COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 057352-96**

Joseph Halama	Employee
Mestek, Inc.	Employer
Mestek, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and McCarthy)

APPEARANCES
Michael E. Kokonowski, Esq., for the employee
Sheila Annand Carey, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals an award of § 34A permanent and total incapacity benefits not claimed by the employee. We agree that § 34A should not have been ordered, and reform the award to properly reflect the claimed § 34 temporary total incapacity benefits. We summarily affirm the judge's finding that the employee is totally incapacitated.

Joseph Halama, sixty-four years old at the time of decision, graduated from high school in Poland and came to the United States in 1962. "He understands a lot of English but was aided by an interpreter at the hearing." (Dec. 2.)

Mr. Halama was initially paid benefits starting in 1998 due to problems he was having with pain in his hands and shoulders, after working as a pipe flarer for several years. He was switched to an assembly line due to this problem, and in an earlier decision the judge found that § 35 partial incapacity benefits were due to the employee as a result of the change in jobs and resulting cut in pay.

Mr. Halama continued to work at the assembly line until January of 2001, when he accepted a layoff due to lack of suitable work. He has not worked since. However, the employer offered him a return to his job on the assembly line in June 2001. Id. Mr. Halama declined, saying that he could no longer perform that job, and

that even at the time of his layoff he was having trouble performing it because the line was too fast. (Dec. 3.)

At a conference on the employee's claim for § 34 benefits beginning January 13, 2001, the judge ordered § 35 partial incapacity benefits. Both sides appealed to a full evidentiary hearing. (Dec. 2.)

The judge made the following findings based upon the § 11A medical examiner's opinion:

> Dr. Eui Chung, the impartial examiner, diagnoses Mr. Halama as suffering from arthritis of the hands, especially the thumbs, which was exacerbated over the years by his work as a pipe flarer. That cumulative strain remains one of the two causes of his disability. (Dep. p. 22, lines 4-12; p. 20, line 18 to p. 21, line 2). He suggests the pain in the thumbs and hands continues to worsen due to the progression of the arthritis (Dep. p. 12, line 16 to p. 13, line 4) and as a result he is now disabled from employment that requires any significant lifting of more than a few pounds because of lack of strength and power in his grip. He should therefore avoid any lifting, and as a result his work capacity is "very minimal". (Dep. p. 22, line 24 to p. 23, line 14). In fact, [Dr. Chung] opines that Mr. Halama has "lost the practical function of both hands for any gainful work." (Stat. Ex. #1, page 3.)

(Dec. 3.)

Further, based on the opinion of the impartial medical examiner and the employee's testimony, the judge found as follows:

> Mr. Halama had a deteriorating condition that had previously required him to accept a lighter duty job. Even there, however, the deterioration in his thumbs continued to increase his pain. I find credible his complaints that even at the time of his layoff the pain was becoming too great to deal with. This testimony is corroborated by the opinion of the impartial physician, who recognizes that the pain would likely continue to worsen, and that the employee has lost the practical function of his hands.
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> Given Mr. Halama's age, his limited work history, and his limited English skills, I do not see where he could now find employment without the "practical function" of his hands.

(Dec. 3-4.)

Although the employee claimed only § 34 temporary total incapacity benefits beginning January 13, 2001, (Dec. 1, 2; Employee Exh. 1), the judge awarded § 34A

permanent and total incapacity benefits. (Dec. 4.) The award of § 34A benefits cannot stand. As the self-insurer correctly argues, "[w]here there is no claim and, therefore, no dispute, we conclude that the judge strayed from the parameters of the case and erred in making findings on issues not properly before [him]." (Self-insurer brief, 5 quoting Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 103 (1994).) As it was improper for the judge in Medley v. E.F. Hauserman Co., 14 Mass. Workers' Comp. Rep. 327 (2000), to award § 34A benefits where no such claim was filed and no motion to amend or join the issue of § 34A was made, so it is here. As such, "the judge erred when he expanded the parameters of the dispute." Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. 183, 185 (2000), citing Ruiz v. Unique Applications, 11 Mass. Workers Comp. Rep. 399 (1997).

However, because the judge's finding of total incapacity is fully supported by the evidence, we amend the decision to award § 34, leaving for another day a determination of entitlement under § 34A.[1] Reformed so as to award § 34 rather than § 34A benefits, the decision is affirmed. Pursuant to § 13A(6), the insurer is ordered to pay an attorney's fee of § 1,273.54.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: May 23, 2003
MC/jdm

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William A. McCarthy
Administrative Law Judge

[1] As the self-insurer points out in footnote 1 of its brief, since this case was heard, the appeals court has determined that exhaustion of § 34 is not required in order to claim § 34A. Slater's Case, 55 Mass. App. Ct. 326 (2002). The employee does remain "free to bring a new claim under § 34A." Medley, supra at 330.