IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dauphin County Social Services for Children and Youth, Petitioner	:	
v.	:	No. 140 C.D. 2008
	:	Submitted: July 3, 2008
Department of Public Welfare, Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: August 14, 2008

Dauphin County Social Services for Children and Youth (C&Y) petitions for review of an order[1] of the Department of Public Welfare, Bureau of Hearings and Appeals (the Bureau) sustaining the decision of the Department of Public Welfare (the Department) ordering expunction of a report of indicated child abuse retained in the Department's ChildLine Registry against C.E.[2] We affirm.

[1] This case comes to us following our remand order in C.E. v. Department of Public Welfare, 917 A.2d 348 (Pa. Cmwlth. 2007).

[2] The Department's regulations describe ChildLine as a unit of the Department that operates a state-wide toll-free system for receiving and maintaining reports of suspected child abuse, along with making referrals for investigation. See 55 Pa. Code §3490.4. The ChildLine Registry is maintained in accordance with the Child Protective Services Law, 23 Pa. C.S. §§6301-6385.

The facts as this matter were fully set forth in our 2007 opinion. In October 2002, C.E. was living with his girlfriend, M.D., along with M.D.'s four-year-old son, W.D., and M.D.'s three-year-old daughter, D.D. D.D. was born on September 20, 1999.

On October 26, 2002, C&Y filed an indicated report of child abuse with ChildLine Registry, asserting that C.E. had abused D.D. C.E. appealed to the Bureau seeking expunction of the report. From February 2004 to July 2004, the Bureau conducted several days of hearings regarding C.E.'s request to expunge.

The first matter considered by the ALJ was whether D.D. was able to testify at the hearing. The ALJ conducted an *in camera* examination of D.D., at which the ALJ and attorneys for C&Y and C.E. were present and also questioned her. The questions concerned such matters as D.D.'s knowledge of colors, whether some statements were right or wrong and her memory of events occurring in the past. Upon completion of the questioning, the ALJ declared that D.D. was incompetent to testify. C.E.'s counsel objected to this determination. Thereupon, the hearing commenced, but without the appearance of D.D.

D.D.'s mother, M.D., testified that she bathed D.D. on the evening of October 24, 2002, and dressed her on the morning of October 25, 2002. M.D. did not observe any injury to D.D.'s genital area in either encounter. At 11:00 a.m. on October 25, 2002, M.D. left for work, leaving C.E. to babysit the children. Shortly thereafter, C.E. and D.D. went to pick up W.D. from school, and all three returned home. M.D. returned home at approximately 4:30 p.m. and then left at 5:00 p.m. with W.D., leaving C.E. and D.D. home together until she returned at approximately 7:30 p.m. At 8:30 p.m., D.D. was picked up by D.D.'s father's girlfriend, K.H., and taken to her father's house.

At the father's house were K.H., D.D., two other adults and three other children. The children played under adult supervision in an inflatable ball pit in the living room until D.D.'s father, Du.D., arrived home from work. At approximately 11:00 p.m., D.D. complained to her father that her buttocks hurt, and when he looked for the source of the pain, he discovered blood on D.D.'s underwear. Subsequently, K.H. found a cut between D.D.'s vagina and rectum.

Du.D. and K.H. took D.D. to the emergency room at Holy Spirit Hospital, where she was examined by Dr. Larry Paul. Dr. Paul noted a superficial cut between the vaginal and rectal areas that was approximately two and a half centimeters in length. The location of the laceration suggested sexual abuse; however, he testified at the hearing that he has seen injuries to the same area not caused by sexual abuse. Dr. Paul did not find any damage to the hymen.

Four days later, D.D. was examined at the Children's Resource Center (CRC), a center that provides services to children who are suspected of being the victims of abuse. Dr. Earl Greenwald, medical director of CRC, testified that the examination of D.D. conducted by him and by a nurse practitioner revealed a several day old tear between the rectum and the vagina. A videotape of the vaginal examination conducted at Holy Spirit Hospital showed a tear of the hymen with a healed cleft. He believed the healed cleft indicated that an object had entered the vagina. Dr. Greenwald felt that D.D.'s injuries were consistent with sexual abuse and were not accidental.

Susan Kolanda, an employee of the child abuse protection unit of the Dauphin County District Attorney's Office, testified that during Dr. Greenwald's examination of D.D., the child could be heard screaming and crying in the reception area, where C.E. was waiting. Ms. Kolanda, who was also in the reception area, heard

C.E. say, in response to D.D.'s cries, that D.D. did not like it when people touched her "down there." (R.R., ALJ Opinion, Exhibit 5, Page 7).

