

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2006).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-111**

In the Matter of the Findings of Abuse by
Dave Lloyd Kulee.

**Filed March 4, 2008
Reversed
Worke, Judge**

Minnesota Department of Health
File No. 3-0900-16533-2

Charles F. Knapp, Daniel G. Prokott, Faegre & Benson, LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402 (for relator Dave Kulee)

Lori Swanson, Attorney General, Audrey Kaiser Manka, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent Minnesota Department of Health)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

WORKE, Judge

Relator challenges respondent's determination that (1) the Minnesota Department of Health proved by a preponderance of the evidence that relator abused a vulnerable adult, and (2) relator was properly disqualified from positions involving direct contact

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

with persons receiving services from certain programs. Because we conclude that respondent's determinations were not supported by substantial evidence, and relator was not properly disqualified, we reverse.

FACTS

In October 2005, a vulnerable adult, who was a patient at the Minnesota Veterans Home, reported to his wife and a social worker that the person who put him to bed the previous evening "tossed [him] into bed" without using a required mechanical lift. The vulnerable adult did not know the name of the person who treated him roughly, but reported that the person had not taken care of him before, the person was a large black man who was wearing a sweatshirt or jersey with numbers on the back, and the incident occurred at approximately 11:30 p.m. The nurse manager assessed the vulnerable adult and found a hematoma on his left hand, three areas of petechiae (bleeding under the skin) on his left forearm, and five superficial scratches on his lower right abdomen. Relator Dave Lloyd Kulee stated that he had put the vulnerable adult to bed that evening, but denied that maltreatment occurred.

Respondent's health-facility complaints office began an investigation about five weeks after the incident. The vulnerable adult, who had short-and long-term memory deficits, was interviewed but was unable to recall the incident. Based on the fact that the vulnerable adult had told several people that he was injured by the person who put him to bed, the investigators concluded that maltreatment had occurred and that relator was responsible for the maltreatment.

The Minnesota Department of Health found the maltreatment serious and issued a disqualification. An administrative law judge (ALJ) held a consolidated contested-case hearing. At the hearing, relator testified that he put the vulnerable adult to bed at about 9:30 p.m. on the day of the incident, using a mechanical lift, with assistance from another human services technician. That technician testified that she recalled helping relator transfer the vulnerable adult earlier in the day, but did not remember a later transfer. Relator testified that he did not own a sports jersey or wear one that day and that he finished his shift at 11 p.m.

In her recommendation to the commissioner, the ALJ found that the assistant director of nursing told investigators that three employees had verified that respondent wore a sports jersey to work that evening. But when they were interviewed, one employee stated that relator wore a long-sleeved red sweater; one stated that relator wore a jersey, but was unsure of the color; and one could not recall what relator was wearing. Only one human services technician who worked at the Minnesota Veterans Home at the time of the incident was white; the others were all black. The ALJ found that the investigators disregarded the vulnerable adult's account of the time the incident occurred because other witnesses saw the vulnerable adult in bed at that time. They also disregarded the description of the numbered jersey because they could not determine who owned such a jersey. The ALJ found that the vulnerable adult needed to be moved every two hours, even at night, and that the injury could have occurred at a different time, rather than when the vulnerable adult was put to bed. The ALJ determined that the investigation apparently proceeded from a false premise—the elimination of other likely

persons who might have abused the vulnerable adult—and noted that the vulnerable adult could no longer recall the incident during the investigation. The ALJ concluded that the commissioner had not proved by a preponderance of the evidence that relator committed maltreatment and recommended rescinding the finding of maltreatment and the decision to disqualify relator.

Both parties filed exceptions to the determination, and the commissioner, through an advisor, issued a final decision. The commissioner adopted most of the ALJ's findings, but disagreed with the ALJ's conclusion and affirmed the determination of maltreatment and disqualification. This appeal follows.

D E C I S I O N

In a contested-case proceeding, this court reviews the determination of the commissioner of health under the Minnesota Administrative Procedure Act. *Zahler v. Minn. Dep't of Human Servs.*, 624 N.W.2d 297, 300-01 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). We review the agency determination to determine whether it is “unsupported by substantial evidence in view of the entire record as submitted” or “arbitrary and capricious.” Minn. Stat. § 14.69(e), (f) (2006). Substantial evidence means “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than ‘some evidence’; (4) more than ‘any evidence’; and (5) evidence considered in its entirety.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (quotation omitted). This court will affirm if the commissioner engaged in “reasoned decisionmaking,” even if this court would have reached a different conclusion. *Cable*

Commc 'ns Bd. v. Nor-West Cable Commc 'ns P'ship, 356 N.W.2d 658, 669 (Minn. 1984).

But this court will intervene “where there is a combination of danger signals which suggest [that] the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings.” *Id.* (quotation omitted).

Relator argues that substantial evidence does not support the commissioner’s decisions that (1) he abused a vulnerable adult when he was working as a human services technician at the Minnesota Veterans Home; and (2) because abuse occurred for which he was responsible, he is disqualified from direct contact with persons or facilities licensed by respondent or the Minnesota Department of Human Services. Minnesota law establishes certain requirements for reporting and investigating allegations of maltreatment of vulnerable adults. *See* Minn. Stat. § 626.557 (2004 & Supp. 2005). The definition of “maltreatment” includes abuse, and abuse includes “[c]onduct which is not an accident or therapeutic conduct . . . which produces or could reasonably be expected to produce physical pain or injury or emotional distress.” Minn. Stat. § 626.5572, subs. 2(b), (15) (2004). A person under investigation may be disqualified if a preponderance of the evidence shows that serious maltreatment occurred and that the person under investigation “was responsible for the maltreatment.” Minn. Stat. §§ 245C.14, .15, subs. 1(d), 4(b)(2) (2004).¹

Appellate courts generally defer to the commissioner’s conclusions regarding conflicts in testimony, weight of testimony, and inferences to be drawn from testimony.

¹ Although the statutes relating to the maltreatment of vulnerable adults have been amended since the reported incident, we apply the earlier versions of the statutes because the alleged abuse occurred in October 2005.

In re Excess Surplus Status of Blue Cross & Blue Shield, 624 N.W.2d 264, 278 (Minn. 2001). But when agency findings on witness credibility differ from those of the ALJ, this court reviews the agency decision more critically. *In re Hutchinson*, 440 N.W.2d 171, 176 (Minn. App. 1989), *review denied* (Minn. Aug. 9, 1989). The commissioner's decision that relator was responsible for maltreating the vulnerable adult rests in large part on the credibility of the vulnerable adult's report. The commissioner found the vulnerable adult to be credible, based on his statement the next day that the person who injured him was the person who put him to bed, his upset emotional condition, and his physical injuries. But the commissioner also adopted 21 of the ALJ's 23 findings, including some that conflicted with the vulnerable adult's version of events. The vulnerable adult reported that the person who injured him was a large black man who wore a numbered sports jersey and that the incident occurred at approximately 11:30 p.m. But both the ALJ and the commissioner found that relator is 5'6" tall and weighed 150 pounds, which is less than the vulnerable adult's weight; that relator was not wearing and does not own a sports jersey; that relator put the vulnerable adult to bed at 9:30 p.m.; and that relator finished his shift and left the building at 11:00 p.m. The findings of both the ALJ and the commissioner also state that the investigators did not credit the vulnerable adult's report of the time of the incident or the vulnerable adult's description of a sports jersey. Therefore, to support its conclusion that relator abused the vulnerable adult, the commissioner relied selectively on the vulnerable adult's statement that he was injured by the person who put him to bed, while ignoring other parts of the vulnerable adult's report that were inconsistent with additional evidence.

Under these circumstances, we cannot endorse the commissioner's credibility determination because it is based on inconsistent inferences drawn from the record, and because the commissioner failed to give reasons to explain this inconsistency. As a result, we must conclude that the commissioner's decision lacks "reflective findings" and does not show that the commissioner engaged in the "reasoned decisionmaking" necessary to uphold the determination of maltreatment and resulting disqualification. *Cable Commc'ns Bd.*, 356 N.W.2d at 669. We further agree with the ALJ that the investigation was flawed because it relied heavily on the vulnerable adult's recollections, which could not be substantiated.

We therefore conclude that the commissioner's determination is unsupported by substantial evidence and that respondent failed to prove by a preponderance of the evidence that relator was responsible for the maltreatment of the vulnerable adult. We reverse the commissioner's determination of maltreatment, as well as relator's disqualification on the ground that he committed serious maltreatment.

Reversed.