

**ARKANSAS COURT OF APPEALS**

DIVISIONS III &amp; IV

No. CA12-474

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES and ARKANSAS  
STATE POLICE

APPELLANTS

V.

DAVID KOPROVIC

APPELLEE

**Opinion Delivered** NOVEMBER 7, 2012APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT, FORT  
SMITH DISTRICT  
[NO. CV2010-2030]HONORABLE J. MICHAEL  
FITZHUGH, JUDGE

AFFIRMED

**CLIFF HOOFFMAN, Judge**

Appellants, Arkansas Department of Human Services, Division of Children and Family Services (DHS), and Arkansas State Police Crimes Against Children Division (CACD), appeal from the circuit court's reversal of the decision of the DHS Office of Appeals, which found that a preponderance of the evidence supported the true determination made by CACD that appellee David Koprovic neglected his foster child, M.M., by inadequately supervising her. Appellants argue on appeal (1) that substantial evidence supports the finding that David Koprovic neglected M.M. through inadequate supervision; (2) that the agency did not abuse its discretion in making this finding; and (3) that there is no evidence that any substantial right of David Koprovic was prejudiced by the finding of neglect. We affirm the circuit court's decision and reverse that of the administrative agency.

David and Judith Koprovic were foster parents to twenty-two-month-old M.M. and

her four-year-old brother, K.M., and were the biological/adoptive parents of four other children. On March 16, 2010, David Koprovic was in his backyard playing with M.M., K.M., and his eleven-year-old twins, Br.K. and Be.K., after he had picked them up from school. The yard had a swing, a playhouse, and other playground equipment, as well as an uncovered pool that was enclosed by a wooden picket fence with two gates. David went inside to fix dinner at 5:30 p.m. and left the children playing outside. He stated that he kept an eye on them through the kitchen window and that he went outside to check on everyone at around 5:45. At that time, the children were playing together nicely near the playhouse, and he went back inside. Approximately fifteen minutes later, David called the children inside for dinner, but M.M. did not come to the door. When he asked where she was, the other children shrugged their shoulders. He immediately ran to the pool, saw M.M. floating in it, and dove in to retrieve her. She did not have a pulse, and David and a neighbor performed CPR while waiting on the ambulance. M.M. regained her pulse before arriving at the hospital, although she at least initially suffered some developmental delays after the accident. According to David, M.M. already suffered some developmental delays due to testing positive for methamphetamine at birth and had attended a therapeutic school. He indicated, however, that the delays were with her fine-motor skills and speech and were not mental in nature.

David testified that the cover was not on the pool because it had been damaged in a recent hail storm and that he was also in the process of preparing the pool for the warm-weather season. When questioned about the gates in the fence around the pool, David stated that the gate nearest the house was latched but did not have a lock. He testified that he did

not put a lock on the gate because the entire gate had to be lifted to unlatch it and that even his eight-year-old daughter was unable to do so. There was also a gate on the back side of the pool near the backyard area; however, David stated that this gate was latched from the inside and that there was a lock on it. He had checked the front gate before going inside to cook dinner but did not check the back gate because he assumed it was locked. David had widened the back gate so that a family member in a wheelchair could access the pool area, but stated that they had not used that gate since their last barbeque the previous summer and that he had no reason to think it was unlocked that afternoon. He further testified that there was nothing along the fence line that M.M. could have climbed to get over the fence. He was informed by the police after the incident that the lock to the back gate was found sitting on top of the fence. David testified that a DHS caseworker came to his home each month and that a DHS home specialist also visited each month to make sure that the environment was appropriate for foster children. He stated that the family had never been reprimanded by DHS or notified of any issues in their home that needed correction.

Kris Deason, a detective with the Fort Smith Police Department, testified that he arrived on the scene of the near-drowning at around 6:30 that evening. He stated that the pool had no cover on it and that it was murky and full of leaves and other debris. Deason testified that the two gates in the fence around the pool did not have locks or other safety devices and that the latches were loose and insubstantial. He was unable to get the front gate latched, and he stated that the latch on the back gate was fairly new and easy to manipulate. Deason further testified that he interviewed the eleven-year-old twins who had been outside

with M.M. that afternoon. Be.K. told Deason that K.M. was playing in the dirt and that the last time she saw M.M. before going inside, she was being pushed by Br.K. on the swing. When her father called them in for dinner, Be.K. stated that he immediately asked where M.M. was and then ran outside to find her. According to Br.K.'s version of events, M.M. had been on the swings when Br.K. was called into the playhouse for Be.K. to show her something. Br.K. indicated that she could still hear M.M. while in the playhouse; however, when her father called them in for dinner, he noticed that M.M. was not with them and then he found her in the pool. When Deason asked Br.K. how M.M. had gotten through the gates, Br.K. said, "Maybe she got something to stand on because she does it a lot. She figures out how to get it open." Br.K. also said that there were rules about the pool and that they were not supposed to be near it without an adult present.

Mary Pat Parnell, who certified the Koprovic's home as a foster home, testified that she was aware of their pool and that it met DHS's requirement that there be a barrier or fence around it. She did not feel that the pool was dangerous, although she noted that the foster parent still has the responsibility to maintain the fence and supervise the children. Parnell indicated that she had not received any prior complaints related to the Koprovic home and that she had never found anything that needed to be corrected.

The CACD report that was entered into evidence at the hearing also contains statements from each of the family members. In Be.K.'s statement on the day of the accident, she was asked how M.M. got inside the fence, and she stated that she did not know. When she was informed that the back gate was found unlocked, Be.K. stated that they had a

barbeque recently and that everyone had been by the umbrella, near the back gate. She explained that maybe someone had unlocked it then or perhaps it had been unlocked since the last time they had used it. In a later statement to CACD, however, her older sister, Br.K.2, admitted that she had taken the lock off the back gate on the day of the incident, when she went to sit in the pool area while watching the other kids. Br.K.2 stated that she did not replace the lock when she went back into the yard and that she was inside the house when M.M. fell into the pool. When Br.K.2 was asked if there was a general rule in place about the older children watching the younger ones, she stated that she or her twin sisters were supposed to be out there with them if the younger ones were outside.

Following their investigation, CACD and DHS found that the preponderance of the evidence supported a true finding of neglect by David due to his inadequate supervision of M.M. A request for an administrative hearing was made by David, and the case was presented to the DHS Office of Appeals and Hearings, which found that DHS had met its burden of proving that David had neglected M.M. by failing to appropriately supervise her and by leaving her in a dangerous situation. The ALJ ordered that David's name be placed on the Arkansas Child Maltreatment Central Registry. David then petitioned for judicial review by the circuit court, which reversed the ALJ's decision. The court noted that DHS knew about the pool, that the pool was fenced and was believed to be locked, that David periodically checked on the children while he was inside cooking, and that M.M. was playing with older children. The court thus found that the ALJ's decision was not supported by substantial evidence and that its finding was an abuse of discretion. Appellants filed a timely notice of

appeal to this court.

On appeal, our review is directed toward the decision of the administrative agency, rather than the decision of the circuit court. *Dep't of Health & Human Servs. v. R.C.*, 368 Ark. 660, 249 S.W.3d 797 (2007). Considerable deference is accorded the decision of the administrative agency in part because these agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts to determine and analyze legal issues affecting their agencies. *Id.* As with all appeals from administrative decisions under the Administrative Procedure Act, the circuit court or the appellate court may reverse the agency decision if it concludes that the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error or law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion. *Id.*; Ark. Code Ann. § 25-15-212(h) (Supp. 2011).

Appellants argue that this court should uphold the ALJ's decision because it is supported by substantial evidence and is not an abuse of discretion. Substantial evidence is valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support the agency's decision and force the mind to pass beyond conjecture. *Tomerlin v. Nickolich*, 342 Ark. 325, 27 S.W.3d 746 (2000). We review the entire record in determining whether substantial evidence supports the agency's decision. *Id.* The party challenging the agency's decision has the burden of proving an absence of substantial evidence and must

demonstrate that the proof before the agency was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* To establish an abuse of discretion, it must be shown that the agency's discretion was improvidently exercised, i.e., exercised thoughtlessly and without due consideration. *Mann v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 352, \_\_\_ S.W.3d \_\_\_. It is the prerogative of the agency to believe or disbelieve any witness and also to decide what weight to accord the evidence. *C.C.B. v. Ark. Dep't of Health & Human Servs.*, 368 Ark. 540, 247 S.W.3d 870 (2007).

The ALJ found that a preponderance of the evidence supported the determination that David had neglected M.M. due to his inadequate supervision of her. According to the relevant provisions of Ark. Code Ann. § 12-18-103(13)(A) (Supp. 2011), "neglect" is defined as "those acts or omissions" by a "foster parent" that constitute a "(vii) Failure to appropriately supervise the child that results in the child's being left alone at an inappropriate age or in inappropriate circumstances creating a dangerous situation or a situation that puts the child at risk of harm."

The ALJ found that David had disregarded his duty to appropriately supervise M.M. when he left her outside. Although there were other, older children present, the ALJ stated that none of the children had specifically been instructed to supervise M.M. or did in fact supervise her. Further, the ALJ found that M.M. was left in inappropriate circumstances where she was without supervision in an area with access to a swimming pool when she was less than two years old and was developmentally delayed. The ALJ stated that it was reasonable to conclude that M.M. would not have gone into the pool and nearly drowned

if she had been adequately supervised by David.

After reviewing the entire record, we agree with Koprovic that the facts in this case do not rise to the level of substantial evidence to support the ALJ's decision finding that David maltreated M.M. by inadequately supervising her. The sole finding of fact cited by the ALJ in support of its decision that Koprovic left M.M. unsupervised in the backyard was that there was "no indication from the evidence that one of the children was instructed to supervise M.M. or that one of the older children did in fact watch M.M." on that day. However, one of Koprovic's older children told investigators that there was a general rule in place that if the younger children were outside playing, she or her twin sisters were supposed to be out there with them. We also note that one of DHS's administrative procedure manuals includes within its definition of "caretaker" any "person ten years of age or older. . . ." Ark. Admin. Code 016.15.4 Appendix 1.

