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withdrawn one of his petitions.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").