COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2215 **Cir. Ct. No. 2008CV13710**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

FELECIA WILLIAMS,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES AND WISCONSIN DEPARTMENT OF ADMINISTRATION, DIVISION OF HEARINGS AND APPEALS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Felecia Williams appeals from a circuit court order affirming a decision issued by the Wisconsin Department of Administration,

Division of Hearings and Appeals ("Division") that upheld the determination of the Wisconsin Department of Children and Families ("Department") that Williams, a treatment foster care parent, neglected children in her care. We affirm.

BACKGROUND

¶2 Williams was a licensed treatment foster care parent. In May 2007,[1] she had multiple children in her care, including her biological children and foster children. On May 18, Williams reported to the foster care agency that one of her foster children, fourteen-year-old D.R., had inappropriately touched two young children in her home, ages three and five years old. An independent investigation into the incident, including Williams's role as a foster parent, was initiated.[2]

¶3 On May 25, a foster child in Williams's care, eleven-year-old D.S., fell from a tree, causing a laceration to his right leg. D.R. called 911 and the paramedics arrived. Williams arrived home to find the paramedics present. An ambulance transported D.S. to the hospital for treatment while Williams drove separately to the hospital with the other children in her care.

¶4 At the hospital, D.S. received six stitches. Williams picked up D.S. from the hospital "45-60 minutes after his arrival." Williams was given a

[1] All references to May and June are to May and June of 2007.

[2] When a caregiver of children is alleged to have abused or neglected a child, WIS. STAT. § 48.981(3)(c)4. (2007-08) requires an investigation of the allegation to determine "whether abuse or neglect has occurred or is likely to occur." *See* ***id.*** The result of the investigation is a finding that the allegation is substantiated or not substantiated.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

prescription for antibiotics for D.S. to take four times a day for seven days. Williams was also instructed to have the stitches removed in ten days, which would have been June 4. It is undisputed that Williams did not fill the prescription until May 28 and that the stitches were not removed until June 11, when a social worker took D.S. to the doctor to have them removed. An investigation into this incident was combined with the investigation of the alleged touching incident.

¶5 The investigation led to the substantiation of claims that Williams: (1) neglected D.S. when she ignored his medical needs by not immediately filling a prescription for antibiotics and not ensuring that his stitches were removed as directed; and (2) neglected D.S. and D.R. by failing to properly supervise them.[3] Williams sought an administrative hearing before the Division.

¶6 At the hearing, investigator Traci Sobstad, social worker Tammy Wagnitz and Williams all testified. Williams objected to the introduction of Sobstad's nineteen-page written report, which Williams alleged was itself hearsay and also contained hearsay. The administrative law judge ("ALJ") admitted the report and said that it would consider the report's weight when it made its final decision. In its written decision, the ALJ concluded that the report was admissible under WIS. STAT. § 908.03(6) as a "[r]ecord[] of regularly conducted activity." *See* ***id.*** The ALJ added: "However, I would also state that the use of this report was incidental as the main facts of the case are either uncontested and/or determined by the direct testimony presented at the hearing."

[3] Another substantiated claim was that there had been sexual contact between D.R. and one of the younger children, which Williams reported to the agency. However, the administrative law judge found that Williams "had no fault with respect to this situation." That claim is not at issue on appeal and will not be addressed.

¶7 The ALJ concluded that Williams had neglected foster children in her care, in violation of WIS. STAT. § 48.981(1)(d), "due to a lack of supervision and lack of an appropriate level of medical care of the foster children in her care." Williams sought review in the circuit court. The circuit court affirmed and this appeal follows.

STANDARD OF REVIEW

¶8 On appeal, we review the administrative agency's decision, not that of the circuit court. ***Trott v. DHFS***, 2001 WI App 68, ¶4, 242 Wis. 2d 397, 626 N.W.2d 48. We will uphold an agency's factual findings if they are supported by substantial evidence. ***Krahenbuhl v. Wisconsin Dentistry Examining Bd.***, 2006 WI App 73, ¶18, 292 Wis. 2d 154, 713 N.W.2d 152; *see also* WIS. STAT. § 227.57(6).[4]

¶9 "When we review an administrative agency's interpretation or application of a statute, we apply one of the following: great weight deference, due weight deference, or no deference." ***DaimlerChrysler Serv. N. Am. LLC v. DOR***, 2006 WI App 265, ¶6, 298 Wis. 2d 119, 726 N.W.2d 312. Specifically:

