In the absence of a finding of credibility, the evidence presented by the Appellant has not been overcome by evidence from the state to the contrary because the state's evidence was no more credible than the Appellant's.

(b) Substantive The ALJ made no findings of injury from either harassment or verbal assault, even accepting for the sake of argument that harassment or verbal assault existed. [NAME 1] himself said there was no harassment and indicated that [APPELLANT'S NAME] had not harmed him. Since there is no definition of harassment, the ALJ should not rely on the subjective statements or observations of others when the alleged victim said he had not been harassed.

While there was testimony regarding stress, there is nothing in the record that shows, nor did the ALJ find, that whatever manifestations existed in [NAME 1] were the results of any harassment or verbal assault. Moreover, there were no medical reports of stress. 2:21 When [NAME 6] was asked "And so you don't know, whether it was, yelling itself that was causing stress, or if it was the content of the conversation," she stated, "That's a very good question. Um, that is a good question. I don't know. I mean I have my opinion. But as far as, what I actually know, no I don't know." 3:43:24

In light of [NAME 1]'s statements to the investigator that he was not injured by his [RELATIVE 3], the.ALJ should not accept the speculation of others as to the effect on [NAME 1]. There is sufficient evidence in the file that [NAME 1] yelled at others and had done so during his life. Thus, he was an active participant in loud voices or yelling, not the victim. Neither the ALJ nor the witnesses took into account the part that [NAME 1] played in, yelling in his relationships with

others. [NAME 5] said both [NAME 1] and [APPELLANT'S NAME] yelled. 2:57:11 [NAME 5] testified that all but one or two of the care givers reported that [NAME 1] yelled at them. 3:08:41 Throughout the testimony, there is statements about yelling but not who started it. 2:57:11 [NAME 7] agreed that [NAME 1] yelled at his [RELATIVE 3] a lot. 3:26:10 [NAME 6] said, "And he would scream at me ..." 3:38:00 On one occasion, [NAME 1] told his [RELATIVE 3], "Shhh, keep your voice down, or they'll be calling the office." 4:50:42 [APPELLANT'S NAME] also testified that "[RELATIVE] yelled at people at [BUSINESS NAME 3] when he was head of research. He yelled at people in the street if he thought that they acted really egregiously." 5:03:31 [APPELLANT'S NAME] also testified, "I don't think ..I initiated yelling at him." 5:03:43

Thus, there was no finding that the yelling caused injury to [NAME 1] or that there was any injury. In fact, the record supports the source of any stress as being from [NAME 1]'s declining financial condition.

4. Error of Law: The requirement of verbal assault is not met by the existence of yelling, contrary to Conclusion 5.4. Yelling may not be verbal assault though verbal assault may include yelling. The ALJ found merely that there was verbal assault because there was yelling. The legal requirement, however, is verbal assault, not yelling. Yelling may be evidence of verbal assault but it is not necessarily verbal assault. The ALJ succumbed to a logical fallacy by presuming that yelling was necessarily verbal assault.

5. Irregularities, misconduct or abuse of discretion by ALJ.

(a) The ALJ did not allow [APPELLANT'S NAME] to present his theory of the case by excluding Exhibits C, D. E, F, G and O. These exhibits would show that [BUSINESS NAME 2] had mismanaged [NAME 1]'s funds and were therefore both the cause of his stress and the [BUSINESS NAME 2] witnesses had motivation to point the finger at [APPELLANT'S NAME]. The fact that [APPELLANT'S NAME] is educated and experienced in financial matters is relevant here. And the Declaration of [NAME 2] requested to be added to the record, shows that [BUSINESS NAME 2] did not manage [NAME 1]'s finances well, nor did they properly plan for the future needs of the [RELATIVES].

(b) The ALJ was also biased against [APPELLANT'S NAME] and showed it throughout the hearing and the findings. At 58:54 when discussing the exclusion of Exhibit G, the ALJ made the gratuitous comment that [APPELLANT'S NAME] was interpreting things in the most paranoid way possible. A cursory reading of the findings and conclusions is replete with the ALJ's antagonism toward [APPELLANT'S NAME] unsubstantiated by the record. "Drumbeat of dread", "less noble motivations", "projection of his own guiltily realized, imperfectly suppressed baser motives onto" [BUSINESS NAME 2].

C. Conclusion:

Based on the foregoing, the Appellant request the Reviewing Officer reverse the Initial Order of the ALJ.

4. The Department filed a response to the Appellant's petition for review which reads as follows:

Respondent, Department of Social and Health Services ("the Department"), Adult Protective Services ("APS"), by and through its representative, EVELYN J. CANTRELL, submits this Reply to Appellant's Supplemental Appeal mailed December 28, 2009.

I. EVIDENCE RELIED UPON

The Department relies upon all the testimony given at the administrative hearing supported by the transcript ("Tr.") and upon all of the exhibits admitted into the record. The Department relies on the Findings of Fact and Conclusions of Law entered by the Administrative Law Judge in the Initial Order dated December 28, 2009 ("IO").

II. STATEMENT OF FACTS AND ARGUMENT

The following facts are supported by the record and the Initial Order, all of which were incorporated in the Department's Post hearing Memorandum.

A. [NAME 1] Was A Vulnerable Adult.

RCW 74.34.020(15) defines "vulnerable adult" to include a person:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
(b) Found incapacitated under chapter 11.88 RCW; or
(c) Who has a developmental disability as defined under RCW 71A.10.020; or
(d) Admitted to any facility; or
(e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
(f) Receiving services from an individual provider.

[NAME 1] was a vulnerable adult because he was 98 years old and was physically unable to care for himself, and was receiving caregiver services. RCW 74.34.020(15)(a)(e); IO, FOF 4.4 and COL 5.2. [NAME 1] had a heart condition, required oxygen, had macular degeneration, had problems with ambulation, and used a walker and a wheelchair at times. *Id.* [NAME 1]'s caregivers provided him with assistance for hygiene, incontinence, changing clothes, light housekeeping, and cooking. *Id.* [NAME 1] had appointed [NAME 4] as attorney-in-fact under a Durable Power of Attorney for his finances on March 17, 2006. Exhibit 9; IO, FOF 4.7. [NAME 4] testified that she had acted as attorney-in-fact on behalf of [BUSINESS NAME 2] for [NAME 1] since approximately 2006 under a prior DPOA. During 2006 through 2008, [NAME 4] never relinquished her fiduciary duty as attorney-in-fact for [NAME 1] nor was any evidence ever provided that [NAME 1] asked her to. Tr., pp. 168-169. [NAME 1] had appointed [NAME 8] as attorney-in-fact under a Durable Power of Attorney for his healthcare. IO, FOF 4.6.

B. The Appellant's Actions Were Willful.

WAC 388-71-0105 defines "willful" as

> [T]he nonaccidental action or inaction by an alleged perpetrator that he/she knew or ***reasonably*** should have known ***could*** cause harm, injury or a negative outcome.

(Emphasis added). [NAME 1] was 98 years old, had a heart condition, and numerous other conditions as a result of aging. The Appellant's actions of persistently and repeatedly arguing with [NAME 1] and yelling at him about his finances were not accidental. Given [NAME 1]'s very advanced years and medical conditions, the Appellant should have known, under a reasonable person standard, that what he did could have caused harm, injury or a negative outcome. In

fact, the evidence presented at the hearing demonstrates the Appellant's actions did cause extreme emotional distress so much so that [NAME 4] and [NAME 5] filed for a Vulnerable Adult Protection Order which was temporarily granted, but was then dismissed because an agreed order regarding limited and supervised visitation imposed on the Appellant was entered. IO, FOF 4.5; *See* Exhibits 10, 11 and 12.

C. [APPELLANT'S NAME] Mentally Abused [NAME 1]

"Abuse" means

> [t]he willful action or inaction that inflicts ***injury***, unreasonable confinement, ***intimidation***, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:
>
> …
>
> (c)"Mental abuse" means any willful action or inaction of [1] mental or [2] verbal abuse. [1] Mental abuse includes, ***but is not limited to***, coercion, ***harassment***, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and [2] ***verbal assault*** that includes ridiculing, intimidating, yelling, or swearing.

RCW 74.34.020(2)(c) (emphasis added). The word "or" is a function word indicating alternatives between different things. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie*, 148 Wash.2d 224, 240, 59 P.3d 655 (2002). Only mental abuse or verbal abuse is required in order to meet the definition of mental abuse.

1. [APPELLANT'S NAME]'s Actions Meet The Elements Of Mental Abuse And Verbal Assault.

The words "harass" and "harassment" are not specifically defined in statute or department rule; therefore, the Department looks to the ordinary dictionary definition. "Harass" is defined as:

> 1.: Exhaust, Fatigue 2.: to worry and impede by repeated raids 3.: to annoy continually.

Merriam-Webster's Dictionary and Thesaurus, Merriam-Webster, Incorporated 490 (2006).

"Harassment" is defined as:

> 1.: the act or an instance of harassing 2: the condition of being harassed.

Merriam-Webster's Dictionary and Thesaurus, Merriam-Webster, Incorporated 490 (2006).

There is substantial evidence in the record of the Appellant making numerous trips to Washington specifically to talk with his [RELATIVE] about his finances which would end up in the Appellant yelling at his [RELATIVE] as testified to by four separate witnesses:

- The Appellant would come to Washington for a week to 14 days, go back to [ANOTHER STATE] and come back to Washington in 4 weeks. Tr., p. 114.
- The Appellant would visit his [RELATIVES] for a week or two, would be at [NAME 1]'s home for the entire day at times, every day the Appellant would pressure [NAME 1] about the finances. Tr., p. 132.
- The Appellant was even renting a room a couple blocks away from [NAME 1]'s home. Tr., p. 132.
- During the arguments between the Appellant and [NAME 1], the Appellant would be insisting his [RELATIVES] were running out of money. Tr., pp. 109, 132-133.
- The verbal arguments between the Appellant and [NAME 1] would last between 1 ½ and 2 hours. Tr., p. 144; *see* Tr., pp. 132-133.

There is substantial evidence to support that the Appellant's arguments with his [RELATIVE] over the finances caused [NAME 1] annoyance, worry, extreme frustration, intimidation and extreme emotional distress as testified to by four witnesses who personally observed [NAME 1] and the Appellant:

- [NAME 1] would end up yelling at the Appellant. Tr., pp. 153-155; *see also* Tr. pp. 99-128.
- [NAME 1] would end up slamming his fist on the table and hanging up the phone on the Appellant. Tr., pp. 110, 128, 154.
- [NAME 1] would withdraw and become fearful when confronted by the Appellant; he would lower his chin and look to the ground. Tr., p. 154.
- The constant conversations and arguments about finances would cause stress for [NAME 1] Tr., pp. 107, 109, 126, 128, 132-133, 154.
- [NAME 1] would become withdrawn; put his head down to his chest or on the table. *Id.*
- [NAME 1] expressed that he wanted limited visitation with the Appellant, he expressed that he did not want to be bothered by discussions of finances. *See* Tr., pp. 125, 137-138.
- [NAME 1] would get agitated and upset; there would be verbal fights between [RELATIVE] and [RELATIVE 3]. Tr., pp. 128, 132-135.
- On one Friday in October 2008, [NAME 1] threatened the Appellant that he would call the police if the Appellant did not leave. Tr., p. 135.
- On one occasion in October 2008, Appellant testified [NAME 7] requested he leave the house because he was upsetting [NAME 1] Tr., p. 202.
  [NAME 1] did not look forward to his [RELATIVE 3]'s visits, he expressed he did not want his [RELATIVE 3] to come, he expressed he did not know what to do about the situation. Tr., pp. 143-144; *see also* Tr., p. 125.
- By October 2008, [NAME 1] would cry after the Appellant would leave the home, he expressed "no one can help me;" he became noncompliant with the caregivers; he would not take his medications; and he would refuse to use the restroom, soil his clothing and then not change his clothing. Tr., p. 144.

It is very clear that the Appellant had a motive to constantly harass his [RELATIVE] about his finances: the Appellant was concerned that if his [RELATIVE]'s money ran out, he would not inherit any of that money. As [NAME 5] testified, the Appellant told her "my [the Appellant] life depends on my [RELATIVE]'s money." Tr., p. 107. When the Appellant was specifically asked whether he was concerned whether there would be no money to inherit, the Appellant did not deny that question, what he testified to was "naturally, if any money is left

over, inheriting it is an interesting idea." Tr., p. 183. Further, when the Appellant attempted to imply that [NAME 1] had been coerced to sign the DPOA appointing [BUSINESS NAME 2] rather than the Appellant as attorney-in-fact, he referred to his [RELATIVE]'s money as "the family's money"[5] and in fact, the family voted who would be attorney-in-fact! Well, it was ***not the family's money***; it was [NAME 1] and [NAME 3]'s money which was meant for their last years in life.

The Appellant admitted that he did not have the "best discussions with his [RELATIVE], his [RELATIVE] told him to shush." Tr., p. 190. Even the Appellant's counsel asked him "did your ***yelling*** at [NAME 1] stress him out"? Tr., p. 199-200. It is clear from the testimony and the testimony regarding [NAME 1]'s actions after the arguments that [NAME 1] was embarrassed and did not know how to tell the Appellant to stay away and not to bill him. In fact, the Appellant admitted that it was possible [NAME 1] was embarrassed and did not know how to tell him to stay away and not bill him. Tr., p. 210. Of course, [NAME 1] loved his [RELATIVE 3]. Of course, [NAME 1] wanted to see the Appellant and visit him. But, the evidence supports that he also wanted those visits to be limited and he did not want to talk about his finances. [NAME 1] should have been enjoying his last days of life in a peaceful and calm manner, enjoying walks with his [RELATIVE 3], talking about the past, etc. Instead, the substantial evidence in the record supports that [NAME 1]'s last days were full of arguments and yelling, controversy, frustration and extreme emotional distress. What is most disturbing is that the Appellant still does not even seem to understand what he did.

Despite the Appellant being concerned over the amount of money going out for his [RELATIVE]'s care giving, he continued to bill his [RELATIVE] for his "financial services" to the tune of $14,000-$17,000 a year not including airline tickets, car rental, food, hotel and other incidental expenses. Tr., pp. 185, 212. He testified this had gone on for years and his visits to Washington began in 2003. Tr., p. 212. It wasn't even very clear what the Appellant really did for his [RELATIVES]. In fact, when counsel and the ALJ asked the Appellant what his source of income was, the Appellant did not directly answer the question and as he continued to answer the question, it became evident that for the last several years, his sole source of income had been from his [RELATIVES]. Tr., pp. 185, 204-205. If the Appellant was so concerned about his [RELATIVE]'s money running out, why did he continue to bill his [RELATIVES] and make them pay for his expenses for making multiple trips a year from [ANOTHER STATE] to Washington and back?

