

NO. 327612  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

**FILED**

MAR 16 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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**ASHLEY BROWN**

Appellant

v.

**STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
CHILD PROTECTIVE SERVICES**

Respondent

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

The Department's Response Brief addresses some, but not all, of the issues raised by Appellant Ashley Brown's Opening Brief. Where the Department has failed to respond to an argument or to distinguish authority relied upon by Ms. Brown, it should be treated as having conceded the issue entirely.<sup>1</sup> Specifically, the State did not respond to the Appellant's argument regarding disputed findings of fact, as well as whether it applied a different duty of care by requiring her to prevent not only all foreseeable consequences but also all unforeseeable consequences, as discussed below.

There is *not* substantial evidence in this case that Ms. Brown's actions amounted to a "serious disregard," as required by the relevant statute and regulation to support a finding of child neglect. *Nor* is there substantial evidence that Ms. Brown failed to immediately seek appropriate treatment once the injury became a clear and present danger to K.D. This Court should therefore reverse the *Review Decision and Final Order*.

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<sup>1</sup> *Hanson v. Estell*, 100 Wn. App. 281, 285-86, 997 P.2d 426, 429 (2000) (respondent's failure to file brief precluded oral argument); *Shell Dealers Ass'n. v. Shell Oil*, 725 F. Supp. 1104, 1109 (D. Nev. 1989) (failure to respond to arguments regarding one of several claims deemed concession supporting partial summary judgment).

## II. ARGUMENT

### A. NOTWITHSTANDING THE DEPARTMENT'S ATTEMPT TO MISLEAD THE COURT ON KEY EVIDENCE, THERE IS NOT SUBSTANTIAL EVIDENCE THAT MS. BROWN'S CONDUCT AMOUNTED TO CHILD NEGLECT.

#### 1. The Department's Statement of Fact Misleads This Court.

On many occasions in its Response Brief, the Department misrepresents an important fact from the record. First, the Department asserts, as fact, that K.D. sustained third-degree burns.<sup>2</sup> Looking to the Department's citation for that proposition, however, it appears that the Department relies on the ambiguous testimony of Dr. Messer, the emergency room treating physician, who actually stated she was not sure whether there were any third-degree burns:

“. . . **maybe** some of the areas **might** have been considered third degree, but I'd have to, like I said, get my little reference -- you know, get a reference guide to be sure on that one, um, as far as if any part of it got to be a third degree burn.” CP 113. (Emphasis added).

The Department's erroneous assertion that K.D. sustained third-degree burns is also contradicted by the Review Judge's Finding of Fact 14, which in part stated that: “. . . Dr. Messer

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<sup>2</sup> Response Brief, p. 2, “Dr. Messer found K.D. to have second and third-degree burns.” Response Brief, p. 6, “the facts show that K.D. suffered second and third-degree burns . . . .”

found the child had second, and ***possibly some third degree burns . . . .***” AR 4, CP 11. (Emphasis added). The equivocation by Dr. Messer and the Review Judge as to whether there was any third-degree burns makes the Department’s flat assertion all the more misleading.

Second, the Department alleges that “K.D. had to remain in the hospital for care of the burns from December 7 until December 12.”<sup>3</sup> This statement is also misleading because it omits the fact that K.D. remained in the hospital for this length of time due, primarily, to an administrative hold placed on him by the Department. AR 229; CP 135.

Third, the Department misleads the court by stating that K.D. was given oxycodone for the pain.<sup>4</sup> While this statement is not incorrect, including the statement without additional context misleads the court as to the level of K.D.’s pain while in the hospital. It should be noted that the hospital gave K.D. oxycodone against Ms. Brown’s wishes. CP 258. Specifically, Ms. Brown testified:

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<sup>3</sup> Response Brief, p. 3.

<sup>4</sup> *Id.*

“Towards nighttime is when they gave him oxycodone . . . . And I had asked them not to do that because he had prior to that been taking the Tylenol all day long running up and down the halls, and they would come into the room, in the middle of the . . . night when he’s peacefully sleeping and give him this narcotic.” CP 258.

