

Circuit Court for Anne Arundel County
Case No. 02-C-14-185285

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2125

September Term, 2014

J.M.

v.

ANNE ARUNDEL COUNTY DEPARTMENT
OF SOCIAL SERVICES

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned)

JJ.

Opinion by Woodward, J.

Filed: August 4, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The instant case concerns a finding of indicated child neglect by the Anne Arundel County Department of Social Services (“the Department”), appellee, after three young children were left unsupervised in a locked car on a hot summer day in 2013. J.M., appellant, who is the mother of one of the children and the foster mother of the other two, challenged the Department’s finding at a hearing before an Administrative Law Judge (“ALJ”). The ALJ affirmed the Department’s finding and denied appellant’s motion for reconsideration. On November 6, 2014, the Circuit Court for Anne Arundel County affirmed the decision of the ALJ.

On appeal, appellant presents nine questions for our review, which we have rephrased and condensed into two:¹

¹ Appellant’s questions, as presented in her brief, are as follows:

1. Did the Administrative Law Judge and the Circuit Court for Anne Arundel County MD make an error of law, in upholding CPS’s ruling?
2. Was the ALJ’s decision arbitrary and capricious?
3. Did the ALJ abuse her discretion when she refused the motion for reconsideration?
4. Was the Appellant’s behavior within the bounds of the Maryland Rule Section 5-801 and Section 5-701?
5. Is a claim of nullification of a legal act on the bases of fraud, error or prejudicing applicable in this case?
6. Did the ALJ give too much deference to the agency’s witness, Ms[.] Dunn?
7. Did the ALJ properly exercise her discretion in allowing the local department to get away with not producing interview documents as required?

(...continued)

1. Did the ALJ err in finding that appellant was responsible for indicated child neglect?
2. Did the ALJ abuse her discretion in denying appellant’s motion for reconsideration?

We answer both questions in the negative and, accordingly, affirm the judgment of the circuit court.

BACKGROUND

On the evening of August 21, 2013, Anne Arundel County Police responded to a call for child neglect at Forest Plaza in Annapolis, Maryland. The responding officer arrived to find three unsupervised children sitting in a car with only the rear passenger window cracked open approximately four inches. These children were later identified as appellant’s five-year-old biological daughter, Taylor, and her two foster children, Aziah, age seven, and Caleb, age four months. The reporting party, Cathy Dunn, informed police that the children had been alone in the car for at least twenty minutes. The officer on the scene observed that the four-month-old was “sweating profusely,” and the other two children both stated that they were hot. The temperature around the time of this incident was approximately eighty-one degrees. The officer was with the children for about five

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8. Did the ALJ abuse her discretion for allowing the agency’s unlawful, unconstitutional and unfair procedures into the record?
 9. Did the ALJ exercise proper discretion by disregarding Appellant’s testimony?

minutes before appellant exited the nearby Home Depot and returned to the car. Appellant told the officer that she had only been in Home Depot for four minutes, and that she had been checking on the children every three minutes.

Patricia Smith from Child Protective Services was assigned to follow up with the case. The following day, August 22, 2013, Smith and a foster care worker, Bonnie Soderberg, visited appellant's home and interviewed the family. Appellant told Smith that she went to Home Depot that day to rent a saw. Appellant explained that she did not want to wake Caleb up, so she decided to leave the children in the car. She gave Aziah a bottle to feed Caleb in the event that he did wake up, locked the car, and rolled the rear window down a few inches. Appellant claimed that she was only in Home Depot for a period of five minutes before she came out to find a police officer standing by her car. Appellant told Smith that she had been educated in the supervision of children when she became a licensed Foster Care parent. When asked directly why she would leave her young children unsupervised in a hot car, appellant stated that she did not know.

Smith then interviewed seven-year-old Aziah. He told Smith that he could not see appellant from the car once she entered the Home Depot. He stated that appellant "was gone a long time" and that "it was so hot" in the car. Aziah was "sweating really bad" and Caleb was "crying because he was so hot." He noted that one of the rear windows was slightly opened, but that the children could not roll the windows down further because

appellant had the keys. He told Smith that “he was very afraid because it was so hot and he could not get out of the car.”