On November 15, 2002, Debra Bauer interviewed D.D. at CRC and the interview was videotaped. Ms. Bauer testified that the videotape fairly and accurately depicted her interview of D.D. and the videotape was admitted into evidence. In the videotape, D.D. used the term "coochie," which she identified by pointing to the vaginal area of a doll. D.D. stated that C.E. touched her coochie on the inside under her clothes; that he hurt her more than one time; that on at least one occasion the touching occurred in the bathroom while her mother was at work; and that C.E. told her not to tell. In response to Ms. Bauer's suggestions about blood, D.D. indicated that C.E.'s touching had caused her to bleed.

Melissa McDermott Lane, a clinical social worker for the State of Maryland, testified on behalf of C.E. She reviewed D.D.'s videotaped interview and expressed some concerns about the way it was conducted. For example, she noted that the interviewer never tested D.D. to see if she knew how to use prepositions correctly. Ms. Lane was particularly concerned about the interviewer's mention of blood, which was too suggestive. Ms. Lane stated that she would not have conducted the interview the way Ms. Bauer did, but she did not opine expressly that the tape was unreliable.

Dr. Scott Krugman also testified on behalf of C.E. He reviewed D.D.'s medical records from Holy Spirit Hospital and from the CRC, as well as the videotape of D.D.'s examination at the CRC. He opined that these records did not contain definitive evidence of child abuse. Dr. Krugman stated that the videotape did not confirm a traumatic injury to D.D.'s hymen; he did not see a "healed" cleft and opined that the abnormality noted by Dr. Greenwald was probably structural. He also opined that D.D.'s examination should have been done in the knee chest position in order to

determine if the hymen was damaged. Finally, Dr. Krugman stated that the laceration D.D. sustained could have occurred in the absence of sexual abuse.

C.E. testified on his own behalf. He categorically denied that he sexually abused D.D. or had ever handled her in an inappropriate fashion. C.E. denied making the remark overheard by Ms. Kolanda or talking to anyone in the reception area. He stated that D.D. jumped off a bed on October 25, 2002, and expressed the thought that this event might have caused her injury.

The ALJ accepted the medical opinions of Dr. Greenwald over those of Dr. Krugman and did not find C.E. credible. The ALJ found D.D.'s statements in the November 15, 2002, videotaped interview to be credible and reliable. Further, he found that credible medical evidence corroborated D.D.'s hearsay statements. That evidence, together with C.E.'s comment overheard in the reception area of the CRC and C.E.'s opportunity to commit the injury that occurred on October 25, 2002, led the ALJ to conclude that C.E. had sexually abused D.D. As such, the ALJ recommended that Petitioner's expunction request be denied. On March 9, 2005, the Bureau adopted the ALJ's recommendation as its final order. C.E. filed an application for reconsideration, which was granted by the Secretary of Public Welfare. However, on January 12, 2006, the Secretary affirmed the Bureau. Petitioner then sought this Court's review.

In his appeal to this Court, C.E. presented four issues for our consideration. First, he contended that the ALJ erred in finding D.D. unavailable to testify and then admitting D.D.'s hearsay statements. Second, he argued that this improper admission of D.D.'s hearsay statements violated his constitutional right to due process. Third, he argued that the ALJ erred in finding that D.D.'s hearsay statements were corroborated by medical evidence. Fourth, he asserted that the Department's order denying expunction was not supported by substantial evidence because the County's investigation was

incomplete as it did not consider the circumstances of the children playing in the ball pit on the evening of October 25, 2002.

We first considered Petitioner's main argument, which was that D.D.'s videotaped interview should not have been admitted. Such evidence, if reliably recorded and conducted, can be admitted where the victim testifies in person at the hearing. It may be admitted even without the child's live testimony, where the tribunal finds that appearing in person would cause the child distress to a degree that the child's ability to communicate would be substantially impaired. Here, the ALJ made no such finding and, thus, C.E. contended it was error for the ALJ to admit D.D.'s videotaped interview.

C&Y countered that D.D.'s hearsay statements were correctly admitted. The ALJ questioned D.D. in an *in camera* hearing, and decided that D.D. was incompetent. C&Y conceded that the ALJ did not use the "magic words" that testifying would cause D.D. emotional harm. However, C&Y argued that this was implicit and, therefore, the ALJ's decision to admit the videotaped interview should not be overturned.

