IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis Spillman, Petitioner	:	
v.	:	No. 303 C.D. 2010
	:	Submitted: June 11, 2010
Workers' Compensation Appeal Board (DPT Business School), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON[1] **FILED: March 23, 2011**

Dennis Spillman (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed a Workers' Compensation Judge's (WCJ) order imposing penalties against DPT Business School (Employer). This case involves the cost containment provisions of Section 306(f.1) of the Workers' Compensation Act (Act),[2] 77 P.S §531. Claimant argues the WCJ erred by calculating penalties using the repriced amount of medical bills, instead of the full amount his provider billed. Claimant also argues the WCJ erred in awarding a third party settlement offset to Employer in satisfaction of Employer's subrogation lien. Underlying both arguments is Claimant's contention that the WCJ's order is based on hearsay documents. For the reasons that follow, we affirm.

[1] This case was reassigned to the author on February 8, 2011.

[2] Act of June 2, 1915, P.L. 736, as amended. This section was amended by P.L. 190, Act 44 of 1993 on July 2, 1993, and renumbered as Section 306(f.1)(1)(i), effective in 60 days.

A WCJ previously determined Claimant sustained a work injury when he slipped on a loose tile on Employer's premises and fell down a stairwell. The WCJ awarded Claimant total disability compensation of $474.36 per week.

After the work injury, Claimant treated with Stephen C. Padnes, M.D. (Provider), a chronic pain specialist and psychiatrist, for approximately two years. Provider submitted medical bills to Employer, which Employer did not pay.

Claimant filed a penalty petition against Employer for failing to pay Provider's bills. In response, Employer filed a petition to review benefits/review benefit offset (review petition). Employer averred Claimant failed to sign a third party settlement agreement (TPSA) and requested reimbursement for its third party subrogation lien (subrogation lien). The WCJ consolidated the petitions and conducted hearings.

Claimant testified in support of the penalty petition and offered the deposition testimony of Provider. During the deposition, Employer's counsel stipulated to the reasonableness and necessity of Provider's care. Dep. of Stephen C. Padnes, M.D. (Padnes Dep.), at 8. Provider testified his bills totaled $32,000. Claimant included some of the bills as exhibits in Provider's deposition to show Provider used the appropriate forms required by the Act.

Employer offered two exhibits to show its insurer repriced the bills in accordance with Section 306(f.1) of the Act. Employer offered a computer

printout from its insurance carrier listing the payments Employer made to Provider. Original Record (O.R.), Employer's Ex. D-1.[3] Employer also offered an affidavit from Employer's insurance carrier's claims handler stating these payments totaled $13,334.85 after repricing. O.R., Employer's Ex. D-2. Claimant avers he objected to these exhibits as hearsay, but he does not indicate where he preserved these objections before the WCJ.

In support of its review petition, Employer offered Employer's Exhibit D-3 which consisted of three documents. First was a letter from Employer's counsel to Claimant's counsel attaching a TPSA for Claimant to execute. O.R., Employer's Ex. D-3 at 4-5 (Letter from Wendy A. Fleming to Thomas More Holland (10/25/04)). Employer's Counsel also stated, "[i]n the event that you would like to provide us with a demand to fully resolve your client's work injury, kindly advise us … and protect our lien amount by placing the $68,725.03 into an escrow account." Id.

The second document in the exhibit was a completed, but unsigned TPSA. O.R. Employer's Ex. D-3 at 2-3 (TPSA dated 10/25/04). The calculations on the TPSA indicated that, after taking into account credit against future workers' compensation payable, Employer would pay Claimant $194.14 per week.

The third document was a letter from Claimant's counsel to Employer's counsel stating "[t]he settlement proceeds have been received.

[3] Each entry identified the dates of service and the amount insurer paid. The document did not identify the amounts Provider billed.

Consistent with your suggestion $68,725.03 has been placed in an interest bearing escrow account in [Claimant's] name." O.R., Employer's Ex. D-3 at 1 (Letter from Thomas More Holland to Wendy A. Fleming (11/30/04)). Claimant's counsel also suggested the parties mediate Claimant's remaining claim. Id.

The WCJ indicated that Claimant objected to D-3 as hearsay, but that the WCJ admitted D-3 "for a limited purpose and not for the truth of the matter asserted." WCJ Op., 7/30/08, Finding of Fact (F.F.) No. 3.

Based on the evidence, the WCJ made the following relevant findings:

> 2. [The TPSA] indicates that Claimant received $400,000.00 in a third party action. The accrued lien was $118,223.06 and the balance of recovery $281,776.04….
>
> * * * *
>
> 13. There has been no evidence submitted by Claimant disputing the calculations on the TPSA. Claimant submitted no evidence that he reimbursed the subrogation lien of $68,725.03 to Employer or its carrier.
>
> 14. This [WCJ] finds that Claimant should pay to the Employer the amount escrowed, $68,725.03, as well as any interest earned in the escrow account.
>
> 15. This [WCJ] finds that Employer may take a credit against Claimant's future benefits in the amount of $280.22 per week for the period from October 25, 2004 to the date of this Decision.
>
> 16. This WCJ finds that [Employer] shall pay Claimant indemnity benefits at the reduced rate of

> $194.14 per week, representing the benefit offset to which it is entitled, after its credit is exhausted.
>
> 17. Claimant has failed to submit any evidence on the Petition to Review/Review Benefit Offset.
>
> * * * *
>
> 20. Based on the conflicting evidence, Employer's contest has been reasonable.

F.F. Nos. 2, 13-17, 20. The WCJ concluded Employer violated the Act by failing to timely pay Provider's bills, and she assessed a penalty of 20% of the repriced amount of $13,332.85. Concls. of Law Nos. 2-5.

Claimant appealed, and the Board affirmed. Claimant petitions for review.

On appeal,[4] Claimant argues the WCJ erred in deciding the penalty petition, the review petition, and the reasonableness of the contest. Claimant requests three items of relief: 1) modification of the penalty by awarding 20% of the actual amount billed; 2) reversal of that portion of the adjudication based on objected-to hearsay documents; and, 3) remand for calculation of attorneys' fees attributable to Claimant's successful pursuit of his penalty petition.

I. Penalty Petition

Claimant argues the WCJ erred by not basing the penalty award on the

[4] On review, we are limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated. Mora v. Workers' Comp. Appeal Bd. (DDP Contracting Co., Inc. & Penn Nat'l Ins.), 845 A.2d 950 (Pa. Cmwlth. 2004).

full amount of Provider's bills. Claimant also asserts the WCJ erred by relying on hearsay evidence of the repriced bills. Accordingly, Claimant argues the penalty should be based on the full amount.

In response, Employer argues Claimant failed to preserve the hearsay arguments. Additionally, Employer argues the Act requires its insurer to reprice the bills before paying them.

Resolution of these issues requires consideration of the penalty and cost containment provisions of the Act.

A. Applicable Law-Cost Containment and Penalty Provisions of the Act

The cost containment provisions of the Act establish procedures for limiting medical expenses and allow for penalties for non-compliance with those procedures. Hough v. Workers' Comp. Appeal Bd. (AC&T Cos.), 928 A.2d 1173 (Pa. Cmwlth. 2007). Department regulations require insurers to reprice medical bills according to a formula provided in Section 306(f.1) of the Act. 34 Pa. Code. §127.205. The Act requires medical providers to accept payments that insurers make in accordance with the repriced amount, as payment in full. Acme Mkts. v. Workers' Comp. Appeal Bd. (Johnson & Peterson M.D.), 725 A.2d 863 (Pa. Cmwlth. 1999). Repricing is mandatory. Sections 306(f.1)(2)-(3) of the Act, 77 P.S. §531(2)-(3). An employer is required pay the repriced amount within 30 days. Section 306(f.1)(5) of the Act, 77 P.S. §531(5). An employer who unilaterally ceases making payments without authorization may be subject to penalties under Section 435 of the Act, added by the Act of February 8, 1972, P.L.

25, 77 P.S. § 991. Schenck v. Workers' Comp. Appeal Bd. (Ford Elec.), 937 A.2d 1156 (Pa. Cmwlth. 2007).

Section 435 of the Act establishes ceilings for penalties based on taking a percentage of the "amount awarded." The Department, the Board, "or any court which may hear any proceedings brought under this Act" may award penalties "not exceeding [10%] of the amount awarded and interest accrued and payable…." Section 435 of the Act, 77 P.S. §991(d)(i). However, the Act authorizes penalties up to 50% for "unreasonable or excessive delays." Id.

The Act does not define the term "amount awarded." We previously held that the term "'amount awarded' indicate[s] the legislature's intention to award penalties only when a claimant is awarded benefits." Jaskiewicz v. Workmen's Comp. Appeal Bd. (James D. Morrisey, Inc.), 651 A.2d 623, 626 (Pa. Cmwlth. 1994). But see Loose v. Workmen's Comp. Appeal Bd. (John H. Smith Arco Station), 601 A.2d 491 (Pa. Cmwlth. 1991) (allowing a penalty based on the amount of bills employer unilaterally ceased paying, even though the WCJ concluded the treatment was not necessary and did not award compensation for the bills).

More recently, we effectively permitted WCJs to use their discretion in determining what "amount awarded" to use when a claimant brings a penalty petition. Hough.[5]

[5] In Hough, we recognized that a WCJ hearing a claimant's penalty petition lacks authority to conclusively establish the correct amount of bills, because such **(Footnote continued on next page…)**

In evaluating the appropriateness of penalties we are mindful that penalties are not workers' compensation benefits, and are not meant to make the claimant whole. Hough; Constructo Temps, Inc. v. Workers' Comp. Appeal Bd. (Tennant), 907 A.2d 52 (Pa. Cmwlth. 2006). Accordingly, claimant need not suffer economic damages before pursuing penalties. Hough. Rather, penalties provide a means for WCJs, the Board, the Department and courts, to insure compliance with the Act. Hough; Graphic Packaging, Inc. v. Workers' Comp. Appeal Bd. (Zink), 929 A.2d 696 (Pa. Cmwlth. 2007).

This Court will only overturn a WCJ's penalty decisions for an abuse of discretion. Schenck.

B. Application

Claimant presents no legal authority that penalties must be based on the non-repriced amount of bills. Employer concedes there is no precedent on this point, but there is a statutory and regulatory obligation to reprice bills. Accordingly, Employer argues the penalties should be based on the repriced amount.

The WCJ's use of the repriced bills in calculating a penalty is

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(continued…)

matters are left to the utilization review and fee review processes of the Act. However, we concluded a claimant has a right to pursue a penalty petition independent of these processes. Accordingly, a WCJ is necessarily enabled to review conflicting evidence regarding bills to determine an "amount awarded" to use in calculating an appropriate penalty.

supported by the statutory language. Section 306(f.1)(3)(i) focuses on the medical provider's responsibilities, directing them to "not require, request or accept payment" in excess of the appropriate repriced amount. In contrast, Department regulation 34 Pa. Code §127.205 focuses on the insurers' responsibilities, requiring insurers to reprice bills that a medical provider submits. The statute and regulation thus differ as to who bears responsibility for repricing the bills.

We previously addressed this discrepancy, noting that industry custom, in part derived from Medicare regulations, requires providers to bill actual amounts. Acme Mkts. That same custom requires insurers to reprice the bills in accordance with Medicare limits. Id. We concluded the regulation did not depart from the legislative intent behind the cost containment provision, but merely harmonized the billing procedure with existing industry practice. Id. Thus, regardless of who reprices the bill, the repriced bill is effectively the limit of what the provider may require or request; it is the limit of what the provider is owed.

Here, the WCJ's use of the repriced bills for determining the "amount awarded" is consistent with the scheme established in the statute and implementing regulations. We conclude the WCJ did not abuse her discretion in basing the "amount awarded" on the repriced bills.

We also conclude the WCJ did not err in assessing a 20% penalty. The WCJ took into account Employer's excessive delay in paying Provider, and used a percentage, 20%, in excess of the base percentage of 10%. This too, is consistent with the scheme established in the Act. See Section 435 of the Act,

added by the Act of February 8, 1972, P.L. 25, 77 P.S. § 991.

C. Hearsay Objections to D-1 and D-2

Claimant argues the WCJ erred by not excluding Employer's Exhibits D-1 and D-2 as hearsay. We agree with Employer that the record contains no indication that Claimant objected to either exhibit before the WCJ. Accordingly, we conclude Claimant waived any hearsay objections to Employer's Exhibits D-1 and D-2. Wheeler v. Workers' Comp. Appeal Bd. (Reading Hosp. & Medical Center), 829 A.2d 730 (Pa. Cmwlth. 2003) (stating the waiver doctrine applies to workers' compensation proceedings and is intended to assist the WCJ in the orderly administration of claims).

Claimant also contends this case involves application of the rule from Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976). Under Walker, a fact-finder may give unobjected hearsay evidence its natural probative effect only if the hearsay evidence is corroborated by competent evidence of record. Id. at 370; see also Rox Coal Co. v. Workers' Comp. Appeal Bd. (Snizaski), 570 Pa. 60, 807 A.2d 906 (2002).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa. R.E. 801(c). The comment to this rule explains that "[s]ometimes an out-of-court statement has direct legal significance, whether or not it is true. For example, one or more out-of-court statements may constitute an offer, an acceptance, a promise … a representation … compliance with a

contractual or statutory obligation, etc." Pa. R.E. 801, Comment. In such instances, the evidence is not hearsay.

In this case, Claimant did not seek further payments to Provider. Thus, it was uncontested that Employer paid Provider all that was due under the Act.

We conclude that D-1 and D-2 are not hearsay for two reasons. First, the exhibits have direct legal significance in this penalty petition proceeding because they establish that Employer eventually complied with its obligations to reprice and pay Provider's bills. Given the purpose of penalty petitions, to assist in ensuring compliance with the Act, evidence establishing the fact and date of compliance is a relevant consideration of direct legal significance. See Pennsylvania Bankers Ass'n v. Pa. Dep't. of Banking, 981 A.2d 975, 988 n.7 (Pa. Cmwlth. 2009) (out-of-court statements "offered to prove compliance with statutory obligation" are "operative facts which are not hearsay").

Second, the exhibits satisfy another purpose unrelated to the truth of their contents. The exhibits provided to the WCJ an alternate method for determining the amount of the penalty. In other words, D-1 and D-2 support Employer's theory that the penalty could be computed using re-priced amounts of Provider's bills.

Based on the conclusion that these documents are not hearsay, we conclude Walker is inapplicable to these documents. Accordingly, the WCJ did

not need corrobative evidence before relying on these documents. For these reasons, we find no error in the WCJ's handling of Claimant's penalty petition.

II. Review Petition

Claimant next argues the WCJ's findings relating to the TPSA and offset are based on objected-to hearsay. Claimant asks the Court to strike these findings and to reverse the WCJ's grant of an offset to Employer.

Section 319 of the Act, 77 P.S. §671, provides that employers "shall" be subrogated to the right of an employee to recovery from a third party for compensable work injuries. This subrogation is "automatic" and "mandatory." Thompson v. Workers' Comp. Appeal Bd. (USF&G Co.), 566 Pa. 420, 428, 781 A.2d 1146, 1151 (2001). Department regulations direct that an employee who obtains a third party recovery "shall" execute a TPSA with the employer. 34 Pa. Code §121.18.

Here, the Board concluded this issue was moot. The Board based this decision on Claimant's acknowledgment in his brief to the Board, "that the third party subrogation lien was already paid prior to the issuance of the WCJ's Order and … the Claimant does not aver that the named subrogation amount was incorrect." Bd. Op., 2/23/10, at 3.

Before this Court, Claimant does not challenge the Board's conclusion as to the subrogation payment. To the contrary, Claimant cites the Board's decision to support the following statement: "Claimant's counsel subsequently

[after receiving the letter from Employer's counsel included in Employer's Exhibit D-3] sent a check for [the lien amount] to the Defendant's third party administrator." Claimant's Br. at 5. Also, in his petition for review to this Court, Claimant asserts the "WCJ erred in adjudicating the [Employer's] review compensation and review benefit offset petitions, which were moot by virtue of the payment made for satisfaction of the alleged lien." Pet. for Review at ¶ 5(b).

Given these acknowledgments, we find no error in the Board's conclusion that this issue is moot.[6] Accordingly, we find no error in the WCJ's disposition of the review petition.

III. Reasonable Contest

Claimant also argues Employer did not present a reasonable contest because Employer conceded to medical expenses. Employer argues Claimant made no unreasonable contest claim before the WCJ and, thus, this argument is waived. Alternatively, Employer argues its contest was reasonable.

The reasonableness of a contest is an issue of law subject to our plenary review. Hough. Where appropriate, unreasonable contest fees must be awarded even if not requested by a claimant. Ramich v. Workers' Comp. Appeal Bd. (Schatz Elec. Inc.), 564 Pa. 656, 770 A.2d 318 (2001). An employer bears the burden of establishing the reasonableness of the contest. Bates v. Workers' Comp.

[6] Alternatively, we conclude that the documents in D-3 are not hearsay because they, like D-1 and D-2, have a direct legal significance. The documents establish that Claimant settled a related case with a third party. In those circumstances, the Act requires a claimant to execute a TPSA.

Appeal Bd. (Titan Constr. Staffing, LLC), 878 A.2d 160 (Pa. Cmwlth. 2005). This Court has holds that where "an employer's failure to follow the procedures in the Act is the reason a claimant must incur attorneys' fees, employer should be liable for claimant's attorneys' fees." Hough, 928 A.2d at 1181. However, an employer's contest is not unreasonable as a matter of law whenever a claimant establishes a violation of the Act. Id. Each case must be decided on its own facts. Id.

Here, Claimant filed the penalty petition because Employer did not timely pay Provider's bills. Employer offered no justification for the delay, and ultimately conceded the treatment was reasonable and necessary. This provides an appropriate basis to award attorneys' fees. Hough.

Nevertheless, we conclude the contest was reasonable. Claimant sought penalties on the full, non-repriced amount of bills. However, Claimant offered no legal support or discussion to support why payment should be on the non-repriced amount of bills. In contrast, Employer relied on authority to establish a reasonable basis that the penalty should be calculated on the repriced amount. This dispute arose from an ambiguity in the controlling law, and it was separate from the admitted reasonableness and necessity of the treatment. Thus, the Claimant would have incurred attorney fees in addressing this legal dispute regardless of the reasonableness and necessity of the treatment.

For this reason, no error is apparent in the WCJ's determination that Employer's contest was reasonable. Accordingly, we deny Claimant's request for

a remand to assess reasonable attorneys' fees.

IV. Conclusion

For the reasons discussed above, we affirm.

ROBERT SIMPSON, Judge

Judge Pellegrini concurs in the result only.
Judge McCullough did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis Spillman, Petitioner	:	
v.	:	No. 303 C.D. 2010
Workers' Compensation Appeal Board (DPT Business School), Respondent	:	

O R D E R

AND NOW, this 23rd day of March, 2011, the order of the Workers' Compensation Appeal Board in the above captioned matter is **AFFIRMED**.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis Spillman,	:	
Petitioner	:	
	:	
v.	:	No. 303 C.D. 2010
	:	Submitted: June 11, 2010
Workers' Compensation Appeal Board	:	
(DPT Business School),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: March 23, 2011

I respectfully dissent. The majority concludes that Dennis Spillman (Claimant) "waived any hearsay objections" to Exhibits D-1 and D-2 because "the record contains no indication that Claimant objected to either exhibit before the [workers' compensation judge] WCJ." (Majority Op. at 10.) The majority also concludes that, assuming Claimant did not waive the issue, Exhibits D-1 and D-2 are not hearsay. (*Id.* at 11.) For the following reasons, I cannot agree.

The WCJ used Exhibits D-1 and D-2 in assessing a penalty against DPT Business School (Employer) for failure to pay medical bills. Claimant argues that the WCJ erred in failing to exclude Exhibits D-1 and D-2 as hearsay. In making this argument, Claimant maintains that he objected to the admission of the exhibits on hearsay grounds at the hearing on March 27, 2008. However, the March 27, 2008, "hearing" was held only for the purpose of putting on the record that Claimant had

withdrawn one of his petitions. The WCJ took no evidence at this proceeding.[1] Thus, it appears that Claimant is mistaken with respect to the hearing date.[2]

An unknown person wrote on the exhibits: "D-1 Pa 2/4/08" and "D-2 Pa 2/4/08." This suggests that the exhibits were marked and offered as evidence on February 4, 2008. The WCJ's decision indicates that a hearing was held on February 4, 2008, but that "no record" was made of that hearing. Under section 418 of the Workers' Compensation Act (Act),[3] a WCJ "shall make a record of hearings." If, in fact, the WCJ had fulfilled this statutory duty, this court could conduct proper appellate review of the waiver issue. However, absent a record of the February 4, 2008, hearing, **this court should not speculate** as to whether Claimant waived his hearsay objections by failing to object to the exhibits at the hearing before the WCJ.[4]

After holding that Claimant waived his hearsay objections, the majority concludes, in *dicta*, that Exhibits D-1 and D-2 are not hearsay. The majority states that Exhibits D-1 and D-2 fall within the "direct legal significance" rule for non-

[1] I note that a deposition was held on March 30, 2007, during which exhibits were admitted. However, Exhibits D-1 and D-2 were not among those admitted. Moreover, the only hearsay objections appearing in the record occurred at this deposition, but, obviously, they are not relevant here.

[2] I would not hold that Claimant waived his hearsay objections simply because Claimant provided an incorrect hearing date in his brief.

[3] Act of June 2, 1915, P.L. 736, added by section 6 of the Act of June 26, 1919, P.L. 642, *as amended*, 77 P.S. §833.

[4] I would not penalize Claimant for the WCJ's failure to fulfill a statutory duty.

hearsay because they establish that Employer complied with its obligation to re-price and pay the medical bills. (Majority Op. at 11.) However, the rule is that an out-of-court statement is not hearsay if it has "direct legal significance, **whether or not it is true**." Pa. R.E. 801, cmt. c (emphasis added).[5] Apart from the truth of their contents, Exhibits D-1 and D-2 establish only that Employer re-priced and paid an amount on the medical bills. To establish that Employer **complied with its statutory obligation** in re-pricing and paying the medical bills, it is necessary to accept the truth, i.e., the statutory validity, of the re-pricing.

The majority also states that Exhibits D-1 and D-2 are not hearsay because they were admitted for a purpose unrelated to the truth of their contents. This purpose was to provide the WCJ with the re-priced amounts so that the WCJ could use them, as an alternative to the full amount of the medical bills, in assessing the penalty. (Majority Op. at 11.) Of course, absent a record, we can only speculate that Employer may have offered the exhibits for that purpose. Moreover, to use the re-priced amounts for the penalty, the WCJ had to accept the truth, i.e., the statutory validity, of the re-pricing.

Because I conclude that Exhibits D-1 and D-2 are hearsay, I would reverse.

ROCHELLE S. FRIEDMAN, Senior Judge

[5] *See* Leonard Packel & Anne Bowen Poulin, *Pennsylvania Evidence* §801.1 (1987) (stating that there is a class of non-hearsay statements which have "legal significance apart from the truth of the matter asserted").