> We give great weight deference to the agency's interpretation when all of the following conditions are met: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the agency's interpretation

[4] WISCONSIN STAT. § 227.57(6) provides in relevant part:

> If the agency's action depends on any fact found by the agency ... the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

> is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. When we give great weight deference to the agency's interpretation, we will sustain a reasonable agency conclusion even if an alternative conclusion is more reasonable.
>
> We give due weight deference when the agency has some experience in an area, but has not developed the expertise that necessarily places it in a better position than a court to make judgments regarding the interpretation of the statute. When we give due weight deference to the agency's interpretation, we will not overturn a reasonable agency decision unless we determine that there is a more reasonable interpretation available.
>
> We give no deference to an agency interpretation when any of the following is true: (1) the issue before the agency is clearly one of first impression; (2) a legal question is presented and there is no evidence of any special agency expertise or experience; or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance.

Id., ¶¶7-9 (citations omitted).

¶10 The Department argues that due weight deference is appropriate. It explains:

> The decision under review was issued by the Division of Hearings and Appeals of the Wisconsin Department of Administration ("DHA"), rather than by [the Department]. [The Department] derives its authority to administer the provisions of Wis. Stat. ch. 48 under Wis. Stat. § 48.02(4). Under prior law, however, the Legislature had delegated the authority to administer the provisions of Wis. Stat. ch. 48, regarding children, to the Wisconsin Department of Health and Family Services (("DHFS") now known as the Wisconsin Department of Health Services). *See*, 2007 Wis. Act 20, effective July 1, 2008 and Wis. Stat. § 48.02(4) (2008). DHA's authority to render the decision at issue is derived from Wis. Stat. § 227.43(1)(by) and (2)(d) (2008) and Wis. Admin. Code § HA 1.01(2). *See also*, former Wis. Stat. § 227.43(1)(bu) (2008) and Wis. Admin. Code § HA 1.01(2). Pursuant to that authority,

> DHA has rendered numerous decisions over the course of time on behalf of both [the Department] and DHFS.

The Department argues that consistent with the Wisconsin Supreme Court's examination of the deference owed to the Division of Hearings and Appeals in ***Racine Harley-Davidson, Inc. v. Wisconsin Division of Hearings and Appeals***, 2006 WI 86, ¶¶53-56, 292 Wis. 2d 549, 717 N.W.2d 184, this court should apply the due weight deference standard to the ALJ's legal decisions.

¶11 Williams did not suggest otherwise in her opening brief, and she has not responded to the Department's argument in her reply brief. We consider this to be a concession that due weight deference is appropriate, *see* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted), and we will apply that legal standard.

DISCUSSION

¶12 Williams argues that Sobstad's report should not have been admitted because it does not qualify as a hearsay exception under WIS. STAT. § 908.03(6). She also argues that the ALJ relied on inadmissible hearsay in determining that substantial evidence supported its findings and conclusions. Finally, Williams contends that the facts do not support a finding that she committed supervisory or medical neglect. We consider each issue in turn.

I. Admission of the written report.

¶13 Although the ALJ concluded that the report qualifies under the hearsay exception outlined in WIS. STAT. § 908.03(6), the Department does not

support that conclusion on appeal. We agree with the Department and Williams that the report does not fall within § 908.03(6).

¶14 The Department also notes, however, that the fact that the report contains hearsay does not render it inadmissible at an administrative hearing. Again, we agree. In ***Gehin v. Wisconsin Group Insurance Board***, 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572, the court recognized that "[a]s to admissibility of evidence, an agency or hearing examiner is not ordinarily bound by common law or statutory rules of evidence." ***Id.***, ¶49 (citing WIS. STAT. § 227.45(1)). However, ***Gehin*** also held:

> [T]he relaxed evidentiary standard is not meant to allow the proceedings to degenerate to the point where an administrative agency relies only on unreliable evidence. The courts are required, under [WIS. STAT.] § 227.57(6), to "set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence."

Gehin, 278 Wis. 2d 111, ¶51 (quoting § 227.57(6)). ***Gehin*** reaffirmed the long-standing rule "that uncorroborated hearsay alone does not constitute substantial evidence," a rule which "prohibits an administrative agency from relying *solely* on uncorroborated hearsay in reaching its decision." ***Id.***, ¶56.

