IN THE COMMONWEALTH COURT OF PENNSYLVANIA

R. M., In Re: M.M., Petitioner	:	
v.	:	
Department of Public Welfare, Respondent	:	No. 1456 C.D. 2009
	:	Submitted: January 15, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: April 1, 2010

R.M. petitions for review of an order of the Secretary of the Department of Public Welfare (Department) that upheld an order of the Bureau of Hearings and Appeals' (Bureau) dismissal of R.M.'s appeal of an indicated report[1] of child abuse with the ChildLine Registry.

On March 16, 2007, the Wayne County Children & Youth Services (CYS) received a report that M.M., then almost fifteen years of age, was kicked by R.M., her father:

[1] Section 6302 of the Child Protective Services Law (Law), 23 Pa. C.S. § 6302, defines the term "indicated report" as:

> A child abuse report made pursuant to this chapter if an investigation by the county agency or the Department of Public Welfare determines that substantial evidence of the alleged abuse exists based upon any of the following:
> (1) Available medical evidence.
> (2) The child protective service investigation.
> (3) An admission of the acts of abuse by the perpetrator.

> The child [M.M.] and her sister [T.M.] reported dad [R.M.] kicked the child [M.M.] four times on her right thigh. Child [M.M.] has a bruise that the nurse practitioner reported appeared to be a pretty deep bruise that was still tender to the touch five days later. Child [M.M.] reports that two days after the incident she had to sit sideways on her chair at school due to the pain of the bruise. Dad [R.M.] admits to kicking the child, but says he only kicked her once. He admits the bruise is consistent with a "good swift kick." This case is indicated due to the child experiencing severe pain and impairment of functioning.

Child Protective Service Investigation Report, March 16, 2007, at 2; Certified Record (C.R.).

By letter dated December 6, 2007, Cathy A. Utz (Utz), Acting Director for the Bureau of Policy and Program Development, notified Thomas Farley, R.M.'s attorney, that R.M.'s request for expungement of the indicated report of child abuse was denied. Utz also informed R.M.'s attorney that "if it is your client's desire to have a hearing, please submit your request in writing within forty-five days of the date of this letter to Child Abuse Appeals . . . ." (emphasis in original). Letter from Cathy A. Utz to Thomas Farley, Esquire, December 6, 2007, at 1; C.R.

At a November 10, 2008, hearing before Administrative Law Judge Barbara Shadie-Nause (ALJ), M.M. testified that on March 10, 2007, R.M. told her and T.M., her younger sister, to dust the den. M.M. continued that "we were cleaning . . .[a]nd then . . . [m]e and my sister were kind of goofing off, and . . . my dad came downstairs . . . [a]nd I tried to help my sister up." Hearing Transcript (H.T.), November 10, 2008, at 16; Reproduced Record (R.R.) at 8a. R.M. "started

to yell at us . . . [a]nd . . . he pushed both of us on the ground . . . [a]nd he had kicked my sister once and then kicked me four times." H.T. at 16-17; R.R. at 8a. "I had eventually gone [sic] up and went into the bathroom . . . [a]nd when I would walk it would hurt . . . and I was limping." H.T. at 21; R.R. at 9a. "And my dad had come in and told me to stop being overdramatic and to get up to go back and do what I was suppose to be doing." H.T. at 21; R.R. at 9a. M.M. was examined by a nurse at Highland Physicians on the Friday following the incident and was told "to take either Tylenol or Motrin." H.T. at 27; R.R. at 11a.

Ruth Silsby (Silsby), a registered nurse practitioner, testified that she examined M.M. on March 15, 2007, and noticed that M.M. "had an area of ecchymosis, which is bruising on the posterior area part of her right thigh . . . [i]t was oblong-shaped, kind of oval-shaped and long about four centimeters by two and a half to three centimeters." H.T. at 44-45; R.R. at 15a. "[I]t was painful when I touched it, it was painful to just kind of light and then deep palpations . . . it was starting to turn from the dark purple, so the coloration would be consistent with an injury that had happened maybe three or four days prior." H.T. at 44-45; R.R. at 15a. Silsby recommended that M.M. take Tylenol and Ibuprofen for pain and to place warm compresses on the bruise. H.T. at 45; R.R. at 15a.

Natalie Burns (Burns), a caseworker for CYS, conducted the investigation into allegations of child abuse concerning M.M. Burns interviewed M.M. who told her that R.M. "threw them both on the floor and kicked M.[M.] four times . . . [a]nd she said . . . that it was very painful . . . that she was bawling

her eyes out, and that T.[M.] was crying too . . . [and] she showed me the bruise on her hip." H.T. at 56; R.R. at 18a.

Burns also interviewed T.M. who corroborated M.M.'s story. "Dad [R.M.] started running through the living room, and threw M.[M.] down, and T.[M.] fell down too. They were both on the ground . . . Dad [R.M.] kicked M.[M.] and then T.[M.] . . . T.[M.] said she was on the other side of M.[M.] so dad [R.M.] didn't get a chance to kick her as hard." H.T. at 59; R.R. at 19a. T.M. told Burns that R.M. kicked her once and kicked M.M. four times.[2]

Burns also stated that R.M. admitted that "he kicked them [M.M. and T.M.] hard enough to get their attention . . . [h]e kicked both of them because he wasn't going to kick one without kicking the other, but he kicked T.[M.] softer because she was farther away from him, and he had to reach his foot over M.[M.] to kick T.[M.]." H.T. at 64; R.R. at 20a. Burns continued that R.M stated that he only kicked M.M. once. H.T. at 65; R.R. at 20a. Burns concluded that during the interview, R.M. was "yelling loudly . . . [h]e would yell swear words . . . [h]e wasn't necessarily angry with me . . . [h]e was angry with the situation . . . ." H.T. at 67; R.R. at 21a.

Rebecca Carroll (Carroll), R.M.'s girlfriend, testified that she helped R.M. remodel his bathroom when they heard M.M. and T.M. "laughing and

[2] T.M. also testified at the hearing that on Sunday morning after the incident M.M. "came into my room, and like she showed me her bruise . . . [a]nd it hurt . . . [s]he lifted up her pants, like, and said T.[M.] look at this. And I didn't know what to say. Like wow . . . I didn't know what to tell her." H.T. at 98; R.R. at 29a.

giggling." H.T. at 111; R.R. at 32a. R.M. "came . . . into his grandfather's bedroom and M.[M.] and T.[M.] were on the floor wrestling . . . M.[M.] was on top of T.[M.] with her butt in the air . . . [a]nd R.[M.] came around and it wasn't a kick . . . [i]t was just to get her [M.M.] attention with his foot and her backside." H.T. at 111-12; R.R. at 32a. Carroll did not see R.M. kick M.M. more than once and did not see R.M. kick T.M. H.T. at 112; R.R. at 32a. After the incident, Carroll said they had lunch and "were joking back and forth, you know, talking." H.T. at 114; R.R. at 33a. Carroll said there was no indication M.M. was injured following the incident. H.T. at 114-15; R.R. at 33a.

Last, R.M. testified that after he kicked M.M. "I went and knocked on the door of the bathroom . . . [a]nd I said, M.[M.] are you okay?" H.T. at 138; R.R. at 39a. "She was laying on the bathroom floor kind of rubbing her thigh . . . [a]nd she said it hurt, it hurt, it hurt." H.T. at 138; R.R. at 39a. R.M. told her to get up and "she got up and dried her face and walked out of the bathroom like nothing happened." H.T. at 138-38; R.R. at 39a. R.M. only observed M.M. limping shortly after the incident, "but afterwards, no." H.T. at 142; R.R. at 40a. R.M. was "angry that the situation had rose [sic] to such nonsense . . . I don't understand why they [CYS] were wasting the taxpayers' dollars on pursuing such nonsense." H.T. at 142; R.R. at 40a.

> The ALJ made the following pertinent findings of fact:
> . . . .
> 14. R.M. pushed M.M. and T.M. to the ground and proceeded to kick M.M. four (4) times on the right side. (N.T. 19-20)
> . . . .

21. R.M. admitted to kicking both M.M., the subject child, and T.M., the subject child's younger sister. (N.T. 65) (emphasis added).

