

A.S. had done when she was nine, M.C. responded that he had sexually abused her. M.C. and her mother filed a report with DPW, which conducted an investigation. A.S. then brought a child abuse expungement appeal before the ALJ, which held a hearing.

In her testimony before the ALJ, M.C. alleged that A.S. came into the living room where M.C. was watching television wearing only his underwear, laid down next to M.C. on the couch with his back against the back of the couch and her back against the pillows, covered himself with a blanket and, while covered, took off his underwear so that he was naked, and watched television in this manner with M.C. M.C. eventually fell asleep and, when she awoke, her hand was grasping A.S.'s erect penis. She removed her hand, and A.S. again placed her hand on his erect penis. She then removed her hand a second time and left the room. There are no allegations that A.S. abused M.C. at any other time or in any other manner.

M.C. did not tell anyone of the incident at this time and treated A.S. as her father, calling him "Dad" and staying at his house with him four days a week every week for a couple of years, even after A.S.'s divorce from M.C.'s mother, after which he continued to treat her as his daughter. M.C. testified that the only reason she did this was because her mother needed someone to watch her and her sisters, and A.S. was the best option. Off and on during this time, M.C. had difficulties with both her mother and A.S. stemming from issues related to cell phones, a boyfriend, a MySpace page that represented M.C. as 18 years old, schoolwork and other teenage problems. In particular, in July of 2008, M.C. lost

her cell phone privileges, which upset her because that was the only way she could communicate with her boyfriend. It was at this time that M.C. composed the four-page letter addressed to God, the discovery of which led to the initiation of this case. In the letter, she discussed how upset she was with various aspects of her life, focusing on her loss of the cell phone, her love for her boyfriend, that she was upset that she did not have a better relationship with her family, and that A.S. had done something to her when she was nine. Her mother saw her writing the letter but did not see the contents. M.C. told her mother that the letter was a story she was writing. She testified that she did not want anyone to find the letter, but acknowledged that she often hid things under her mattress, so it would be found if anyone looked. She also testified that she told two friends of the abuse long before, but neither of them was interviewed by DPW or called as a witness.

A.S.'s testimony largely corroborated the nature of his relationship with M.C. and the difficulties M.C. had with him and her mother. However, he flatly denied ever abusing M.C., and stated that he treated her as his daughter even after he divorced her mother. He contended that M.C. was mad at him because of the cell phone restrictions and composed the letter alleging the abuse as a way to get attention from her mother and to get back at him for disciplining her. He contended that M.C. always put things under her mattress, so even though the letter was ostensibly hidden, she knew it would be found before long and wanted it to be found.

The ALJ found M.C.'s testimony to be credible and A.S.'s testimony to be not credible, although he stated that A.S. testified in a normal manner and did

not do anything that clearly marked his testimony as not credible. The ALJ concluded that M.C.'s testimony constituted substantial evidence that the abuse occurred and recommended that A.S.'s appeal be denied. A.S. sought reconsideration, which was denied in an order by the Bureau of Hearings and Appeals. This appeal followed.¹

On appeal, A.S. contends that M.C.'s testimony was filled with inconsistencies and contradicted by more credible evidence while his own testimony was consistent throughout and not contradicted by any other evidence. M.C.'s credibility was particularly damaged by her failure to call the two friends as witnesses to whom she earlier allegedly confided the abuse. Without that corroboration, her testimony is suspect because she had other motives to fabricate the claim of abuse. A.S. concedes that this Court may not review the credibility of witnesses² and instead couches his arguments in terms of whether there was substantial evidence.

Substantial evidence in the context of maintaining an indicated report of child abuse is, in turn, defined as “evidence which so preponderates in favor of a

¹ Our 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 Child Protective Services Law, 23 Pa. C.S. §§6301-6385, or whether the findings of fact are supported by substantial evidence. *A.P. v. Department of Public Welfare*, 884 A.2d 974 (Pa. Cmwlth. 2005).