Ms. Brown’s account of K.D.’s pain level was consistent with Dr. Sicilia’s documented account upon first examining K.D. in the emergency room. AR 223-224. Dr. Sicilia noted that K.D. was a “well-developed child” who presented as “active and playful” and in no “acute distress.” AR 223-224. It is also consistent with Dr. Messer’s documented observation of K.D. where she noted that he was awake, alert and cooperative during her examination. AR 228.

This Court should conclude that the Department’s misleading statements are not supported by substantial evidence in the record, and the Court should therefore disregard them.

2. The Department Failed to Address All of the Findings of Fact Challenged by Ms. Brown, and There is Not Substantial Evidence to Support the One Disputed Finding of Fact that the Department Did Address.

Without addressing Ms. Brown’s specific challenges to the Review Judge’s findings of fact, most of which were contained in

his conclusions of law<sup>5</sup>, the Department argues that “[t]he record clearly contains substantial evidence which supports the Department’s founded finding of negligent treatment and/or maltreatment as affirmed by the Review Judge.”<sup>6</sup> In support of its argument, the Department points to evidence in the record that it supports the Department’s decision. As argued in the Appellant’s Opening Brief, however, there is not substantial evidence in the record to the support that general finding.

The Department does not address the three other findings of fact that Ms. Brown disputes in her Opening Brief. The Department failed to specifically respond to Ms. Brown’s argument that the Review Judge’s Finding of Fact 15 (that it would have been apparent at the time of the incident that the burn needed medical

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<sup>5</sup> The standard of review for findings of fact and conclusions of law is a two-part process. *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the court must determine whether there is substantial evidence to support the finding of fact. *Id.* Substantial evidence exists when there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997), *rev. denied*, 132 Wn.2d 1004 (1997). Second, the court must determine whether the findings of fact support the conclusions of law. *Landmark*, 138 Wn.2d at 573. A conclusion of law erroneously described as a finding of fact will be reviewed as a conclusion of law. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Conversely, a finding of fact erroneously described as a conclusion of law will be reviewed as a finding of fact. *Id.* Here, Ms. Brown challenged four findings of fact, three of which were erroneously described as a conclusion of law.

<sup>6</sup> Response Brief, p. 7.

attention) is not supported by substantial evidence on the record.<sup>7</sup> Similarly, the Department did not address Ms. Brown's argument that there is not substantial evidence to support the Review Judge's rejection of Dr. Keblawi's opinion that Ms. Brown acted reasonably in not seeking immediate medical attention for her child's injury.<sup>8</sup> Finally, the Department did not address Ms. Brown's argument that there is not substantial evidence to support the finding that Ms. Brown's failure to seek immediate medical treatment led to "additional blistering, bleeding, suffering, and infection that could possibly have been avoided, or at least reduced . . . ."<sup>9</sup>

For the reasons argued here and in the Appellant's Opening Brief, this Court should conclude that none of these findings is supported by substantial evidence, and the Court should therefore reverse the finding of neglect against Ms. Brown.

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<sup>7</sup> Appellant's Opening Brief, p. 31-35.

<sup>8</sup> Appellant's Opening Brief, p. 35-37.

<sup>9</sup> Appellant's Opening Brief, p. 37-38.

**B. THE COURT SHOULD CONSIDER ALL OF MS. BROWN'S ARGUMENTS BECAUSE THE COURT OF APPEALS SITS IN THE SAME POSITION AS THE SUPERIOR COURT IN ITS REVIEW.**

The Department argues that this Court should decline to consider: (1) Ms. Brown's arguments related to whether the Review Judge erroneously interpreted and applied the law by imposing an expanded definition of child neglect that includes a reasonable person standard, which resulted in the *Review and Decision and Final Order* falling outside the Department's statutory authority; and (2) Ms. Brown's argument that the Review Judge erred by determining that he could not weigh the evidence related to Dr. Keblawi's testimony. The Department argues that these issues "were not raised previously before the superior court,"<sup>10</sup> and that RAP 2.5(a), which allows the Court discretion to not consider "any claim of error which was not raised in the trial court," should preclude Ms. Brown from raising these issues now.