22. R.M. admitted that he kicked M.M., the subject child, harder because she was closer to him during the altercation. (N.T. 65) (emphasis added).

23. R.M. denied kicking M.M. four (4) times. (N.T. 65)

24. R.M. claims he kicked M.M. once and that M.M. only had one bruise on her right side, which would be consistent with one good swift kick. (N.T. 65-66).

25. R.M. agreed that kicking a child was not appropriate and not acceptable; however, the kick was needed. (N.T. 66) (emphasis added).

. . . .

31. M.M. had extreme and severe pain after the incident. (N.T. 21, 83) (emphasis added).

32. T.M. witnessed the alleged incident and observed M.M. get kicked 4 times by R.M. (N.T. 92, 95). (emphasis added).

. . . .

35. The testimony of M.M. was credible.

36. The testimony of Natalie Burns was credible.

37. The testimony of Ruth Silby was credible.

38. The testimony of T.M. was credible.

39. The testimony of R.M. was not credible. (emphasis added).

40. The testimony of Ms. Carroll was credible.

ALJ's Adjudication, February 26, 2009, Findings of Fact (F.F.) Nos. 14, 21-25, 31-32, and 35-40 at 3-4. The ALJ concluded:

> Appellant [R.M.], as a parent, may administer corporal punishment to M.M., his child. However, in this case, the evidence shows that M.M. was kicked four (4) times on the right thigh, was unable to immediately arise off the floor, walked with a limp, and was in severe pain for over a week. That kind of punishment constitutes a gross deviation from the standard of care that a reasonable person would observe in Appellant's [R.M.] situation and satisfies the criminal standard . . . . (emphasis added).

ALJ's Adjudication at 8. The ALJ recommended that R.M.'s appeal be denied.

I. Whether The ALJ Erred When She Precluded The Testimony Of Michael Stefanov, PH.D. (Dr. Stefanov)?

Initially, R.M. contends[3] that he attempted to introduce the testimony of M.M.'s therapist, Dr. Stefanov, as to what he observed and concluded concerning his treatment of M.M. R.M. asserts that Dr. Stefanov would not have been questioned as to any confidential communication that took place between him and M.M. R.M. emphasizes that Dr. Stefanov's testimony would reconcile the differences between the conflicting testimony of the other family members and help the ALJ to determine a fact pursuant to Pa. R.E. 702.

Pa. R.E. 702 provides:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge,

[3] This Court's standard of review of the Department's decision is limited to determining whether the adjudication violates constitutional rights or is not in accordance with the Law or whether findings of fact are supported by substantial evidence. K.S. v. Department of Public Welfare, 564 A.2d 561 (Pa. Cmwlth. 1989).

> skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

In Franklin Plastics Corporation v. Department of Environmental Resources, 657 A.2d 100, 103 (Pa. Cmwlth. 1995), this Court noted:

> It is beyond dispute that Commonwealth agencies are not bound by technical rules of evidence at agency hearings and may receive all relevant and reasonably probative evidence. Section 505 of the Administrative Agency Law, 2 Pa.C.S. § 505; A.Y. v. Department of Public Welfare, 537 Pa. 116, 641 A.2d 1148 (1994). However, where the record demonstrates that evidence sought to be introduced is not reasonably probative the evidence may be excluded . . . . (emphasis added).

First, 42 Pa. C.S. § 5944 (**Confidential communications to psychiatrists or licensed psychologist**) provides that "[n]o psychiatrist or person who has been licensed under the act . . . to practice psychology shall be, without the written consent of the client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client . . . . (emphasis added). There is nothing of record that M.M. signed a written consent waiving her confidential communications with Dr. Stefanov.

Second, R.M. attempted to elicit an opinion from Dr. Stefanov that goes straight to the credibility of M.M. "The attorney examiner [ALJ] is the ultimate finder of fact" and responsible for credibility determinations. Bucks County Children and Youth Social Services Agency v. Department of Public Welfare, 808 A.2d 990, 993 (Pa. Cmwlth. 2002).

Third, there was no offer of proof that Dr. Stefanov was present when R.M. kicked M.M. four times as she lay on the floor. Dr. Stefanov at best could only testify as to M.M.'s truthfulness during their therapy sessions.

