

IN THE COURT OF APPEALS OF IOWA

No. 9-543 / 97-922
Filed March 15, 2000

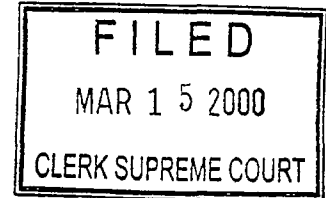
BERNARD MAUK,

Appellant,

vs.

STATE OF IOWA DEPARTMENT OF HUMAN SERVICES,

Appellee.



Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Bernard Mauk appeals from a district court ruling affirming the Iowa Department of Human Services' decision not to expunge his information from the child abuse registry. **AFFIRMED.**

Bernard Mauk, Pleasant Hill, pro se.

Thomas J. Miller, Attorney General, and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., and Zimmer, and Miller, JJ.

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PER CURIAM

Bernard Mauk appeals from a district court ruling affirming the Iowa Department of Human Services' decision not to expunge his information from the child abuse registry. We affirm.

I. Background Facts and Proceedings. Petitioner, Bernard Mauk, is the father of Lyndsay. In 1988, Lyndsay was three and one-half years old and in the custody of Mauk's ex-wife, Diana. Following a visit with Mauk in 1988, Lyndsay allegedly sat on the lap of Diana's new husband, Brian Cornish, and placed his hand on her genital area. In response to Mr. Cornish's inquiry, Lyndsay said her father did this with her.

Mr. Cornish immediately told his wife of the incident. Lyndsay allegedly repeated the act in her mother's presence. The following day, Ms. Cornish called a psychologist for advice on how to proceed. She was advised to confront Mauk. After doing so, her attorney and the psychologist advised her that a child protective investigation should occur. Shortly thereafter, Ms. Cornish called the Iowa Department of Human Services ("DHS"), alleging Mauk had sexually abused Lyndsay. During the investigation which followed,¹ Lyndsay explained to a DHS investigator, a therapist, and a psychologist a game that she and her father allegedly played, which involved him running his hands down the front of her body

¹When the department of human services receives an allegation of child abuse, it must begin an assessment and complete a report. Iowa Code § 232.71(1). If the department concludes by a preponderance of the evidence that a sexual offense was committed, it must place pertinent data in the central child abuse registry. Iowa Code §§ 232.71(8), 235A.18(2). The subject of a child abuse report may request a correction of the data. Iowa Code § 235A.19(2)(a). Data regarding a particular case of suspected abuse is sealed ten years after the initial abuse report. Iowa Code § 235A.18(1). Information is expunged from the registry by operation of law eight years after the report is sealed. *Id.*

and cupping her genital area. The investigator attempted to arrange an interview with Mauk through his attorney. However, the parties could not agree on a location for the interview and none was ever held.

DHS issued a founded report of child abuse in September of 1988 and filed its findings with the Iowa Child Abuse Information Registry. In January 1989, Mauk sought to have his name expunged from the registry but was denied. Mauk requested and was granted an evidentiary hearing. A hearing was initially scheduled for August 8, 1989. That hearing was continued at the request of DHS, with no objection by Mauk's attorney, because of pending district court matters involving Mauk and his former spouse. The hearing was reset for December 20, 1990. Mauk's attorney moved to continue this hearing. This request was granted and the hearing was rescheduled for April 16, 1991. Mauk's attorney again moved to continue and the hearing was canceled. In March of 1995, an administrative law judge notified Mauk and his counsel that his appeal would be considered abandoned based on lack of activity unless a motion to reconsider was submitted. Mauk requested a hearing and one was set for September 13, 1995. Mauk's attorney withdrew before the hearing.

Following the evidentiary hearing, an administrative law judge issued a proposed decision, affirming the action of the DHS. On November 7, 1995, the department director issued a final decision adopting the ALJ's proposed decision. Mauk sought judicial review. The district court affirmed the agency.

This appeal followed. Mauk asserts four grounds in support of his contention that his record should be expunged. He complains he was not interviewed by the DHS investigator after the abuse allegations arose, as required by Iowa Code

section 232.71(2)(e) (1997).² He also contends the ALJ erred by: (1) not permitting Mauk to call Lyndsay and her older brother, Jamison, to testify at the evidentiary hearing; (2) refusing to admit into evidence a videotape of Lyndsay being interviewed; and (3) failing to comply with Iowa Rule of Evidence 702.

II. Scope of Review. In appeals from agency action, our review is at law, not de novo. See *Hurd v. Iowa Dep't of Human Services*, 580 N.W.2d 383, 386 (Iowa 1998). We apply the standards of Iowa Code section 17A.19(8) (1997) to assess whether our conclusions coincide with those reached by the district court. *Shine v. Iowa Dep't of Human Services*, 592 N.W.2d 684, 686 (Iowa 1999) (citation omitted).

III. Failure to Interview. Mauk argues the social worker investigating his daughter's allegations was required to interview him under Iowa Code section 232.71(2)(e). He does not state what implications this failure has for these proceedings, but we presume he intends it to serve as a ground for reversal.

This issue has not been preserved for our review because it not raised below. See *McCracken v. Iowa Dep't of Human Services*, 595 N.W.2d 779, 785 (Iowa 1999) (appellate court review limited to questions raised before the agency); see also *In re Marriage of Rebouche*, 587 N.W.2d 795, 798 (Iowa App. 1998) (declining to consider issues raised for the first time on appeal). We find no decision on this issue in either the agency or district court ruling and thus there is

² That code section was repealed effective July 1, 1998. See Iowa Code Ann. 232.71 (West Supp. 1999).

nothing for us to review. We also note that paragraph (e) of section 232.71(2), requiring DHS to interview the alleged abuser, was not enacted until 1989. See Iowa Acts 1989 ch. 230, § 7 (adding paragraph (e) to Iowa Code § 232.71(2)).

IV. *Permitting the Children to Testify.* Mauk served subpoenas on Lyndsay and her brother, Jamison, prior to the hearing. The ALJ quashed the subpoenas, concluding it would not be in the children's best interests to subject them to the stress of testifying at the hearing, particularly when it was evident their testimony would add minimal information. Mauk questions whether the children's best interests is an appropriate basis on which to exclude their testimony. We review evidentiary rulings for abuse of discretion. *In re E.H. III*, 578 N.W.2d 243, 245 (Iowa 1998).

We agree with the ALJ that Lyndsay's memory would have been unreliable when the hearing occurred in 1995. She was only three and one-half years old at the time of the incident and the hearing took place seven years later. Jamison was only seven at the time of the incident and it did not appear he had any personal knowledge of the alleged abuse. It would also have been stressful for both children to testify under these circumstances. Mr. Mauk cites no authority for his argument that the ALJ could not exclude these children's testimony based on a consideration of their best interests. To the contrary, best interests are considered in deciding whether a child should testify. See *E.H. III*, 578 N.W.2d at 246. It was well within the ALJ's discretion to exclude the children's testimony.

V. *Admissibility of Videotape of Lyndsay.* Prior to the hearing, Mauk made a videotape of himself questioning his daughter. He now places error with the ALJ's refusal to admit this videotape into evidence.

For the same reasons Lyndsay should not have been made to testify in person, the videotape should not have been admitted. The videotapes were simply a mechanism to circumvent the ALJ's ruling that Lyndsay and her brother could not be compelled to testify. We affirm on this issue.

VI. Weight of Opinion Testimony under Rule 702. Mauk asserts the ALJ failed to comply with Iowa Rule of Evidence 702 when it gave undue weight to the testimony from therapists, counselors, and a psychologist without first requiring that their opinions be supported by citations to published studies, reviews of literature or other learned sources. In particular, Mauk seems to take issue with the experts' testimony regarding the use of anatomically correct dolls to question Lyndsay about the incident in 1988.

Again, Mauk challenges the agency action without having preserved error by raising the issue before the district court. See *McCracken*, 595 N.W.2d at 785. The district court ruling contains no reference to rule 702, so again we have nothing to review.

Furthermore, we find no requirement that an expert cite published studies or other sources in order to render their testimony admissible. Iowa courts have a liberal policy regarding the admissibility of expert testimony. *E.g.*, *Hylar v. Garner*, 548 N.W.2d 864, 868 (Iowa 1996); *Ort v. Klinger*, 496 N.W.2d 265, 267 (Iowa App. 1992). In his brief, Mr. Mauk points to recent criticism of the use of anatomical dolls to assess child sexual abuse. This information goes to the weight of the experts' testimony, not its admissibility. See *Hylar*, 548 N.W.2d at 869 (any deficiencies in expert's preparation or background go to weight, not admissibility, of testimony) (citing *Hutchison v. American Family Mut. Ins.*, 514 N.W.2d 882, 885 (Iowa 1994).

Mauk should have elicited these criticisms at the 1995 hearing, either by cross-examination of the State's experts or by calling his own expert.

VII. Substantial Evidence. Although Mauk does not specifically allege insufficiency of the evidence on appeal, this argument is implicit in all of his other contentions. Where a party contends the agency decision is unsupported by substantial evidence, we ask whether a reasonable person would find the evidence adequate to reach a given conclusion. *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). The question is whether there is substantial evidence to support the finding actually made, not whether evidence might support a different finding. *Sahu v. Iowa Bd. of Medical Examiners*, 537 N.W.2d 674, 676-77 (Iowa 1995). Due to the limited nature of our review, we do not reassess the weight to be accorded various items of evidence. *Burns*, 495 N.W.2d at 699. We are bound by the agency's factual findings "unless a contrary result is demanded as a matter of law." *Sahu*, 537 N.W.2d at 677 (citation omitted).

The ALJ concluded Mauk sexually abused his daughter. Mauk contended the allegation was the result of a conspiracy between Ms. Cornish and her second husband. None of the therapists or psychologists involved in this case had any evidence that the mother was trying to cause problems or had coached Lyndsay. Alternatively, Mauk contended someone else was the perpetrator. Lyndsay never named another perpetrator, only her father.

Ultimately, Mauk's main contention is that the child should not have been believed by the ALJ. The ALJ concluded:

. . . [the child] was consistent in what she told her mother, her stepfather, and all the professionals involved in the case. Despite [Mauk's] disagreement with how the interviews were conducted, there

is no evidence of coaching. [The child] was very matter-of-fact in telling about the touching and was able to give details when asked and to tell that it felt good and did not hurt. The only times she denied that the touching took place were when she was under stress and would have connected that stress with telling about the touching. The fact that she engaged in some sexually explicit behavior in the psychologist's office indicates a sexual experience in her background. The administrative law judge concludes that [the child] is more credible than [Mauk] and that [Mauk] did engage in inappropriate sexual contact with [the child].

The district court agreed, stating

Indeed, L.M. was consistent in explaining the game she and her father played, and in demonstrating the game on anatomically correct dolls. There is no evidence that L.M. was coached, or that L.M. fabricated the story to trick her mother. On the contrary, the evidence shows that L.M. did not have the abstract thinking and planning ability to concoct such a story. These factors, coupled with the fact that L.M. acted out sexually during her last visit with Dr. McDonough, support the ALJ's decision.

Although there may be some evidence to the contrary, given our limited scope of review of agency fact findings, we also find substantial evidence to support the agency conclusion. We affirm the decision to deny expunction of Mauk's information from the registry.

AFFIRMED.

Zimmer and Miller, JJ., concur; Sackett, C.J., dissents.

SACKETT, C.J. (dissents)

This appeal challenges a district court ruling refusing to expunge from the child abuse registry a report appellant abused his daughter, Lyndsey.

The report of the alleged abuse initially came from the child's stepfather who indicated the child told him appellant played a game that resulted in his touching her genitals over her clothing and vice versa. The mother reported this to D.H.S. She was involved in a custody and visitation dispute with appellant when the alleged abuse occurred.

Lyndsey was interviewed by a number of persons, including a child protective investigator, a police detective, a therapist, and a psychologist who determined the child was truthful in telling about the game.

Janet S. McDonough interviewed Lyndsey five times. During the first visit they talked; in the second visit Lyndsey put the boy's hand on the girl's crotch; in the fourth visit she denied the game. In the fifth visit she acted out sexually. She never identified her father with the touching game. McDonough determined she was sexually stimulated and did describe something that happened.

Appellant, in the meantime, voluntarily submitted to a lie detector test and answered no to questions concerning the alleged game. The examiner found him to not be deceptive regarding the areas covered during the test.

I disagree with that portion of the majority opinion that affirms the order quashing a subpoena for Lyndsey.

The majority has agreed to the administrative law judge's conclusion the child's memory would not be reliable at the time of the hearing. She was three and a half when the incident was reported and eleven at the time of the hearing. There is no evidence to support such a finding. Instead, it was based on the

assumption Lyndsey's memory of the alleged abuse or even that it occurred would not be reliable after seven years.

The administrative law judge rejected the polygraph results finding, "Lie detector tests have not been found to be reliable evidence . . ." yet, while not hearing the child's testimony, accepted opinions from the series of people who talked to the child.

I would reverse the order quashing the subpoena and remand this case to the agency to order Lyndsey to be called as a witness.