

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 083147-89

James Hopkins
Digital Equipment Corp.
Liberty Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine & Maze-Rothstein)

APPEARANCES
Roger P. Lipton, Esq., for the employee
Patricia M. Vachereau, Esq., for the insurer

CARROLL, J. The employee appeals from an amended decision, which increased his earning capacity and awarded a reduced attorney's fee. We summarily affirm the earning capacity determination. But because the administrative judge reduced the attorney's fee for reasons other than those allowed by G.L. c. 152, § 13A(5), we reverse the fee award and award the statutory fee.

The relevant facts are not in dispute. On October 16, 1989, James Hopkins experienced a burning pain in the left aspect of his neck while lifting sheet metal as part of his employment for Digital. (Dec. 3.) He remained out of work for about two months before returning to light duty assignment for approximately six months. He stopped work altogether on May 28, 1990, on advice from his treating doctor. Id.

After stopping work, Hopkins filed a claim for weekly incapacity benefits. That claim was the subject of a hearing before a prior administrative judge, who filed a decision awarding approximately one month of § 34 temporary total incapacity benefits and continuous § 35 temporary partial incapacity benefits thereafter, based on an assigned earning capacity of \$200.00 per week. (Stipulation #3, incorporating into the record the earlier decision dated February 9, 1993.) On September 3, 1997, the insurer's request for a further modification or discontinuance of benefits was conferenced before another

administrative judge.¹ The request was denied and the insurer appealed giving rise to a hearing *de novo*.

In the decision on appeal before us, the administrative judge adopted the opinions of the § 11A medical examiner as well as those of a vocational consultant. After considering the employee's age (62), limited physical restrictions, experience and training (electrical certificate, associates degree and work experience as an electronic technician), the judge determined that the employee had an earning capacity of \$450.00 per week, an amount greater than that previously assigned. (Dec. 5.) Because the employee's earning capacity was increased, the judge ordered the insurer to pay § 35 benefits at a rate less than the employee had been receiving. He also ordered the insurer to pay a fee to the employee's attorney which was less than the statutorily specified amount. (Dec. 5.)

The employee argues, in essence, that the judge committed an error of law when he reduced the attorney's fee. We agree.

The reason given by the administrative judge for ordering a reduced fee is as follows: "Based on the insurer's primary claim to modify the presently assigned earning capacity of \$200.00 which, after hearing, was increased to \$450.00 weekly I find a reasonable legal fee under Section 13A to be \$3,000.00, plus related expenses." (Dec. 5.)

Section 13A(5) of the statute governs the attorney's fee in this situation. It states:

Whenever an insurer files a complaint or contests a claim for benefits and . . . the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney in an amount equal to three thousand five hundred dollars [\$3,500.00²] plus necessary expenses. An administrative judge may increase

¹ The administrative judge who rendered the decision on the employee's initial claim for benefits no longer served in the department.

² St. 1991, c.398, § 103, provides that subsections (1) through (9) and (11) of § 13A of G.L. c 152 "shall apply to all services performed after the effective date of this Act." On the other hand, § 106 of the aforesaid St. 1991 c.398, provides that subsection (10) of the aforesaid § 13A shall be deemed to be substantive in character.

Therefore, when injuries occurred prior to December 23, 1991, but legal services are performed thereafter, attorneys' fees are limited to the amount in § 13A(5), that is, \$3,500.00. On the other hand, adjustments under subsection (10) of § 13A do apply to injuries occurring after December 23, 1991. Therefore, since this is a 1989 injury, the attorney's fee is limited to \$3,500.00.

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or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

(Emphasis added.)

The insurer does not dispute that the employee “prevailed” at the hearing, and there is no issue as to the entitlement of the employee’s counsel to a fee. (Insurer’s Br. 11.) See Stowe v. MBTA, 12 Mass. Workers’ Comp. Rep. 458, 460 (1998); 452 Code Mass. Regs. § 1.19(4). However, the fee can only be reduced “based on the complexity of the dispute or the effort expended by the attorney.” G.L. c. 152, § 13A(5).

The judge’s stated reason for reducing the fee payable to the employee’s attorney does not comport with either reason specified in the statute and thus is in error. We therefore reverse the order of a reduced fee and award the statutorily set fee of \$3,500.00. We summarily affirm the remainder of the decision.

So ordered.

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

Filed: September 8, 1999