The Department's argument must fail for three reasons. First, in a case involving a petition for judicial review from an administrative order, the superior court sits in an appellate position and not in the position of a trial court. WAC 388-15-135(b),

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<sup>10</sup> Response Brief, p. 8.

WAC 388-02-0640(1), RCW 34.05, *et. seq.* Rather, it is the Administrative Law Judge (ALJ) and the Board of Appeals (BOA) Review Judge at the administrative level that sits in the position analogous to that of superior court trial judge. WAC 388-15 *et. seq.*; WAC 388-02 *et seq.*; RCW 34.05 *et. seq.*

In Ms. Brown's case, the issues raised on judicial review are issues of law that could not have been known to or asserted by her at the time of the administrative hearing. The fact that the ALJ or BOA Review Judge applied an incorrect legal or review standard in its decision is not something Ms. Brown could have predicted and raised at that administrative hearing.<sup>11</sup>

Second, an appellate court engaging in judicial review applies the standards in RCW 34.05.570 "directly to the record before the agency, sitting in the same position as the superior court." *Utter v. State, Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 299, 165 P.3d 399 (2007) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)). The appellate court "**review[s] only the board's decision, not the ALJ's decision or the superior**

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<sup>11</sup> The Department's misunderstanding of this concept is further evidenced by the fact that the only case law it cites on this issue is regarding the appeal of a trial court decision, and not a case involving judicial review of an administrative decision. Response Brief, p. 9.

**court's ruling.”** *Marcum vs. Dep't of Soc. & Health Servs.*, 172 Wn. App. 546, 559, 290 P.3d 1045 (2012) (emphasis added). The appellate court “review[s] de novo the board’s legal determinations using the APA’s ‘error of law’ standard,” and it “may substitute [its] view of the law for the board’s.” *Id.* at 559.

This Court is not reviewing the superior court decision or even the ALJ’s decision. *Marcum*, 172 Wn. App. at 559. Instead, it is reviewing the Board of Appeals *Review Decision and Final Order*, a document that is, in and of itself, an “appellate” decision. *Id.* In this respect, judicial review of administrative decisions is unique and not properly analogous to appellate procedure found in the RAP.

Third, Ms. Brown’s petition for judicial review in superior court asserted the following grounds for relief, which she also asserts before this court: (1) the Department erroneously interpreted and applied the law<sup>12</sup>; (2) the decision is not supported by substantial evidence; and (3) the order was arbitrary and capricious.

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<sup>12</sup> The Review Judge erroneously interpreted and applied the law by expanding the definition of child neglect to include a ‘reasonable person’ tort law standard and a heightened or different duty of care, thereby expanding the definition of child neglect and resulting in the *Review Decision and Final Order* being outside the statutory authority of the agency.

Ms. Brown could not have raised these issues at either the initial or review level of administrative proceedings, but she has properly asserted them on judicial review in both superior court and now before this Court. The Court should therefore consider all of the issues raised by Ms. Brown in her Opening Brief.

**C. THE DEPARTMENT ERRONEOUSLY INTERPRETED AND APPLIED THE DEFINITION OF NEGLIGENCE WHEN IT INCLUDED A REASONABLE PERSON STANDARD AND A DIFFERENT DUTY OF CARE.**

The Department argues that it did not erroneously interpret and apply the wrong standard because although it did make a finding of fact regarding what a reasonable person would do, it also “recognizes and references the appropriate standard” and specifically addresses the fact that the Department does not have to make a finding of “total disregard.”<sup>13</sup>

The Review Judge not only made a finding of fact regarding a reasonable person standard, but also based a conclusion of law on that same standard. Specifically, the Department entered a finding of fact that “[t]he substantial area affected by the burn, the distribution of the burn including the genitalia, and the severity of the burn would have caused *any reasonable person* to seek

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<sup>13</sup> Response Brief, p. 11.

medical care for the child right away.” AR 4. (Emphasis added). Conclusion of law 11 states, “[a] review of the entire record in this case supports the ALJ’s finding that **any reasonable person** would have sought medical care for the child right away.” AR 12. (Emphasis added).

Conclusion of law 12, which contains a recitation of the statutory definition of neglect, is based almost wholly on the Review Judge’s determination in conclusion of law 11 that a “reasonable person” would have sought medical care immediately. Specifically, conclusion of law 12, in part, states:

Based on the Appellant’s own lack of medical knowledge; her uncertainty as to what actually occurred due to her not being there when the injury occurred; the reported screaming of her son upon being scalded by hot water; the evidence that a burn had occurred; the extensiveness of the injured area; the sensitive nature of the area injured; and the potential inability by a layperson to perceive eventual consequences caused by scalding, all dictate that Appellant should have sought immediate medical attention for her toddler son. AR 13.

Moreover, the Review Judge clearly concedes that his review of the circumstances relies not on what did occur but on what *might* have been done differently with the advantage of hindsight: “The undersigned recognizes the advantage of viewing the entire factual record in ‘hindsight,’ an advantage not available to

the Appellant the evening she left work to return home to tend to her injured son.” AR 13.

Instead of examining whether Ms. Brown’s actions *at the time they occurred* constituted a serious disregard of the consequences to such a magnitude as to constitute a clear and present danger to K.D., the Review Judge determined what she should have done *in retrospect* based on a reasonable person standard, and then judged her actions based on this incorrect standard.

It is not sufficient to merely recite or reference the correct legal standard in a conclusion of law. It is significant that the Department does not dispute Ms. Brown’s assertion that the Review Judge imposed a heightened standard of care by requiring her to take action to avoid not only all foreseeable consequences but also all *unforeseeable* consequences.

Here, the Review Judge was required to correctly interpret and apply that standard in deciding whether to affirm a finding of neglect. Because the Review Judge did not do so, the Court should conclude that the agency erroneously interpreted and applied the statutory definition of “negligent treatment or

maltreatment,” and the Court should therefore reverse the neglect finding.

**D. THE AGENCY ORDER IS OUTSIDE THE STATUTORY AUTHORITY OF THE AGENCY BECAUSE IT IMPOSES AN EXPANDED DEFINITION OF NEGLECT THAT IS NOT AUTHORIZED BY STATUTE.**

The Department argues that it acted within its statutory authority by entering a finding against Ms. Brown because it has broad authority and responsibility to investigate allegations of abuse and neglect against children.<sup>14</sup> It further argues that it has implied authority to carry out these investigations by making findings about whether the abuse or neglect occurred.<sup>15</sup> ***This argument completely misunderstands*** Ms. Brown’s assertion that the *Review Decision and Final Order* is erroneous as a matter of law because it applied an expanded definition of neglect that was not authorized by statute. She incorporates and relies on her argument outlined in her Opening Brief.

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<sup>14</sup> Response Brief, p. 10.

<sup>15</sup> *Id.*

**E. THE REVIEW JUDGE ERRONEOUSLY INTERPRETED AND APPLIED THE LAW BY CONCLUDING THAT THE ADMINISTRATIVE LAW JUDGE'S DETERMINATIONS REGARDING THE CREDIBILITY OF DR. MESSER AND DR. KEBLAWI AND THE WEIGHT GIVEN TO THEIR OPINIONS "CANNOT BE REVERSED ON REVIEW."**

The Department also mischaracterizes Ms. Brown's argument that the Review Judge erroneously interpreted and applied the law in his conclusion of law that that the ALJ's weight of evidence or credibility determinations "**cannot be reversed** on review," unless such determinations are arbitrary, capricious, or an abuse of discretion. (Emphasis added). AR 11-12. The Department ignores this statement and argues that "because his findings are consistent with the evidence admitted during the hearing and consistent with his statutorily-delegated authority," there was no error.<sup>16</sup>

Under the APA, a review judge has the same decision-making authority as the ALJ, which includes the authority to make credibility determinations and weigh evidence. RCW 34.05.464(4); *Hardee v. Dep't. of Social & Health Serv., Dep't. Early Learning*, 152 Wn. App. 48, 215 P.3d 214 (2009), *affirmed* 172 Wn.2d 1

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<sup>16</sup> Response Brief, p. 12.

(2011). A reviewing officer must only give due regard to the ALJ's opportunity to observe witnesses. *Id.*

Despite this authority, the Review Judge concluded that “[t]he challenged credibility determinations were neither made arbitrarily nor capriciously and do not constitute an abuse of discretion by the ALJ. ***They cannot be reversed on review.***” AR 7, 11-12 (emphasis added).

Requiring proof that an ALJ's determination on credibility or weight of evidence was made arbitrarily and capriciously or was otherwise an abuse of discretion, the review judge acted contrary to the APA and limited his own decision-making authority to the detriment of Ms. Brown who has asked only for the review judge to reweigh the evidence. Instead, the Review Judge had the authority to reweigh the evidence and, while giving due regard to the ALJ's credibility determinations, could make his own credibility determinations.

**F. THE AGENCY ORDER IS ARBITRARY AND CAPRICIOUS.**

For all the above reasons cited in this brief, and for the reasons cited in the Appellant's Opening Brief at 41, Ms. Brown

reiterates that the Court should conclude that the BOA *Review Decision and Final Order* is arbitrary and capricious.

**G. APPELLANT ASHLEY BROWN IS ENTITLED TO ATTORNEYS' FEES AND COSTS.**

For the reasons cited in the Appellant's Opening Brief at 41-44, Ms. Brown reiterates that the Court should authorize an award of fees and costs, including reasonable attorneys' fees pursuant to RAP 18.1 and RCW 4.84.350.<sup>17</sup>

**III. CONCLUSION**

The Court should conclude that the Department's neglect finding is based on an erroneous interpretation and application of the law because it included a reasonable person standard, with the benefit of hindsight, and a heightened or different duty of care standard not found in the abuse and neglect statute in RCW 26.44. The Court should also conclude that that erroneous interpretation and application of the law resulted in an order that is outside the agency's authority. Finally, the Court should conclude that the Department's *Review Decision and Final Order* is not based on substantial evidence on the record.

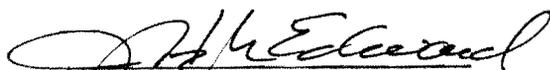
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<sup>17</sup> Ms. Brown will file the affidavit establishing that she is a qualifying party.

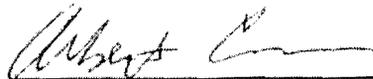
The Court should set aside the DSHS BOA *Review Decision* and *Final Order* issued in Ms. Brown's case, set aside the agency action finding her to have committed child neglect, and authorize an award of reasonable attorneys' fees and costs to Ms. Brown.

Respectfully submitted on March 16, 2015.

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**COURT OF APPEALS  
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**ASHLEY BROWN,**

**Petitioner,**

**and**

**NO. 327612**

**DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, CHILD  
PROTECTIVE SERVICES,**

**DECLARATION OF SERVICE**

**Respondent.**

I declare under penalty of perjury under the laws of the state of Washington that on the 16th of March, 2015, I personally served Chelsea Price, Assistant Attorney General, with a true and correct copy of the Appellant's Opening Brief in the above-captioned matter by personally delivering said document to her office located at 1116 W. Riverside Avenue, Spokane, Washington.

Signed this 16th day of March, 2015, within the county of Spokane, state of Washington.

  
\_\_\_\_\_  
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