We noted that in an expunction hearing, the out-of-court statement of a child victim of sexual abuse can be admitted into evidence in certain circumstances. Those circumstances are established by following Section 5986 of the Judicial Code, which applies to juvenile dependency hearings. 42 Pa. C.S. §5986. Our Supreme Court has directed that this Section should also be followed where a child's videotaped testimony is proffered in an expunction hearing brought under the Child Protective Services Law. See A.Y. v. Department of Public Welfare, 537 Pa. 116, 641 A.2d 1148 (1994). The Pennsylvania Supreme Court held in A.Y. as follows:

> 1. Hearsay testimony of a child victim will be admitted in accordance with the standards set forth in 42 Pa. C.S. 5986, and this rule shall be applied to permit the testimony of the victim's parents and other family members as well as those professionals charged with investigating incidents of child abuse; 2. Hearsay testimony in conjunction with admissible corroborative evidence of the acts in question can *in toto* constitute substantial evidence which will satisfy the Agency's burden to justify a conclusion of abuse. 3. However, *uncorroborated* hearsay cannot satisfy the Agency's burden unless it comports with the following requirements: a) the statement was accurately recorded by audio or video equipment; b) the audio-visual record discloses the identity and at all times included the images and/or voices of all individuals present during the interview of the minor; and c) the statement was not made in response to questioning calculated to lead the minor to make a particular statement and was not the product of improper suggestion.

A.Y., 537 Pa. at 126, 641 A.2d at 1153 (emphasis in original).

Under Section 5986, a child's hearsay statements are admissible if they are reliable and the child testifies. If the child does not testify, then the child must be found unavailable by reason of the extreme emotional distress that testifying would cause and thereby render the child unable to communicate reasonably. This Section goes on to state as follows:

> (a) General rule.-A statement made by a child describing acts and attempted acts of indecent contact, sexual intercourse or deviate sexual intercourse performed with or on the child by another, not otherwise admissible by statute or court ruling, is admissible in evidence in a dependency proceeding initiated under Chapter 63 (relating to juvenile matters), involving that child or other members of that child's family, if:
>
> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and *circumstances of the statement provide sufficient* indicia of reliability; and

> (2) the child either:
>
> (i) testifies at the proceeding; or
>
> (ii) *is found by the court to be unavailable* as a witness.
>
> (b) Emotional distress.-In order to make a finding under subsection (a)(2)(ii) that *the child is unavailable as a witness, the court must determine, based on evidence presented* to it, *that testimony by the child* as a witness *will result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate.* In making this determination, the court may do all of the following:
>
> (1) Observe and question the child, either inside or outside the courtroom.
>
> (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

42 Pa. C.S. §5986 (a)(1)(2)(i)(ii), (b)(1)(2) (emphasis added).

We then explained that during the hearing, but before the ALJ issued his recommendation, Section 5986 was amended by the Act of July 15, 2004, P.L. 736, No. 87, effective immediately. Previously, Section 5986(b) read, in relevant part, as follows: "(b) Emotional Distress.-In order to make a finding under subsection (a)(2)(ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress **such that the child cannot reasonably communicate.**" (Emphasis added). As both parties used the 2004 language requiring "substantial" impairment to the child's ability to communicate, we concluded that there did not appear to be an issue as to whether we should apply the 2004 version of Section 5986 in this case.

At the time of the hearing, D.D. testified that she was not afraid of C.E., that she felt good and that she was not afraid to be present at the hearing. When asked how she would feel about being asked questions if C.E. were present, she responded, "I would feel like crazy." C.E., 917 A.2d at 354. D.D. was also asked numerous other questions about colors, past events and her knowledge of the difference between giving right answers and giving wrong answers. In the course of this questioning, D.D. stated that "I think something is making me crazy," indicated that her stomach hurt and at two different points asked to use the restroom. Id. However, D.D. was apparently ill with a cold and there was no follow-up questioning or discussion by the ALJ as to why she felt "crazy," why her stomach hurt or why she needed restroom breaks. In addition, there was no testimony offered by any adult such as a parent, physician, therapist or social worker that D.D. would experience "serious emotional distress" if she were to testify.

At the conclusion of D.D.'s questioning, the ALJ declared D.D. incompetent to testify because she was only four years old, her memory did not go back to October 2002, and she did not seem to understand the importance of giving a factually correct answer to a question. The ALJ explained as follows:

> At this point, I'm not satisfied that the child is competent to testify, and I'm going to declare that the child is not competent to testify in this matter based upon the fact that-based upon the child's responses today. She certainly could remember back to last Christmas; however, the child's memory did not go much beyond that. She's a child of four years of age. *I'm not sure that the child appreciated-she certainly could distinguish between-I asked her to distinguish whether something was a certain color,* and she could distinguish the color and she could tell you whether it was right or wrong. However, I'm not sure *the child-if she has the capacity at this point to understand why she needs to give correct responses,* or the right responses or wrong responses. So for all those reasons, I'm going to declare that the child's not competent to testify.