Smith also interviewed appellant’s five-year-old biological daughter, Taylor. Taylor told Smith that she was very sweaty in the car and was scared by the arrival of the police. After Smith and Soderberg completed their interview of the family, the two foster children were removed from the home and taken to another approved foster care home.

On August 27, 2013, Smith concluded her investigation and filed a report with the Department, in which she determined that appellant was responsible for indicated child neglect. Smith stated that the children “are not old enough to care for themselves and they are at high risk for getting hurt, kidnapped, hit by a car or lost if left unsupervised.” Moreover, according to Smith,

the children’s health or welfare was harmed or placed at substantial risk of harm. The children are not old enough to care for themselves and were at risk to a number of dangers while being in a hot car with no adult to care for them. They could have become overheated and sick, or even died.

Smith concluded her report by finding that appellant was a neglecter, because, as a licensed foster parent, appellant “had explicit training in caring for children and supervision laws,” but “still chose to make a very poor decision and leave the three children unsupervised.” Smith also stated that appellant “admitted that she did so and even sent an email confirming that she did so and that she was remorseful.”

Appellant appealed the Department's finding of indicated child neglect on September 2, 2013. On December 18, 2013, a hearing was held before the ALJ. Four people testified at the hearing: Dunn, Smith, appellant, and appellant's husband.

Dunn testified that she was leaving the Home Depot at approximately 6:40 p.m. when she noticed the children alone in the car. Dunn asked Aziah where his parents were through the crack in the rear window, and was told that appellant was in the store. According to her cell phone records, Dunn called 911 at 6:43 p.m. to report the incident. She then decided to wait for the police to arrive, which they did around fifteen to twenty minutes later. When the police arrived, she pointed out the car and then returned to her car and watched. According to Dunn, the police were there for about five minutes before appellant came out of the store.

Smith's testimony at the hearing reiterated the information contained in her report, as summarized *supra*.

Appellant testified on her own behalf. She informed the ALJ that she had been a foster mother for about eight months at the time of the incident. She explained that she parked in the closest parking space to the store, and gave Aziah a bottle of milk in case Caleb woke up. She told the children that she would be right back and entered the Home Depot to rent the saw. Appellant claimed that she could see the car from her position in Home Depot. She testified that "it took a few minutes" to fill out and sign the contract, during which she looked up to check on the car once. It was not until she was paying for

the saw that she looked outside and saw police standing by her car. She never saw Dunn approach the car. Appellant stated that she did not have any specific training in supervising children in cars, but admitted that parents are assumed to understand how to handle it. Appellant also testified that she understood why leaving unsupervised children in her car looked bad to people passing by, but claimed that her daughter would have called her if anything was wrong.

Finally, appellant's husband testified that appellant was not neglectful and that she was concerned with the well-being of the children at all times.

On January 9, 2014, the ALJ issued her decision affirming the Department's finding of indicated child neglect. The ALJ found that appellant left the children unattended in the car for approximately twenty minutes. The ALJ did not believe appellant's testimony that she checked on the children "every three minutes," because appellant would have seen Dunn, a stranger, talking to the children and would have observed the police "much sooner." In her decision, the ALJ concluded that appellant's conduct "clearly fulfill[ed] the[] requirements for a finding of indicated child neglect," because she "failed to provide proper care and attention" and the children were "placed at substantial risk of harm."

On February 5, 2014, appellant filed a motion for reconsideration. In the motion, appellant requested a new hearing and listed several new witnesses that she planned to call. She also alleged that she only left the children unattended for eight minutes, and included an affidavit from a Home Depot employee claiming that appellant was in the store for five

minutes and checked on the children three times. Appellant further alleged that she had never been interviewed by Smith. On February 6, 2014, appellant filed a petition for judicial review with the circuit court.

