

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 033161-00

Rufus Darby
City of Boston
City of Boston

Employee
Employer
Self-Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and McCarthy)

APPEARANCES

Justin F.X. Kennedy, Esq., for the employee

John T. Walsh, Esq., for the insurer

HORAN, J. Rufus Darby's case sojourns to our shores once again, this time via the self-insurer's appeal of a second hearing decision issued following our prior recommittal.¹

At the second hearing, "the parties agreed that no further testimony or documentary evidence was necessary . . ." to enable the judge to issue a curative decision. (Dec. 9.)² No motions were made; no new claims or defenses were asserted.

The judge wrote a second decision, and properly addressed all the issues. He also awarded the employee § 34A³ benefits, which had not been claimed. Not surprisingly, the self-insurer appeals the award of unclaimed permanent and total incapacity benefits.⁴

¹ See Darby v. City of Boston, 17 Mass. Workers' Comp. Rep. 447 (2003)(case recommitted for judge to make definitive findings on the reasonableness and necessity of surgery at the C6-7 level, its causal relationship to the employee's work, and the extent of the employee's disability prior to any surgical procedure).

² The use of "Dec." herein refers to the judge's second hearing decision.

³ G. L. c. 152, § 34A, provides, in pertinent part: "While the incapacity for work resulting from the injury is both permanent and total, the insurer shall pay . . . the injured employee . . . weekly compensation equal to two-thirds of his average weekly wage . . ."

⁴ The self-insurer has not appealed any other issue addressed on recommittal.

The self-insurer relies on two cases in support of its position. In Halama v. Mestek, Inc., 7 Mass. Workers' Comp. Rep. 245 (2003), we vacated an *award* of unclaimed § 34A benefits. In Medley v. E.F. Hauserman Co., 14 Mass. Workers' Comp. Rep. 327 (2000), we set aside a judge's *denial* of unclaimed § 34A benefits. There being no meaningful distinction between the facts of this case and our relevant jurisprudence, we reverse the second hearing decision only to vacate the award of permanent and total incapacity benefits. If it can be advanced in good faith, the employee is free to file a claim for further benefits. See G. L. c. 152, § 14(1), and G. L. c. 152, § 16.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: November 17, 2004