

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

R.S., Jr., :
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 Petitioner :
 :
 v. : No. 1947 C.D. 2010
 : SUBMITTED: April 1, 2011
 Department of Public Welfare, :
 Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: June 14, 2011

R.S., Jr. (R.S.) petitions for review of the order of the Department of Public Welfare (Department) that upheld the order of the Department's Bureau of Hearings and Appeals, which adopted the recommendation of the Administrative Law Judge (ALJ) and denied R.S.'s appeal from the filing of an indicated report of child abuse and his request for the expunction of the child abuse record. The report in question found that R.S. had physically abused J.R., the nine-month old daughter of J.G., R.S.'s paramour. We affirm.

The facts, as found by the Department, are as follows. In June of 2008, J.R., then nine months old, and her mother J.G., would sometimes stay at J.G.'s house, where she lived with her parents, and sometimes at R.S.'s house,

where he lived with his parents and sister. When J.G. was at work, J.R. would either be cared for by J.G.'s parents and or by R.S., his mother, and his sisters.¹ On Friday, June 27, 2008, R.S.'s mother and two sisters cared for J.R. during the day. By all accounts, including the testimony of R.S.'s mother and sisters, J.R. was in good spirits and had no visible wounds or bruises at that time, apart from several small scratches caused by her own fingernails. At about 5:00 P.M., R.S. and J.G. returned to the home, and shortly thereafter R.S. volunteered to take J.R. up to the bedroom for a nap. Less than an hour later, R.S. called for help, saying J.R. had fallen.

R.S. testified that J.R. had been lying on his chest as he lay on the bed. The bed consisted of a mattress and box spring sitting directly on the floor, which was carpeted. R.S. testified that that he dozed off, and awoke as J.R. slid off of him onto the floor. R.S. testified that he immediately called for help. J.G., as well as R.S.'s mother and sisters, responded to the call, and entered the room. They found J.R. on the bed, with freshly developing bruises. According to their testimony, J.R., while crying, did not seem unduly upset, or to be crying more than normal.

Shortly thereafter, J.G. and R.S.'s sisters took J.R. to the hospital, while R.S. remained at the house. At the hospital, J.R. was examined by Dr. James Herr. Dr. Herr noted bruising and swelling on the left side of J.R.'s head, as well as bruising near the right temporal region, bruising on both sides of the neck and a large bruise on the rib cage. He noted that the bruises appeared fresh. He ordered a number of tests, including x-rays. Radiologist Dr. Jeffery Kramer testified that

¹ One of R.S.'s sisters lives at the house in question. Another lives elsewhere, but frequently visits the house, and assisted in caring for J.R. on the day the abuse occurred.

x-rays taken the day of the incident revealed a buckle fracture of the left tibia, and that a second set of x-rays taken on July 7, 2008 revealed a recent fracture of the lateral aspect of the left eighth rib. According to Dr. Kramer, while buckle fractures of the tibia are relatively common injuries in young children, and are not readily observable in children who, like J.R., had not yet begun to walk, rib fractures are extremely rare, and, due to pliability of the ribs at that age, result only from the application of a great amount of force. Dr. Kramer further noted that fractured ribs are often associated with shaking injuries that occur when holding the child's torso.

Both doctors expressed skepticism that J.R.'s injuries could have resulted from a fall off of a bed, especially a bed which, because it had no frame and was resting directly on the floor, was only several feet tall. Dr. Kramer testified that "there's absolutely no way" J.R. could have sustained her injuries in a fall of three to four feet. Reproduced Record (R.R.) at 69a.

A report of the incident was made to the Lancaster County Children and Youth Services, which, with the Department, issued an indicated report of child abuse listing R.S. as an alleged perpetrator.

R.S. appealed, and the case was heard by an ALJ. The ALJ recommended denying the appeal. In his opinion, the ALJ found that R.S.'s account of how J.R. received her injuries was not believable, as it was inconsistent with the medical testimony. The ALJ found that the injuries were in fact caused when R.S. "purposefully directed an unspecified sudden and massive force to J.R.'s left ribs." ALJ Opinion at 10. The ALJ found the other witnesses credible, although he did not credit the testimony of R.S.'s family members that J.R. did not cry more intensely than normal after receiving the injury. The ALJ also found that

it was not established that J.R.'s head injury caused the "serious physical injury" necessary to be defined as "child abuse" under the law, but that the injury to her rib did qualify. Accordingly, the ALJ recommended that R.S.'s appeal from the indicated report and his request for the expunction of the child abuse record be denied. The ALJ's recommendation and opinion were adopted by the Department. The Department granted R.S.'s application for reconsideration, but then upheld its prior decision. An appeal to this court followed.

The statutory definition of child abuse includes the following: "[a]ny recent act or failure to act by a perpetrator which causes nonaccidental serious physical injury to a child under 18 years of age." 23 Pa. C.S. § 6303(b)(1)(i). The definition of "serious physical injury" includes an injury which "causes a child severe pain." 23 Pa. C.S. § 6303(a).

On appeal, R.S. makes three arguments, all based on an alleged lack of substantial evidence. R.S. argues that substantial evidence is lacking that J.R. was injured while in his custody, that he caused J.R.'s injuries, and that J.R.'s injuries caused her severe pain. "Substantial evidence" is defined as "evidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion." 23 Pa. C.S. § 6303(a).

R.S.'s first two arguments rely on obfuscation regarding the timing of J.R.'s injuries. Essentially, R.S. argues that because the fractured rib was not detected in the x-rays taken the day of the incident, and was only found after later x-rays, the date of injury is therefore in question, because it could have occurred at a time when J.R. was not in his custody.

While it is true that the radiologist, considering the x-rays in isolation, could not conclusively state exactly when the fracture occurred, this argument fails

when considered in the context of the other testimony heard by the ALJ. It was found as a fact that J.R. had no injuries apart from minor scratches before she went upstairs with R.S. After R.S. called for help, a number of witnesses entered the room and observed, among other injuries, a rapidly spreading bruise on J.R.'s ribs. In the emergency room, Dr. Herr observed the same thing. Later x-rays revealed fractured rib in "exactly the same location" as the bruise. R.R. at 64a. Dr. Kramer, the radiologist, explained that the fracture probably existed when the initial x-rays were taken, but it was not visible because it was a hairline fracture, which only became visible as the healing process took place. Dr. Kramer, considering the x-rays, provided a range of several days in which the fracture could have taken place, a range which included the date of the incident, June 27.

Considering all of the medical and lay testimony, the ALJ concluded that J.R. sustained the fracture on June 27, when she was alone in the bedroom with R.S. While it is true that the radiologist's testimony alone does not conclusively prove the date of injury, the evidence as a whole is more than enough for a reasonable person to accept as adequate to support the conclusion that R.S. caused J.R.'s injuries. For this reason, we cannot disturb the ALJ's conclusions, which were adopted in full by the Department.

R.S.'s argument that the Department's conclusion that J.R. suffered severe pain is not supported by substantial evidence is similarly meritless. R.S. points to testimony from his family members that, after the injury, J.R. did not appear to be in very much pain or to be crying excessively, but the ALJ found this testimony not credible. The ALJ's conclusions were adopted by the Department, which in these types of case is the ultimate fact finder. *Bucks County Children & Youth Soc. Serv. Agency v. Dep't of Pub. Welfare*, 977 A.2d 1254 (Pa. Cmwltlth.

2009). For this reason, we do not disturb the credibility findings made by the Department. *Id.*

After rejecting the family members' testimony, the ALJ based his findings regarding the pain caused by J.R.'s injuries on medical testimony, including the testimony of Dr. Herr, who described the pain that would result from her injuries as "significant to severe" with regard to the bruising, and, with regard to the fractured rib, as an "eight to nine at least" on a scale of ten. R.R. at 65a. The ALJ did not err in accepting this medical opinion as to the seriousness of the pain caused by J.R.'s injuries.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner	:	
	:	
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	:	
Department of Public Welfare,	:	
Respondent	:	

ORDER

AND NOW, this 14th day of June, 2011, the order of the Department of Public Welfare in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION

BY SENIOR JUDGE FRIEDMAN

FILED: June 14, 2011

I respectfully dissent. The majority upholds the indicated report of child abuse against R.S., Jr. (R.S.) because it concludes that there was substantial evidence in the record to prove that nine-month-old J.R. suffered severe pain from her rib fracture.¹ Based on my review of the record, as a whole, I cannot agree.

The Department of Public Welfare (Department) determined that J.R. experienced severe pain from the rib fracture based on the testimony of Dr. James Herr and Dr. Jeffrey Kramer that “rib bone fractures such as that experienced by J.R. are severely painful when they occur and remain somewhat painful while healing.”

¹ “Child abuse” is defined in the Child Protective Services Law (Law) as a recent act by a perpetrator that causes non-accidental serious physical injury to a child under the age of eighteen. 23 Pa. C.S. §6303(b)(1)(i). “Serious physical injury” is defined as an injury that causes a child severe pain or significantly impairs a child’s functioning temporarily or permanently. 23 Pa. C.S. §6303(a).

(Adjudication at 9.) However, Dr. Kramer never personally observed or examined J.R. and based his opinion solely on his review of the medical records. More important, Dr. Herr, who examined J.R. in the emergency room shortly after her admission, testified that J.R. was “alert, [and] not exhibiting any acute pain or crying.” (N.T., 6/1/09, at 53.) He also testified that J.R. “did not appear to be [in] any acute distress.” (*Id.*) On cross-examination, Dr. Herr further testified that there was no indication that J.R. had been crying, (*id.* at 73-74), and that “the child seemed quieter than I would have expected,” (*id.* at 73). Thus, Dr. Herr’s direct observations of the child following the injury contradicted his own medical opinion that this type of fracture would necessarily cause “significant to severe” pain, *i.e.*, an “eight to nine at least” on a scale of one to ten. (*Id.* at 89.) Notably, neither the Department nor the majority addresses this conflicting evidence.

I believe this case is analogous to *R.P. v. Department of Public Welfare*, 820 A.2d 882 (Pa. Cmwlth. 2003), in which we reversed the denial of a mother’s request to expunge an indicated report of child abuse. The issue in *R.P.* was whether an eight-month-old child who suffered second-degree burns in a bathtub suffered severe pain under the Law. The child’s treating physician testified that a second-degree burn is “[n]ormally” the type of injury that would cause severe pain; however, when he initially examined the child, it “‘didn’t appear that [the child] was in a general amount of stress.’” *Id.* at 887 (quoting notes of testimony). On cross-examination, the physician admitted that he did not observe the child to be in any severe pain. *Id.* Therefore, we concluded that the Department’s finding of severe pain was unsupported by substantial evidence.²

² See also *A.M. v. Department of Public Welfare*, 540 A.2d 1, 2 (Pa. Cmwlth. 1988) (reversing denial of expunction request where the record contained no finding of severe pain; **(Footnote continued on next page...)**)

Similarly, in this case, both medical experts testified that the type of rib fracture J.R. sustained normally would cause severe pain at the time of injury. Dr. Kramer, however, never observed the child and, thus, could not testify as to whether the child actually exhibited any pain. Dr. Herr repeatedly testified that he did not observe J.R. to be in any acute pain or distress shortly after the injury. Thus, under *R.P.*, I believe the evidence was insufficient to establish that J.R. was in severe pain.³

Because I would conclude that the Department did not meet its burden of proving by substantial evidence that J.R. suffered severe pain, I would reverse.

ROCHELLE S. FRIEDMAN, Senior Judge

(continued...)

although the medical expert opined that the child's injuries would have caused moderate to severe pain, neither the expert nor the child testified that the child actually experienced severe pain).

³ I recognize that, in some cases, severe pain may be established by circumstantial evidence alone. *See S.T. v. Department of Public Welfare*, 962 A.2d 679, 683 (Pa. Cmwlth. 2008); *D.N. v. Department of Public Welfare*, 562 A.2d 433, 436 (Pa. Cmwlth. 1989). Here, however, there was also testimony regarding the child's perceived pain level, which contradicted the circumstantial evidence. *Cf. City of Philadelphia, Office of Children, Youth and Family Services v. Department of Public Welfare*, 767 A.2d 10, 12 (Pa. Cmwlth. 2001) (finding no severe pain based on photographs of injury as well as caseworker's testimony regarding child's subjective complaints); *N.B. v. Department of Public Welfare*, 527 A.2d 623, 624-25 (Pa. Cmwlth. 1987) (finding no severe pain based on child's testimony that she did not recall being in great pain).