The evidence presented in this case showed that Koprovic's eleven-year-old twins were outside playing with M.M. at the time of the tragic accident; Koprovic could see the children playing outside through the kitchen window and periodically looked out the window to check on them; he went outside at one point to confirm that everything was fine and saw that the children were all playing near the swingset; the pool was completely fenced with two gates; the back gate was always kept locked and to Koprovic's knowledge, had not been used since the previous summer; the front gate shut in such a manner that, to Koprovic's knowledge, the younger children were unable to lift and open it; Koprovic checked to make sure that the front gate was secure before going inside; he was not aware that his older



daughter had unlocked the back gate earlier that day and had forgotten to lock it back; and he stated that there was nothing along the fence line that M.M. could have climbed on or dragged over there to get over the fence. The evidence also showed that DHS was aware of the pool, that Koprovic was subject to monthly and quarterly home visits by the caseworker and a DHS home specialist, and that Koprovic had never been reprimanded or informed of any safety issues in the home by DHS.

Thus, while we conclude that this was a tragic accident, we cannot find substantial evidence to support the ALJ's decision to place Koprovic's name on the Child Maltreatment Registry. Because there is a lack of substantial evidence supporting the agency's decision, there is no need to discuss the other possible bases for reversing its decision under Ark. Code Ann. § 25-15-212(h), such as an abuse of discretion.

Appellants also contend that Koprovic lacked standing to contest the placement of his name on the registry because he failed to prove that his "substantial rights" were prejudiced under Ark. Code Ann. § 25-15-212(h). However, while both appellants and Koprovic address this issue in their briefs, this argument was not raised to or ruled upon by either the ALJ or the circuit court, and it is thus not preserved for our review. *Duke v. Selig*, 2009 Ark. App. 843. We therefore affirm the circuit court's decision and reverse that of the ALJ.

Affirmed.

GLOVER, MARTIN, and BROWN, JJ., agree.

VAUGHT, C.J., and ABRAMSON, J., dissent.

**RAYMOND R. ABRAMSON, Judge, dissenting.** I agree with the majority that this is a tragic accident and, if I were the ALJ in this case, I would have found that, under these facts, Koprovic’s actions were not child maltreatment under the statute. But, while I personally disagree with the ALJ’s conclusion, I believe we are constrained by our standard of review to uphold the ALJ’s decision.

In these situations, our review of an administrative agency decision is extremely limited in scope. *Ark. Dep’t of Human Servs., St. Francis Div. of Children & Family Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). Our review is directed not to the decision of the circuit court but to the decision of the administrative agency. *Id.* Our review is limited to ascertaining whether there is substantial evidence to support the agency’s decision. *Ark. Prof’l Bail Bondsman Licensing Bd. v. Oudin*, 348 Ark. 48, 69 S.W.3d 855 (2002).

Substantial evidence is defined as “valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture.” *Id.* (quoting *Ark. State Police Comm’n v. Smith*, 338 Ark. 354, 362, 994 S.W.2d 456, 461 (1999)). The challenging party has the burden of proving an absence of substantial evidence. *Id.* To establish an absence of substantial evidence, the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* In making the substantial-evidence determination, the appellate court reviews the entire record and give the evidence its strongest probative force in favor of the agency’s ruling. *Id.* Our supreme court has stated that, between two fairly conflicting views, even if the reviewing court might have

made a different choice, the agency's choice must not be displaced. *Id.* Here, the majority has eschewed this standard of review and has impermissibly focused on mitigating facts to reverse when we are required to look solely to the facts in support of the findings to determine if they are sufficient.

Arkansas Code Annotated section 12-18-103(6) (Supp. 2011) defines child maltreatment as “abuse, sexual abuse, neglect, sexual exploitation, or abandonment.” “Neglect” is defined in Arkansas Code Annotated section 12-18-103(13)(A), which provides:

“Neglect” means those acts or omissions of a . . . foster parent . . . which constitute:

. . .

(vii) Failure to appropriately supervise the child that results in the child's being left alone at an inappropriate age or in inappropriate circumstances creating a dangerous situation or a situation that puts the child at risk of harm.

Ark. Code Ann. § 12-18-103(13)(A)(vii) (Supp. 2011).

Based on this statute, the record before us, and our standard of review, I cannot say that there was insufficient evidence to support the ALJ's determination. While there are certainly mitigating facts in the record, it is nevertheless clear that, giving the evidence its strongest probative force in favor of the agency's ruling, as we must, Mr. Koprovic left a twenty-two-month-old, developmentally delayed child outside in close proximity to an uncovered swimming pool without adult supervision, without ensuring that the older children were supervising her, and without checking to see if the gates to the pool were locked. That falls within the very definition of neglect under the statute. Thus, even though I as a fact-finder would have given greater weight to the mitigating circumstances surrounding this tragic

event, I cannot hold that the ALJ's determination lacked substantial evidence. Certainly, I cannot find that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not have reached its conclusion. Accordingly, I dissent.

VAUGHT, C.J., joins in this dissent.

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