¶15 The parties agree that these principles control in this case. The issue before us, then, is whether the ALJ's findings and conclusions were based on uncorroborated hearsay. At the outset, we recognize that the ALJ itself indicated that the "report was incidental as the main facts of the case are either uncontested and/or determined by the direct testimony presented at the hearing."

II. Williams's challenges to the factual findings.

¶16 Williams challenges several of the ALJ's factual findings, asserting that they are not supported by substantial evidence. We consider each challenge in turn.

¶17 The ALJ found that on Friday, May 25, D.S. and D.R. "were riding their bikes unsupervised even though [D.R.] had been allegedly inappropriately touching the children." The ALJ also found that Williams "was not in the household when the accident occurred." Williams argues that these findings are contrary to Williams's testimony "that D.S. rode his bike with a different group of boys and that Ms. Williams watched the boys from an upstairs window." We are not convinced.

¶18 Williams's own testimony supports the ALJ's findings. Even if Williams sent the boys out to ride bikes with different groups of children and watched them from the window at some point, she did not testify that she kept them in her sight the entire time. Indeed, Williams testified that when she was preparing to leave the house to drive home some children she was babysitting, she "went to look for the boys," which included walking around the block to try to find them. As the ALJ noted, Williams returned to her home to find that D.S. "had fallen off a tree in an empty lot around the back of her house" and that D.R. "had already gone to the house to call 911 by the time she got there." Thus, it is undisputed that at some point, D.S. and D.R. were outside of Williams's supervision and that she was not home at the time of the accident. Williams's testimony is substantial evidence that supports the ALJ's findings.

¶19 Next, Williams challenges the ALJ's finding that when D.S. was sent to respite foster care on Sunday, June 3 (where he remained for one night),

Williams "did not send [D.S.'s] medications with him and did not instruct the respite worker to have his stitches removed the following day." With respect to the finding that Williams did not instruct the respite worker about the need to remove the stitches, Williams asserts that she told the respite provider "about the situation." However, Williams's own testimony refutes her suggestion that she informed the respite provider to have the stitches removed. Specifically, when asked if she told the respite worker whether D.S. needed to get his stitches removed, Williams testified, "No." While Williams subsequently testified that she informed the respite provider "of kind of what's going on," Williams never explicitly contradicted her testimony that she had not told the respite worker about the stitches. The ALJ's finding is supported by the evidence.

¶20 Williams also disagrees with the ALJ's finding that Williams did not give the respite worker D.S.'s antibiotics. Williams notes that she testified that she did so, and she asserts that "no competent evidence was offered to rebut" her testimony. We agree that there was no contrary testimony offered. However, the ALJ was not required to accept Williams's testimony, and there are reasons it may not have done so. First, Williams had difficulty remembering when D.S. went to respite care. She was not sure if he went to respite care two days after the accident or nine days after the accident.[5] Thus, the ALJ may have deemed Williams to be an unreliable witness as to the antibiotics issue.

[5] The report indicates that the first respite occurred nine days after the accident, on June 3. The parties allude to the fact that D.S. was returned from respite care after one night, and then shortly thereafter (two days later, according to Williams) he was permanently removed from the home, perhaps to respite care (which may explain the references to the "second respite"). The report does not indicate precisely when this second removal occurred.

(continued)

¶21 Second, after Williams testified that D.S.'s antibiotics "were sent with him to respite," her own attorney's next question was, "When was that though? Obviously that's the second respite. When did that happen?" The parties then discussed which Sunday was at issue: May 27 or June 3. Then Williams's attorney said: "You said, as far as you remember, you did send the—" and Williams interrupted to say, "I did send it *as far as I remember*." (Emphasis added.) Thus, Williams's own testimony suggested she was not positive if she gave the antibiotics to the caregiver the first time D.S. went to respite care.

¶22 For these reasons, we conclude that Williams's own testimony (including her uncertainty about her delivery of the medication) supports the ALJ's finding that Williams did not give the medication to the respite worker. But more importantly, even if this partial finding was not supported by the record, the ALJ's finding that Williams did not send the antibiotics along with D.S. for one night in respite care was not the only basis for its conclusion that Williams neglected to provide an appropriate level of medical care for D.S. The discussion section of the ALJ's decision discussed at length the fact that Williams failed to immediately fill the prescription (it was not filled for three days), and Williams's unpersuasive excuses as to why she failed to do so. It also noted that the stitches were seven days late in being removed, "despite the doctor's discharge instructions." Thus, the ALJ's ultimate conclusion did not hinge on the validity of its finding that Williams did not give the first respite provider the antibiotics.