On March 13, 2014, the ALJ denied the motion for reconsideration. The ALJ determined that “[a]ll of this evidence could have been but was not introduced at the hearing by [] [a]ppellant’s attorney and cannot now be reviewed by me in connection with the Motion.” The ALJ concluded that “the Decision contains no material errors of law or fact and was not based upon fraud, mistake, or irregularity.”

On October 27, 2014, the court held a hearing on appellant’s petition for judicial review. On November 6, 2014, the circuit court issued an order affirming the ALJ’s decision. Appellant filed a timely notice of appeal.

DISCUSSION

I. Indicated Child Neglect

In reviewing a decision made by an administrative agency, “our role is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised on an erroneous conclusion of law.” *White v. Workers’ Comp. Comm’n*, 161 Md. App. 483, 486 (2005) (citation and internal quotation marks omitted). On appeal, “[w]e look only at the decision of the agency, and not that of the circuit court.” *Id.* at 487. “In applying this standard, we are mindful that we must not engage in judicial fact-finding or substitute our

judgment for that of the agency.” *Hill v. Baltimore Cty.*, 86 Md. App. 642, 657, *cert. denied*, 323 Md. 185 (1991).

“This standard of review is both narrow and expansive. It is narrow to the extent that reviewing courts, out of deference to agency expertise, are required to affirm an agency’s findings of fact, as well as its application of law to those facts, if reasonably supported by the administrative record, viewed as a whole. The standard is equally broad to the extent that reviewing courts are under no constraint to affirm an agency decision premised solely upon an erroneous conclusion of law.”

Adventist Healthcare Midatlantic, Inc. v. Suburban Hosp., Inc., 350 Md. 104, 120 (1998) (quoting *Ins. Comm’r for the State v. Engelman*, 345 Md. 402, 411 (1997)).

Appellant argues that the ALJ erred in her finding of indicated child neglect, because there was not substantial evidence that appellant’s conduct rose “to the level of creating a substantial risk to her children’s health or safety.” Appellant contends that the case hinges on the ALJ’s finding that appellant could not see the car from inside the store, thus leaving her children unattended. According to appellant, the ALJ erred by completely discounting her testimony and insisting that, had appellant looked out the window, she would have seen Dunn, because Dunn was only at the car once and “very briefly.” Appellant concludes that, for there to be a substantial risk of harm, there needs to be “some evidence beyond mere speculation as to the risk of harm that could potentially occur.”

The Department counters that it satisfied its burden of showing that appellant failed to provide proper care and attention to her children, which exposed them to a substantial risk of harm. According to the Department, there was substantial evidence to show

improper care and attention, because appellant left the children in a locked car by themselves for twenty minutes, and the ALJ did not believe appellant’s claim that she could see the children from inside the store. The Department argues that there was substantial evidence that the children were exposed to a substantial risk of harm, because, among other reasons, they were too young to care for themselves, they were exposed to the obvious danger of being left unattended in a hot car, the baby was crying, and they were sweating profusely.

Under Maryland law, neglect is defined as

the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate . . . that the child’s health or welfare is harmed or placed at substantial risk of harm. . . .

Md. Code (1984, 2012 Repl. Vol.), § 5-701(s) of the Family Law Article (“FL”). Neglect is “indicated” when “there is credible evidence, which has not been satisfactorily refuted, that [] neglect . . . did occur.” FL § 5-701(m).

The Department bears the burden of proving neglect at a hearing. *See* COMAR 07.02.26.12B. The elements necessary to reach a finding of indicated child neglect are as follows:

A. Indicated Child Neglect.

- (1) Neglect—Other than Mental Injury. Except as provided in §A(2) of this regulation, a finding of indicated child neglect is appropriate when there is credible evidence, which has not been

satisfactorily refuted, that the following four elements are present:

- (a) **A current or prior failure to provide proper care and attention;**
- (b) The alleged victim was a child at the time of the failure to provide proper care and attention;
- (c) The failure to provide proper care and attention was by the child’s parent or caretaker; and
- (d) **The nature, extent, or cause of the failure to provide proper care and attention indicate that the child’s health or welfare was harmed or was at substantial risk of harm.**

COMAR 07.02.07.13A. (emphasis added).

In her decision, the ALJ examined the above four elements that are required for a finding of indicated child neglect. The ALJ first noted that factors (b) and (c) were not disputed by appellant, as it was clear that all of the children were under the age of eighteen at the time of the incident and appellant was their parent or caretaker. Therefore, as expressed by the ALJ, “[t]he only real issues in this case are whether [] [a]ppellant failed to provide proper care and attention when she left the [c]hildren in her [v]ehicle and whether the health or welfare of the [c]hildren was thereby harmed or was placed at substantial risk of harm.”

The ALJ concluded that appellant’s actions “clearly fulfill[ed] these requirements.” The ALJ acknowledged appellant’s testimony that she only left the children for five minutes, but found that Dunn’s testimony and the documentary evidence pointed to an

unsupervised period of around twenty minutes. Furthermore, the ALJ simply did not believe appellant's testimony that she checked on the children "every three minutes."

The ALJ added that, even if appellant's three to five minute timeframe was accurate, appellant still "would have failed to provide [the children] with the proper amount of care and attention necessary to prevent the risk of substantial harm to such very young children."

The ALJ pointed to Section 5-801(a) of the Family Law Article, which states:

A person who is charged with the care of a child under the age of 8 years may not allow the child to be locked or confined in a . . . motor vehicle while the person charged is absent and the . . . motor vehicle is out of the sight of the person charged unless the person charged provides a reliable person at least 13 years old to remain with the child to protect the child.

FL § 5-801(a). The ALJ concluded that, given appellant's "clear violation of this statute[,] a finding of unsubstantiated or ruled out child neglect would be inappropriate in this case."

We agree and hold that there was substantial evidence in the record to support the ALJ's determination of indicated child neglect by appellant. The ALJ made findings of facts based on the testimony and other evidence presented, and then applied the pertinent COMAR regulations to the facts to conclude that this incident did constitute indicated child neglect. As was the case before the ALJ, there are only two elements of indicated child neglect that need to be examined: (1) whether there was a failure to provide proper care and attention, and (2) whether the children's health or welfare was at substantial risk of harm. See COMAR 07.02.07.13A.

As to the first element, there was substantial evidence in the record to support a finding that appellant failed to provide proper care and attention to the three children. Appellant left the three young children, ages seven, five, and four months, alone and locked in her car in a busy parking lot. Despite appellant's testimony to the contrary, the evidence presented to the ALJ supported her finding that the children were left in the car for approximately twenty minutes, and that appellant did not check on them "every three minutes" from inside the Home Depot. According to her testimony, Dunn noticed the children in the car at some point between 6:30 and 6:40 p.m. Her cell phone records showed that the call to 911 was placed at 6:43 p.m. and lasted for seven minutes. Dunn then waited about fifteen to twenty minutes for the police to arrive at the parking lot. According to the police report, the police were at the car for about five minutes before appellant came out of Home Depot. Furthermore, the fact that appellant never noticed Dunn and did not see the police for five minutes after their arrival supports the ALJ's conclusion that appellant did not regularly look out from the store to check on the children. Finally, regardless of the amount of time that the children were locked in the car, appellant violated Section 5-801, which makes it a misdemeanor to leave a child under the age of eight years locked or confined in a motor vehicle out of sight of the person charged with the care of the child, unless a reliable person at least thirteen years old is with the child. Therefore, appellant failed to provide the necessary proper care and attention to the children.

As to the second element, there was substantial evidence in the record that appellant's failure to provide proper care and attention placed the children at substantial risk of harm. We agree with the Department that appellant's argument focuses too much on the probability of actual harm occurring, because appellant's "leaving the three children alone in the car exposed them to a foreseeable risk of harm, even if the probability of that harm occurring was not extraordinarily high."

A "substantial risk of harm' means a foreseeable risk of harm to a child during alleged child abuse or neglect." COMAR 07.02.07.02B(44). Here, foreseeable risk of harm to the children existed for several reasons. According to the evidence, the children were left alone in the car while the temperature outside was around eighty-one degrees. The children were all very young, and the two older children were not old enough to sufficiently care for the four-month-old baby. During appellant's lengthy time away from the car, the baby woke up and began crying uncontrollably. The two older children were also sweating and could not lower the windows. Furthermore, although appellant claimed that the children were safe because she left them with a phone in case anything went wrong, no call was ever made, notwithstanding the fact that the children were very hot and sweating, the baby was crying, and they were approached by both a stranger and the police. The car was also located in a busy parking lot, and as stated by the Department, "[i]f the children had been able to open the car door, they would have been exposed to the dangers associated with children walking unattended in a parking lot." Although no actual harm

came to the children, appellant's actions did create a foreseeable risk of harm. Thus there was substantial evidence to support the ALJ's finding of a substantial risk of harm.

In sum, the evidence presented before the ALJ was sufficient to satisfy all four elements of indicated child neglect. See COMAR 07.02.07.13A. Accordingly, there was no error in the ALJ's decision affirming the Department's finding of indicated child neglect.

II. Motion for Reconsideration

The denial of a motion for reconsideration is reviewed under an abuse of discretion standard. *Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700, cert. denied, 354 Md. 113 (1999). In the instant case, appellant filed her motion for reconsideration pursuant to COMAR 07.01.04.20B., which permits the granting of a motion to reconsider if the decision “[c]ontains material errors of law or fact,” or “[w]as based upon fraud, mistake, or irregularity.”

In her motion for reconsideration, appellant asked the ALJ to reconsider based on new evidence submitted with appellant's motion and to be produced at a new hearing. In her opinion denying appellant's motion, the ALJ responded:

This regulation does not allow for the submission of additional evidence. Nevertheless, [] [a]ppellant attached to her [m]otion a notarized letter that was not submitted at the hearing, a letter from a character witness who did not testify at that proceeding, and a recently obtained report from the Anne Arundel County Police Department of criminal activity at the Home Depot around the date she left the children alone in its parking lot. Moreover, [] appellant requests that [the ALJ] conduct a new hearing, allowing her to present two additional witnesses

whom she did not call to testify at the December 18, 2013 hearing. All of this evidence could have been but was not introduced at the hearing by [] appellant’s attorney and cannot now be reviewed . . . in connection with the [m]otion.

In addition, the ALJ noted that appellant challenged “the local department’s investigative efforts and the testimony of [] Dunn.” Dunn’s testimony came down to a credibility determination, and the ALJ “found [] Dunn’s testimony credible, particularly as she had no motive to dissemble.” We will not disturb such determination on appeal. Finally, appellant asserts that the Department failed to fully investigate the case, because Smith’s report contained information that was not given to her by appellant. The ALJ rejected this assertion in her opinion, stating that it was “unclear as to what more the local department could have discovered, by further investigation, that might have changed [the ALJ’s] decision.” We agree that the evidence in the record relied upon by the ALJ in affirming the finding of indicated child neglect was substantial, even without Smith’s interview with appellant. The ALJ summarized this evidence in her opinion:

[] Dunn’s testimony, the documentary evidence (including the police report, [] Dunn’s cell phone bill, and [] [a]ppellant’s Home Depot Receipt) and [] [a]ppellant’s own testimony were sufficient to convince me that the [c]hildren were left unsupervised for close to twenty minutes. While [] [a]ppellant testified that she checked on the [c]hildren every three minutes, the evidence presented at the hearing indicated otherwise. Finally, as I noted in the Decision, even had [] [a]ppellant left the children unsupervised for only three minutes in a busy parking lot, she would have failed to provide them with the proper amount of care and attention necessary to prevent the risk of substantial harm to such very young children.

Therefore, we see no “material errors of law or fact,” nor any “fraud, mistake, or irregularity,” in the ALJ’s affirmance of the Department’s finding of indicated child neglect. See COMAR 07.01.04.20B. Accordingly, the ALJ acted within her discretion in denying appellant’s motion for reconsideration.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED; APPELLANT TO PAY
COSTS.**