

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 042099-04

Cheryl B. Lopes
Lifestream, Inc.
Liberty Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant)

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Michael J. Sherry, Esq., for the insurer

McCARTHY, J. The employee appeals from an administrative judge's decision awarding her three closed periods of total and partial incapacity benefits for work-related injuries suffered in a motor vehicle accident. The employee challenges the evidentiary bases for the termination of her § 34 and § 35 weekly benefits. Finding no error, we summarily affirm the decision on these issues. The employee also maintains the judge erred by reducing his attorney's fee without explanation. Because we cannot tell whether the reduction was purposeful or inadvertent, we recommit the case for further findings on this issue alone.

Where an employee prevails at hearing, his attorney is entitled to a fee, which the "administrative judge may increase or decrease . . . based on the complexity of the dispute or the effort expended by the attorney." G. L. c. 152, § 13A(5). The applicable attorney's fee on May 8, 2006, when the decision in this case issued, was \$4,751.77. See § §13A(10) and 34B; DIA Circular Letter No. 320 – Table II, effective October 1, 2005. Without explanation, the judge awarded employee's counsel a reduced fee of \$4,500.00.¹ (Dec. 12.)

¹ We note that this amount does not comport with the fee designated by any of the previous years' circular letters.

A judge's determination to increase or decrease an attorney's fee is a discretionary decision with which we will generally not interfere, unless it is arbitrary or capricious or an abuse of discretion. Burnette v. Command Marketing Corp., 13 Mass. Workers' Comp. Rep. 56, 60 (1999). Here, however, in the absence of any explanation as to why the judge reduced the fee by \$251.77, we cannot tell whether the reduction was inadvertent or intentional, and, if intentional, whether it was based on reasons approved by the statute. Under such circumstances, we must recommit the case for the judge to reconsider the amount of the attorney's fee and, if he awards a fee different from the statutorily prescribed fee, to make brief findings supporting the change. See Duggan v. Arthur Blank & Co., 17 Mass. Workers' Comp. Rep. 158, 164 (2001)(judge must give reasons for amount of increased attorney's fee); DiFronzo v. J.F. White/Slaterry/Perini Joint Venture, 15 Mass. Workers' Comp. Rep. 193, 198 (2001)(recommittal appropriate for further findings on amount of increased attorney's fee); Thompson v. Sturdy Memorial Hosp., 13 Mass. Workers' Comp. Rep. 427, 429 (1999)(where judge gave no rationale supporting an increased attorney's fee, case must be recommitted). cf. Mulkern v. Massachusetts Turnpike Auth., 20 Mass. Workers' Comp. Rep. 187, 200 (2006)(increased fee award affirmed where judge gave reasons based on complexity of litigation and effort expended by counsel); Burnette, supra at 60-61 (no abuse of discretion where judge provided plausible reason allowed by statute for reducing the fee).

So ordered.

Filed: **October 4, 2007**

William A. McCarthy
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge