

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CARLA SMITH,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,
Respondent.

No. 40474-5-II

UNPUBLISHED OPINION

Van Deren, J. — Carla Smith appeals the Washington State Department of Social and Health Services' (DSHS) Board of Appeals's affirmation that she abused her son, D,¹ when she unintentionally struck him on the face. Smith argues that she did not commit child abuse because she accidentally struck her son on the face and, for an act to be considered child abuse, WAC 388-15-009(1) requires nonaccidental physical injury. Because the parties stipulated that Smith unintentionally caused injury to D's face, we reverse the finding of abuse and remand for dismissal.

FACTS

Smith is D's mother. On May 6, 2008, D went to school with a swollen lip and a four

¹ We use D's initial instead of his full name to protect his privacy.

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inch red mark on his face that extended from his mouth to his hairline. D told the counselor that Smith had been hitting him on his bottom and legs with a belt and, when he moved, she slipped, hitting him on the face.

The counselor reported the injury to DSHS. DSHS Child Protective Services Investigator Kelly Boyle interviewed D at his elementary school and also met with Smith. Smith explained that she intended to hit D on his bottom but accidentally struck him on the lip and face when he moved. On May 8, Boyle visited Smith's home and observed that the mark on D's face was beginning to fade but was still visible. D's injury did not require medical care, and he suffered no permanent injuries.

On June 10, DSHS sent Smith a letter informing her that it had made a determination that the abuse allegation of D was founded. Smith asked DSHS to review its decision and, on August 23, Smith received a second letter from DSHS that affirmed its previously founded finding of child abuse.

Smith then requested a hearing before the Washington State Office of Administrative Hearings to contest DSHS's finding. The parties submitted the matter to an administrative law judge (ALJ) without a hearing and relied on their stipulation and agreed request for issuance of a decision on the pleadings. The stipulation stated that, "The parties are in agreement that [Smith] did not intend to cause the injuries to [D's] face, that there were no permanent injuries such as a scar, that the injury did not require hospitalization or medical care, and the marks were resolved and healed within a week." Admin. Record (AR) at 48. Moreover, it stated that Smith "acknowledged that she struck her son with a belt on May 5, 2008, that she intended to spank him on his bottom, and that she had accidentally struck him in the lip and face when he moved." AR

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at 47.

The ALJ issued an initial order affirming DSHS's abuse finding. Smith then petitioned the DSHS Board of Appeals (Board) for review and the Board issued a final order affirming DSHS's finding.

Smith filed a petition for review of the final order in Thurston County Superior Court on July 9, 2009. The trial court affirmed DSHS's finding of abuse or neglect. Smith appeals.

ANALYSIS

Smith argues that the Board erred in issuing a final order affirming DSHS's finding of child abuse based on its interpretation of WAC 388-15-009(1).² Specifically, Smith contends that she accidentally hit D in the face; thus, her action did not constitute a "nonaccidental infliction of physical injury" as required by WAC 388-15-009(1).

I. Standard of Review

We sit in the same position as the superior court when reviewing an agency action. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). We grant relief from an agency order in an adjudicative proceeding if we determine that the agency has erroneously interpreted or applied the law. RCW 34.05.570(3)(d). Smith has the burden of demonstrating the invalidity of the final order. *See* RCW 34.05.570(1)(a). "On issues of law, we apply the error of law standard of review, permitting us to substitute our judgment for that of the administrative body; however, we accord substantial weight to the agency's view of the law it administers." *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 914

² Smith assigns error only to the trial court's failure to reverse the Board's abuse finding. But we review the final decision of an administrative agency on the administrative record, and disregard any findings or conclusions the superior court entered. *See Fisher v. Emp't Sec. Dep't*, 63 Wn. App. 770, 772-73, 822 P.2d 791 (1992).

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P.2d 750 (1996) (quoting *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352 (1995)).

II. Abuse Finding

We interpret statutory and administrative code provisions to ascertain and give effect to their underlying policy and intent. *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). We look first to the provision's language to determine its underlying intent. *Cannon*, 147 Wn.2d at 56. "If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone." *Cannon*, 147 Wn.2d at 56.

DSHS promulgated WAC 388-15-009 under the statutory authority of RCW 74.04.050, RCW 74.08.090, RCW 74.13.031, RCW 74.04.050, chapter 26.44 RCW and Laws of 2005, ch. 512. Chapter 26.44 RCW addresses child abuse.

"Abuse or neglect" means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding [lawful physical discipline] under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child.

RCW 26.44.020. Further, "the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child." RCW 9A.16.100.

The Washington Administrative Code defines "physical abuse" as

the *nonaccidental* infliction of physical injury or physical mistreatment on a child. Physical abuse includes, but is not limited to, such actions as:

- (a) Throwing, kicking, burning, or cutting a child;
- (b) Striking a child with a closed fist;
- (c) Shaking a child under age three;
- (d) Interfering with a child's breathing;
- (e) Threatening a child with a deadly weapon;
- (f) Doing any other act which is likely to cause and which does cause

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bodily harm greater than transient pain or minor temporary marks or which is injurious to the child's health, welfare or safety.

WAC 388-15-009(1) (emphasis added). WAC 388-15-009(2) states, "Physical discipline of a child, including the reasonable use of corporal punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child."

The rule at issue is "clear on its face." *Cannon*, 147 Wn.2d at 56. WAC 388-15-009(1) defines physical abuse as the "nonaccidental infliction of physical injury." Thus, under the rule's plain language, the act of inflicting physical injury must be nonaccidental. Here, although DSHS stipulated to Smith's unintentional injury to her son, it argues that she caused a "nonaccidental infliction of physical injury" under WAC 388-15-009(1). We reject DSHS's attempt to distinguish between the definitions of unintentional and nonaccidental and assert that child abuse occurs when a parent unintentionally injures a child while applying discipline that is not found to be unreasonable or immoderate. RCW 9A.16.100; WAC 388-15-009(2).

The fact that Smith did not intend to cause D's injuries was undisputed. An "accidental injury" is an "injury occurring as the unforeseen and chance result of a voluntary act." Webster's Third New International Dictionary 11 (1993). Here, Smith hitting D's face was an accidental injury occurring as the unforeseen and chance result of a voluntary act. Contrary to DSHS's position, D's injury cannot be both unintentional and nonaccidental for purposes of the abuse finding. Although Smith intended to discipline D by spanking D on his buttocks with a belt, the Board did not find that her intended act of physical discipline constituted abuse. Instead, the Board determined that the unintentional infliction of physical injury was nonaccidental. But D's

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unintended injury was not “nonaccidental.”

We accord substantial weight to DSHS’s view of the law it administers. *See William Dickson Co.*, 81 Wn. App. at 407. DSHS is required to investigate reports of alleged child abuse and to determine whether alleged incidents meet the definitions of child abuse or neglect. RCW 74.13.031; RCW 26.44.050; WAC 388-15-017. Here, DSHS interpreted and agreed that Smith’s act was unintentional for purposes of the administrative hearing, yet now claims it was nonaccidental, without providing a definition of “nonaccidental” that means anything other than not accidental or unintentional. There being no dispute that Smith did not intend to hit her son in the face while disciplining him, the Board’s order cannot be sustained by reliance on a nonaccidental injury. To have done so constitutes an error of law in interpreting and applying the law defining abuse, i.e., the act must be nonaccidental.

Further, our interpretation of the rule is sensible and rational. If DSHS believes and agrees that the parent unintentionally inflicted an injury when disciplining a child using reasonable and moderate means, it makes no sense to subject the parent and child to an administrative hearing process claiming that the injury was nonaccidental. To do so would undermine the respect due to DSHS and overburden it and to subject parents to an unreasonable intrusion of their family.

Smith accidentally struck her son in the face while in the process of disciplining him. We hold that the Board erred by issuing a final order affirming DSHS’s finding that Smith

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committed child abuse as a result of this discipline and reverse the abuse finding and remand for dismissal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

I concur:

Johanson, J.

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Penoyar, C.J. (concurrency) — Smith struck her son with a belt in an attempt to discipline him. As he attempted to pull away, she continued to strike him with the belt. Her strikes were deliberate, nonaccidental acts. But the resulting injury from these deliberate acts was accidental. Put simply: nonaccidental acts, accidental injury. To support its finding of “nonaccidental infliction of physical injury,” under WAC 388-15-009(1), DSHS merged Smith’s deliberate acts and their accidental effects. Such a reading might well have the palliative effect of protecting children from the ill-advised acts of their parents, whether it be risky play, roughhousing, or inordinate physical discipline. But the rule’s language does not support such a reading. Instead, the language suggests that it is the *effect* of the parent’s act—the “infliction of physical injury”—that must be nonaccidental. WAC 388-15-009(1). Under the current rule, a parent’s deliberate act cannot support a finding of child abuse absent the parent’s intent to inflict physical injury. Although Smith exercised poor judgment, there is no evidence that she intended to inflict “physical abuse” as the rule defines that term. WAC 388-15-009(1). Accordingly, the facts do not support DSHS’s finding of abuse.

Penoyar, C.J.