Williams initially testified that D.S. went to respite care two days after his accident, which would have been May 27. However, when the ALJ pointed out that she could not have sent the antibiotics with D.S. to respite care on May 27 because the prescription was not filled until May 28, Williams said the respite care must have occurred the next Sunday, on June 3.

III. Williams's challenges to the ALJ's legal conclusions.

¶23 Williams argues that the ALJ "erroneously applied a heightened standard of care and failed to require a finding that [D.S.'s] physical health was seriously endangered as required by the statute." (Capitalization omitted.) Specifically, she contends that she did not commit supervisory neglect or medical neglect within the meaning of WIS. STAT. § 48.981(1)(d),[6] which provides the following definition of the word neglect: "'Neglect' means failure, refusal or inability on the part of a caregiver, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." Williams argues that the ALJ misinterpreted the statute "to permit a finding of neglect based on proof of unwise or irresponsible behavior alone." We disagree with Williams's characterization of the ALJ's decision.

¶24 At issue is the ALJ's application of WIS. STAT. § 48.981(1)(d), which is part of WIS. STAT. ch. 48, known as "The Children's Code." *See* WIS. STAT. § 48.01. As noted above, we will apply due weight deference to the ALJ's interpretation of the statute.

A. Supervisory neglect.

¶25 Williams argues that she did not commit supervisory neglect (in other words, fail to provide "necessary care") under WIS. STAT. § 48.981(1)(d) "because there is no evidence [she] ever left the young men home alone," and "[i]t

[6] WISCONSIN STAT. § 48.981(1)(d) was recently renumbered WIS. STAT. § 48.02(12g). *See* 2009 Wis. Act 185 § 86 (eff. March 30, 2010). Because the ALJ's decision was issued prior to that renumbering, we continue to refer to § 48.981(1)(d) in this decision.

is not neglect to permit an [eleven-year-old boy] to go out riding his bike in the neighborhood with a group of friends." (Capitalization omitted.) Williams explains that "[t]here was nothing inappropriate about allowing the two boys to go outside and play with the neighbor boys at the same time," and notes that "no guardian of an 11-year-old can be expected to know that young man's exact location all the time."

¶26 The ALJ concluded that Williams's level of supervision was not sufficient because D.R. "was not supposed to be left home alone with the other children because of the sexual acting out allegations." It explained:

> [Williams] asserted that she believed the allegations against [D.R.] to be true, even if the child denied it. But despite her beliefs, she continued to allow [D.R.] to be alone with [D.S.] unsupervised. The record is uncontested in that the children were riding their bikes unsupervised and that [Williams] did not know where the children were the day that [D.S.] fell off the tree.

Further, the ALJ was not persuaded by Williams's testimony that she was unclear about the need to monitor the interactions of D.R. and D.S., as opposed to just D.R.'s interactions with the younger children. The ALJ concluded:

> Petitioner's conduct shows a consistent pattern [of] disregard of her responsibilities as a foster parent and her assumptions that someone else should take care or tell her how to take care of the situation. Even if she was not given a written plan outlining [D.R.'s] supervision, the allegation that the child had sexual contact with the children—whether or not it occurred—should have been sufficient to raise the level of supervision that petitioner had to closely monitor all interactions that the child had with the other children in her care, without any need for specific directions from the foster care agency. Petitioner's failure to closely monitor the children in her care given the potential for sexual abuse was neglect.

¶27 We conclude that the ALJ reasonably interpreted WIS. STAT. § 48.981(1)(d), concluding that necessary care in this case required closer supervision of D.R., and that there is not "a more reasonable interpretation available." *See* ***DaimlerChrysler***, 298 Wis. 2d 119, ¶8. The issue before the ALJ was not whether any eleven-year-old boy could ride his bike alone. The issue was whether Williams properly supervised interaction between D.S. and D.R. after she herself notified the social workers that two young children had alleged that D.R. inappropriately touched them, and after the social workers told her that D.R. needed greater supervision. It was appropriate for the ALJ to consider the special supervisory needs of both D.S. and D.R. *See* WIS JI—CHILDREN 250 ("'Necessary care' means that care which is vital to the needs and the physical health of the child.... In determining what constitutes necessary care, [the jury] may consider all of the facts and circumstances bearing on the child's need for care, including his or her age, physical condition, and special needs.").[7] Under these facts, we will not reverse the ALJ's conclusion that Williams's lack of supervision (which did, in fact, lead to D.R. and D.S. playing alone in the yard) constituted neglect under § 48.981(1)(d).

[7] WISCONSIN JI—CHILDREN 250 is the jury instruction used in CHIPS cases when the State alleges that a child is in need of protection or services because he or she has been neglected. Williams relies on this jury instruction because the definition of neglect offered in WIS. STAT. § 48.13(10) is virtually identical to that provided in WIS. STAT. § 48.981(1)(d). Section 48.13(10) provides a basis for a CHIPS order where the child's "parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child."

B. Medical neglect.

¶28 Williams argues that she "did not commit medical neglect under WIS. STAT. § 48.981[(1)](d) because D.S.'s physical health was never in serious danger." (Some capitalization omitted.) She argues that there is not neglect as defined by § 48.981(1)(d) "every time a guardian fails to meet a generalized standard of care-giving (such as always following a doctor's directions exactly). Instead, it must be shown that the guardian's failure to follow a doctor's directions seriously endangered the child in a way that is more than just hypothetical." She points to WIS JI—CHILDREN 250, which states in relevant part:

> The physical health of the child is "seriously endangered" if the failure to provide care creates a significant risk that the child will be seriously harmed or injured. However, actual harm or injury need not have occurred. In determining whether the physical health of the child was seriously endangered, you may consider the natural and probable consequences of the failure to provide care. You may also consider the nature of any possible harm to the child and the level of risk that a particular harm will occur.

Williams also cites ***In the Interest of A.E.***, 163 Wis. 2d 270, 471 N.W.2d 519 (Ct. App. 1991), where we approved the jury instruction language for WIS. STAT. § 48.13(10) that defined the statutory term "seriously endanger" as: "'potential harm to the child,'" and where we noted that "[a]ctual physical injury need not occur for the child to be seriously endangered; it is sufficient that such harm could happen except for the intervention of others." *See* ***A.E.***, 163 Wis. 2d at 274-75 (quoting WIS JI—CIVIL 7030). In approving the jury instruction, we rejected the parent's argument that the term "seriously endanger" referred to past conduct. *See* ***id.*** Noting that there were "no Wisconsin cases construing the 'seriously endanger' language of the statute or the jury instruction," we cited a dictionary

that defined "endanger" as "'to bring into danger or peril of probable harm.'" *See* ***id.*** (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 748 (1976)).

¶29 Relying on the definitions of neglect described in WIS JI—CHILDREN 250 and ***A.E.***, Williams asserts that there was no evidence "that D.S. was ever in any real danger of physical harm by Ms. Williams' inability to pick up the prescription until after the weekend or her decision not to follow-up with D.S.'s new caregiver concerning his stitches." Thus, she concludes, "[w]ithout such evidence, the ALJ erred in concluding that Ms. Williams committed medical neglect."[8]

¶30 We are not convinced that the ALJ's conclusion is in error. As WIS JI—CHILDREN 250 states, it is not necessary that the child was actually harmed by the failure to administer medical care. At issue is whether Williams's failure to timely provide the prescribed medicine created a significant risk that D.S. would be seriously harmed or injured. *See* ***id.*** The ALJ concluded that where D.S. was given six stitches, prescribed antibiotics to be taken four times a day for seven days and was to have the stitches removed in ten days, Williams's three-day delay in administering the antibiotics and the seven-day delay in removing the stitches constituted medical neglect. Thus, the ALJ implicitly concluded that Williams's failure to provide necessary medical care created a significant risk that D.S. would be seriously harmed or injured. *See* ***id.*** This conclusion is reasonable and we will

[8] To the extent Williams is implicitly arguing that expert testimony was required to demonstrate the level of physical risk to which the child was subjected, we reject her argument as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (We need not address undeveloped arguments.).

not overturn it because we are unconvinced "that there is a more reasonable interpretation available." *See* ***DaimlerChrysler***, 298 Wis. 2d 119, ¶8.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.