COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040723-05**

Michael Pileeki	Employee
Jerry Construction Company	Employer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge Hernández.

APPEARANCES
Robert L. Noa, Esq., for the employee at hearing and oral argument
James N. Ellis, Esq., for the employee on appeal
Joseph W. Murphy, Esq., for the insurer

FABRICANT, J. The employee appeals from the administrative judge's dismissal of his claim, with prejudice, on the basis of his failure to appear at hearing. Because the record indicates that the employee's absence might have been due to an incapacity to testify unrelated to any industrial injury, and that his claim could then require the application of G. L. c. 152, § 39,[1] we reverse and recommit the case for further findings on that issue.

The employee injured his left foot while working on November 23, 2005. The insurer paid benefits without prejudice for three months, after which the employee returned to work. The employee's subsequent claim for further partial incapacity

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[1] General Laws c. 152, § 39, provides, in pertinent part:

> When . . . the appointment of a guardian or conservator of an employee or dependent who is a minor or is otherwise legally incapacitated, is required to comply with this chapter, the insurer shall furnish or pay for legal services rendered in connection with the appointment of such legal representative, guardian or conservator or in connection with his duties, and shall pay the necessary disbursements for such appointment, the necessary expenses of such legal representative, guardian or conservator, and reasonable compensation to him for time necessarily spent in complying herewith. Said payments shall be in addition to sums paid for compensation.

benefits commencing as of December 8, 2006 was denied by the insurer. At the § 10A conference held on August 4, 2008, the judge denied the employee's claim, which was subsequently appealed to an evidentiary hearing. (Dec. 2.)

At the June 2, 2009 hearing, which the employee did not attend, counsel for the employee introduced into evidence, without objection by the insurer, two letters written by co-counsel for the employee, recounting events leading to the employee's absence that day. (Dec. 2; Exs. 4 and 5.) The judge recounted the pertinent content of the letters:

> [O]n October 14, 2008, Employee's counsel alleges that [the employee] was unable to attend [the § 11A examination]. . . . The impartial examination was rescheduled to February 9, 2009. Again, on February 2, 2009, Employee's counsel alleged that [the employee] . . . was unable to attend the impartial examination. At this time the Employee filed a motion to amend his claim to a close[d] period and the parties opted out of the impartial examination.

(Dec. 2.) Employee's counsel moved to join a claim for benefits pursuant to § 39, informing the judge that because of a medical condition, the employee remained unable to testify. (Tr. 4-6) The judge dismissed the claim, with prejudice, citing the employee's failure to prosecute his claim. (Dec 2-3.)

Questions of a claimant's competency to testify, and the disposition of matters attendant to that area of inquiry, are uniquely entrusted to the authority of the presiding judge. Accord, Bamihas v. Table Top Pies, 9 Mass. Workers' Comp. Rep. 595, 598-599 (1995)(self-operation of § 7A, "because its core is competence, capacity and impossibility to testify," necessarily invokes the judge's authority to act *sua sponte*). Here, the judge did not exercise that authority, having failed to make findings on the veracity of co-counsel's assertions, in evidence for their full probative value, that the employee was incapacitated from testifying.[2] The invocation of § 39

[2] At hearing, the judge suggested that there was insufficient evidence of testimonial incapacity to warrant the application of § 39. (Tr. 10-12.) We disagree. The assertions of facts in the two exhibits, not being the subject of an objection, were competent evidence of such facts, notwithstanding their hearsay quality. See Adoption of Kimberly, 414 Mass. 526, 534-535 (1993); MacDonald's Case, 277 Mass. 418, 422 (1931).

required the judge to make findings addressing its application. See Lopes's Case, 74 Mass. App. Ct. 227, 230 n.6 (2009)("[I]t was error for the administrative judge to deny the request [for § 39 benefits] and instead order the claim dismissed for want of prosecution, without previous warning that such a drastic sanction was in store").

Accordingly, we reverse the decision and recommit the case for further findings consistent with this opinion.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: