



The administrative law judge (ALJ) Shawn A. Bozarth, Esquire, found after a hearing that A.S. is the paternal uncle of R.M., born November 21, 1990, who enjoyed a close relationship with A.S. and T.S. (his wife) until January 2005. R.M. lived with her mother, C.M., her stepfather and her sister, and she frequently spent days and vacations with A.S. and his family. On December 31, 2004, R.M. was watching television with A.S. and T.S. at their home. She fell asleep leaning against A.S. on the couch but woke up when she felt A.S.'s hand reach inside her pants attempting to fondle her vaginal area. Pretending to be asleep, she rolled onto her side to maneuver away from A.S. When A.S. touched her again, R.M. stood up and went to the bathroom; T.S. was asleep on another couch during this time. R.M. remained at A.S.'s house the next day and returned home on January 2, 2005. On January 3 or 4, 2005, T.S. phoned R.M.'s mother, C.M., inquiring how R.M. was doing and stating that she had something to disclose to C.M. but not over the phone. That evening R.M. told C.M. about the fondling incident on December 31; C.M. reported child abuse to the state police, which made a referral to Cumberland County Children and Youth Services (CYS).

R.M. was first interviewed by State Trooper George Kelly, then later by Denise Dunlap, who investigated the incident on behalf of CYS. R.M.'s account of the events related to Dunlap and Trooper Kelly was consistent. Dunlap did not interview A.S. or T.S. because of preconditions attached to the interview by A.S.'s attorney including a polygraph test for R.M. Dunlap recommended that the case be indicated for child abuse based on R.M.'s account to Dunlap and Trooper Kelly. A.S. requested expunction of the report but DPW denied. Following a hearing, the ALJ recommended denial of A.S.'s appeal.

The ALJ in his adjudication stated that, pursuant to 55 Pa. Code §3490.4, sexual abuse of a minor child requires substantial evidence showing "[a]n

act or failure to act by a perpetrator which causes ... sexual abuse or exploitation of a child." The ALJ credited testimony of R.M., her mother, C.M., Dunlap and Trooper Kelly but discredited testimony of A.S. and T.S. He reasoned as follows:

The Appellant and his niece, R.M., enjoyed a close relationship.... That relationship came to an abrupt end after January 2, 2005. R.M. clearly indicates that the cause of this rift was a single incident of touching or attempted touching of her genitals by the Appellant while she was half-asleep on New Year's Eve 2005 [sic].

The Appellant could not explain why this rift occurred, other than to accuse R.M. of lying and to deny the abuse occurred. However, the evidence undercuts the Appellant's explanation, because it is empty of any circumstances why R.M. would suddenly lie about something so serious, involving someone to whom she was so emotionally attached. R.M.'s explanation that she was abused and the abuse ended a rich relationship ... makes the sudden end understandable. The Appellant's explanation makes no such sense.

The Appellant has denied the touching occurred from the beginning and both he and his wife, T.S., related the same identical account about what occurred. R.M. fell asleep on the loveseat and not the couch ... and was moved by the Appellant when he awaked to use the bathroom. These details are too conveniently identical as to appear made up to contest or rebut every aspect of R.M.'s testimony about the abuse.

In this light, Trooper Kelly's testimony is significant that the Appellant and R.M. concur on all the details ... except the events in late afternoon, when the sexual abuse occurred....

T.S. revealed some of the depth of anger, at what she and the Appellant perceived as R.M.'s lies about what occurred on New Year's Eve 2005 [sic]. She tore up a picture [sic] the Appellant and T.M.[sic], taken on January 2, 2005. (May 31, 2007 N.T.-97-98).

...

Both the Appellant and R.M. testified to how the abuse allegations tore their family apart. ... Such

emotion is a ground to doubt credibility and most of the emotion accrued to the Appellant and to T.S., and to doubt that the Appellant and T.S. only talked about it "once or twice, two or three times since this has been going on." (May 31, 2007, N.T.-104).

The telephone conversation ... between C.M. and T.S. corroborates the existence of the sexual abuse. T.S. phoned to ask in effect, "Is R.M. O.K.?" "I have something to tell you, but I can't right now." T.S.'s quotes leave the impression that that something was the sexual abuse, as described by R.M. Of course, T.S. denied this conversation ever occurred, but her denial is not credible in light of her statement that she would do anything to help her husband.

R.M. disclosed the abuse on the same day, after this telephone conversation, relating to her mother the same details and incident of abuse that she later did consistently to Ms. Dunlap, to Trooper Kelly, and at the hearing.

Setting aside the telephone conversation of T.S. and C.M., the lack of follow up contact by T.S., or the Appellant after January 2, 2005, to ask what became of their close relationship with R.M., suggests that something happened. The only existing possibility is that the Appellant abused R.M. sexually, as she described.

ALJ Adjudication, pp. 9 - 10. The BHA adopted the recommendation to deny A.S.'s appeal, and DPW Secretary Estelle B. Richman upheld BHA's order. The final order of February 1, 2008 now under review provides, in part, as follows:

Credibility determinations are solved by the Fact Finder and cannot be disturbed on appeal. Winston v. DPW, 675 A.2d 372 (Pa. Cmwlt. 1996).

The testimony of the victim alone constitutes substantial evidence to support an indicated report of child abuse. G.S. v. DPW, 104 Pa. Cmwlt. 84, 521 A.2d 87 (1987).

