

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 055875-94

Jan Jachimczyk
United County Industries
Liberty Mutual Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Carroll, McCarthy and Costigan)

APPEARANCES

William F. Scannell, Jr., Esq., for the employee
Thomas E. Fleischer, Esq., for the insurer at hearing
Nicole M. Edmonds, Esq., for the insurer on appeal

CARROLL, J. The insurer appeals from a decision awarding, among other things, benefits pursuant to G. L. c. 152, § 36A. The insurer argues only that the judge erred by ordering payment of § 36A benefits, as the employee's widow did not claim such benefits at the hearing. We agree, and reverse the § 36A award without prejudice.

General Laws c. 152, § 36A, provides, in pertinent part:

In the event that an injured employee who has become entitled to compensation under section thirty-six dies before fully collecting the said compensation, the balance remaining shall become due and payable in a lump sum to his dependents.

...

In the present case, the employee sustained an industrial injury on December 9, 1994. (Dec. 6.) The insurer paid temporary total incapacity benefits, (Tr. 3-4), and the employee filed his claim for § 34A permanent and total incapacity benefits. That claim came on for hearing on June 19, 2000 and September 5, 2000. In the claim, the employee specifically reserved on his entitlement to § 36 specific injury benefits. (Dec. 2.) The employee died on February 23, 2002, prior to the filing of the hearing decision. (Dec. 18.) Although the employee's widow amended the claim to add a claim for § 31 death benefits, the judge concluded that the employee's death was unrelated to his industrial

injury. (Dec. 2, 19.) The judge, however, awarded the employee's widow the specific injury benefits due her under the above-referenced provision of § 36A. (Dec. 21.)

The insurer contends on appeal that the judge was without authority to award § 36A benefits, where none were sought at the hearing. The insurer is correct. "Where there is no claim and, therefore, no dispute . . . the judge strayed from the parameters of the case and erred in making findings on issues not properly before [him]." Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 103 (1994). Here, the insurer would be hard pressed to know exactly what the judge ordered, as there had been no determination of the underlying § 36 entitlement upon which to base a § 36A award. Indeed, § 36 entitlement was specifically *reserved* in this particular proceeding. Under such circumstances, we must reverse the award. Nonetheless, the employee's widow's right to bring a separate claim for § 36A benefits remains intact, as our reversal is *without prejudice*.

Accordingly, the decision is reversed without prejudice as to the § 36A award, and affirmed in all other respects.

So ordered.

Martine Carroll
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Filed: **October 24, 2003**