It may be true that [BUSINESS NAME 2] was paying too much for the care giving services. However, no evidence was submitted supporting that contention. If the Appellant truly felt that [BUSINESS NAME 2] was somehow not managing [NAME 1]'s financial estate, under the statutes governing powers of attorneys, he should have petitioned the Court, and requested an accounting:

> **Chapter 11.94 RCW**
> **Power of attorney**
>
> **RCW 11.94.100. Persons allowed to file court petition.**
>
> (1) A petition may be filed under RCW 11.94.090 by any of the following persons:
> …

[5] Although the undersigned remembers the Appellant referring to his [RELATIVE]'s money as "the family's money," the transcript at page 214 indicates he said "the family's documents." Since many parts of the transcript were inaudible to the transcriber, it is the undersigned's assumption the transcriber did not hear it correctly. The undersigned calls this to this tribunal's attention in the event she misunderstood what the Appellant said.

(e) ***Any other interested person***, as long as the person demonstrates to the court's satisfaction that the person is interested in the welfare of the principal and has a good faith belief that the court's intervention is necessary, and that the principal is incapacitated at the time of filing the petition or otherwise unable to protect his or her own interests.

The Court would have had the authority to appoint a guardian ad litem to conduct an investigation, and the issue could have been resolved years ago. Instead, the Appellant chose to harass his [RELATIVE] causing his [RELATIVE] extreme emotional distress and intimidation. If the Appellant maintains that during the time he harassed his [RELATIVE], [NAME 1] was not an incapacitated person, then [NAME 1] had a right to put his trust in [BUSINESS NAME 2] as attorney-in-fact over his financial affairs which is precisely what he did. The Appellant's actions were unconscionable and his actions certainly meet the definition of mental abuse.

III. REPLY TO APPELLANT'S SPECIFIC ARGUMENTS

The Department makes the following arguments in reply to the Appellant's Supplemental Appeal:

A. The APA Does Not Require The ALJ To Make A Finding Of Fact On Credibility Whenever There Is Disputed Evidence.

The Appellant implies that the Administrative Procedure Act requires the ALJ to make findings of fact on credibility of the evidence or demeanor of the witnesses whenever there is disputed evidence. This is simply not true. RCW 34.05.461(3) states:

> Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefore, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based ***substantially*** on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

RCW 34.05.461(3) (emphasis added). Therefore, it is only when a finding of fact is based ***substantially*** on the credibility of the evidence or demeanor of witnesses that an ALJ must identify the credibility finding. As the Administrative Procedure Act goes on to state:

> Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. ***Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs***. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

RCW 34.05.461(4) (emphasis added). There was direct testimony offered by numerous witnesses available for cross examination that disputed the Appellant's version of events creating a preponderance of the evidence. Therefore, there is no specific requirement that the ALJ must make a credibility finding unless his finding of fact is based solely on the credibility of the evidence or testimony. For example, an altercation takes place between a perpetrator and a victim and there is no other witness. At that time, in the absence of any physical injury corroborating an injury to the victim or any other corroborating evidence, the ALJ must determine whose version of events is more credible.

Furthermore, the Appellant was represented by counsel and could have called any of his own witnesses and the Appellant certainly had the opportunity to cross examine the Department's witnesses.

B. [NAME 1] Was Injured By The Appellant's Mental Abuse.

Appellant also argues that the ALJ made "no findings of injury from either harassment or verbal assault ..." "Abuse" means:

> [t]he willful action or inaction that inflicts [1] injury, [2] unreasonable confinement, [3] intimidation, ***or*** [4] punishment on a vulnerable adult.

RCW 74.34.020 (emphasis added). "Injury" is defined as:

> **1 a**: an act that damages or hurts: **2**: hurt, damage, or loss sustained

Merriam-Webster's Dictionary and Thesaurus, Merriam-Webster, Incorporated 568 (2006).

"Intimidate" is defined as:

> : to make timid or fearful; *esp* : to compel or deter by or as if by threats *adv* intimidation. Synonyms: browbeat, bully, cow, hector …

Merriam-Webster's Dictionary and Thesaurus, Merriam-Webster, Incorporated 573 (2006).

Appellant's argument is simply not true. The ALJ made the following findings of fact which are supported by the record as described more fully above:

- "When [APPELLANT'S NAME] visited for 12 hours daily, he returned ***again and again obsessively, intrusively, and obnoxiously*** …" FOF 4.10 (emphasis added).
- "[APPELLANT'S NAME] beat a drumbeat of dread that [NAME 1] and [NAME 2] would outlive their liquid assets and find themselves unable to meet their needs." FOF 4.10.
- "[NAME 1] loved [APPELLANT'S NAME] and enjoyed his company in the abstract, but [APPELLANT'S NAME]'s harping, interminable visits ***oppressed him***." FOF 4.11 (emphasis added).
- "When [APPELLANT'S NAME] yelled, [NAME 1]'s face reddened, he pounded the table, he yelled himself, and finally he would puff his cheeks, put his head down, and voice his resignation, 'I'm done.'" FOF 4.11. [NAME 1] was 98 years old with numerous medical problems. FOF 4.4.

- "On October 17, 2008, caregiver [NAME 7] observed a very loud yelling match between [NAME 1] and [APPELLANT'S NAME] that ended when [NAME 1] announced, 'Get out of the house, or I will call the police.'" FOF 4.11. "I wish he wouldn't come." FOF 4.11.

The ALJ concluded:

- "[APPELLANT'S NAME] bombarded [NAME 1] with predictions of imminent financial doom, even though [NAME 1] lacked the capacity to make the suggested changes to his estate plan. [APPELLANT'S NAME]'s stridency and perseverance over hours, days, weeks and months elevated his genuine concern for [NAME 1]'s estate plan to the level of ***harassment***. As part of the harassment, [APPELLANT'S NAME] ***repeatedly yelled*** at [NAME 1]" COL 5.4 (emphasis added).
- "[APPELLANT'S NAME]'s pattern of harassment induced ***anger, frustration, resignation, depressed mood, and self-neglect*** in [NAME 1]" COL 5.4 (emphasis added). In fact, one of [NAME 1]'s caregivers testified that after one such argument, [NAME 1] became noncompliant with his medications, would refuse to use the restroom, would soil his clothing and then refuse to change. Tr., p. 144.
- [APPELLANT'S NAME]'s acts were "willful, because badgering is an intentional act." COL 5.4.

The ALJ most certainly did find injury and intimidation from [APPELLANT'S NAME]'s willful acts of harassment and badgering.

The findings of fact and conclusions of law demonstrate that when the ALJ considered [NAME 1]'s physical age, physical and cognitive impairments along with the willful actions of [APPELLANT'S NAME], he found that [NAME 1] suffered from injury and intimidation as demonstrated by a depressed mood, anger, frustration, oppression and self-neglect as evidenced by [NAME 6]'s testimony that [NAME 1] wet his pants after one such argument and did not want to change his clothing. There is no requirement that the injury must be physical, nor is there any requirement that the emotional injury must be demonstrated in physical evidence. There were numerous witnesses who recounted [NAME 1]'s injuries due to [APPELLANT'S NAME]'s actions.

C. Yelling, Coupled With Evidence Of An Injury, Can Constitute Verbal Assault; However, Verbal Assault Is Not Necessarily Required To Meet The Definition of Mental Abuse.

Appellant also argues that yelling is not enough evidence to constitute verbal assault. RCW 74.34. 020(2)(c) specifically states that verbal assault ***includes*** yelling. Therefore, if yelling caused an injury, then the definition of mental abuse would be met. Furthermore, the record supports that [APPELLANT'S NAME]'s actions of yelling and screaming at [NAME 1] along with his actions as described above and found by the Administrative Law Judge constituted verbal assault. The flaw in Appellant's argument is that even without the finding and conclusion of verbal assault, the ALJ specifically found there was harassment which meets the definition of mental abuse:

"Mental abuse" means any willful action or inaction of [1] mental ***or*** [2] verbal abuse. Mental abuse includes, ***but is not limited to***, coercion, harassment, inappropriately

isolating a vulnerable adult from family, friends, or regular activity, and ***verbal assault*** that includes ridiculing, intimidating, yelling, or swearing.

RCW 74.34.020(2)(c) (emphasis added). The word "or" is a function word indicating alternatives between different things. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie*, 148 Wash.2d 224, 240, 59 P.3d 655 (2002). Only mental abuse or verbal abuse is required in order to meet the definition of mental abuse. The Department argues that both mental abuse and verbal abuse were met as evidence by the findings of fact and conclusions of law in the Initial Order.

D. There Were No Irregularities, Misconduct Or Abuse Of Discretion By The Administrative Law Judge.

1. There was no error or abuse of discretion when the ALJ excluded certain exhibits proposed by the Appellant.

The Appellant argues that the ALJ somehow erred in excluding Appellant's proposed exhibits C, D, E, F, G and O. He further argued that this error prevented the Appellant from putting forward his theory of the case; i.e., that [BUSINESS NAME 2] had mismanaged [NAME 1]'s funds. There are two flaws in Appellant's argument.

The first and foremost flaw is that whether or not [BUSINESS NAME 2] had mismanaged [NAME 1]'s funds was not relevant to the issue of whether the Appellant mentally abused a vulnerable adult. Had the Appellant truly believed [BUSINESS NAME 2] had mismanaged [NAME 1]'s funds under the power of attorney, there were other legal courses of action available to the Appellant. If [BUSINESS NAME 2] mismanaged [NAME 1]'s funds, then the Appellant's course of action should have been against [BUSINESS NAME 2], not against a vulnerable adult. Even if [BUSINESS NAME 2] mismanaged [NAME 1]'s funds, that is no excuse for the Appellant to mentally abuse him.

The second flaw is that the ALJ reasonably considered both objections and arguments against the objections to Exhibits C, D, E, F and O. A court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Washington vs. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). In fact, as demonstrated below, the ALJ left open the possibility that any of these documents could have been reconsidered for admission based on further motion after or during [APPELLANT'S NAME]'s testimony.

Proposed Exhibit C was an overview of the Appellant's [OTHER RELATIVE]'s financial position. The purported "overview" was not signed under oath or penalty of perjury, it was completed June 6, 2009 after the events of mental abuse occurred, and there was no foundational evidence submitted to corroborate that the "overview" and the amounts purported to be at issue were true and accurate. The Department objected on the grounds of relevance, cumulative, and foundational issues. Tr., pp. 32-33. The judge found that the document was prepared three months after [NAME 1] passed away and that the content reflected the Appellant's [OTHER RELATIVE]'s position. Tr., pp. 33-34. Furthermore, Appellant's counsel argued that the document is relevant to the financial spreadsheets starting in June of 2006, those financial spreadsheets were not part of the exhibits proposed. *Id.* The ALJ properly excluded the document stating that the Appellant could testify about those facts if he considered it important to do so. *Id.*

Proposed Exhibit D was a document again prepared by the Appellant three months after his [RELATIVE] had passed away entitled "past (failed) attempts to plan." The Department objected to the document for all of the reasons stated above, and in addition, to the fact that the Appellant did not include what ***he was paid*** out of his [RELATIVE]'s funds such as rent. Tr., pp.

34-35. The ALJ properly excluded the document stating that the Appellant could testify about those facts if he considered it important to do so. Tr., p. 35.

Proposed Exhibit E was a document again prepared by the Appellant three months after his [RELATIVE] had passed away entitled "inappropriate payments initiated by [BUSINESS NAME 2]." The Department objected to the document for all of the reasons stated above in addition to the fact that the Appellant did not include any receipts of the costs that were incurred causing [BUSINESS NAME 2] to make the payments; therefore, it was not an accurate reflection of the [BUSINESS NAME 2] financial records. Tr., pp. 36-37. Further, the bank statement attached to the document Appellant prepared was an incomplete bank statement (only page 13). *Id.* Appellant's counsel argued that the accounting reflected what occurred during the pendency of the guardianship, which occurred after the period of time Appellant was alleged to have mentally abused [NAME 1] Tr., p. 37. The ALJ properly excluded the document stating that it was not relevant. *Id.*

Proposed Exhibit F was a document again prepared by the Appellant three months after his [RELATIVE] had passed away entitled, "Home Care-Givers, have they been 'quitting.'" The Department objected to the document for all of the reasons stated above in addition on the grounds that Appellant was not [NAME 1]'s case manager, was not always in the home, and did not provide any foundational information corroborating his accounting of when the caregivers were or were not in the home. Tr., p. 38. The ALJ properly excluded the document stating that this issue would be better addressed through [APPELLANT'S NAME]'s testimony as well as not particularly closely related to the issues of the hearing. *Id.*

Proposed Exhibit O was a document prepared by the Appellant three months after his [RELATIVE] had passed away of his [RELATIVE]'s financial position. The Department objected to the document for all of the reasons stated above in addition on the grounds that the Appellant did not back up his [RELATIVE]'s financial position with any documentation and the document itself states, "I took my best guess figures and put together the value." Tr., pp. 47-49. The ALJ properly excluded the document however, he indicated that the document could be revisited after the Appellant's testimony, if it helped to organize and explain the document, on later motion. Tr., pp. 49-50.

Therefore, the ALJ reasonably considered the Department's objections, counsel's arguments against the objections, and ruled after considering both. The Appellant has raised no evidence to suggest that the ALJ abused his discretion because there was no manifestly unreasonable decision or a decision based on untenable grounds or reasons. In fact, the transcript clearly indicates the ALJ left it open to counsel to move to admit any of the above exhibits at a later time: "I tell you what [speaking of Exhibit O], then let's revisit this after [APPELLANT'S NAME]'s testimony if it helps to organize and explain it. That's probably so for the similar documents in Exhibit C. And if – if it proves that those documents organize and explain his testimony." Tr., p. 49. Further, "Exhibit O is excluded, but may be admitted on later motion. Tr., p. 50.

2. The ALJ was not biased against the Appellant.

The Appellant also argues that the ALJ was biased against [APPELLANT'S NAME] and "showed it throughout the hearing and his findings of fact." Supplemental Appeal, p. 8. The Department disagrees with the Appellant and relies on the record as it speaks for itself.

IV. CONCLUSION

The Department respectfully requests the review judge review the record and affirm the Initial Order affirming the Department's substantiation of mental abuse.

II. FINDINGS OF FACT

1. In April 2008, [NAME 1] was an approximately 98 year old man. He was 99 years old when he passed away [DATE], 2009. Before his death, [NAME 1] suffered numerous maladies of extreme old age, including an unsteady gait, hearing impairment, a heart condition, and macular degeneration. He required a walker to ambulate, hearing aids to hear, supplemental oxygen to breathe, and he relied upon round the clock caregivers to complete several activities of daily living (ADLs), including locomotion, toileting, personal hygiene, and instrumental activities of daily living (IADLs), including meal preparation and ordinary housework. His [OTHER RELATIVE], [NAME 3], had suffered a recent steep decline in cognitive ability. [NAME 3] needed the [RELATIVE]'s 24 hour per day caregivers assistance more than [NAME 1][6]

2. [NAME 1] enjoyed a distinguished career as an electrical engineer and had made significant contributions in his professional field.[7] As late as November 2008, he was intellectually interactive with others, was aware of his environment, was responsive to questions, and had the cognitive ability to actively participate in meetings, to form opinions and actively engage and express disagreements with others. [NAME 1]'s caregivers found him to be "very sharp."[8]

3. [NAME 1] had three adult [RELATIVES], [NAME 9], [APPELLANT'S NAME], (the Appellant), and [NAME 10]. [NAME 9]'s [RELATIVE] previously managed [NAME 1] and [NAME 3]'s investment portfolio until her own untimely death. Around 2003, [NAME 1] and [NAME 3] asked the Appellant to help manage their considerable estate and the Appellant agreed to do so. The Appellant charged [NAME 1] $25 per hour plus expenses including regular airfare from his home in [ANOTHER STATE'S CITY] to [NAME 1]'s home in Washington. These fees were

[6] *See* Verbatim Report of Proceedings (Tr.) p. 102, lines 7-19, p. 103, lines 3-17, p. 131, lines 15-18, and p. 142, lines 6-24,
[7] Tr., p. 76, lines 10-25.
[8] Tr., p. 76, lines 3-15, p. 118, lines 12-22, and p. 136, lines 10-11.

paid by [NAME 1] through [BUSINESS NAME 2].[9] As an occupational therapist, [NAME 10] was the [RELATIVE] with the greatest medical experience and background, so [NAME 10] held healthcare durable power of attorney for both [NAME 1] and [NAME 3].

4. In March 2006, [NAME 1] executed a General Durable Power of Attorney (GDPOA) naming [NAME 4] in her role as Executive Director of [BUSINESS NAME 2] ([BUSINESS NAME 2]) or its successor organization as his Attorney-In-Fact. If [NAME 4] became unable or unwilling to serve in this role, then the Appellant was designated as a successor Attorney-In-Fact. The GDPOA was effective immediately upon its execution.[10] [NAME 4] acted as [NAME 1]'s and [NAME 3]'s Attorney-In-Fact during the time period at issue in this case.[11] During the period April 2008 through October 2008, [NAME 5] was employed as [BUSINESS NAME 2]'s Assistant Director/Case Manager and subsequently became [BUSINESS NAME 2]'s Director.[12]

5. The Appellant had significant disagreements with [BUSINESS NAME 2] in the handling of his [RELATIVE]'s financial planning. The Appellant believed [BUSINESS NAME 2] was initially overpaying for caregiver services and was not proactive enough in beginning the process to liquidate real property holdings and investments in Washington and [ANOTHER STATE 2]. The Appellant believed his [RELATIVES] needed assessable cash funds to maintain their lifestyle for a longer period than had been determined and planned for by [BUSINESS NAME 2]. The Appellant and his [RELATIVE] had marked disagreements over the care and financial well-being of their [RELATIVES]. The animosity arising from this [RELATIVE] conflict bothered [NAME 1] considerably.

6. The Appellant's involvement in his [RELATIVE]'s financial concerns would bring him to Washington State from his home in [ANOTHER STATE'S CITY], [ANOTHER STATE], for

[9] Tr., p. 180, lines 18-23, and p. 177, lines 1-11.
[10] Exhibit 9.
[11] Tr., p. 168, line 25 through p. 169, line 2.
[12] Tr., p. 100, lines 6-10.

periods lasting for a week or two at a time. The visits would occur four or five times per year. Initially, the Appellant and his [RELATIVE] got along well. However, when the Appellant insisted on talking about his [RELATIVE]'s financial affairs, the discourse would often deteriorate into an intense shouting match. These arguments were numerous, lengthy (lasting up to two hours at a time), and often resulted in yelling between the Appellant and his [RELATIVE]. Caregivers in the home during these incidents described them as "verbal fights" and would involve the Appellant pressuring his [RELATIVE] about financial matters. These verbal altercations left [NAME 1] extremely agitated, upset, and would require efforts by both the caregiver and [NAME 3] to calm him down after the Appellant had left. At the end of one such altercation on October 17, 2008, [NAME 1] became so angry he ordered the Appellant to leave the house or he would call the police. When the Appellant continued to argue with his [RELATIVE], the caregiver had to intervene to get the Appellant to leave. It came to a point where [NAME 1] ceased to look forward to the Appellant's visits, stating, "I wish he would not come" and "I don't know what to do about it." After some of these episodes, [NAME 1] would become very resistant to caregiver recommendations such as a reminder to use the bathroom, resulting in his soiling himself, or refusal to take his medications. [NAME 1]'s exhibited these emotions of anger, anxiety, and exacerbation only after he had been involved in verbal altercations with the Appellant.[13] [NAME 1] was otherwise a "wonderful, calm person." It was "not normal for him to be this upset" as he would become after verbal exchanges with the Appellant.[14]

7. A meeting was held at [NAME 1]'s request on October 6, 2008, based on his concern over a disagreement with the Appellant regarding caregiver services provided for [NAME 1] and [NAME 3]. The meeting was attended by [NAME 1] his attorney, the Appellant, and the director and assistant director of [BUSINESS NAME 2]. The meeting became an escalating verbal altercation with the Appellant, at one point, making the comment that his life

[13] Tr., p. 132, line 15 through p. 135, line 15 and p. 143, line 15 through p. 144, line 22.
[14] Tr., p. 133, lines 18-24.

depends on his [RELATIVE]'s money. [NAME 1] responded by putting his head down and saying, "I can't go on like this. This is just too much."[15]

8. Telephone conversations between the Appellant and his [RELATIVE] in late 2007 and the mid- 2008, regarding the extent of caregiver services needed, deteriorated into yelling matches. One such altercation resulted in [NAME 1] slamming his fist on a table in an effort to get the Appellant to hear him and to understand that he wanted the conversation to end. [NAME 1] finally stated, "I am done" and hung up the phone.[16] Another altercation occurred by speaker phone in October 2008, when the Appellant happened to call his [RELATIVE] during a meeting [NAME 1] was having with his attorney and [BUSINESS NAME 2]. The Appellant insisted on knowing what the meeting was about and would not be put off by [NAME 1]'s promise to call him later. The exchange between the Appellant and his [RELATIVE] escalated to the point where [NAME 1] shouted that he would call the Appellant back later and hung up the phone.[17]

9. The frequency and the intensity of the verbal altercations between the Appellant and his [RELATIVE] escalated to the point where [BUSINESS NAME 2] believed it created a danger to the well-being of [NAME 1] and [NAME 3] and interfered with the caregivers' ability to do their jobs in [NAME 1]'s and [NAME 3]'s home. All five caregivers assigned to the care of [NAME 1] and [NAME 3] reported yelling altercations between the Appellant and [NAME 1][18] Such concerns led to Superior Court action setting parameters for the visits the Appellant would have with his [RELATIVES] and the issues that could be raised during such visits.[19]

