

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Meridian
Services, Inc.

**RECOMMENDATION ON MOTION
FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Eric L. Lipman on October 5, 2016, for an oral argument on the Respondent's Motion for Summary Disposition.

James H. Clark, III, Assistant Attorney General, appeared on behalf of the Minnesota Department of Human Services (Department). Samuel D. Orbovich, Fredrikson & Byron, P.A., appeared on behalf of the Licensee, Meridian Services, Inc. (Meridian).

By way of a Notice and Order for Prehearing Conference and Hearing dated June 7, 2016, the Department alleged that Meridian was responsible for maltreatment of a vulnerable adult by neglect, as those terms are used in Minn. Stat. §§ 626.557, subds. 9c(b), (c), .5572, subds. 15, 17(a) (2016).

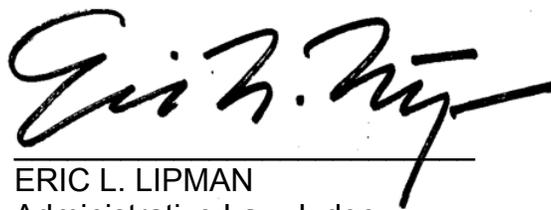
Meridian sought summary disposition on this claim. It maintained that the care it provided in this case was a "therapeutic error," but was not "neglect." Moreover, Meridian asserted that as to this point, there was not a genuine issue of material fact. The hearing record on the motion closed on October 5, 2016, following the conclusion of the oral argument.

Based upon the hearing record, the undersigned makes the following:

RECOMMENDATION

1. The Commissioner **GRANT** Meridian's Motion for Summary Disposition.
2. The Commissioner **VACATE** the Determination of Maltreatment
3. The Commissioner **VACATE** the Order to Pay a Fine.

Dated: October 31, 2016


ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Factual Background

Meridian owns a 2010 Chrysler Town and Country minivan with a ramp that has been modified to accommodate one person who uses a wheelchair.¹

The vulnerable adult (VA) who is the subject of this case, owns a Tracer SX5 wheelchair that is manufactured by Invacare.²

In order to provide the VA with opportunities that she enjoys, including visits to local shopping malls, Meridian trained its staff on methods of safely transporting the VA in the facility's minivan.³ The minivan is equipped with a ramp that extends from the interior cabin through the rear of the vehicle.⁴ On the floor of the interior cabin is a four-point wheelchair passenger securement system manufactured by Q'Straint. The system is comprised of four retractable Q'Straint Oval L-Pocket floor anchors for securing the wheelchair restraint straps to the floor of the van. The Oval L-Pocket floor anchors were part of an "L-Series" floor anchorage system.⁵ The VA's wheelchair had brakes on each side which can be engaged by pushing the levers down.⁶ The wheelchair is held in place by Sure-Lok restraint belts.⁷

The Work Book for Trainees for the Q'Straint QRT MAX restraint system includes the following instruction to van operators:

5. While you are handling the wheelchair, begin looking for appropriate attachment points on the chair.
6. Remember they must be on rigid frame members and near the level of the seat if possible.
7. You should have seen examples of rigid frame members or welded locations while viewing the [accompanying QRT MAX] video.
8. Once you have located a good solid frame member you wish to mark the location for future reference, especially for wheelchairs that you transport on a daily basis.

¹ Affidavit of Khaydreona R. Clark at ¶ 3 (Clark Aff.); Affidavit of Angela Cavelier at ¶ 3 (Cavelier Aff.); Affidavit of Samuel D. Orbovich, Exhibit A (Orbovich Aff.).

² Cavelier Aff. at ¶ 2.

³ Clark Aff. at ¶¶ 4-6.

⁴ Clark Aff. at ¶ 3; Orbovich Aff., Ex. A at DHS 378, 403, 409.

⁵ Orbovich Aff., Exs. A, G.

⁶ See Clark Aff. at ¶¶ 5, 14.

⁷ Cavelier Aff. at ¶ 5; Orbovich Aff., Ex. A at DHS 371.

9. The use of colored wire is the ideal device to mark the securement points.

10. You may also include this information on route sheets or other instructions so other drivers or attendants are aware of the securement point indicators.

11. Attach the four QRT MAX retractors to the anchorage points.⁸

In March of 2015, while being transported in the Chrysler Town and Country minivan, the VA's wheelchair tipped backwards.⁹

More than six months later, in October of 2015, Khaydreona R. Clark joined the staff of Meridian as a Program Counselor.¹⁰

On March 5, 2016, Ms. Clark and the VA were scheduled to take a dinner outing and shopping trip for the VA. Ms. Clark loaded the VA into the minivan by using the rear ramp and applied the four point Q'Straint system.¹¹

Ms. Clark directed the VA to apply her wheelchair brakes, and Ms. Clark "wobbled" the wheelchair to assure herself that the wheelchair was secure in its placement before taking her place in the driver's seat. Notwithstanding these efforts, and unbeknownst to Ms. Clark, the front two hooks of the Q'Straint system fell off the wheelchair, negating their protection. A few minutes later, the vehicle had departed the facility. As Ms. Clark made a right-hand turn from Girard Avenue on to another street, the VA exclaimed "whoa." Her wheelchair had moved. As Ms. Clark pulled the minivan to the side of the road to stop, the wheelchair tipped backwards.¹²

Ms. Clark parked the vehicle, and manually lifted the VA's chair into an upright position. The VA said that she was not injured, a matter that Ms. Clark confirmed by her own inspection for bruises or injuries. After re-securing and locking the wheelchair in place, the VA and Ms. Clark continued on the scheduled outing.¹³

At the conclusion of the dinner and shopping excursion, Meridian staff took the VA to Urgent Care for evaluation. Meridian staff sought assurance that VA had not sustained any injuries that were not detected during Ms. Clark's roadside review.¹⁴ There were no reports of injury from the medical staff that evaluated the VA.¹⁵

⁸ Orbovich Aff., Ex. G at DHS 547.

⁹ Affidavit of Lindsay Arth, Ex. A at 2 (Arth Aff.).

¹⁰ Orbovich Aff., Ex. C at DHS 454.

¹¹ Clark Aff. at ¶¶ 5-6.

¹² *Id.* at ¶ 7.

¹³ *Id.* at ¶¶ 8-9.

¹⁴ *Id.* at ¶¶ 11-12.

¹⁵ Orbovich Aff., Ex. D at DHS 473; see also Cavalier Aff. at ¶¶ 6-7; Orbovich Aff., Ex. C at DHS 457.

The VA did not require any medication or other care as a result of her wheelchair tipping backwards on March 5, 2016.¹⁶

Ms. Clark had transported the VA in the minivan on many other occasions and no such mishap occurred during those journeys.¹⁷

On March 6, 2016, a Program Administrator for Meridian reported this incident to the Minnesota Adult Abuse Reporting Center (MAARC). Following that report, the Department assigned Investigator Lindsay Arth to make her own inquiries into the matter.¹⁸ Among the items in her report, were the following:

In March 2015, the VA had a prior incident where s/he tipped in [his/her] wheelchair while in the van.

....

The VA's wheelchair was manufactured by Invacare was the Tracer SX5 model. On April 14, 2016, this investigator spoke with *someone from Invacare* who stated it was not recommended that the VA's wheelchair be used for transportation because there were no 'tie-down brackets' or areas where the wheelchair 'could be tied down in a van.'

....

Given that the VA required use of the wheelchair for mobility and that a person from the manufacturer of the VA's wheelchair stated that it was not recommended that the wheelchair be used for transportation because there were no 'tie-down brackets' or areas where the wheelchair 'could be tied down in a van,' it would have been reasonable and necessary to ensure that the VA was in a wheelchair that was designed to be used during transport. The VA's wheelchair was not designed to be used during transport which resulted in the VA falling on two occasions. Therefore, there was a preponderance of the evidence that there was a failure to provide care which was reasonable and necessary to maintain the VA's physical health and safety.¹⁹

As she reasoned, Meridian neglected the VA because it failed to obtain a sturdier wheelchair model, with tie-down brackets, during the two-year period between February of 2014 and March of 2016. Ms. Arth concluded:

Information was consistent from staff persons that the VA's wheelchair was 'temporary.' Although the facility made attempts, four appointments between May 26 and December 29, 2015, for the VA to get

¹⁶ *Id.*

¹⁷ Clark Aff. at ¶ 13.

¹⁸ Arth Aff. at ¶ 1.

¹⁹ Arth Aff., Ex. A at 3, 5, 6 (emphasis added).

a new wheelchair, each appointment was cancelled for various reasons. Given that the VA had the wheelchair since February 2014, it would have been reasonable that over the course of two years, the facility would have ensured that the VA had a wheelchair that could safely be used during transport. Given the above, that there was a prior incident where the VA's wheelchair tipped during transport, and that multiple staff persons, including supervisory staff persons, expressed concerns regarding the VA's wheelchair, including that there was not a designated place for the tie-downs to be secured, the facility was responsible for maltreatment of the VA.²⁰

On May 5, 2016, the Department determined that Meridian was responsible for maltreatment by neglect of a vulnerable adult in violation of Minn. Stat. § 626.5572.²¹

Maltreatment Standards

Minn. Stat. § 626.557, subd. 17(a) (2016) defines “neglect” as:

The failure or omission by a caregiver to supply a vulnerable adult with care or services, including but not limited to, food, clothing, shelter, health care, or supervision which is:

- (1) reasonable and necessary to obtain or maintain the vulnerable adult's physical or mental health or safety, considering the physical and mental capacity or dysfunction of the vulnerable adult; and
- (2) which is not the result of an accident or therapeutic conduct.

Further, Minn. Stat. § 626.557, subd. 20 (2016) defines “therapeutic conduct” as:

the provision of program services, health care, or other personal care services done in good faith in the interests of the vulnerable adult by: (1) an individual, facility, or employee or person providing services in a facility under the rights, privileges and responsibilities conferred by state license, certification, or registration; or (2) a caregiver.

Summary Disposition Standards

Summary disposition is the administrative equivalent of summary judgment.²² Summary disposition is appropriate when there is no genuine dispute as to the material

²⁰ Arth Aff., Ex. A at 7.

²¹ Arth Aff., Ex. B at 1.

²² See *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

facts of a contested case and one party necessarily prevails when the law is applied to those undisputed facts.²³

The moving party - in this case, Meridian - carries the burden of proof and persuasion to establish that there are no genuine issues of material fact which would preclude disposition of the case as a matter of law.²⁴ When considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the non-moving party - in this case, the Department.²⁵

As noted in the Second Prehearing Order, however, in order to defeat an otherwise proper motion for summary disposition, the non-moving party must show the existence of material facts that are genuinely disputed.²⁶ Affidavits offered in opposition to a motion for summary disposition must be based upon personal knowledge and show that the declarant has knowledge of the matters that are asserted in the document.²⁷

Legal Analysis

In this case, Ms. Arth maintains that use of the Tracer SX5 model wheelchair for transportation in the retrofitted minivan amounted to neglect because: (a) “someone from Invacare ... stated it was not recommended ... because there were no ‘tie-down brackets’ or areas where the wheelchair ‘could be tied down in a van;” and (b) “multiple staff persons, including supervisory staff persons, expressed concerns regarding the VA’s wheelchair”²⁸ The difficulty, of course, is that Ms. Arth’s report on these matters does not identify the declarants who made the statements or establish those persons’ knowledge about the matters that are asserted.

The Department makes two rejoinders: first, a trained investigator like Ms. Arth would only make her inquiries of persons who are knowledgeable in their fields; and second, the relaxed hearsay rule of Minn. R. 1400.7300, subp. 1 (2015) permits these kind of informal summaries. Neither argument is persuasive.

As to the first argument, the affidavit Ms. Arth submitted in this matter does not describe her selection process for interviewees or any limits she places on whom she interviews; nor does any other part of the hearing record touch on her practice.²⁹

²³ See *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988).

²⁴ See *Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

²⁵ See *id*; *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

²⁶ *In Re Appeal by Meridian Services, Inc.*, OAH Docket No. 8-1800-33554, SECOND PREHEARING ORDER, at 1 n.2. (Minn. Office Admin. Hearings July 29, 2016) (citing *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 511-12 (Minn. 1976)).

²⁷ See *Cronquist v. City of Minneapolis*, 237 F.3d 920, 927 (8th Cir. 2001); *Dull v. St. Luke's Hosp. of Duluth*, 21 F. Supp. 2d 1022, 1028 (D. Minn. 1998); *Couillard v. Charles T. Miller Hospital, Inc.*, 92 N.W.2d 96, 98 (Minn. 1958); *Itasca County Soc. Services v. Milatovich*, 381 N.W.2d 497, 498-99 (Minn. Ct. App. 1986).

²⁸ Arth Aff., Ex. A at 5, 7.

²⁹ See generally Arth Aff., Exs. A, B.

Because the interviewees are not identified, we are asked to simply assume that they were well chosen and knowledgeable. The tribunal is asked to do more than construe facts in “the light most favorable” to the Department – it is asked to assume facts that were never pleaded in the first instance.