Fourth, M.M.'s factual description of what occurred between her and R.M. was corroborated by T.M. who witnessed the incident. Therefore, there was nothing that Dr. Stefanov, as an expert, could offer that would have assisted the ALJ in determining whether an act of child abuse occurred. Ultimately, R.M. consistently stated that he intended to and in fact kicked his daughter.

Last, R.M. attempted to offer the testimony of Dr. Stefanov to explain the difference in the parenting styles of the respective parents that "partly . . . caused this to happen." H.T. at 9-10; R.R. at 6a-7a. The ALJ properly ruled that "mom and dad can testify to parenting styles." H.T. at 10; R.R. at 7a.

Here, the ALJ did not err when she excluded the testimony of Dr. Stefanov.

II. Whether The ALJ Erred When She Sustained The Department's Objection Concerning R.M.'s Attempt To Introduce M.M.'s Juvenile Probation Record?

R.M. next contends that the ALJ precluded him from introducing M.M.'s involvement with juvenile authorities and her resulting probation. R.M. proffered this evidence to clarify whether M.M. was abused or whether M.M.

attempted to claim abuse in order to reside with L.M., her mother, who was less strict than R.M.[4]

Clearly, any testimony concerning M.M.'s involvement in the juvenile system was irrelevant concerning the incident of child abuse. Critically, R.M. failed to subpoena anyone from the juvenile system as a witness at the hearing before the ALJ. More important, any such witness was not present when the abuse occurred. In essence, R.M. believed that because M.M. was seeing a therapist and was involved in the juvenile system, his actions were justified. Again, the ALJ properly excluded such testimony.[5]

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[4] Christine Rechner (Rechner), attorney for R.M., and Mark S. Jennings (Jennings), attorney for Department:

> **Rechner**: Okay. Was there any other problem that M.[M.] was having at this time?
> **R.M.**: M.[M.] was serving a . . . .
> **Jennings**: Objection, Your Honor, unless this has something to do with the incident itself, I object to the testimony.
> **Rechner**: Your Honor, it does have something to do---The child---The trouble she was having---trying not to say anything about it---resulted in dad having certain consequences for her actions that were not enforced by mom, which--- (emphasis added).
> **ALJ**: And I understand that, but let's get to the incident that occurred on March 10th of '07.
> **Rechner**: Okay.

H.T. at 129; R.R. at 36a.

[5] This Court notes that R.M. raises an additional argument that a parent has a right to use corporal punishment to discipline his child. Commonwealth v. Kramer, 371 A.2d 1008 (Pa. Super. 1977). This argument is waived because R.M. raised it in the Argument Section of his brief and not in his Statement of Question Involved. See Harburg Medical Sales Co. v. Bureau of Workers' Compensation (Employers Mutual Casualty Co.), 911 A.2d 214, 217-18 n.12 (Pa. Cmwlth. 2006). Assuming that this argument was preserved, it would have failed on the merits.

In P.R. v. Department of Public Welfare, 569 Pa. 123, 801 A.2d 478 (2002), our Pennsylvania Supreme Court held:

(Footnote continued on next page…)

Accordingly, this Court affirms.[6]

(continued…)

> The most common initiation point is the administration of corporal punishment . . . . Any definition of child abuse that arises by defining that term in contrast to accident must incorporate the reality that corporal punishment is undertaken with intent. Corporal punishment at its core embodies intent to inflict pain . . . . . .
>
> The tension in resolving these cases where a parent or guardian is accused of child abuse when an act of corporal punishment results in a serious injury must be acknowledged. . . . To balance the competing objectives of protecting children from abuse while maintaining the parental right to use corporal punishment, the legal standard for differentiating abuse from accident must acknowledge some level of culpability by the perpetrator that his actions could reasonably create a serious injury to the child. (citations omitted and emphasis added).

P.R., 569 Pa. at 137-38, 801 A.2d at 486-87.

