SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2606-16T4

DEPARTMENT OF CHILDREN AND FAMILIES, DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

H.V.,

Defendant-Appellant.

Submitted January 22, 2018 – Decided February 6, 2018

Before Judges Ostrer and Rose.

On appeal from the Department of Children and Families, Division of Child Protection and Permanency.

Gruber, Colabella, Liuzza & Thompson, attorneys for appellant (Mark Gruber and Natalie L. Thompson, on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Jason W. Rockwell, Assistant Attorney General, of counsel; Salima E. Burke, Deputy Attorney General, on the brief).

PER CURIAM

Defendant H.V.[1] appeals from a January 13, 2017 decision of the Assistant Commissioner of the Department of Children and Families ("DCF") in the Division of Child Protection and Permanency ("Division"), finding defendant neglected her three-year-old son, I.B., by driving while intoxicated and causing a motor vehicle accident in which I.B. was injured. Consequently, defendant's name was placed on the central registry.[2] We affirm.

I.

The record developed at a hearing before an administrative law judge ("ALJ") reveals the following relevant facts. I.B. was born in February 2009. At the time of the pertinent events in April 2012, I.B. was three years old. Pursuant to an informal custody arrangement, I.B. lived with defendant in her parents' home, but frequently saw his father (and H.V.'s husband), M.B.

On April 5, 2012, at approximately 5:30 p.m., after consuming an unspecified quantity of alcohol and reaching for her cellular telephone while driving, defendant lost control of her automobile, hit a rock embankment, and caused the car to overturn and land on

[1] We use initials to protect the privacy of the parties. See R. 1:38-3(d)(12).

[2] The Division forwards findings of abuse to a central registry maintained by the DCF. N.J.S.A. 9:6-8.11.

its roof in the roadway. No other vehicles were involved in the accident. I.B. was the only passenger in defendant's car.

Law enforcement officers and emergency squad members were summoned to the scene. Their reports of the motor vehicle accident do not indicate whether or not defendant was intoxicated. At the scene, defendant admitted to the officers she crashed after looking down at her telephone. The police issued defendant summonses for careless driving, N.J.S.A. 39:4-97, and use of a hands-free wireless telephone, N.J.S.A. 39:4-97.3. She was not, however, charged with driving while intoxicated ("DWI").

Defendant and I.B. were taken by ambulance to St. Luke's Hospital in Phillipsburg. I.B. was treated for a scalp laceration by suturing the wound with a staple. I.B. was discharged to M.B.

Defendant was carried into the emergency room on a backboard, immobilized with a cervical collar, and complained of a headache. Dr. Jack Chambers, the emergency room physician, examined defendant and ordered various tests and scans, including a blood-alcohol test. According to a neurological assessment, defendant was "alert, oriented to person, place, time, and circumstance." However, Dr. Chambers ordered the alcohol test because high blood-alcohol concentration ("BAC") levels can mask a patient's tolerance for pain, and he was concerned about defendant's ability to feel the extent of her injuries.

Administered at 6:50 p.m. shortly after her admission to the emergency room, defendant's initial alcohol test indicated a BAC of 265 mg/dL,[3] which is more than three times the legal limit of 80 mg/dL.

At approximately 8:00 p.m., a hospital nurse referred the incident to the Division. The nurse reported, among other things, defendant's alcohol level was "really high," and I.B. would be released to his father.

Sometime prior to 9:15 p.m., defendant left the hospital. Law enforcement officers located defendant at a Burger King, and returned her to the hospital where she was placed under a one-to-one security watch. A nurse's observation check-list report for the watch period notes defendant's behavior as "intoxicated." The watch period was in effect "until sober."

Division intake workers, Sara Clause and Vendetta Hines-Weekes, arrived at the hospital at approximately 10:45 p.m. and interviewed defendant. Although defendant could not recall details, she admitted she drank earlier in the day while home alone with I.B. She believed she drank two or three Mike's Hard Lemonade alcoholic beverages and did not eat anything. During the

[3] "mg/dL" is the acronym for milligrams per deciliters.

interview, defendant was coherent, spoke clearly and did not slur her words.

Defendant's blood alcohol was retested at 12:45 a.m. The results indicated a BAC of 116 mg/dL. Defendant was discharged from the hospital after a reexamination at 1:45 a.m. Defendant's discharge instructions stated she had been treated in the emergency department for "intoxication with alcohol."

As part of defendant's treatment plan, the Division referred her to Preferred Children's Services Child Protection Substance Abuse Initiative. Defendant met with a counselor on April 20, 2012, and admitted she was drunk at the time of the accident, having consumed six Mike's Hard Lemonade beverages on that day. Defendant expressed concern for her alcohol problem, and was referred for services.

On July 23, 2012, after receiving an extension to issue its findings,[4] the Division substantiated H.V. for neglect based on the April 5 incident. H.V. appealed, and the matter was transferred to the Office of Administrative Law as a contested case.

[4] DCF granted an extension to June 30, 2012. However, On July 7, 2012, M.B. was in a motorcycle accident and eventually succumbed to his injuries. In addition to developing a new care plan for I.B. after M.B.'s death, the case worker continued to provide services to defendant prior to transferring the case to the permanency unit.

The ALJ conducted a hearing on June 6, 2016 and August 1, 2016. The Division presented the testimony of Dr. Chambers, and intake workers, Clause and Hines-Weekes. Defendant testified and presented the testimony of Dr. Lance Gooberman, who was qualified as an expert in blood alcohol levels and alcohol intoxication. Documents were also admitted into evidence, including the Division's investigative summary, the police report, the emergency services report, and hospital records for defendant and I.B.

In his findings of fact, the ALJ summarized the pertinent testimony as follows. Clause testified that defendant "did not remember much" about the accident. Defendant did not recall leaving her parents' home or getting into her motor vehicle, but she recalled that she was heading to her husband's house when the accident occurred. She told Clause she drank three Mike's Hard Lemonade beverages earlier in the day, and that she drank one glass of wine every night to help her sleep.

According to Clause, "the primary reason for substantiating child neglect was [defendant's] elevated blood-alcohol level." Defendant's diverting her attention to look at her telephone was a secondary reason. Clause clarified that neglect was substantiated because defendant admitted she drank alcohol before driving, her blood-alcohol level was elevated, and she was inattentive while driving. Clause admitted defendant "exhibited

no signs of having been driving under the influence of alcohol." Her eyes were not bloodshot and her speech was not slurred. Because defendant was acting hysterical, however, Clause could not discern whether she was intoxicated or upset.

Hines-Weekes also recalled defendant did not slur her words and spoke clearly during her interview at the hospital. However, Hines-Weekes recalled defendant was "remorseful," "shaken up" and "apologetic." Hines-Weekes "smell[ed] alcohol" on defendant during the interview. Defendant calculated she drank two Mike's Hard Lemonade beverages on the date of the accident. However, through the testimony of Hines-Weekes, the Division introduced an assessment from Preferred Children's Services indicating defendant had consumed six such beverages on the date of the accident. This assessment indicated further that, as a teenager, defendant was charged with DWI and received treatment following that accident.

Dr. Chambers testified that defendant told him she "had a couple of drinks" when he examined her in the emergency room. Dr. Chambers ordered a blood-alcohol test because "an elevated BAC could mask pain, and he needed to know where [defendant] experienced pain so he could treat it." The ALJ then found, "[Dr. Chambers'] point was clear: [h]e ordered the alcohol test to treat [defendant] – not to determine whether [defendant] was over the legal limit for alcohol – and the test was a qualitative test,

not a quantitative one. Stated otherwise, the alcohol test was not a forensic test." Dr. Chambers testified further that, because reactions to the influence of alcohol vary greatly among individuals, observations of individuals under the influence vary greatly. The ALJ found Dr. Chambers questioned defendant's BAC result of 265 mg/dL because she "did not act in a way that would correlate to such a reading."

The ALJ credited Dr. Gooberman's testimony as reliable and forthright. Dr. Gooberman concluded defendant's blood-alcohol test was not forensically reliable because the hospital's chain of custody was not available, and the hospital utilized "an enzymatic test instead of a gas-chromatography or mass-spectroscopy test, which is the gold standard." Dr. Gooberman dismissed defendant's 265 mg/dL as unreliable because "he could not believe that someone with a BAC of four times[5] the legal limit could not exhibit signs of intoxication."

Defendant testified and admitted she "did not remember much from the date of the accident." Nor could defendant recall drinking on the date of the accident. However, she recalled "that she used to drink [twelve]-ounce [] cans of Mike's Hard Lemonade, that they came in a four-pack, that she had one the night before

[5] Defendant's initial blood-alcohol test result was more than three times the legal limit of 80 mg/dL.

the accident, and that she had one left before she got in the car." Defendant did not believe she "had a drinking problem at the time of the accident, but now knows, looking back, that she did."

Following the presentation of the evidence, the ALJ issued a written decision on October 17, 2016, finding the evidence was insufficient to sustain the allegation that defendant neglected I.B. pursuant to N.J.S.A. 9:6-8.21(c)(4). Specifically, the ALJ concluded:

> First, a preponderance of the evidence does not exist that [defendant] was under the influence of alcohol while driving on the date of the accident. [Defendant] did not believe she was under the influence of alcohol and no reliable evidence exists to substantiate that [defendant] was impaired to a point of posing a risk to I.B. Indeed the reported level of alcohol in her blood was not explained by any expert witness on behalf of the DCF and remains unclear. Second, one taking his or her eyes off the road to reach for a cell phone constitutes negligence, not gross negligence. Taken together or apart, these instances of purported negligence do not constitute gross negligence, which would warrant substantiation.

In so ruling, the ALJ declined to consider defendant's initial BAC of 265 mg/dL, finding the results were unreliable because the test was performed for medical treatment and not for forensic purposes. Although he found defendant "had two [twelve]-ounce cans of Mike's Hard Lemonade before she left her parents' house

to drive her son I.B. to her husband's house[,] . . . exactly when she drank them or how long it took to drink them" was not proven. The ALJ found further that defendant did not exhibit any signs of intoxication on the date of the accident. The ALJ thus recommended reversal of the Division's findings and dismissal of the case. Accordingly, defendant's name would not be placed on the central registry.

The Division filed exceptions to the ALJ's decision, pursuant to N.J.A.C. 1:1-18.4(b)(1), and defendant submitted a reply to the exceptions. The matter was then submitted to the Assistant Commissioner, who accepted many of the ALJ's factual findings and credibility determinations, but concluded the ALJ "failed to properly consider and weigh the certified hospital records, and testimony of Dr. Chambers that conclude that [defendant] had a BAC of 265 mg/dL at the hospital after the accident." She also took issue with the ALJ's finding that defendant did not display any signs of intoxication.

To support her decision, the Assistant Commissioner found additional facts, including: defendant's consumption of between two and six twelve-ounce cans of Mike's Hard Lemonade prior to driving with I.B. as her passenger; defendant's admission she could not recall the day of the accident, nor how many alcoholic beverages she drank; defendant's absconding from the hospital

necessitating placement on a security watch, and the notation in the hospital record of "intoxication"; the "dropping" between defendant's first BAC level of 265 mg/dL to 116 mg/dL six hours later; defendant's admission she had a drinking problem; Dr. Chambers' explanations for variations in reactions to alcohol; and defendant's history of driving while intoxicated and prior treatment.

The Assistant Commissioner then engaged in a legal analysis as to whether defendant's conduct constituted gross negligence. She concluded the credible evidence in the record supported a finding of gross neglect.

On appeal, defendant argues the Assistant Commissioner's decision is "arbitrary, capricious and unreasonable," and her additional findings of fact are "not supported" by credible evidence in the record. Defendant also contends the DCF's issuance of its finding of substantiated neglect after the time allowed by the administrative code warrants dismissal. We disagree.

II.

Our role in reviewing a final decision of an administrative agency is limited. In re Taylor, 158 N.J. 644, 656 (1999). "Absent arbitrary, unreasonable or capricious action, the agency's determination must be affirmed." N.J. Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472, 480 (App. Div. 2010) (quoting

G.S. v. Dep't of Human Servs., 157 N.J. 161, 170 (1999)). "If [an appellate court] is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result itself." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988) (citations omitted); see also Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001) (recognizing that "[g]enerally, an appellate court does not substitute its judgment of the facts for that of an administrative agency").

Appellate courts "do not, however, simply 'rubber stamp the agency's decision.'" N.J. Dep't of Children & Families, Inst. Abuse Investigation Unit v. S.P., 402 N.J. Super. 255, 268 (App. Div. 2008) (quoting Paff v. N.J. Dep't of Labor, 392 N.J. Super. 334, 340 (App. Div. 2007)). Upon review, "an appellate court must undertake a 'careful and principled consideration of the agency record and findings.'" Campbell, 169 N.J. at 587 (citing Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985)). Further, there is a "particularly strong need for careful appellate review" where the agency's factual findings are contrary to those of an ALJ. In re Lalama, 343 N.J. Super. 560, 565 (App. Div. 2001).

However, a head of an administrative body is not bound by an ALJ's factual findings and legal conclusions "unless otherwise provided by statute." N.J.A.C. 1:1-18.1(d). Accordingly, an agency head reviews an ALJ's decision "de novo . . . based on the record" before the ALJ. In re Parlow, 192 N.J. Super. 247, 248 (App. Div. 1983).

Further, the agency is the "primary factfinder" and has the "ultimate authority, upon a review of the record submitted by the ALJ[,] to adopt, reject or modify the recommended report and decision of the ALJ." N.J. Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 189 N.J. Super. 491, 507 (App. Div. 1983) (citing N.J.S.A. 52:14B-10(c)). When an agency head rejects or modifies any findings of fact or conclusions of law made by an ALJ, it must state the reasons for doing so with particularity. N.J. Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472, 480 (App. Div. 2010) (citing N.J.S.A. 52:14B-10(c)); S.D. v. Div. of Med. Assistance & Health Servs., 349 N.J. Super. 480, 485 (App. Div. 2002). The new or modified findings must be supported by "sufficient, competent, and credible evidence in the record." Ibid.

The Division is the state agency charged with investigating child abuse and neglect. The regulations in effect at the time of the referral required the Division to make a finding that the

allegations were either substantiated or unfounded. N.J.A.C. 10:129-7.3. A finding was defined as substantiated, "when the available information, as evaluated by the child protective investigator, indicated by a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.A.C. 10:133-1.3 because the alleged child victim has been harmed or placed at risk of harm by a parent[.]" N.J.A.C. 3A:10-1.3. Where the Division's investigation has "substantiated" child abuse or neglect, the regulations allow for a hearing. N.J.A.C. 3A:5-4.3(a)(2).

After her review of the record, the Assistant Commissioner accepted the ALJ's findings of fact and credibility determinations, but made additional findings of fact, deciding defendant's actions rose to the level of gross neglect. Given our standard of review, and consistent with the factual record and applicable law, we conclude the Assistant Commissioner's modified findings of fact and conclusions of law are supported by sufficient, competent and credible evidence in the record. We, therefore, affirm substantially for the reasons expressed in her written decision.

The Assistant Commissioner began her analysis with the definition of an abused or neglected child pursuant to N.J.S.A. 9:6-9.21(c). Specifically,

> [A] child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care . . . by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . .

The Supreme Court has explained that, for the purpose of applying this statute, a parent or guardian fails to exercise a "minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." G.S., 157 N.J. at 181. Minimum degree of care refers to conduct that is "grossly or wantonly negligent, but not necessarily intentional[,]" rather than conduct that is simply negligent. Id. at 178. As the Assistant Commissioner aptly observed, the Court in G.S. held, "[w]hen a cautionary act by the guardian would prevent a child from having his or her physical, mental or emotional condition impaired, that guardian had failed to exercise a minimum degree of care as a matter of law." Id. at 182.

We are persuaded that the Assistant Commissioner properly concluded defendant's conduct rose to gross negligence. Defendant's admission that she consumed alcohol on the date of the accident, coupled with averting her attention from the road, caused her vehicle to overturn, injuring her three-year-old son. While

I.B.'s injuries were not serious, they required medical care, and the statute does not require that a child experience actual harm. N.J.S.A. 9:6-8.21(c)(4)(b); see also Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 178 (2015) (recognizing a court "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect.") (quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)).

Moreover, we agree with the Assistant Commissioner that the Division need only prove defendant was under the influence with her child in the motor vehicle by a preponderance of the evidence. Here, as she observed, while defendant's blood-alcohol level was tested for treatment purposes at the hospital, the accuracy of the test was reliable. Specifically, physicians ordered the tests "to make significant medical decisions that can seriously impact a patient's well-being." As the Assistant Commissioner observed, the ALJ misconstrued Dr. Chambers' testimony questioning the reliability of defendant's BAC of 265 mg/dL because she did not exhibit signs of intoxication. Rather, Dr. Chambers "has seen many people with levels that high with good motor function, not slurred, and acting rational at that time." The Assistant Commissioner found further that defendant's expert, Dr. Gooberman,

failed to seek clarification from the hospital regarding questions he raised as to the reliability of its testing.

We also agree with the Assistant Commissioner's assessment, here, that it was unnecessary for the Division to prove, through the use of expert testimony, defendant was impaired. In so doing, the Assistant Commissioner distinguished the present facts from those of our decision in N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320 (App. Div. 2011) (finding expert testimony was necessary where the trial judge was unable to discern the level of drugs in defendant's body at the time of a supervised visit). As the Court clarified in N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 28-29 (2013), however, expert testimony is not required in abuse and neglect cases when "an adequate presentation of actual harm or imminent danger can be made without the use of experts."

We agree with the Assistant Commissioner that Dr. Chambers, while not qualified as an expert in blood-alcohol levels and alcohol intoxication, treated defendant, and explained the hospital's blood-alcohol tests and their reliability. Unlike V.T., who had ingested marijuana days prior to a supervised visit with his eleven-year-old child, defendant was the custodial parent of her three-year-old son who admittedly drank alcohol and averted her eyes from the road to view her mobile telephone. Indeed, as

the Assistant Commissioner concluded, "[i]n this case actual harm resulted from the accident and there was imminent risk demonstrated due to [defendant's] act of driving while under the influence of alcohol."

Finally, we dismiss, as meritless, defendant's contention that the Assistant Commissioner failed to reject the ALJ's recommended decision in a timely fashion. The Division obtained an order extending the time in which to issue its final agency decision. See N.J.A.C. 1:1-18.8 (permitting extensions of time limits in which to file a final decision). The final decision was issued within one month after the expiration of the extension because, in large part, I.B.'s custodial parent died suddenly, causing the Division to develop an alternate care plan for the child.

While we commend defendant for her cooperation with the Division's services, and her post-incident efforts to treat her admitted alcohol problem, these measures do not erase the imminent danger she created by driving her motor vehicle under the influence of alcohol and reaching for her cellular phone while driving with her three-year-old son in the car. E.D.-O., 223 N.J. at 189. Although we are mindful of the negative consequences to defendant of being placed on the central registry, we are unable to conclude that the Assistant Commissioner's decision to do so on this record

is arbitrary, capricious, or lacking in evidentiary and legal support. Moreover, the Assistant Commissioner's determination comports with our holding in N.J. Division of Child Prot. & Permanency v. J.A., 436 N.J. Super. 61, 69 (App. Div. 2014), where we noted "that no reasonable person could fail to appreciate the danger of permitting children to ride in a motor vehicle driven by an inebriated operator."

Affirmed.