² Weight and credibility of the evidence are matters solely within the purview of the fact finder, and this Court will not re-evaluate such a determination. *K.J. v. Department of Public Welfare*, 767 A.2d 609, 613 (Pa. Cmwlth. 2001). Here, the fact finder found M.C. to be credible and A.S. to be not credible, and we must follow that conclusion when evaluating whether there was substantial evidence that A.S. abused M.C.

conclusion that it outweighs, *in the mind of the factfinder*, any inconsistent evidence and reasonable inferences drawn therefrom.” *L.S. v. Department of Public Welfare*, 828 A.2d 480, 483-84 (Pa. Cmwlth. 2003) (emphasis added); *R.P. v. Department of Public Welfare*, 820 A.2d 882, 885 (Pa. Cmwlth. 2003). Because the fact finder found that only M.C. was credible, we must determine whether her testimony preponderates in favor of the conclusion that she was sexually abused by A.S. and that it outweighs any inconsistent statements she made. If that condition is met, we must affirm.

Here, M.C. testified clearly and consistently that A.S. twice placed her hand on his erect penis while lying naked next to her when she was nine. Although several years had passed, she never contradicted herself on any of these details. Furthermore, M.C. revealed the abuse only after her mother’s boyfriend found a letter M.C. had written addressed to God that she had hidden under her mattress. On the other hand, M.C. called A.S. “Dad” and lived with him four days a week for years, she had arguments with him over cell phone use and other daily teenage matters, and she hid the letter in a place that she knew her mother knew that she kept things. However, the fact that M.C. regarded A.S. as her father and lived with him and whether she got upset at him when he disciplined her have no bearing on whether he abused her in the past, and if M.C. had wanted her mother to know of the abuse, a much easier way would have been to simply tell her, rather than writing a cryptic letter and then hiding it. While we may have found otherwise, because the fact finder could have concluded that this evidence so preponderates in favor of the conclusion that A.S. abused M.C., the requirement of substantial evidence has been met.

For the foregoing reasons, the order of the DPW is affirmed.

DAN PELLEGRINI, JUDGE

M.C.'s use of her cell phone; for example, her parents revoked M.C.'s cell phone privileges when they discovered that she received a "dirty text message" from a boy. (R.R. at 40a.)

On July 23, 2008, M.C. was thirteen years of age. Although A.S. had revoked her cell phone privileges, this day M.C. had hidden a cell phone in her pants. A.S. noticed the bulge and confronted M.C., who lied about having a cell phone. A.S. then confiscated the phone. (R.R. at 43a-44a.) On July 26, 2008, M.C. wrote in her diary that she was heartbroken and cried when she told Zac about it. (R.R. at 148a-49a.) The next day, she wrote in her diary that she was giving her mom and dad "the silent treatment" because her mother called Zac stupid and because her dad wanted to take away her cell phone. (R.R. at 150a.) On July 28, 2008, in a conversation with the girlfriend of A.S., M.C. stated that her mother was trying to convince A.S. to allow M.C. to have a cell phone and that her mother "understood how [M.C.] felt about it." (R.R. at 45a.)

On July 30, 2008, M.C.'s mother learned that M.C. had taken the cell phone belonging to M.C.'s sister and "put 88 text messages on it." (R.R. at 47a.) M.C.'s mother threatened to punish M.C. by buying her clothes at Wal-Mart and Payless instead of Aeropostale and Abercrombie and Fitch. (R.R. at 47a.) That night, M.C. went into the bathroom, closed the door and wrote a "Dear God" letter. (R.R. at 54a.) As she was finishing the letter, M.C.'s mother walked in and asked what M.C. was writing. (R.R. at 54a-55a.) M.C. said it was a story, and her mother walked out. (R.R. at 54a.)

M.C.'s mother told her boyfriend that she saw M.C. writing something, and the boyfriend said that he would look to see "if there was anything." (R.R. at 54a.) M.C. put the "Dear God" letter between the mattresses of her bed, and her mother's boyfriend found it there. (R.R. at 55a.) M.C. testified, "I think my mom knew where it would be, because I would always ... keep stuff in between my mattresses." (R.R. at 56a.)

When asked what the "Dear God" letter said, M.C. testified, "It was just saying how ... I didn't want to go to [A.S.'s] house because me and him didn't really get along." (R.R. at 26a.) The essence of the "Dear God" letter is that, but for Zac, M.C. hates her life and would rather be dead. (R.R. at 142a.) "It kills me inside knowing I'll never talk to him [over the cell phone] and honestly ... I'm done with everything. You can see my arms. Why are you letting me do this to myself?" (R.R. at 143a.) M.C. wrote that she is tired of hearing "you can do better" from her mother, who "probably thinks I'm a slut"; she simply cannot meet her mother's expectations. (R.R. at 142a-44a.) As for A.S., "I stopped caring [for him] the one night it happened when I was 9, and no one knows [about] it but me and Zac and Danielle P. No one will believe me so why does it matter." (R.R. at 142a-43a.) "[M]y friends are all I have. I can't come to my family. That's why the phone is a big deal to me." (R.R. at 144a.)