Here, R.M. admitted that he kicked M.M. with his left foot because "I kick better with my left . . . [and] I was angry at both of them [M.M. and T.M.] . . . ." H.T. at 133; R.R. at 37a. R.M. stated that after he kicked M.M. "she did limp to the bathroom . . . [and] she was, like kind of limping and dragging---half dragging her right leg to the bathroom." H.T. at 151; R.R. at 42a. Last, R.M. stated that it was inappropriate to discipline M.M. with a kick "but at the time it was appropriate [sic]thing to do given the fact that my foot was right next to M.[M.]'s buttocks . . . [a]nd I knew I could smack her with . . . the side of my foot . . . [a]nd she couldn't get her hand back there quick enough." H.T. at 144; R.R. at 40a.

There was substantial evidence of record to support the ALJ's finding that "M.M. was kicked four (4) times on the right side [and] that kind of punishment constitutes a gross deviation from the standard of care" and as a result M.M. was a victim of child abuse. ALJ's Adjudication at 8.

[6] The Department also asserts that R.M.'s appeal *nunc pro tunc* was erroneously granted.

A review of the record indicates the following:

On **December 6, 2007**, Cathy A. Utz, the Acting Director of Bureau notified Thomas Farley, Esquire. R.M.s former attorney, that the request to expunge the report of child abuse was denied. Letter of December 6, 2007, from Cathy A. Utz to Thomas Farley at 1; C.R. The letter also informed R.M. of his right to a hearing before the Bureau and that his request must be in writing and filed within forty-five days of the date of the December 6, 2007, letter, or until **January 22, 2008**.

(Footnote continued on next page…)

BERNARD L. McGINLEY, Judge

(continued…)

On **February 23, 2008**, Attorney Farley responded that he immediately forwarded the December 6, 2007, letter to R.M. but that he never received it. Attorney Farley continued that R.M. wished to appeal the decision. Letter from Thomas Farley to Cathy Utz, February 23, 2008, at 1.

On **April 2, 2008**, Christine Rechner, Esquire, R.M.'s current attorney, informed DPW, Child Abuse Appeals, that she had been retained by R.M. and that due to R.M.'s failure to receive notice of the denial of expungement, she wished to appeal *nunc pro tunc*. Letter from Christine Rechner to Child Abuse Appeals, April 2, 2008, at 1-2; C.R.

On **April 16, 2008**, Terry L. Clark, Director of Division of Operations and Quality Management responded to Attorney Farley that "[y]our request cannot be honored because it was submitted more than 45 days after our notice to you [but] [s]hould you choose to take issue with this denial of your untimely request . . . [w]e will forward your request to the Bureau of Hearings and Appeals." Letter from Terry Clark to Thomas Farley, April 16, 2008, at 1; C.R.

On **April 22, 2008**, Attorney Farley requested that R.M. be allowed to appeal because of a postal error. Letter from Thomas Farley to Terry Clark, April 22, 2008, at 1; C.R.

On **July 3, 2010**, the Department notified CYS of R.M.'s request for a hearing and that "you may wish to submit a Motion to Dismiss to BHA [Bureau] based on the appellant's [R.M.'s] untimely request." Letter from Department to CYS, July 3, 2008, at 1 R.R. at C.R. Also, on **July 3, 2010**, the Department notified the Bureau that R.M. requested a hearing concerning the indicated report of abuse and that CYS "may wish to submit a motion regarding the timeliness." Letter from Department to Bureau, July 3, 2010, at 1; C.R.

However, the record is silent concerning whether there was a hearing on the appeal *nunc pro tunc* or a petition filed in opposition to the request. The record reflects only the outcome of R.M.'s appeal *nunc pro tunc* at the hearing on the indicated report of child abuse when the ALJ stated "the Secretary has granted this appeal … [w]e have to go forward." H.T. at 11; R.R. at 7a. As a result, this Court is unable address the merits of the Department's alternative issue in support of the Department's denial of R.M.'s appeal from the indicated report of child abuse. In any event, the outcome would be the same, insofar as R.M.'s appeal was dismissed on the merits.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

R. M., In Re: M.M., Petitioner	:	
v.	:	
Department of Public Welfare, Respondent	:	No. 1456 C.D. 2009

O R D E R

AND NOW, this 1st day of April, 2010, the order of the Secretary of the Department of Public Welfare in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge