

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)
)
 K C. G)
_____)

OAH No. 13-1066-SAN
Agency No.

DECISION

I. Introduction

On November 19, 2012, the Office of Children Services (OCS) received a report of alleged physical abuse. OCS investigated, and ultimately substantiated a finding of abuse by K G. Mr. G appealed that finding. A hearing was held on September 24, 2013. Mr. G appeared in person and represented himself. OCS was represented by Assistant Attorney General Diane Foster.

OCS failed to meet its burden of proving that the substantiated finding should be upheld.

II. Facts

Mr. G is the father of B and Z G. Z G, the younger brother, suffers from Prader Willi Syndrome.¹ Mr. G has shared custody of the boys with their mother, Y N. The boys alternate between the two homes for one week at a time at each home.² Mr. G lives with his wife, L U, and her son, D. They recently had another child together. Ms. N lives with her significant other, H O.

Mr. G testified that Z gets a lot of bruises and scratches. He lives with two brothers and they play rough. In addition, Z's lack of muscle tone causes him to stumble and fall more often. When he and Ms. N first separated, he would take pictures to document any injuries. Because there would be numerous small bruises or scratches from normal childhood play, he stopped documenting every injury and started recording only the more serious ones.

During the week prior to November 18, 2012, the boys were at Mr. G's house. On Saturday, November 17, Mr. G's father, E G, took care of B and Z in the afternoon and evening.³

¹ Testimony of Mr. G. According to Mr. G, Prader Willi is a genetic defect which causes a variety of symptoms. Of significance in this case is that Z has a loss of muscle tone and is not able to express himself verbally. In November of 2012, Z was 3 years old and B was 6 years old.

² Testimony of Mr. G.

³ Testimony of E G.

He took them to a neighborhood movie night. There were other adults present as well as about 10 children at the movie night. He took the kids home to Mr. G's house at about 11:00 p.m.⁴

On the afternoon of November 18, 2012, Mr. G brought the boys to Ms. N's mother's home, which is the location they use to exchange the children each week.⁵ The next day, Ms. N brought the children to No Name for an evaluation.⁶ According to the No Name report,⁷ Ms. N stated that she gave the children a bath the evening of November 18, and noticed multiple bruises on Z.

X Y, FNP, examined Z approximately 5:00 pm on November 19, 2012.⁸ She observed multiple bruises on Z's arms and to the right and left abdominal area.⁹

B was interviewed at No Name on Monday, November 19, 2012. A copy of the video interview is in the record. In that interview, B stated that on the previous Friday, he and Z were both punished by being hit with a belt.¹⁰

Mr. G testified that he has also taken one or both boys to No Name several times to show that they had been injured while in Ms. N's care. On one occasion, OCS investigated a burn on Z's back. Ms. N initially told Mr. G that Z was scratched. Only later did she admit that he had been burned when falling against a fire pit or burn barrel. The agency record reflects other OCS investigations.¹¹ The November 19, 2012 incident is the only one that has been substantiated.

III. Discussion

OCS maintains a central registry of all investigation reports.¹² Those reports are confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.¹³ At the conclusion of an investigation, OCS may find that an allegation has been substantiated. When a substantiated finding is appealed, OCS has the burden of proving by a preponderance of the

⁴ *Id.*

⁵ *Testimony of Mr. G.*

⁶ Ms. N was not called as a witness for this hearing.

⁷ Agency Record 109 – 132.

⁸ Agency Record 130; Testimony of X Y.

⁹ *Id.*

¹⁰ *See also* Agency Record 113.

¹¹ *See* Agency Record at 34 and 66 (allegation of sexual abuse against L U); 51 (allegation related to burn while in Ms. N's care); 63 (allegation related to burn while in Mr. G's care); 133 (allegation of neglect by Ms. N); 164 (allegation of physical abuse of B by Mr. G).

¹² AS 47.17.040.

¹³ AS 47.17.040(b).

evidence that the finding should be upheld. Abuse or neglect for the purpose of a substantiated finding is defined in AS 47.17.290(2):

“[C]hild abuse or neglect” means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby[. ¹⁴]

As the Department interprets this statute, a substantiated finding of abuse is upheld if it is proven that a child has been injured.¹⁵ The statute does not contain any definition of “physical injury,” but there is no requirement that it be a severe injury, and the ordinary understanding of a physical injury would include bruising.¹⁶ There is no dispute in this case that Z had bruises, and was therefore injured. The only question in dispute is whether OCS has proven that the substantiated finding should be against Mr. G, as opposed to some other person.

F X is the OCS employee who investigated the allegation of abuse, and ultimately substantiated the finding against Mr. G. She was primarily concerned about the bruises on Z’s sides. She believes those types of bruises take more force to create, and are less likely to be caused through normal play.¹⁷ These bruises had started to turn brown. It was her understanding from the medical professionals at No Name that, because of the color of the bruises, they were likely several days old and not more recent.¹⁸ She testified emphatically that she relied on the professional judgment of the No Name medical professionals to help her determine when the bruising occurred.¹⁹

Because she believed the bruising was several days old, Ms. X concluded they could not have been caused while Z was in Ms. N’s care. B had stated during his interview that on the prior Friday he and his brother had both been punished by Mr. G, who allegedly struck each of them with a belt. Based on her review of the injuries, the medical examination, B’s interview,

¹⁴ AS 47.17.290(2). See also *In re F.T.*, OAH No. 13-0050-SAN (Commissioner of Health and Social Services 2013), page 3; *In re U. Z.*, OAH No. 12-0422-SAN (Commissioner of Health and Social Services 2013). These cases are available online at <http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName=SAN>.

¹⁵ *In re F.T.*, OAH No. 13-0050-SAN, page 4.

¹⁶ See *In re John Doe*, OAH No. 06-0112-DHS (Commissioner of Health and Social Services 2007), page 3 (applying ordinary meaning of physical injury), available at <http://aws.state.ak.us/officeofadminhearings/Documents/DHS/DHS060112.pdf>

¹⁷ Testimony of Ms. X.

¹⁸ *Id.*

¹⁹ *Id.*

and the fact that the prosecutor filed criminal charges against Mr. G, Ms. X substantiated the allegation of physical abuse, listing Mr. G as the perpetrator.²⁰

X Y is a nurse practitioner employed by No Name. She conducted the forensic physical examination of Z.²¹ She explained that it is difficult to be specific about the age of a bruise based on its color. She did say that if a bruise has started to turn brown or yellow, then it was likely to be at least 12 to 18 hours old. It was her guesstimate that the bruising on his abdomen occurred more than 12 to 18 hours before she examined Z.²²

Ms. Y's report indicates that she had finished the report of Z's examination at 5:00 pm on November 19, 2012.²³ Ms. X began her intake report at 3:00 p.m.²⁴ Although the photographs of Z are not time stamped, the file information on the CD containing those pictures shows they were taken between 4:51 and 5:17 p.m. on November 19, 2012. Alaska Police Department Officer Q R indicated in his report that he had been called to No Name at 4:39 p.m.²⁵ He interviewed Ms. Y, who told him Z had bruising on both sides.²⁶ It is possible that Ms. Y had conducted her physical examination of Z, and observed the brown bruising, as early as 3:00 p.m.

According to Ms. Y, a brown or yellow bruise observed at 3:00 p.m. on Monday would likely be 12 to 18 hours old. That means Z's injury could have occurred as recently as 3:00 a.m. Monday morning if it were 12 hours old. Ms. Y also testified that she was unable to determine whether any of the bruises were from being hit with a belt.

Ms. X testified that she relied heavily on what the medical providers told her about the age of the bruising in reaching her conclusions. The only medical evidence offered in this hearing was the testimony of Ms. Y. Based on her testimony, Z may have been bruised Sunday evening when he was in Ms. N's care, Saturday afternoon and evening when he was in E G's care, or when he was being cared for by either Mr. G or L U during the week prior to November 19, 2012.

²⁰ *Id.*; Agency Record at 244.

²¹ Testimony of Ms. Y.

²² *Id.*

²³ Agency Record at 117.

²⁴ Agency Record at 98.

²⁵ Agency Record at 17.

²⁶ *Id.* He finished writing his report at 6:08 pm (Agency Record at 17), and there is no way to determine the precise time he actually interviewed Ms. Y.

The only evidence that the bruising was caused while in Mr. G's care comes from the interview of B G.²⁷ During the interview, B disclosed that both H and his dad spank him with a belt. He also indicated that L spansks him every day with a belt. During the interview B stated that when he gets in trouble at his mom's house, H will pick him up by his hair and legs, and throw him outside onto his face, and that his face gets scratches and bloody. He stated that when his dad gets made at Z, he throws him into his room and hits him in the face with a belt.

B was asked about the last time anyone hit him with a belt. He responded that it was last Friday. He was then asked to tell about the time his daddy hit him with a belt last Friday. B had not yet identified that it was his father who hit him with a belt, but he went on to say that it was in the afternoon and he and Z both got hit with a belt. B did not have any bruises on him Monday afternoon. Ms. X's notes of the interview state, "At times it was difficult to tell if B was making up a story or the events were real."²⁸ She did, however, conclude that his disclosure of Z being hit with a belt on Friday was credible.²⁹

The substantiated finding was based on the bruises on Z's abdomen. It is more likely than not that those bruises were made sometime before 4:00 a.m. Monday morning, but it is not possible to pinpoint the timing of the injury more precisely. The bruising could have been while Z was in the care of Ms. N, H O, Mr. G, L U, or E G.³⁰ Even if B's disclosure is accepted, it has not been proven that the bruises came from the incident when he and Z were hit with a belt. Ms. Y testified that she could not say what caused the bruising, and B was not bruised from his punishment.

IV. Conclusion

OCS has the burden of proof. It did not show that it is more likely true than not true that Z's bruises occurred while he was in Mr. G's care. The substantiated finding of physical abuse is reversed.

DATED this 27th day of September, 2013.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

²⁷ The recorded video is stored on a CD which is part of the record in this matter. It is unfortunate that the recording does not indicate the time or date of the interview. In this case, however, Mr. G did not dispute the date of the interview.

²⁸ Agency Record at 98.

²⁹ Testimony of Ms. X.

³⁰ L U, Ms. N, and H O did not testify at the hearing.

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 1st day of November, 2013.

By: Signed _____
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication.]