On the last page, M.C. wrote and crossed out the words, "I've wanted to be done since I was nine or ten. I'm surprise[d] dad can live with himself or maybe he was too drunk that night to remember. I'll never kno[w]. I don't care anymore." (R.R. at 145a.) M.C. testified that she started to cross out "everything"

because, if “they” found her letter, she wanted “it” crossed out. (R.R. at 64a.) M.C. conceded that she did not cross out a sentence about Zac because she wanted “people” to read the words, “but there’s one person [Zac] holding me back [from being done], and I love him.” (R.R. at 145a.) When counsel pointed out that crossing out the words about A.S. did not really hide them, M.C. testified, “It has to do with my mom.” (R.R. at 64a.)

M.C.’s mother read the letter and asked M.C. what happened when she was nine years old. M.C.’s mother then reported the alleged sexual abuse to the Department of Public Welfare (DPW). A DPW investigator interviewed M.C.’s mother, M.C. and A.S. No one interviewed Zac or Danielle P. DPW filed an indicated report of child abuse, and A.S. sought expunction of the report.

At the expunction hearing, DPW presented the testimony of M.C., who was permitted to testify without A.S. in the room because her attorney asserted that she was “very fearful of him and nervous.”¹ (R.R. at 7a-8a.) M.C. then testified that she stayed with A.S. four days every week for years, that the sexual abuse occurred only once and that nothing else happened “ever again.” (R.R. at 26a.) M.C. testified that she told two friends about the abuse, but DPW did not interview them or call them as witnesses. M.C. admitted that she has lied in an attempt to keep her cell phone.

¹ The ALJ heard no testimony and made no finding of fact regarding whether M.C. feared A.S. Nevertheless, the ALJ required A.S. to listen to M.C.’s testimony from another room.

A.S. denied the abuse, contending that M.C. expected her mother to find the letter and that M.C. made the accusation to get her mother's attention on the issues between them, which did not include M.C.'s use of the cell phone, and to retaliate against A.S. for preventing her from communicating with Zac. Ultimately, the Administrative Law Judge (ALJ) believed M.C. that the abuse occurred.²

I. Substantial Evidence

In reviewing the ALJ's decision, we examine whether DPW presented substantial evidence to support the indicated report of child abuse. Section 6303 of the Child Protective Services Law (Law) defines substantial evidence as "[e]vidence which outweighs inconsistent evidence and which a *reasonable person* would accept as adequate to support a conclusion." 23 Pa. C.S. §6303 (emphasis added).

² I note that, to the extent the ALJ believed M.C. because M.C. testified with "genuine emotion" and did not appear to be "rehearsed," (Adjudication at 5), the ALJ failed to consider that M.C. was not required to face A.S. during her testimony. Our supreme court has stated that, in general, a witness is less likely to lie when she must testify while facing the accused; however, when the witness is a child testifying that someone abused her, it is debatable whether the child is more likely to tell the truth while facing the accused. *R. v. Department of Public Welfare*, 535 Pa. 440, 458, 636 A.2d 142, 151 (1994). I submit that the debate could be resolved if DPW were required to present clear and convincing evidence.

I conclude that, considering **all** of the evidence,³ it was not reasonable for the ALJ to accept M.C.'s testimony as adequate to support his conclusion that the alleged abuse occurred.⁴ In deciding to accept M.C.'s testimony in that regard, the ALJ failed to consider: (1) M.C.'s admission that she has lied in the past in order to keep her cell phone; (2) M.C.'s admission that, although M.C. stayed with A.S. for lengthy periods of time after the alleged incident, A.S. did not abuse her ever again; (3) DPW's failure to present the testimony of Zac and Danielle P. to corroborate M.C.'s testimony that she reported the abuse to them; (4) M.C.'s admission that she wrote the "Dear God" letter only after A.S. confiscated her cell phone; (5) M.C.'s admission that her mother knew where the "Dear God" letter would be; (6) M.C.'s testimony that her mother understood her need for a cell phone and tried to convince A.S. to allow M.C. to have a cell phone, indicating that living with her mother would eliminate the cell phone issue; and (7) M.C.'s inaccurate but revealing testimony that the "Dear God" letter stated that M.C. did not want to stay with A.S. anymore, i.e., that M.C. wrote the letter because she did not want to stay with a parental figure who would not allow her to use her cell phone.

³ I note that this court will address whether an agency has issued a "reasoned decision" only where the witnesses presented conflicting testimony by deposition, i.e., where the fact-finder could not observe the testimony. See *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 828 A.2d 1043 (2003). Here, because M.C. was not required to face the person she accused, the ALJ could not observe M.C. testifying in the normal manner. In other words, I submit that M.C.'s testimony was akin to deposition testimony, so that the ALJ needed to provide adequate reasons for accepting it as credible based on all of the evidence.

⁴ In his findings, the ALJ stated that M.C.'s testimony was credible and A.S.'s testimony was not credible. (Findings of Fact, Nos. 21-22.) However, in his discussion, the ALJ stated that A.S. was credible, but "not as credible as" M.C. (Adjudication at 5.)

II. Clear and Convincing Evidence

I also reiterate my previously stated view that, in order to satisfy due process requirements, DPW should be required to present clear and convincing evidence at an expunction proceeding to maintain an indicated report of child abuse. *See K.J. v. Department of Public Welfare*, 767 A.2d 609 (Pa. Cmwlth.) (Friedman, J., dissenting), *appeal denied*, 567 Pa. 750, 788 A.2d 381 (2001). This court declined to address the issue in *K.J.* after concluding that the matter had been waived. However, in my view, the issue has been raised here. A.S. argues that the ALJ erred in relying solely on M.C.'s uncorroborated testimony, which, as a matter of law, does not constitute clear and convincing evidence. *See Fell v. Department of Transportation, Bureau of Motor Vehicles*, 925 A.2d 232 (Pa. Cmwlth. 2007) (holding that the clear and convincing evidence standard is not satisfied by uncorroborated testimony).

Our supreme court has stated in *dicta* that the clear and convincing evidence standard should apply in this type of case.

Although [the party seeking expunction of the indicated report of child abuse] did not question the standard of proof required by [DPW] in order to maintain the indicated report, this Court is quite troubled by the use of any standard less than requiring clear and convincing evidence. Even though the statute requires substantial evidence, it is quite possible that such a standard does not

adequately protect the rights of the accused given the nature of these proceedings.^[5]

J.S. v. Department of Public Welfare, 528 Pa. 243, 248 n.2, 596 A.2d 1114, 1116 n.2 (1991). Subsequently, in *R. v. Department of Public Welfare*, 535 Pa. 440, 636 A.2d 142 (1994), our supreme court stated that a child abuse report expunction proceeding implicates the subject's constitutionally protected interest in his or her reputation. The Court explained:

[I]n Pennsylvania, reputation is an interest that is recognized and protected by our highest state law: our Constitution. Sections 1 and 11 of Article I make explicit reference to "reputation," providing the basis for this Court to regard it as a fundamental interest which **cannot be abridged without compliance with constitutional standards of due process** and equal protection.

Id. at 454, 636 A.2d at 149 (emphasis added).

Explaining the connection between due process and standard of proof, the United States Supreme Court has stated:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'

⁵ In *K.J.*, although the majority concluded that the issue had not been preserved for appeal, the majority stated that "the concerns voiced by our Supreme Court in this dictum [in *J.S.*] have logic and strength." *K.J.*, 767 A.2d at 612.

Santosky v. Kramer, 455 U.S. 745, 754-55 (1982). The U.S. Supreme Court then stated that the clear and convincing evidence standard is appropriate when the individual interests at stake are both particularly important and more substantial than mere loss of money. *Id.* The U.S. Supreme Court has held that the clear and convincing evidence standard is appropriate in government-initiated proceedings that threaten the individual involved with stigma. *Id.*

Because the government initiates expunction proceedings by placing a name on the “black list”⁶ of child abusers, because the proceedings implicate an individual’s constitutionally protected interest in reputation, which is particularly important and more substantial than mere loss of money, and because the proceedings threaten an individual with stigma, I submit that DPW must present clear and convincing evidence to maintain an indicated report of child abuse. Clearly, that standard was not met in this case. *Fell.*

Accordingly, unlike the majority, I would reverse.

ROCHELLE S. FRIEDMAN, Senior Judge

⁶ See *A.Y. v. Department of Public Welfare, Allegheny County Children & Youth Services*, 537 Pa. 116, 641 A.2d 1148 (1994) (referring to the statewide child abuse registry as a “black list”).