IN THE COURT OF APPEALS OF IOWA

No. 0-173 / 09-0985
Filed June 16, 2010

MARLENE ROBINSON,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES AND/OR IOWA DEPARTMENT OF INSPECTIONS AND APPEAL,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

A child care worker appeals from a district court ruling affirming the Iowa Department of Human Services' determination that a reported child abuse incident was confirmed. **REVERSED AND REMANDED.**

Gilbert R. Caldwell III, Newton, for appellant.

Thomas J. Miller, Attorney General, and Diane M. Stahle, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

Marlene Robinson appeals from a district court ruling on judicial review affirming the Iowa Department of Human Services' (DHS) classification of a reported incident of physical child abuse as confirmed. Marlene[1] contends: (1) the agency's determination that she committed the abuse is not supported by substantial evidence and (2) the agency violated her due process rights during the agency hearing. Because we agree with Marlene's first contention, we reverse and remand without reaching her second argument.

I. Background Facts and Proceedings.

We summarize the evidence that was presented at the administrative hearing in this matter.

Marlene and her husband, Eugene Robinson, operate a category C child development home called Robinson Carousel Day Care (Robinson Carousel). *See* Iowa Code § 237A.3A (2007) (regulating child development homes). The Robinsons established their daycare in 1966, and have subsequently provided daycare services to an estimated 1600 children.[2] The record contains numerous letters and statements of parents supporting the Robinsons and attesting to the quality of their programming. Both Marlene and Eugene have obtained advanced degrees (Marlene a Master's Degree in counseling and psychology and Eugene a Ph.D. in education and psychology), and both have enjoyed careers in education. The Robinsons have a long history of compliance with

[1] We refer to Marlene Robinson by her first name to avoid confusion with her husband, who is also referred to extensively in this opinion.

[2] Eugene is a former dean of students at Iowa State University. When he retired about twenty years ago, he decided to join his wife, who was already operating the daycare.

DHS rules and standards, and they have never been the subject of any prior allegations of abuse. At the time of the incident, Marlene was seventy-three years old and Eugene was seventy-seven.

Robinson Carousel is operated out of the Robinsons' split-level residence in Ames. Typically, they have twelve to fourteen children in the daycare. Marlene and Eugene are the primary care providers at Robinson Carousel, but they do have some part-time assistance from other adults, including their daughter, Michelle. At Robinson Carousel, the children are separated according to age, with Eugene working with the preschool children downstairs and Marlene working with the school age children upstairs. Although the children were generally divided, Marlene would occasionally provide care and supervision to some of the younger children when Eugene was unavailable.

In early July 2006, J.R. and his younger brother were enrolled at Robinson Carousel. As a four year-old boy who was going to turn five in September, J.R. was placed into the preschool group under the primary care of Eugene.[3] At the time of his enrollment, J.R. was experiencing bowel and bladder control accidents. According to J.R.'s parents, these accidents had started when J.R. and his family were on a trip to Florida earlier in the summer. At Robinson Carousel, they occurred as often as three times a day and required extra changes in clothing and additional staff attention. Sometimes, they caused interruptions in activities for the other children.

[3] According to J.R.'s parents, J.R. was eligible to go to kindergarten in the fall but they planned to hold him back for one year.

The alleged child abuse incident occurred on July 28, 2006. On that day, J.R. and his two-year-old sibling were dropped off by their father at 6:45 a.m. and picked up by their father around 5:45 p.m.[4] When the father arrived, Marlene was in the downstairs area cleaning the toilet. Marlene approached the father to discuss J.R.'s accidents and suggested that J.R. be returned to diapers. Although Marlene and the father dispute how each reacted,[5] it is undisputed that the father rejected the idea and took J.R. home. The father did not observe any marks on J.R. at that time or when he placed J.R. into his pickup truck, buckled him into the booster seat, and took him home.

The drive home took approximately ten minutes. When J.R. and the father got home, they joined J.R.'s mother on the deck to grill dinner. A short time later, the mother noticed something on J.R.'s neck. Since both the mother and the father work in the medical field,[6] they recognized it to be petechiae (small red and purple spots on the skin caused by broken capillary blood vessels). As the mother relates, she inquired as to what happened, and J.R. stated, "The old lady did it." The mother then followed up, "Do you mean Mrs. Robinson?" to which J.R. replied, "Yes."

According to the father, J.R. was first asked whether another child choked him and said, "No, Mrs. Robinson did it. She's a mean lady." According to the

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[4] The center's regular hours began at 7:00 a.m. and ended at 5:30 p.m., but the parents had made arrangements that they could drop off and pick up J.R. and his younger brother outside of regular hours.

[5] The father described Marlene as "very frustrated," while Marlene and Eugene stated to the contrary that the father was very angry about the suggestion that J.R. be put in diapers. As Eugene put it, "[The father] was very adamant at that time, very adamant, that [J.R.] would not be put in diapers, and stomped out the door with the two children."

[6] The mother works in nursing; the father is a radiology technician.

father, J.R. said that Mrs. Robinson had grabbed his neck after he was being too loud in the story corner.[7]

The parents immediately decided to have him evaluated by a doctor. The mother also wondered if the petechiae might be a reaction to immunizations that J.R. had received two days before.

J.R. was taken to an evening acute care clinic by his mother where he was seen by a pediatrician, Dr. Kathleen Foster-Wendel.[8] Dr. Foster-Wendel confirmed that J.R. had petechiae on his neck and photographed them. According to her report:

> He has some notable petechiae on his neck both sides a little bit on front and a little bit onto his anterior chest on the right side and some posteriorly. These could certainly be marks from hands around the neck. He was scratching the area, but mother said he was not scratching that area prior to her asking questions about it at home and the attention that we were given it here.

Dr. Foster-Wendel had a blood test performed and ruled out possible causes of petechiae including a blood platelet disorder or a viral infection. Dr. Foster-Wendel observed that the petechiae were arranged in three sausage-shaped linear marks across the front of the neck extending ear-to-ear with the first linear mark being just below the chin and the third linear mark just above the clavicle. Based upon her observations, Dr. Foster-Wendel concluded that J.R. had a "[p]etechial rash on the neck most likely due . . . to trauma and pressure on the neck." Dr. Foster-Wendel then superimposed her hand over the petechiae and

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[7] According to the parents, J.R. also told them that on an earlier date, he had been grabbed by the neck by Mrs. Robinson when he got out of his sleeping "box" during nap time. (According to the Robinsons, the preschool children sleep on mats, which are sometimes separated by dividers.)

[8] Dr. Foster-Wendel was not J.R.'s regular pediatrician, who had just seen J.R. for a routine kindergarten physical. However, she is a partner of that physician.

concluded that the injury was more consistent with the right hand of an adult, and not a child. However, Dr. Foster-Wendel admitted that she was not able to identify the person who inflicted the petechial marks on J.R. Dr. Foster-Wendel also stated that a superficial redness would appear immediately after contact, but that petechiae would not be visible for up to ten to fifteen minutes later.

According to Dr. Foster-Wendel's medical record, "mother noticed petechia on his neck and asked him if a child had choked him and he has [said] no the old lady at day care did." Thus, Dr. Foster-Wendel's medical record does not indicate that J.R. directly reported the abuse to her. Nevertheless, in her subsequent testimony, Dr. Foster-Wendel recalled that during her examination of J.R. in the mother's presence, she asked J.R. if a child had choked him, and J.R. replied, "No, it was the old lady at day care that did." Dr. Foster-Wendel "believed" that the child told her this, but she could not say so with 100 percent certainty. As she put it in her hearing testimony, "I didn't document it quite that way in my note, and it was 18 months ago."

Regarding the possibility of a reaction to the school vaccinations that J.R. had just received, Foster-Wendel said it is possible to develop a rash after immunizations but the neck is not the usual place for such a rash.

The following day, Saturday, July 29, 2006, the father notified the daycare that both J.R. and his sibling were being withdrawn from the facility. That day, J.R. visited his maternal grandmother. According to the mother, when the grandmother asked how his injury occurred, J.R. responded "that the old lady did it."

On August 1, 2006, the abuse allegation was reported to DHS and assigned to be investigated by a child protection worker (CPW). This CPW had been employed at DHS for over four years and had six months' experience at that time as a child protection worker.

The CPW had a lengthy phone conversation with the father on August 3 and then made an unannounced visit later that day to Robinson Carousel. Marlene and her daughter Michelle (who works from time to time at the center) were present. Marlene denied making any contact with J.R., and denied even being near J.R. on the day of the incident.[9] Marlene and Michelle indicated that J.R. was large for his age, and could be aggressive with other kids and hyperactive.

Eugene later joined the interview and confirmed Marlene's denials. Eugene stated that he was with J.R. the entire day, that Marlene was never alone with J.R., and that he did not see Marlene touch J.R. Eugene and Marlene also denied that their daycare has a story corner or reading corner.[10]

On August 9, 2006, the CPW made a scheduled visit to the home of J.R. and his parents. In addition to speaking with J.R.'s parents, she tried to speak with J.R. at that time:

> CPW asked [J.R.] if he would talk with her and [J.R.] reported that he didn't want to be in trouble. CPW reported to [J.R.] that he was not in trouble and he could talk with his parents here. CPW asked [J.R.] what he told his parents and [J.R.] said again he didn't want

[9] Marlene did state that J.R. had taken a nap that day on a mat that was placed on the floor (rather than on the carpet) in case he had an accident. The naps take place upstairs, although the preschool area is generally downstairs.

[10] The daycare does have a table where library books are sometimes stored, but no reading table as such. This table is part of the preschool area downstairs. Eugene and Marlene claimed that Marlene did not work at all downstairs on July 28.

> to be in trouble. [J.R.'s] parents both told [J.R.] that he was not in trouble and it was CPW jobs to help him and make sure he is safe and his friends are safe. [J.R.] again said that he did not want to be in trouble, and [J.R.] would not speak with this worker about this incident. [J.R.] was very affectionate with his parents during this situation and he did not appear fearful of them.

DHS never made any other attempt to interview J.R. However, the CPW had a later follow-up phone call with the father on August 17, 2006, where she asked if J.R. was "a truthful kid or if he likes to tell stories." The father responded that J.R. "likes to tell stories, but he is not likely to consistently make up a story, [J.R.] by history has been a truthful kid."

The CPW did not interview Dr. Foster-Wendel. Nor did the CPW interview J.R.'s grandmother (who had allegedly been told about the physical abuse by J.R.). However, at the suggestion of the DHS help desk, the CPW did contact six randomly selected parents who had children currently attending Robinson Carousel. The first contact responded that their children had reported seeing "them grab kids by the back of the neck." However, the reports did not specify whether it was Marlene or Eugene, and only stated "they." The parents said they were concerned when they first heard this, but their children had no concern. These parents continued to send their children to the center, which they said their children enjoy. The other five parents contacted by the CPW had no concerns at all regarding the Robinsons, and were pleased with their children's overall care. Some of these parents in turn reported to the Robinsons that they had been contacted by DHS.

Although the DHS investigation became generally known, no parents other than J.R.'s removed their children from Robinson Carousel. One of the

parents who had been contacted by the CPW interviewed her own two children, one of whom would have been in the preschool group, and neither of them said they saw anything improper on that date. This parent also testified that she spoke with other parents, and none of them had heard anything of concern from their children or felt their children needed to be removed from the center. The CPW herself did not attempt to interview any of the other children who had actually been with J.R. on July 28, 2006.

On August 25, 2006, DHS notified Marlene that it was confirming the report of abuse, and that her license to provide childcare was being revoked as a result. Marlene appealed the determination. In addition to her previous denials, Marlene also stated that she has severe problem with arthritis in her hands, such that she cannot open a bottle top, and therefore could not have choked J.R.

While the appeal was pending but prior to any hearings, the administrative law judge (ALJ) received an ex parte communication from J.R.'s parents via facsimile. The fax consisted of a printout of an e-mail from the parents, with the addressees listed as unknown. The e-mail summarized the parents' perspective on the case and, in very strong terms, expressed concern that Marlene was continuing to provide care while the abuse determination was under appeal.[11] Upon receipt of the ex parte communication, the ALJ submitted it for the record, disclosed it to both parties, and advised the parties that it "would not affect my ability to hear the case as scheduled." Marlene's motion for sanctions was denied.

[11] The e-mail stated that there were "two other families testimonies of witnessed abuse," a claim not supported elsewhere in the record. The e-mail concluded, "We were very fortunate that [J.R.] did not end up killed or worse, in a vegetative state."

On February 15, 2008, a hearing was held before the ALJ. At the hearing, the ALJ, over Marlene's objection, designated J.R.'s mother and father as parties to the action. The ALJ also denied Eugene's request to be a party and ordered the non-party witnesses, including Eugene, to be sequestered during the confidential proceedings. At the close of the hearing, the ALJ also allowed into evidence, over objection, the previous ex parte communication from the mother and father.

On March 13, 2008, the ALJ issued a proposed decision upholding the confirmed child abuse report. In her proposed decision, the ALJ drew a number of conclusions. First, "the evidence of record clearly establishes that J.R. sustained physical injury at the hands of an adult." Second, "J.R. repeatedly told reliable adults that it was the 'old lady' who hurt him and identified the Appellant as the old lady." Third, Marlene Robinson was the only woman working that day. Fourth, one other parent's children had observed Marlene and/or Eugene Robinson grab children by the neck. Fifth, there was some evidence that Marlene Robinson was upset about the number of accidents J.R. was having. The ALJ ultimately concluded that "J.R.'s hearsay statements are reliable, credible and accurate and entitled to greater weight than Appellant's sworn testimony denying the allegations."

The ALJ, however, reversed DHS's determination that Marlene should be prohibited from providing child care. Instead, the ALJ determined that Marlene could provide child care subject to certain conditions.

Both Marlene and DHS sought review of the proposed decision. Specifically, the DHS appeals advisory committee maintained that Marlene's

registration was required to be revoked for five years under Iowa Code section 237A.5(2)(e)(2).[12]

On October 2, 2008, the director of DHS issued a final decision. The director upheld the classification of the reported child abuse as "confirmed," and further found that such a violation required Marlene to be prohibited from any involvement with childcare for a period of five years.

Marlene timely filed a petition for judicial review. In her petition, Marlene claimed the agency determination that she committed child abuse was not supported by substantial evidence, that the mother and father were not appropriate parties to the action, that the agency erred in admitting the ex parte communication, and that the appeals advisory committee should not have been allowed to raise new legal issues in their post-hearing memorandum. On March 25, 2009, the district court issued a detailed and thorough opinion that affirmed the final decision of DHS. As the following excerpts indicate, the district court did express some skepticism about the strength of DHS's case against Marlene:

> It is clear that DHS relied upon the opinion of Dr. Foster-Wendel as well as statements J.R. made to Dr. Foster-Wendel, the [parents], and his grandmother. DHS also considered additional "circumstantial evidence" such as who had access to J.R. on July 28, 2006. DHS determined all this supported the finding that Robinson was the person who inflicted the injury on J.R. There is substantial evidence in the record to the contrary. The Director made additional findings of fact beyond those made by the ALJ to support his decision. Those additional findings are not all supported by the record. However, whether Robinson inflicted this

[12] This provision, now section 237A.5(2)(f)(2), states that if a person "has been found to have committed physical abuse, the person shall be prohibited from involvement with child care for a period of five years from the date of conviction or founded abuse."

> injury upon J.R. is an issue of fact. Where the evidence is in conflict or where reasonable minds might disagree about the conclusion to be drawn from the evidence, the Court must give appropriate deference to the agency's findings. . . . The Court concludes that the findings of fact made by the ALJ were sufficient to substantiate the decision made.
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> The Court notes that it has considered Robinson's argument that the evidence in this case is not substantial because it is mostly hearsay evidence. . . . Although the evidence in this case is hardly ironclad, the record is not composed solely of hearsay evidence. The Court also cannot say that a common sense evaluation of the evidence could only lead to the conclusion that DHS should be reversed on the substantial evidence standard. The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's decision is not supported by substantial evidence. Accordingly, DHS's determination that Robinson committed the confirmed and registry placed child abuse allegation in this case is affirmed.

Marlene appeals.

II. Scope and Standard of Review.

We apply the standards of judicial review set forth in the Iowa Administrative Procedure Act, Iowa Code chapter 17A, in our review of the agency's findings concerning child abuse reports. *See* Iowa Code § 235A.19(3); *Mauk v. Iowa Dep't Human Servs.*, 617 N.W.2d 909, 911 (Iowa 2000). When the claimed error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings when the record is viewed as a whole. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Substantial evidence" is statutorily defined as

> the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code § 17A.19(10)(f)(1). Where the evidence is in conflict or where reasonable minds might disagree about the conclusion to be drawn from the evidence, the court must give appropriate deference to the agency's findings. *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 197 (Iowa 1992). It is the agency's duty as the trier of fact, not the reviewing court, to determine the credibility of the witnesses, to weigh the evidence, and to decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-95 (Iowa 2007).

> [C]ourts should broadly and liberally apply those findings to uphold rather than to defeat the agency's decision. Evidence is not insubstantial merely because it would have supported contrary inferences. It is substantial when a reasonable mind could accept it as adequate to reach the same findings. The determining factor is not whether the evidence supports a different finding but whether the evidence supports the finding actually made.

IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632 (Iowa 2000) (citations omitted).

To the extent we must determine constitutional issues, our review is de novo. *Drake Univ. v. Davis*, 769 N.W.2d 176, 181 (Iowa 2009).

III. Analysis.

Marlene contends the agency's determination that she committed an act of physical abuse against J.R. was not supported by substantial evidence. Again, the question we must answer is whether the evidence in this case "would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). Would a reasonable person accept the totality of the evidence in this case as sufficient to reach the same findings? In this case, we believe a reasonable person would have a number of significant doubts. The father did not

notice the petechiae while picking up J.R., strapping him in, and driving him home. However, based on Dr. Foster-Wendel's testimony, if the petechiae were caused by an injury inflicted by Marlene, it seems unlikely they would not have been present and noticeable when the father picked up J.R. Also, according to the hearsay testimony, J.R. was choked on July 28 when he was in the "story corner." There seems to be no dispute that Eugene was responsible that day for J.R. and the other preschoolers, who were downstairs, while Marlene was responsible for the older, school-age children, who were upstairs. It is possible that Marlene attended to J.R. at some point in the reading area during the day even though he was not one of her charges, but this would have meant leaving the school-age children alone. This too seems like an unusual scenario.

The reaction of the other families raises further doubts. This facility was relatively small. As might be expected, the parents of the other children discussed this incident among themselves and with their own children. If another child had witnessed the incident with J.R., or if another parent believed that it had actually occurred, one suspects that some action would have been taken by one of these other families. But, as the hearing testimony indicates, no corroboration of J.R.'s report surfaced, and all the other parents kept their children at Robinson Carousel.

A reasonable person might also question the weight of some of the circumstantial evidence cited by the agency. The agency's view is that Marlene could have had hostility toward J.R. because of the number of accidents he was having. However, the record seems to indicate that the Robinsons displayed considerable patience with the situation. For three weeks, J.R., who was nearly

five years old, had been generally having two to three accidents per day at the day care.[13] Some of the accidents were messy and involved changing the boy's entire wardrobe. Some of the accidents necessitated an interruption of the preschool group's activities. J.R.'s parents were aware of the situation but had no plan to address it other than waiting it out. The evidence is in conflict as to how the conversation went at the day care on July 28, but the substance of what Marlene and the father said to each other is not. To an outsider Marlene's request seems more reasonable than the father's reaction.[14]

Thus, while the case against Marlene is not exclusively based on hearsay, we believe it is so heavily reliant on hearsay as to bring the case within the principles set forth in *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603 (Iowa Ct. App. 1990). In *Schmitz*, our court acknowledged that hearsay is, of course, admissible in administrative proceedings. 461 N.W.2d at 607; *see also* Iowa Code § 17A.14(1); *Gaskey v. Iowa Dep't of Transp*., 537 N.W.2d 695, 698 (Iowa 1995) (stating that hearsay is admissible in administrative proceedings and can constitute "substantial evidence"). Yet the *Schmitz* court concluded that if the record is composed solely of hearsay evidence, the reviewing court should examine the evidence closely in light of the entire record to ensure that the hearsay evidence "rises to necessary levels of trustworthiness, credibility, and

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[13] His father acknowledged, "I believe there was one day he didn't have any accidents, but there were—most of the days it was between two to three accidents."

[14] More helpful to DHS's position, in our view, is the report from one of the six families contacted by the CPW that their children had seen one or both of the Robinsons "grab kids by the back of the neck." There is a difference between grabbing a child by the back of the neck and throttling a child in the front of the neck, as allegedly occurred in J.R.'s case, but an adult who tends to grab children by the back of the neck might be more predisposed to choke them as well. Yet none of the other five families reported this, and even the family in question did not view the situation as one of physical abuse.

accuracy." 461 N.W.2d at 607-08. In making this common sense evaluation, our court set forth five factors:

> (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled.

Id. at 608. None of these criteria are dispositive, and in each case they must be given appropriate weight. *Id*.

In this case, both the agency and district court applied the *Schmitz* factors, and concluded the hearsay was sufficiently trustworthy and reliable. We disagree. The fundamental dilemma in this case is that the hearsay essentially comes through the filter of J.R.'s parents. They are relating what they say J.R. told them. J.R. may have repeated the story to Dr. Foster-Wendel (in the presence of J.R.'s mother), but Dr. Foster-Wendel was not 100 percent sure and her medical record does not indicate that he did. J.R.'s parents cannot be considered disinterested witnesses. *See id.* (noting that the first factor is "the nature of the hearsay").

DHS made only a minimal effort to interview J.R. directly. On one occasion, the CPW tried to engage J.R. in discussion at the family home. However, no attempt was made to have the parents bring in J.R. so he could be interviewed by an experienced interviewer. Had J.R. repeated the allegations directly to an impartial professional, who concluded that his story was credible, this would of course be a different case. If there were a recording available, thereby allowing an independent assessment of J.R.'s credibility, this would also be a different case. Instead, DHS trusted the opinion of J.R.'s father as to whether J.R. was credible. Even that opinion was somewhat ambiguous, since

the father acknowledged that J.R. "likes to tell stories" while adding that he was "truthful" and not likely "to consistently make up a story."

In this case, after receiving the referral, the CPW engaged in two phone conversations and one face-to-face interview with the parents, as to all of which the parents had advance notice. The CPW had only one substantive encounter with the Robinsons, which was unannounced. She never attempted to speak to Dr. Foster-Wendel, or to interview directly any other children who were at the day care on July 28.[15] She did not try to follow up in more detail with the one family whose children said they had seen the Robinsons "grab kids by the back of the neck." Given the serious consequences that a child abuse finding would have, it is puzzling that none of these avenues were pursued. *See id.* (noting as factors "the cost of acquiring better information" and "the need for precision").

In the face of these circumstances, we believe the hearsay does not rise "to necessary levels of trustworthiness, credibility, and accuracy." *Id.* at 607-08. In this case, the agency essentially relied on the parents as to what was said and how credible the child was. The agency did not make a meaningful attempt to interview J.R. independently, even though he was almost five years old. The agency passed up other possible interviews. The costs of performing these interviews would have been quite modest. There was a considerable need for reliable information, because the Robinsons flatly denied that any physical abuse had occurred and the remaining evidence raised a number of questions.

[15] As we have noted, by the time the hearing took place, Dr. Foster-Wendel was not certain whether J.R. had discussed the physical abuse with her. A contemporaneous interview of Dr. Foster-Wendel might have cleared up this point.

Even if the *Schmitz* rule were not applicable here, we believe the sum total of the evidence pointing toward a confirmed child abuse finding in this case cannot be considered "substantial," since it is so heavily dependent on the parents' hearsay testimony as to what their young son told them. For the foregoing reasons, we conclude the agency's finding that Marlene Robinson physically abused J.R. is not supported by substantial evidence, and therefore we reverse the district court's determination and the agency's decision, and remand for further proceedings consistent herewith. Because of this resolution, we do not reach Marlene's procedural arguments regarding the fairness of her hearing.

REVERSED AND REMANDED.