In his brief, A.S. quotes *L.S. v. Department of Public Welfare*, 828 A.2d 480, 483 (Pa. Cmwlt. 2003): "The proper inquiry into whether an indicated report ... should be expunged or maintained is whether the report is accurate." On

appeal from a refusal to expunge an indicated report, DPW bears the burden of proving that a perpetrator's actions constitute child abuse within the meaning of the Law, and the evidence necessary to support a report is such evidence that so preponderates in favor of a conclusion that it outweighs in the fact finder's mind inconsistent evidence and reasonable inferences drawn from that evidence. *D.T. v. Department of Public Welfare*, 873 A.2d 850 (Pa. Cmwlth. 2003).<sup>2</sup> The Court in *D.T.* reaffirmed that a victim's testimony alone may constitute substantial evidence.

A.S. argues that DPW failed to prove the accuracy of the indicated report because no substantial evidence existed to show that the abuse occurred. CYS' investigation considered only R.M.'s version, which lacked corroborating evidence. Further, R.M.'s admissions as well as the testimony of her mother and Trooper Kelly support that the abuse did not occur. According to A.S., a victim's testimony does not constitute substantial evidence *per se*, and in *G.S.* there was no evidence contrary to the victim's testimony. Unlike in *G.S.* credible testimony exists to the contrary to show that R.M.'s accusation alone does not constitute substantial evidence. Trooper Kelly confirmed that A.S. denied the allegation in a call from R.M. when he did not know that others were listening; criminal charges against A.S. were dismissed; R.M. admitted wearing tight-fitting pants, making the alleged act unlikely; R.M. felt safe enough to accompany A.S. on errands the next day and chose to stay longer; a photograph taken the next day showed A.S. and R.M. as a happy pair; neither R.M. nor her mother sought counseling after the incident; her mother was unaware of rape crisis counseling that R.M. received; and

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<sup>2</sup>The Court's review in expunction proceedings is limited to determining whether constitutional rights were violated, whether errors of law were committed or whether necessary findings of fact are supported by substantial evidence. *R.P. v. Department of Public Welfare*, 820 A.2d 882 (Pa. Cmwlth. 2003).

no professional who interviewed R.M. recommended continued counseling. A.S. contends that the ALJ unreasonably inferred that the rift between A.S. and R.M. was caused by the abuse when a more likely cause is R.M.'s false accusation.

Next, A.S. entreats the Court to reverse the credibility determinations. Without citation, A.S. asserts that credibility determinations are necessary findings that must be supported by substantial evidence, and he argues that substantial evidence does not support the findings that A.S. and T.S. were not credible. No evidence was introduced to impeach the credibility of A.S. or T.S. The ALJ's credibility determinations were based on testimony that was quoted out of context, and he found that the testimony of A.S. and T.S. appeared to be fabricated because they presented details that were too nearly identical. Based on his version of what occurred A.S. posits that the ALJ abused his discretion by recasting truthful corroborative testimony as fabrication simply because he felt that it was untrue. Moreover, the ALJ quoted T.S.'s testimony out of context because he omitted its subsequent qualification in the redirect examination that followed:

Q: Now, the question was also asked, you're protective of your husband and you would do anything to help him. Does that include lying for him?

A: No, I will not lie for him, no.

N.T., p. 108. This statement by T.S. remains unrefuted, and the ALJ's omission of it is disingenuous. He also omitted Trooper Kelly's testimony that A.S. denied the abuse allegation to R.M., which infers that A.S. is telling the truth. Therefore, the Court should reverse the credibility determinations as to T.S., who testified that no abuse occurred nor could it have occurred without her knowledge.

The Court has reviewed the record and concludes that DPW did not err in denying expunction of the indicated report of child abuse in this case. The ALJ credited R.M.'s testimony, which alone constitutes substantial evidence to

support the report. *D.T.; G.S.* The ALJ discredited A.S.'s testimony, where he remained silent as to why R.M. would falsely accuse him and made no attempt to discuss the abrupt rift in his relationship with R.M. The ALJ also discredited T.S.'s testimony, where she testified that she would do anything to help her husband and the details of the events recalled by her appeared to be concocted solely to refute R.M.'s account. A.S.'s argument that R.M.'s false accusation caused the rift fails to attribute any motive for the accusation. The fact finder has sole authority to make these credibility determinations, which cannot be disturbed. *Winston*.<sup>3</sup> As for the contention that the record might support a contrary conclusion, the Court notes that Trooper Kelly's testimony adds nothing to enhance the veracity of A.S. and that his counsel restricted his access to be interviewed. Also, viewed in its entirety, the record shows that the ALJ did not quote the testimony of T.S. out of context.

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DORIS A. SMITH-RIBNER, Judge

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<sup>3</sup>DPW did not file a brief, but CYS filed one as Intervenor. CYS states that the indicated report showed no deficiency and does not include an interview with A.S. because he refused; under 55 Pa.Code §3490.55(d), Dunlap was required to interview A.S. only "if possible." Quoting *G.W.K. v. Department of Public Welfare*, 558 A.2d 151, 153 (Pa. Cmwlth. 1989), it also states that "[t]he deficiencies, if any, in CYS' investigation and report do not preclude the hearing officer from considering the investigation and report in the first instance." Lastly, it emphasizes that a different standard of proof in criminal matters applies and that the dismissal of A.S.'s criminal charges does not negate the findings of the ALJ. See *Gomez v. Department of Public Welfare*, 533 A.2d 826 (Pa. Cmwlth. 1987) (holding that indicated report was supported by substantial evidence notwithstanding acquittal on criminal charges from the same incident).