Id. at 355 (emphasis added). Because D.D. was found to be an incompetent witness, her videotaped interview was admitted. The ALJ did not explain why, if D.D. did not have the capacity to give right or wrong answers at age four, D.D. did have this capacity at age three when the videotaped interview was conducted.

We explained that witness competency is a relevant inquiry in every proceeding. However, we concluded that it was not dispositive of the question here, which was whether to admit the witness's hearsay statement and excuse the witness from testifying. Under Section 5986, the child will be excused from testifying where to do so would "result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate." 42 Pa. C.S. §5986. We found that the ALJ's findings did not relate to that standard and it was not, as C&Y argued, a mere failure by the ALJ to use the "magic words" contained in 42 Pa. C.S. § 5986.

After reviewing the ALJ's findings, we determined that it could not be construed to mean that if D.D. testified, she would have suffered emotional distress to the degree that it would *substantially* impair her ability to communicate, especially since the record was devoid of any evidence, such as testimony from D.D.'s mother or from a mental health professional about how the act of testifying would have affected D.D. The ALJ found that other factors, such as her age, impaired D.D.'s ability to communicate truthfully, but we concluded that these factors were not relevant under Section 5986. Instead, we concluded that the relevant factor was whether testifying

would cause the witness emotional distress to the extent that her ability to communicate would be substantially impaired.[3]

Because there was never a preliminary determination made that D.D. was unavailable as a witness under the Section 5986 standard, we vacated the order denying expunction and remanded the matter to the Department. On remand, the ALJ was to conduct a new inquiry into D.D.'s availability to testify before deciding whether to admit the videotaped interview. If she was determined to be available, D.D.'s hearsay statements could then be properly considered by the ALJ. If she was not available to testify, the ALJ was to make the required findings under Section 5986(b) before determining whether or not the videotape was admissible. In either event, the ALJ was ordered to issue a new decision on the merits of Petitioner's expungement request.[4]

As a final matter, we also addressed the contention by C&Y that the presumption found in 23 Pa. C.S. § 6381(d) could serve as a basis to refuse to expunge the finding of indicated child abuse. This Court has previously held that 23 Pa. C.S. § 6381(d) created a presumption that the parents or those responsible for the child's welfare were the ones that inflicted the child abuse, and only the abuse itself had to be established in the case of indicated child abuse by *prima facie* evidence. J.B. v. Department of Public Welfare, 898 A.2d 1221, 1226 (Pa. Cmwlth. 2006). However, we disagreed that this presumption provided an alternate ground for affirming the Department's adjudication in this case. We found that C&Y had waived this issue by not raising it at the hearing and further noted that the presumption could not apply as

[3] C.E. briefly argued that the ALJ improperly admitted D.D.'s out of court statement because the ALJ did not discuss on the record whether the statement was relevant and had sufficient indicia of reliability. Based on our disposition of the case, we did not need to address the argument.

[4] Based on our decision to remand the case, C.E.'s remaining arguments were not addressed.

several adults had supervised D.D. for a substantial period of time prior to the discovery of the perineal cut.

On remand, the ALJ conducted an *in camera* interview with D.D. D.D. testified that she was currently seven years old. D.D. was questioned regarding her ability to distinguish between the truth and a lie. She claimed that she knew the difference between the truth and a lie and stated that she did not lie.

D.D. was asked if she knew C.E. She stated that she did not know him. She also claimed that she did not remember being at a prior hearing before the ALJ. D.D. stated that she believed she was currently testifying in front of the ALJ because her father was in jail and she needed a guardian.

On remand, the ALJ also reviewed the record, including the prior testimony of the witnesses and the exhibits. He then restated his original findings of fact along with one new finding of fact. The new finding was that D.D. was available to testify; however, she did not have any recollection of the events the led to the allegations of sexual abuse.

The ALJ then determined that C&Y failed to prove that C.E. sexually abused D.D. as D.D. was available to testify, but could not recall C.E. or the period of time she was allegedly abused. The ALJ concluded that the hearsay testimony of D.D. could only be deemed admissible if the child was unable to testify due to emotional distress. As it was not claimed that the child was unable to testify due to emotional distress, the hearsay testimony could not be admitted. Since the hearsay testimony of D.D. was the only evidence substantiating that C.E. was the abuser, its inadmissibility rendered C&Y unable to meet its burden of proof through substantial evidence of record.

C&Y now appeals to this Court.[5] On appeal C&Y alleges that the ALJ erred in failing to admit D.D.'s hearsay testimony. C&Y further alleges that D.D.'s hearsay statements should be deemed admissible under Pa.R.E. 803.1(3), Pa.R.E. 803(1) and 42 Pa. C.S. § 6104.

A witness is not available to testify where she credibly "testifies to a lack of memory of the subject matter…." Pa.R.E. 804(a)(3). Pursuant to 42 Pa. C.S. §5986(b), if a child cannot testify as a witness, a child's hearsay statements can only be admitted where the child is not available due to serious emotional distress. In order to determine whether the child cannot testify due to serious emotional distress, the ALJ may interview the child and/or hear testimony from a guardian or expert regarding the child's condition.

In the present case, D.D. testified to an absence of memory as to the period of time at issue. Testimony was not presented that her lack of memory was in any way caused by emotional distress. As such, we conclude that the ALJ properly refused to admit D.D.'s hearsay statements into evidence pursuant to Section 5986(b).

C&Y further claims that the child's hearsay statements should be admitted pursuant to Pa.R.E. 803.1(3). Pa.R.E. 803.1(3) permits a recorded recollection concerning an issue the witness once had knowledge of into evidence in order to refresh the witness's memory. However, once the recorded recollection is provided to the witness, the recorded recollection must be adopted by the witness. As noted by the comment following the rule, "Pa.R.E. 803.1(3) classifies recorded recollection as an

[5] Our scope of review is limited to determining whether legal error has been committed, whether constitutional rights have been violated, or whether the necessary findings of fact are supported by substantial evidence. K.J. v. Department of Public Welfare, 767 A.2d 609 (Pa. Cmwlth.), petition for allowance of appeal denied, 567 Pa. 750, 788 A.2d 383 (2001).

exception to the hearsay rule in which the testimony of the declarant is necessary, not as an exception in which the availability of the declarant is immaterial."

As D.D. was not requested to review the videotape in order to refresh her memory and did not affirmatively adopt the statements contained therein, this exception cannot apply. C&Y argues that Ms. Bauer should somehow be able to adopt the statements made by D.D. on the videotape. We reject this claim by C&Y. Pa.R.E. 803.1(3) does not permit a witness to adopt statements made by others and present such statements as evidence.

C&Y also claims that that statements made by D.D. should be deemed admissible under Pa.R.E. 803(1). Rule 803(1) excludes from the hearsay rule "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

C&Y fails to provide this Court with a statement, made by D.D., while D.D. was perceiving the event or condition, or immediately thereafter. In its brief, C&Y merely reiterates a number of statements made by D.D. and claims that the statements were reliable. C&Y does not address how any of the statements could be construed as a statement describing or explaining the event or condition made while D.D. was perceiving the event or condition, or immediately thereafter. We note that on the day D.D. was taken to the hospital, D.D. was not alleged to have described the event or condition to anyone and D.D. was not interviewed by Ms. Bauer until November 15, 2002, twenty-one days after the injury occurred. As such, we reject C&Y's claims that it presented sufficient evidence that C.E. abused D.D. based on Rule 803(1).

Finally, C&Y claims that Ms. Bauer's interview of the child should be deemed an official record and, as such, admissible pursuant to 42 Pa. C.S. § 6104. It is not apparent from the record whether or not C&Y raised this issue before the ALJ.

However, we note that even if Ms. Bauer's interview qualifies as an official record, said conclusion does not automatically render the hearsay statements contained therein admissible. As explained by the Pennsylvania Supreme Court in Commonwealth v. May, 587 Pa. 184, 196, 898 A.2d 559, 565 (2006), where an official record is admitted into evidence, the statements of the individuals as recorded by the official constitute "double hearsay." Double hearsay can only be admitted where a separate hearsay exception permits the inclusion. Id. As C&Y has not established that there is a separate hearsay exception permitting the introduction of D.D.'s statements, we reject its claim that the child's statements are admissible pursuant to 42 Pa. C.S. § 6104.[6]

Accordingly, the order of the Department is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge

[6] C&Y cites to D'Alessandro v. Pennsylvania State Police, 594 Pa. 500, 937 A.2d 404 (2007), in support of its claim that the statements of D.D. contained in Ms. Bauer's "official" interview should be admitted. However, in that case, the Pennsylvania Supreme Court noted that the petitioner had failed to raise the issue that the statement contained in a police report constituted double hearsay in his appeal and, in the alternative, noted that a separate exception to the hearsay rule was applicable.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dauphin County Social Services for Children and Youth, Petitioner	:	
v.	:	No. 140 C.D. 2008
Department of Public Welfare, Respondent	:	

O R D E R

AND NOW, this 14th day of August, 2008, the order of the Department of Public Welfare is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge