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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0995**

In the Matter of  
the Temporary Immediate Suspension  
of the Family Child Care License  
of Samantha Stone.

**Filed April 28, 2009  
Reversed  
Hudson, Judge**

Minnesota Department of Human Services  
OAH Docket No. 4-1800-19490-2

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Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Worke, Judge.

## **UNPUBLISHED OPINION**

**HUDSON, Judge**

On certiorari appeal, relator challenges the temporary immediate suspension of her childcare license by respondent Minnesota Department of Human Services (DHS). Because there is not substantial evidence to support DHS's determinations, we reverse the suspension of relator's license.

### **FACTS**

Relator Samantha Stone has been licensed to provide childcare services in Minneapolis since March of 2005. On February 7, 2008, Hennepin County Human Services & Public Health Department (county) recommended to respondent Minnesota Department of Human Services (DHS) the temporary immediate suspension of relator's license. The county's recommendation was based on an injury allegedly sustained by H.J., a toddler, while at relator's daycare on February 1, 2008.

When H.J. first arrived at daycare on February 1, relator did not notice anything unusual about H.J.'s physical condition or behavior. But after H.J. awoke from a nap, relator noticed that H.J. was making unusual movements with his right wrist and seemed to be favoring his right arm. When relator asked H.J. about his arm, he indicated that it was hurting him. Relator subsequently observed H.J. eating, drinking, and lifting a large toy without showing any signs of discomfort. But relator also noticed that, at times, H.J. held his right arm close to his body and was using only his left arm to lift himself off of the floor.

When H.J.'s mother picked H.J. up from daycare, relator told her that H.J. seemed to be favoring his right arm but said that she did not notice anything unusual happen to H.J. that day. At home, H.J. appeared to be favoring his right arm and there was swelling above his right elbow, but he did not seem to be experiencing any pain. The next morning, H.J. began to cry as he reached for a toy and his parents decided to take him to a pediatrician. H.J. was diagnosed as having a fracture in his right arm.

On February 3, 2008, H.J.'s mother told relator about H.J.'s arm fracture and asked whether anything had happened to H.J. at daycare that could have caused the fracture. Relator offered four possible explanations as to what may have caused the injury: another child may have fallen on H.J. on February 1; another child may have pulled H.J.'s arm; H.J. may have twisted his arm in a crib; or the injury could have been sustained while H.J. was at home. The last explanation was based on statements made by relator's mother, who claimed to have noticed H.J. favoring his arm when he arrived at daycare on the morning of February 1. Relator subsequently acknowledged that her mother was not at the daycare on the morning of February 1 and that there was no indication that H.J. was injured until after his nap.

On February 4, 2008, H.J. was taken to a pediatric surgeon. The surgeon expressed concerns that H.J. was physically abused and referred H.J. to the Midwest Children's Resource Center (MCRC). H.J.'s parents told MCRC staff about H.J.'s arm injury and about other injuries H.J. suffered while in relator's care. The MCRC director reported that H.J.'s arm fracture "as well as other numerous cutaneous injuries while in

[relator's] care make this case highly concerning for inflicted trauma.” MCRC proposed that H.J. have no further contact with relator and notified Child Protection Service.

On February 7, the county recommended to DHS the temporary immediate suspension of relator's license. In addition to information about H.J.'s arm fracture, the county's recommendation included information about a leg fracture allegedly suffered by H.J. while in relator's care on August 6, 2007. DHS initially declined to order a suspension of relator's license, but requested that the county submit additional information as it became available.

On February 12, 2008, the county renewed its recommendation of a temporary immediate suspension of relator's license. In its renewed recommendation, the county included a new complaint regarding relator's daycare. The complaint alleged that another child, H.A., suffered a “black eye” and a “fat lip” while in relator's care on August 22–23, 2007. After receiving the renewed recommendation, DHS issued a temporary immediate suspension of relator's license, finding that “the health, safety, and rights of [the] children in [relator's] care are in imminent risk of harm.”

Relator appealed the suspension and the matter was assigned to an administrative law judge (ALJ). At the hearing, the parties stipulated that the leg fracture suffered by H.J. in 2007 could not have occurred while he was in relator's care. Further, H.A.'s father testified that the “black eye” suffered by H.A. was only a coin-sized bruise on the corner of his eye, and that H.A.'s “fat lip” was similarly no more than a small bruise with “some swelling that was noticeable.” He also acknowledged that H.A.'s injuries were not

substantial enough to report at the time they occurred, and that he only filed a report of the injuries after talking to H.J.'s mother about H.J.'s injury.

Several doctors involved in the investigation and treatment of H.J.'s injury testified at the hearing. Dr. Mark Hudson from MCRC testified that the x-rays of H.J.'s arm indicate that the fracture occurred within five days from the day H.J. first sought medical treatment on February 2. But it was Dr. Hudson's "best medical opinion" that the fracture occurred on February 1 because H.J. had no symptoms of pain prior to waking from his nap on February 1.

Dr. Hudson stated that H.J. would not necessarily be crying hard from his injury; rather, the symptoms of pain for H.J.'s injury could include fussiness, irritability, and decreased movement. He also said that children "seem to do okay with those types of injuries and, in fact, their symptoms get hard to read." But he further testified that it was his "best medical opinion" that a child with a broken arm should have been "crying very hard and showing signs of pain immediately at the break."

Dr. Becky Carpenter from Children's Hospital testified that she could not localize the date of the injury. Instead, she said that the x-rays taken of H.J.'s arm on February 11 showed signs of healing, which means that the fracture would have occurred sometime between seven to fourteen days before the x-ray, a time frame that would have included the possibility that H.J. was injured prior to February 1. Dr. Carpenter also testified that at the time the fracture occurred, H.J. would have most likely cried significantly in response to great pain.

MCRC director Dr. Carolyn Levitt testified that arm fractures like the one suffered by H.J. are “quite painful” and that “the adult caring for [H.J.] at the time of the injury should have noticed his discomfort and painful cry.” Dr. Levitt later said that she did not believe that H.J.’s cry would necessarily be a “painful cry,” but that there would have been some form of crying at the time of the fracture. Dr. Levitt also agreed with Dr. Carpenter’s assessment of the x-rays and the injury timeline.

The ALJ held that the evidence did not establish that H.J.’s injury occurred while in relator’s care; instead, the evidence only suggested that H.J.’s fracture occurred between January 28 and February 1. The ALJ noted that, given the force required to cause H.J.’s injury, H.J. would have experienced great pain and cried out when the fracture occurred, and H.J. did not have any such reaction while in relator’s care on February 1.

The ALJ suggested that H.J. could have injured his arm on January 25, 2008, when H.J. fell off of a counter at home. Although H.J.’s mother said that she stopped H.J.’s fall and that there was no indication that H.J. suffered an injury from the fall, the ALJ concluded that the evidence raised the possibility that the fall on January 25 caused the fracture because H.J.’s mother’s recollection of the incident could have been inaccurate. The ALJ also stated that, based on Dr. Hudson’s testimony about children coping well with fractures like the one suffered by H.J., it was possible that H.J. was injured by the fall on January 25 but did not manifest any symptoms until February 1.

As a result, the ALJ held that DHS “failed to demonstrate reasonable cause to believe that physical abuse of H.J. occurred while the child was being served by

[relator's] family child care program.” Therefore, the ALJ recommended that DHS dismiss its temporary immediate suspension of relator's license.

On May 30, 2008, DHS affirmed its temporary suspension of relator's license. DHS stated that it was not alleging acts of abuse or neglect by relator. Rather, DHS was alleging that relator failed to supervise H.J. pursuant to Minn. R. 9502.0315, subp. 29a, which defines “supervision” as “being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child.” DHS said that the medical evidence was consistent with H.J. suffering an injury on February 1 and that relator could not provide a plausible explanation as to how H.J.'s injury occurred. DHS concluded that if relator was supervising H.J. as she was required to under Minn. R. 9502.0315, subp. 29a, relator would have known the source of H.J.'s injury.

As a result, DHS held that there was reasonable cause to believe that relator failed to comply with Minn. R. 9502.0315, subp. 29a. The failure to comply with an applicable rule subjects a license holder to a temporary and immediate license suspension under Minn. Stat. § 245A.07, subds. 2, 2(a) (2008), if the failure to comply “pose[s] an imminent risk of harm to the health, safety, or rights of persons served by the program.” DHS said that the complaints raised by the parents of H.J. and H.A., as well as other evidence in the record, are sufficient to show that relator's failure to supervise poses an imminent risk of harm to the children in her care.

This certiorari appeal follows.

## DECISION

### I

Relator challenges the temporary immediate suspension of her license. “Judicial review presumes the correctness of an agency decision.” *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006). The party challenging the agency’s decision bears the burden of proving that the decision was improperly reached. *City of Moorhead v. Minn. Pub. Utils. Comm’n*, 343 N.W.2d 843, 849 (Minn. 1984). We will sustain the agency’s decision if it is supported by substantial evidence and is not arbitrary and capricious. *Meuleners*, 725 N.W.2d at 123; Minn. Stat. § 14.69(e), (f) (2008). An agency’s ruling is

arbitrary and capricious if the agency: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) [made a decision that is] so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.

*White v. Minn. Dep’t of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Oct. 31, 1997).

“The standard of review is not heightened whe[n] the final decision of the agency decision-maker differs from the recommendation of the ALJ.” *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). “Although a reviewing court might reach a contrary conclusion to that arrived at by an administrative body, the court cannot substitute its judgment for that of the administrative body when the finding is properly supported by the evidence.” *Vicker v. Starkey*, 265

Minn. 464, 470, 122 N.W.2d 169, 173 (1963). We retain “authority to review de novo administrative interpretations of statutes, [but] an agency’s interpretation of a statute that it administers is entitled to deference.” *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007); *see also* Minn. Stat. § 14.69(d) (2008) (providing that we may reverse an agency’s decision if it is “affected by [ ] error of law”).

DHS determined that relator failed to supervise H.J. pursuant to Minn. R. 9502.0315, subp. 29a. In reaching its determination, DHS concluded that relator failed to provide a plausible explanation as to how H.J.’s injury occurred. According to DHS, if relator was properly supervising H.J., she would have known the source of H.J.’s injury. Therefore, relator’s failure to provide a plausible explanation for the injury was proof that relator was not properly supervising H.J. DHS’s determination subjected relator to a license suspension under Minn. Stat. § 245A.07, subds. 2, 2(a), if DHS could establish that relator’s failure to supervise posed “an imminent risk of harm to the health, safety, or rights of persons served by the program.”

While we defer to DHS’s interpretation of Minn. R. 9502.0315, subp. 29a, we note that DHS’s interpretation sets a very high standard for DHS to meet. If DHS posits that relator’s inability to adequately identify the source of H.J.’s injury is proof of relator’s failure to supervise, there must be substantial evidence that shows relator had the opportunity to observe and identify the injury. In other words, there must be substantial evidence that H.J.’s injury occurred while in relator’s care. The gravamen of relator’s challenge is that after the ALJ hearing, there was not substantial evidence to show that H.J. fractured his arm while in relator’s care on February 1. We agree.

Dr. Carpenter testified that she could not localize the date of the injury, but instead said that there was a seven- to fourteen-day time period within which the injury could have occurred. Dr. Levitt agreed with Dr. Carpenter's assessment of the injury timeline. Although Dr. Hudson stated that it was his "best medical opinion" that the fracture occurred on February 1, he also acknowledged that the x-rays of H.J.'s arm indicate that the fracture occurred sometime between January 28 and February 1. While the doctors' testimony suggests that H.J.'s injury *could* have occurred while in relator's care on February 1, it does not establish that that the injury *did* occur in relator's care on February 1, and DHS's interpretation of Minn. R. 9502.0315, subp. 29a, requires DHS to show that H.J.'s injury actually occurred on February 1 while in relator's care.

Further, while there was disagreement about the intensity with which H.J. would have cried at the onset of his injury, all three doctors testified that there would have been some crying in response to the pain of the fracture. Dr. Carpenter testified that at the time the fracture occurred, H.J. would have most likely cried significantly in response to great pain. Dr. Carolyn Levitt testified that the type of injury H.J. incurred is "quite painful," and although she did not believe that H.J.'s cry would necessarily be a "painful cry," there would have been some form of crying at the time of the fracture. While Dr. Hudson was equivocal on the matter, he did state that it was his "best medical opinion" that a child with a broken arm should have been "crying very hard and showing signs of pain immediately at the break."

But the record is completely devoid of any evidence that H.J. cried in response to pain while in relator's care on February 1. The complete lack of any such evidence

strongly suggests that H.J.'s injury did not occur in relator's care on February 1. As a result, there is not substantial evidence that H.J.'s injury was sustained while in relator's care. In turn, DHS's determination that relator failed to adequately supervise H.J. pursuant to Minn. R. 9502.0315, subp. 29a, is not supported by substantial evidence.

Relator further contends that there was not substantial evidence to show that she poses an imminent risk of harm to the children in her care. We agree. The county's initial recommendation was based upon H.J.'s arm fracture and the leg fracture allegedly suffered by H.J. while in relator's care on August 6, 2007. DHS declined to order a suspension of relator's license, which suggests that the county's allegations did not lead DHS to believe that relator posed an imminent risk of harm to the children in her care. It was not until the county renewed its recommendation and alleged that in 2007 another child, H.A., suffered a "black eye" and a "fat lip" while in relator's care that DHS issued a temporary immediate suspension of relator's license.

But after the ALJ hearing, there is not substantial evidence to show that H.J. fractured his arm while in relator's care on February 1, 2008. Moreover, the parties stipulated at the hearing that H.J. did not fracture his leg while in relator's care in 2007. After the ALJ hearing, therefore, H.J.'s injuries provide far less support for DHS's imminent-risk determination than they did when DHS initially declined to suspend relator's license.

Similarly, H.A.'s father testified that H.A.'s "black eye" and "fat lip" were only small bruises that were not substantial enough to report at the time they occurred. Thus, H.A.'s injuries were not as severe as the county originally alleged in its renewed

recommendation; thus, they provide less support for DHS's determination than they did when first considered by DHS. Accordingly, there was not substantial evidence to show that relator posed an imminent risk of harm to the children in her care.

Because there is not substantial evidence to support DHS's determinations, we reverse DHS's temporary immediate suspension of relator's license.<sup>1</sup>

**Reversed.**

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<sup>1</sup> Relator also asserts that DHS failed to consider other relevant facts. Because we reverse the suspension of her license, we do not consider relator's claim here.