Further, while Minn. R. 1400.7300 (2015) does permit administrative law judges to receive “evidence which possesses probative value, including hearsay,” any hearsay statements must be “the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.”³⁰ Reasonable and prudent persons do not rely upon the statements of persons they do not know, and have never been identified, when managing important affairs.³¹

In this context, it is useful to note that the Office of Administrative Hearings has employed an eight-factor test to assess hearsay evidence. As Judge Neilson wrote:

Under the rules of the Office of Administrative Hearings governing contested case proceedings, hearsay is to be admitted only under circumstances indicating some reliability. See Minn. R. 1400.7300 (hearsay may be admitted “if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs”). Factors that have generally been used by the courts in assessing whether evidence offered in an administrative hearing is “reliable, trustworthy, and probative” have been summarized as follows: In determining whether evidence is reliable, trustworthy, and probative for the purposes of an administrative hearing, other jurisdictions have enumerated several factors that provide helpful guidance . . . : (1) whether the statement was written and signed; (2) whether the statement was sworn to by the declarant; (3) whether the declarant was a disinterested witness or had a potential bias; (4) whether the hearsay evidence is denied or contradicted by other evidence; (5) whether the declarant is credible; (6) whether there is corroboration for the hearsay statement; (7) whether the case turns on the credibility of witnesses; (8) whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; and (9) whether the party against whom the hearsay is used has access to the statements prior to the hearing or the opportunity to subpoena the declarant.³²

³⁰ Minn. R. 1400.7300, subp. 1.

³¹ *In Re Revocation of the Family Child Care License of Mindy Blankers*, OAH Docket No. 8-1800-31668, 2014 WL 7337943, slip op. at *5 (Minn. Office Admin. Hearings November 26, 2014) (“A prudent person, in the conduct of their serious affairs, would, at a minimum, want to know who made the statement; what information was provided about Ms. Blankers’ explanation of events; the training and qualifications of the person making these assessments; the inquiries that the declarant made into the injuries that occurred; and the person’s reasons for excluding Ms. Blankers’ description of events as a cause of the child’s injuries. None of these items are in the hearing record.”).

³² *In Re Residential Building Contractor’s License of Capricorn Corp.*, OAH Docket No. 11-1005-11089-2, 1998 WL 177725, slip op. at *11 (Minn. Office Admin. Hearings February 17, 1998) (citing *Indus. Claims Appeals Office v. Flower Stop Mktg. Corp.*, 782 P.2d 13, 18 (Colo. 1989)).

In this case, because the declarants are unidentified, and their statements are unwritten and unsworn, none of the listed factors run in the Department's favor.

The Administrative Law Judge is mindful that without a contested case proceeding, the identities of the individuals who furnished information during Ms. Arth's investigation would be classified as "not public data."³³ However, as part of these proceedings, a protective order providing for disclosure of these materials was issued.³⁴ Further, filing a pleading with this information can change the classification of the data under the Minnesota Government Data Practices Act.³⁵ Ordinarily, witnesses who provide substantive evidence against another party to a contested case proceeding, do so in full view of that party.³⁶

For these reasons, the record does not include competent evidence that Meridian neglected the VA because her Tracer SX5 wheelchair was unsafe. Without that evidence, the Department is not entitled to put Meridian to the expense and burden of an evidentiary hearing. Meridian is entitled to summary disposition on its defenses.

E. L. L.

³³ Minn. Stat. §§ 13.02, subd. 12, 626.557, subd. 12b (b)(2)(iv) (2016).

³⁴ FIRST PREHEARING ORDER, *In Re Appeal of Meridian Services, Inc.* OAH Docket No. 8-1800-33554 (June 27, 2016); see generally Minn. Stat. § 13.03, subd. 6 (2016).

³⁵ Compare Minn. Stat. § 13.39, subd. 3 (2016) ("Any civil investigative data presented as evidence in court or made part of a court record shall be public") with Minn. Stat. § 626.557, subd. 12b (b)(2)(iv) (2016) ("Data on individuals collected and maintained in the investigation memorandum are private data, including ... the identity of all individuals interviewed as part of the investigation").

³⁶ See Minn. Stat. § 14.60, subd. 2 (2016) ("No factual information or evidence shall be considered in the determination of the case unless it is part of the record"); *In Re Marolon Terrell Pratt*, OAH Docket No. 16-1005-21207-2, 2010 WL 5574244, at *4 (Minn. Office Admin. Hearings August 25, 2010) ("In the past, we have found affidavits to be insufficient to raise a question of material fact if they merely stated legal or factual Conclusions without providing a basis for the affiants' knowledge and without making any showing that the affiants were competent to testify as to the matters stated.' ... [In this case, the] investigators identified the sources of their information and how it was obtained."); *Bastian v. Jensen*, OAH Docket No. 11-1901-11328-2, 1998 WL 15000, at *7 (Minn. Office Admin. Hearings January 6, 1998) (Pleadings with "unsworn and conclusory assertions are insufficient to create an issue of fact" and avoid summary disposition).