10. On October 30, 2008, the Department received a report of possible abuse of a vulnerable adult.[20] The Department investigated the allegation and part of that investigation

[15] Tr., p. 107, lines 5-18 and p. 109, lines 19-22.
[16] Tr., p. 110, lines 5-20.
[17] Tr., p. 153, lines 8-23.
[18] Tr., p. 112, lines 5-10.
[19] Exhibits 7 and 11.
[20] Exhibit 1.

involved interviewing [NAME 1] on November 5, 2008, in his home. [NAME 1] acknowledged that a protection order would be in place for another couple of weeks, but he did not want any further protection orders. He did want the Appellant's visits to be for shorter periods of time.[21] [NAME 1] was asked about his earlier statements of frustration and resignation that he could not handle these interactions with his [RELATIVE] any longer. [NAME 1] responded by stating everything was just fine – that there was no problem.[22] He further stated that his [RELATIVE 3] may have raised his voice, but it was nothing more than that.[23] When asked if pressure had been exerted on him about finances by the Appellant, [NAME 1] responded, "No, nothing like that."[24] And, [NAME 1] informed the investigator that the Appellant had not harassed him at all.[25] The Department investigator did not find [NAME 1]'s statements unusual even though they conflicted with other evidence and the declarations set forth in the referral. The investigator testified that, based on her experience, it was not unusual for a person in an abusive relationship to "re-cant" earlier accusations.[26] Based on her education in counseling, psychology, and abusive relationship training, the investigator drew conclusions in making her finding of abuse from the fact that [NAME 1] wanted shorter visitations with the Appellant.[27] Unfortunately, due to his demise, [NAME 1] was not available to testify at the hearing as to allow the parties' representatives and the ALJ to question him regarding apparent inconsistencies in his contemporaneous statements and actions heard and observed by caregivers and other [BUSINESS NAME 2] employees and his later statements to the Department investigator.

11. Based on its investigation, the Department made a substantiated finding of mental abuse. The Department sent the Appellant notice of the substantiated finding on February 20, 2009, by certified and regular mail. As indicated by the Appellant's timely request

[21] Tr., p. 65, lines 11-16.
[22] Tr., p. 65, line 20 through p. 66, line 1.
[23] Tr., p. 77, lines 9-14.
[24] Tr., p. 87, lines 1-7.
[25] Tr., p. 87, lines 21-23.
[26] Tr., p. 66, lines 2-5 and p.
[27] Tr., p. 96, lines 17-24.

for hearing, the Appellant actually received the notice of substantiated finding no later than February 25, 2009. The Founded Finding Letter explained:

> From about April 2008 through October 2008 you yelled at and pressured a vulnerable adult about financial decisions which caused the vulnerable adult to be upset.
>
> These actions met the definition of mental abuse in RCW 74.34.020(2)(c):
> . . .
> **"Mental abuse"** [definition in RCW 74.34.020(2)(c)][28]

III. CONCLUSIONS OF LAW

Jurisdiction, Applicable Law, and Standards of Review

1. The Appellant timely filed a petition for review of the initial order and the petition is otherwise proper.[29] Jurisdiction exists to review the initial order and to enter the final agency order.[30]

2. The Board of Appeals will look to precedential appellant case law in the absence of valid applicable regulatory law when addressing a specific substantive issue.[31] However, an appellant court's analysis of its powers and limitations in its review role of a lower court's decision is not necessarily applicable in addressing the Board of Appeals role in reviewing an ALJ's initial decision. "Although the reviewer's *position* is analogous to that of an appellate court, the review *process* is not analogous to that of judicial appellant review. . . . The reviewer, however, may substitute its judgment for the presiding officer on all issues, including credibility, although it may consider the presiding officer's views on credibility."[32]

3. RCW 34.05.464(4) grants the undersigned Review Judge the same decision-making authority as the ALJ. This includes the authority to make credibility determinations and

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[28] Exhibits 4, 5, and 6.
[29] WAC 388-02-0560 through -0585.
[30] WAC 388-02-0530(2) and 388-02-0570.
[31] WAC 388-02-0220(2).
[32] Washington Administrative Law Practice Manual §9.10 at 9-57.5 (2000), *citing Messer v. Snohomish County Bd. Of Adjustment,* 19 Wn. App. 780, 578 P.2d 50 (1978) and *Farm Supply Distrib., Inc. v. Washington Util. & Transp. Comm'n,* 8 Wn. App. 448, 506 P.2d 1306 (1973), respectively.

to weigh the evidence. [33] If the ALJ has identified any findings of fact in the Initial Order as being based on the credibility or demeanor of the witnesses pursuant to RCW 34.05.461(3), then the undersigned is required to give due regard to the ALJ's opportunity to observe the witnesses.

4. It is helpful if all parties in the administrative hearing process understand the unique characteristics and specific limitations of this hearing process. An administrative hearing is held under the auspices of the *executive branch of government* and a presiding administrative or review officer does not enjoy the broad equitable authority held by a superior court judge within the *judicial branch of government.* It is well settled in law and practice that administrative agencies, such as the Office of Administrative Hearings and the Board of Appeals, are creatures of statute, and, as such, are limited in their powers to those expressly granted in enabling statutes, or necessarily implied therein. *Taylor v. Morris,* 88 Wn.2d 586, 588 P.2d 795 (1977). It is also well settled that an ALJ's or a review judge's jurisdictional authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute or Department rule found in the Washington Administrative Code (WAC). An ALJ or review judge, acting as a presiding or reviewing officer, is required to apply the Department's rules adopted in the WAC as the first source of law to resolve an issue unless a regulation has been ruled invalid by published appellant court decision. If there is no Department rule governing the issue, the presiding officer or review judge is to resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and

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[33] WAC 388-02-0600(3)(e) reads, "*Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record.*" This regulatory review standard has been ruled invalid by the Washington Court of Appeals Division One in *Bashiru Kabbae v. DSHS,* 144 Wn. App. 432, 442-43, 192 P.3d 903 (2008). Under *Kabbae,* the undersigned is no longer limited by this provision in changing an initial order, can enter additional material findings based on the evidence in the hearing record, and in doing so can set aside or modify the ALJ's findings. Quoting *Tapper v. Employment Security Department,* 122 Wn.2d 397, 404, 858 P.2d 494 (1993). The Department has pending a Code Reviser (CR) 102 to do away with regulatory review standards found in WAC 388-02-0600(3), acknowledging the Court of Appeal's analysis that such review standards conflict with RCW 34.05.464(4).

regulations, and court decisions.[34] The presiding officer or review judge may not declare any rule invalid and challenges to the legal validity of a rule must be brought *de novo* in a court of proper jurisdiction.[35]

5. The undersigned has reviewed the audio record and written transcript of the hearing, the documents admitted as exhibits, the Initial Order, the Appellant's petition for review with supplement, and the Department's response to the petition to determine the adequacy and appropriateness of the *Findings of Fact* made by the ALJ in the Initial Order. After review, the undersigned has modified, supplemented, and deleted some of the Initial Order *Findings of Fact* so that they are supported by substantial evidence based on the entire record.[36]

6. Chapter 74.34 of the Revised Code of Washington (RCW) is titled "Abuse of Vulnerable Adults." The statute establishes a system for reporting instances of abuse of a vulnerable adult and defines abuse as willful action or in-action causing injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult.[37] Abuse is further defined as to include "mental abuse," meaning any willful action or inaction of mental or verbal abuse. This includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.[38]

7. The statute defines "vulnerable adult" to include a person over the age of sixty who has the functional or physical inability to care for himself or who is receiving services from an individual provider.[39] [NAME 1] was over the age of sixty, was physically incapable of caring for himself, and was receiving services from an individual provider during the period at issue in

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[34] WAC 388-02-0220.
[35] WAC 388-02-0225(1).
[36] RCW 34.05.464(8).
[37] RCW 74.34.020(2).
[38] RCW 74.34.020(2)(c).
[39] RCW 74.34.020(13)(a) and (f).

this case. [NAME 1] was a vulnerable adult as defined by the statute and was entitled to the protections provided therein.

8. The Department has implemented chapter 74.34 RCW by adopting chapter 388-71-0100 through –01280 of the Washington Administrative Code (WAC), entitled “Home and Community Services and Programs-Adult Protective Services.” The first sentence of WAC 388-71-0105 incorporates by reference and makes applicable those definitions found in RCW 74.34.020, including the definitions for “abuse” and “mental abuse.” Administrative hearings conducted under these regulations are controlled by statutes and regulations found at RCW 34.05 and WAC 388-02, respectively.[40]

Standard of Proof Applicable to a APS Hearing

9. Applicable regulations address what standard of proof is to be used in APS hearings, providing that, "The ALJ shall decide if a preponderance of the evidence in the hearing record supports a determination that the alleged perpetrator committed an act of abandonment, abuse, financial exploitation or neglect of a vulnerable adult.”[41] The "preponderance of the evidence" standard is required under the regulations relevant to this proceeding. This standard means that it is more likely than not that something happened or exists.[42]

Credibility Determinations

10. The Appellant asserts that because the ALJ made no findings regarding the credibility of the evidence or demeanor of the witnesses, the evidence presented by the Appellant has not been overcome by the Department’s evidence because the Department’s evidence has not been found to be any more credible than that of the Appellant. Because the Department has the burden of proof, the Appellant argues he should prevail. There are only three material issues involved in this case and, thus, only evidence related to those three issues

[40] WAC 388-71-01245.
[41] WAC 388-71-01255(1).
[42] WAC 388-02-0485.

is relevant. The three material issues are (1) Whether [NAME 1] was a vulnerable adult; (2) What actually occurred between the Appellant and [NAME 1] giving rise to the allegation of mental abuse; and (3) Whether the Appellant's actions towards [NAME 1] during those alleged incidents caused the requisite injury. First, the Appellant did not challenge the findings regarding his [RELATIVE]'s status as a vulnerable adult as defined by RCW 74.34.020(13). Indeed, the Appellant specifically stated in his petition for review that he was not challenging this fact. Second, the Appellant concedes that he did yell at his [RELATIVE]. His disagreement with the Department lies in the application of the statutory definition of mental abuse to the unchallenged fact that he did yell at his [RELATIVE]. And third, the Appellant asserts that his verbal altercations with his [RELATIVE] did not constitute harassment or verbal assault as the Department has not proven injury to his [RELATIVE] due to the altercations. The Appellant did not challenge the evidence that his [RELATIVE] exhibited anger, anxiety, and exacerbation during and after the incidents of yelling, he only argues the underlying *cause* of such debilitating emotions. There are few, if any, material facts in conflict in this case. The disagreement arises in the interpretation and application of relevant law. What credibility determinations that were made by the ALJ are inferred by the entered findings. And finally, because the undersigned can make independent credibility findings as addressed in *Conclusion of Law 3,* the omission of any specific credibility findings is not a basis for completely reversing the Initial Order when it can be amended and supplemented.

11. The Appellant argues that the testimony of [NAME 4] and [NAME 5] is not credible because [NAME 4] testified at hearing, and both witnesses stated in a declaration, that [BUSINESS NAME 2] was named as the Durable Power of Attorney for [NAME 1] and [NAME 3]. The GDPOA designates [NAME 4] as the Attorney-in-Fact for the principle *in her role as Executive Director of [BUSINESS NAME 2] or its successor organization.* It was not unreasonable for both [NAME 4] and [NAME 5] to understand this provision to mean that whoever held the position as Executive Director of [BUSINESS NAME 2] would be the Attorney-

in-Fact and, as a matter of practice, [BUSINESS NAME 2] or its successor organization would continue as the Attorney-in-Fact, notwithstanding who was the Executive Director. [NAME 4]'s and [NAME 5]'s testimony regarding their reasonable interpretation of the *Designations* provision of the GDPOA does not impugn their integrity nor render their testimony not credible.

12. The testimony of each caregiver, regarding the Appellant's repeated engagement of his [RELATIVE] in lengthy heated arguments, was responsive, concise, consistent, and made without prevarication or undue hesitation. The Appellant did not undermine the caregivers' renditions of what had occurred through cross-examination or submission of other evidence. This is also true of the caregivers' statements regarding the reactions they observed in [NAME 1] during and immediately following the verbal altercations. The Appellant's inference that there existed some form of conspiracy by [BUSINESS NAME 2] and its employees, including the caregivers, to undermine him is not supported by any evidence in the hearing record. The caregivers' testimonies are found to be credible.

Mental Abuse of a Vulnerable Adult

13. The relevant statute requires that the alleged willful action inflict injury or intimidation. The regulation further defines "willful" to mean "the nonaccidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known could cause harm, injury or a negative outcome."[43] The Appellant's actions in yelling at his [RELATIVE] were deliberate and not accidental. Furthermore, the Appellant knew or should have known that his actions in engaging his [RELATIVE] in heated arguments that resulted in yelling caused his [RELATIVE] to become angry and stressed. The actions of the Appellant were "willful" as defined in the regulation.

14. The Appellant argues that the requisite injury or harassment has not been proven by the Department as any anguish, stress, or despondency exhibited by [NAME 1] could have been caused by financial concerns rather than the verbal altercation with the Appellant. The

[43] WAC 388-71-0105 **"Willful."**

evidence supports the findings that [NAME 1] exhibited anger, anguish, and stress only after his heated arguments with the Appellant and not as part of his normal demeanor. If financial concerns were the cause for his anger and anxiety, he would have expressed such emotions on a regular basis. The Appellant's argument that [NAME 1]'s anger and stress were caused by his worry over financial matters and not his verbal confrontations with his [RELATIVE] is not supported by the evidence in the hearing record and is without merit.

15. The Appellant argues that in determining if the yelling caused [NAME 1] injury, it is best to rely on [NAME 1]'s answers in response to questions relating to this issue asked by the Department investigator. The difficulty with this argument arises when trying to reconcile [NAME 1]'s statements to the investigator, which are hearsay since he could not testify at hearing, with the non-hearsay testimony of the caregivers and [BUSINESS NAME 2] employees who witnessed first-hand [NAME 1]'s symptoms of anger, anxiety, and stress that were contemporaneous with the verbal exchanges, rather than much later during an interview with the Department investigator.

16. It cannot be ignored that [NAME 1] was part of our "greatest generation," when the ability of a man to accept adversity without complaint was generally viewed as a worthy characteristic. The evidence in the hearing record supports the finding that not only was [NAME 1] an accomplished engineer and educator, he was also a gracious and well-loved man by both family and acquaintances. The letter of condolence received by the Appellant after his [RELATIVE]'s death from a former associate was exceptional and very telling in what type of human being [NAME 1] was. When [NAME 1] responded to questions put to him by the Department investigator by stating that he was not harassed by his [RELATIVE]'s yelling and that it was "nothing," he was not being necessarily dishonest, just abundantly generous and gracious, as was his nature. He was simply exhibiting those influences he grew up with encouraging a man's quiet acceptance of adversity, especially when it involved protecting one's family.

17. When dealing with verbal assault, the Department does not need to, nor should it have to, rely solely on the subjective perception of the vulnerable adult. The undersigned is unaware of a published Washington court decision addressing whether an objective or a subjective standard should be used in determining if harm exists under RCW 74.34.020(2)(c). However, the statutory definition is similar to the federal definition of "abuse" used in determining if a caregiver in a Medicaid nursing facility has abused a resident of that facility.[44] Two courts have interpreted the federal definition to require the use of an objective determination. The decisions of courts in other jurisdictions do not control the outcome of this case but support the conclusion that the federal definition requires the application of an objective standard to determine harm, pain, or mental anguish. The District of Columbia Court of Appeals applied the federal definition of abuse in *Hearns v. Dist. Of Columbia Dep't of Consumer & Regulatory Affairs,* 704 A.2d 1181 (1997). Concluding that a resident was harmed by a nursing assistant pulling the resident's arm and shaking her finger in the resident's face, the court stated, "…although there was no apparent proof that the dragging or pulling of the patient resulted in 'physical harm [or] pain,' the agency could rationally conclude that rough pulling and rebuking of any elderly individual would cause such pain or at least mental anguish." *Hearns* at 1183. The Supreme Court of Connecticut also applied an objective standard of harm in a case in which a nursing assistant used vulgar language while rendering incontinent care to a resident. *Salmon v. Dep't of Pub. Health & Addiction Servs.*, 259 Conn. 288, 293, 788 A.2d 1199 (2002). The *Salmon* court concluded that the circumstances of the case, "can lead to only one logical conclusion, namely, that a reasonable, sentient, and cognizant resident in [the resident's] position would have been adversely impacted by the [nursing assistant's] conduct." *Salmon* at 304. The courts looked at the facts and circumstances of the alleged abusive act

[44] 42 CFR § 488.301 provides: "Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish."

and determined that the behavior would have harmed a reasonable resident in the victim's position.

18. The application of an objective determination of harm is also supported by the underlying objectives of the Department's Adult Protection Services Program. The APS registry is designed to protect the health and safety of vulnerable adults. If the determination of abuse in each case was dependent upon the perceptions and statements of the victim, the result would be inconsistent protection of vulnerable adults in each situation. A perpetrator could commit the same act against two different victims, with two different results. One victim might feel and express pain or mental anguish, while the other might not. In addition, because of fear or intimidation, some vulnerable adults might not be comfortable speaking when they feel pain as a result of mental abuse. In those situations, abuse could not be proven and the vulnerable adult would remain in danger. There is no indication in RCW 74.34.020(2)(c) that the determination of mental abuse should be determined by the relative outspokenness or pain threshold of a particular vulnerable adult.

19. What a vulnerable adult is willing to gracefully accept because of their personal character and humility should not determine what constitutes verbal assault or harassment in a particular case. Furthermore, it cannot be ignored, that [NAME 1] indicated to the investigator a wish that his visits with his [RELATIVE 3] were shortened and exhibited a reluctance to answer specific questions regarding the reason for this wish. This evidence, combined with the unequivocal testimony of the caregivers and [BUSINESS NAME 2] employees regarding [NAME 1]'s notable and contemporaneous negative reactions he exhibited in response to the verbal altercations with his [RELATIVE 3], do prove by a preponderance of the evidence that the Appellant's persistent and intense arguments with his [RELATIVE] inflicted, at the very least, mental anguish and a negative outcome on [NAME 1] and were, therefore, verbal assaults. Because the evidence supports the finding that the Appellant's persistent and repetitive verbal

engagements regarding financial matters were unwelcomed by [NAME 1] those actions constituted harassment as well as verbal assault.

20. The Appellant argues that “yelling,” per se, does not constitute verbal assault. This is true as obviously demonstrated by the scenario where a grandchild yells, “HAPPY BIRTHDAY, GRANDPA!!” upon seeing his vulnerable adult grandparent at a family birthday celebration. Yelling must always be considered in context and the consequences of the yelling examined.

21. It appears from the hearing record and the Appellant’s petition for review that he is raising the defenses that his [RELATIVE] would start and/or be an active participant in the “yelling,” that “yelling” was an historical and accepted element of the family dynamics, and the purpose of the verbal altercations matters. What may have been an acceptable method of verbal exchange in a family between two non-vulnerable adults does not constitute a defense when one of the participants becomes a vulnerable adult. The “dynamics” of the “family dynamics” change when a family member enters into the status of a “vulnerable adult.” Just as a parent can no longer use corporal punishment on a disabled child once that child reaches the age of majority and becomes a “vulnerable adult” due to his/her disability, a elderly vulnerable adult cannot be verbally assaulted even though such behavior was accepted and not actionable prior to the elderly person becoming a vulnerable adult. Who started the yelling or the vulnerable adult’s response in-kind to a verbal assault is never a defense to the allegation of verbal assault against that vulnerable adult.

22. The subject or subjects being addressed during the verbal assault do not provide a defense to the proscribed behavior. The ALJ was more than generous in allowing in some evidence regarding the vulnerable adult’s financial situation, perhaps recognizing that it may have some benefit in telling the complete story or in assigning motivations. The ALJ’s exclusions of Appellant’s proposed exhibits regarding the services being provided by [BUSINESS NAME 2] and other financial matters did not constitute an error of law. Such

evidence is not relevant in addressing whether the Appellant yelled at and harassed his [RELATIVE] and, in doing so, caused injury or intimidation. As set forth above, those were the only two material issues for hearing once the Appellant acknowledged his [RELATIVE] was a vulnerable adult. The Appellant's motivation in engaging his [RELATIVE] in heated arguments regarding his financial situation does not provide a defense to the verbal assault and harassment perpetuated on [NAME 1]. Any evidence that [BUSINESS NAME 2]'s was motivated by nefarious reasons in creating an abuse case against the Appellant, rather than what they were legally obligated to do as a guardianship service for [NAME 1] and [NAME 3], simply does not exist. A review of both the audio and written record of the hearing reveal that the ALJ conducted the hearing in a fair and unbiased manner. The Appellant's argument to the contrary is without merit and is rejected.

23. Having reached an ultimate finding that the Appellant did willfully yell at and harass his [RELATIVE] resulting in injury to him, application of the relevant statute leads to the legal conclusion that the Appellant did mentally abuse a vulnerable adult. Under the supported facts found in this case, neither the ALJ nor the undersigned have legal authority to reverse the Department's substantiated finding of mental abuse as defined in statute.

IV. DECISION AND ORDER

Based on the conclusions entered above, the Initial Order, as amended and supplemented above, is affirmed.

Mailed this 11th day of May, 2010.

JAMES CONANT
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to:
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Gary Preble, Appellant's Representative
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