COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 061541-89**

Peter Mason	Employee
Bay State Cleaning	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Lewenberg.

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

HORAN, J. The employee appeals from a decision dismissing his claim for § 36 benefits. The judge concluded that in 1992, the insurer paid the employee § 36 benefits in excess of the amount claimed. We affirm the decision.

On September 18, 1989, the employee suffered a work-related injury. Based on a July 31, 2009 evaluation by Dr. Errol Mortimer, and his counsel's affidavit[1] of August 11, 2009, the employee claimed loss of function and disfigurement benefits under §§ 36(g) and (k) in the amount of $5,241.56. (Dec. 2; Ex. 3.) The insurer did not contest the employee's entitlement to the § 36 benefits claimed; rather, it maintained that it had previously paid the employee § 36 benefits in excess of the amount claimed. (Tr. 4; Ins. br. 1-3; Oral Argument Tr. 16-17.)

In his decision, the judge credited the testimony of the insurer's claim representative that on February 28, 1992, the insurer issued a check payable to the

[1] See 452 Code Mass. Regs. § 1.07(2)(i)(1-2).

employee in the amount of $7,809.03 for § 36 benefits. Accordingly, the judge denied and dismissed the claim. (Dec. 4-5.)

On appeal, the employee argues the judge erred by concluding the insurer had "proved its affirmative defense by showing that it had previously paid the Employee § 36 benefits." (Employee br. 8.) We disagree. The issue at the hearing was: "[d]id the employee previously receive the claimed Section 36 benefits?" (Dec. 3.) This presented a question of fact and was not, as employee's counsel posited at oral argument, "a question of law." (Oral Argument Tr. 4.) Because the insurer defended the claim on the grounds of prior payment, it had the burden of proof.[2] Murray v. Grossman, 289 Mass. 217, 221 (1935); Wadsworth v. Glynn, 131 Mass. 220, 221 (1881). The judge found the insurer carried its burden. He found:

> The insurer had one witness who was a claim representative. I found her testimony credible and I find that on or about February 28, 1992 the insurer issued a check to the employee in the amount of $7,809.03 for benefits pursuant to Section 36 (see exhibit #4). This is an amount in excess of the amount now claimed. There is no evidence that the employee did not receive and cash this check in 1992.
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> . . .
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> I therefore find that the employee's claim for a lesser amount of benefits

[2] "It is plain that, if not conceded by the insurer, evidence must be introduced [by the employee] which satisfies the statutory requirements and warrants an award." Ginley's Case, 244 Mass. 346, 348 (1923). Accordingly, the insurer could have moved to dismiss the claim because the employee failed to appear at the hearing. See Adam v. Harvard Univ., 24 Mass. Workers' Comp. Rep. 193, 198 (2010) (employee's "absence resulted in the creation of a record devoid of any evidence supporting his claim"), aff'd, Adam's Case, 79 Mass. App. Ct. 1122 (2011), further appellate review denied, 460 Mass. 1109 (2011); Cotter v. Hawkeye Constr. Co., 22 Mass. Workers' Comp. Rep. 149, 150-151 (2008)(employee's absence from hearing not excused by mere presentation of medical evidence favorable to his claim); Ferreira v. Forrest Homes of MA, 22 Mass. Workers' Comp. Rep. 125, 128 (2008), aff'd, Ferreira's Case, 75 Mass. App. Ct. 1101 (2009)(Memorandum and Order Pursuant to Rule 1:28)(same); further appellate review denied, 455 Mass. 1102 (2009). It did not do so. By stipulating to the employee's entitlement to § 36 benefits, (Tr. 4; Oral Argument Tr. 16-17), and defending on the grounds of payment, (Ins. br. 1-3), the insurer had the burden to prove that it paid the claim.

pursuant to Section 36 should be denied as the benefits have already been paid by the insurer and received by the employee.

(Dec. 4-5.) The employee did not testify at the hearing.[3] (Dec. 4.) As the judge credited the insurer's evidence[4] of payment, it cannot be said that he erred in denying and dismissing the employee's claim. The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **July 31, 2012**

[3] At oral argument, it was revealed the employee failed to appear because he was incarcerated. At one of several status conferences held off the record, employee's counsel "made the decision and told the judge . . . that we would be proceeding on the . . . claim without taking the employee's testimony." (Oral Argument Tr. 4.) We take this opportunity to iterate "that all significant proceedings be transcribed for the purpose of assuring the record is adequate for addressing the issues raised on appeal." LaFleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 397 (2011), and cases cited.

[4] We reject the argument that the employee's claim for benefits, filed with the department, was evidence that the insurer failed to pay the claim. Pleadings are not evidence. General Laws c. 231, § 87.