COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 050106-95**

Edward Klimek	Employee
Wilbraham Toyota Volkswagen	Employer
Hanover Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Carroll)

APPEARANCES
Terrence A. Low, Esq., for the employee
Bernard W. Schranze, Esq., for the insurer

MAZE-ROTHSTEIN, J. The employee appeals a decision denying entitlement to a wage adjustment under the provisions of G. L. c. 152, § 51.[1] On appeal, he contends that it was error, under that section, to deny him the requisite wage increase due to his post-injury failure to obtain specific advanced training certifications. He also argues that his wages were expected to increase, regardless of advancement training, warranting an award pursuant to § 51. Because his arguments have merit, we reverse the decision and recommit the case for further findings. See G. L. c. 152, § 11C.

Edward Klimek, the employee, was thirty-four years old at the time of the hearing. He had worked as an auto mechanic for nine years until his industrial injury on December

[1] General Laws c. 152, § 51, as amended by St. 1991, c. 398, §78, provides:

> Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, in the open labor market, his wage would be expected to increase, that fact may be considered in determining his weekly wage. A determination of an employee's benefits under this section shall not be limited to the circumstances of the employee's particular employer or industry at the time of injury.

6, 1995. On that date, he suffered a crush injury to three fingers on his dominant right hand, resulting in residual numbness and loss of grip strength. He went out of work at that time and was paid benefits.[2] After a few months he returned to work as a Service Advisor, and in February of 1997 he resumed his duties as an auto mechanic. Shortly thereafter, he stopped work again because his symptoms worsened. Mr. Klimek then made a shift in his employment and became a driver, first for UPS and later for Federal Express. Each job paid more than his job as a mechanic. (Dec. 2.)

The employee filed claims for both § 35 partial incapacity compensation and a § 51 wage adjustment, both of which were denied by the judge at a § 10A conference. Aggrieved, he appealed to a full evidentiary hearing on the § 51 claim only,[3] which was denied. (Dec. 2, 4.)

On appeal the employee alleges that, per § 51, the record evidence is sufficient to allow for a finding that his wages, in the open labor market, would have been expected to increase naturally but for the industrial injury. He also submits that his post-injury conduct in not obtaining the remaining four out of the required eight National Institute for Automotive Service Excellence (ASE) Certifications is not material to any necessary element of proof for wage adjustment under § 51, since his wages were expected to increase regardless. (Employee br. 6-11.) We agree.

[2] We take judicial notice of documents in the board file, which reveal that the insurer paid § 30 medical benefits and § 34 weekly incapacity benefits based on an estimated average weekly wage of $360.00 for a closed period from the date of injury until February 4, 1996, when the employee returned to work with the employer. (Insurer's Notification of Payment dated December 19, 1995; Stipulations submitted with Employee's Exhibits.) See Rizzo v. M.B.T.A, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). See also P. J. Liacos, Massachusetts Evidence § 2.8.1, at 25-26 (7th ed. 1999).

[3] At hearing it was decided that only the § 51 claim would be determined, and, if the judge found in favor of the employee, he would allow the parties to bring claims as to earning capacity based on whatever the new average weekly wage, set by the judge, might be. (Tr. 86.) The parties stipulated that the later claim would be moot if the judge denied the § 51 claim given Mr. Klimeck's increased post-injury earnings. Id.

In Sliski's Case, 424 Mass. 126 (1997), the Supreme Judicial Court clarified the purpose of § 51 benefits while distinguishing them from cost of living increases (COLA) provided by § 34B:

> While COLA benefits are aimed at protecting an individual's economic position by acting as a buffer against the erosion of inflation, § 51 benefits attempt to compensate young workers for the economic opportunities they would have had if their careers had not been interrupted so early. In some cases, an employee's abilities and prospects at the time of injury may be such that the employee could not reasonably look forward to wage increases related to skill acquisition, so that any wage increases would be purely inflationary. In other cases, however, economic projections under § 51 will reflect expectations regarding skill development and job progression.

Id. at 135. Hence, to ensure entitlement to § 51 benefits, the employee must "reasonably look forward to wage increases related to skill acquisition." Id. In the present case, the judge denied the employee's claim under § 51:

> [I]t is clear that with the skills acquisition that would be represented by attaining ASE Certification, Edward Klimek would have most probably seen the sort of pay increase suggested by Section 51. But I am not persuaded that Mr. Klimek would have actually obtained this increase. By February of 1997 Mr. Klimek had returned to his work as an auto technician. He had completed his work at Porter and Chester Institute. And yet despite working as a mechanic for over a year at this time, and the impending loss of certification in three of the eight areas in July of 1998, he did not take those additional tests. He gives no satisfactory explanation as to why not. I therefore decline to find that he is entitled to an adjustment of his wage under Section 51.

(Dec. 3-4.)

It is well settled that an employee must do more than merely assert the fact that he may have been qualified to obtain specialized licensure prior to an industrial accident to be entitled to § 51. Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 213 (2001). Embarking on a professional career with completion of various steps necessary, including specific certification, can establish an expectation of increased wages due to enhanced skills. Hughes v. D&D Elec. Contr., Inc., 11 Mass. Workers' Comp. Rep. 314, 315 (1997). "Increases in average weekly wages under § 51 'are only

due when the projected wage increases are 'related to skill acquisition,' rather than 'purely inflationary.' " Olejnikow v. Omni Plumbing and Heating, 15 Mass. Workers' Comp. Rep. 89, 92 (2001), quoting Etienne v. G.M.C. Masonry Co., Inc., 14 Mass. Workers' Comp. Rep. 51, 53 (2000)(claim denied where no evidence in record supportive of wage increase related to skill acquisition).

Presently, the judge's findings refer to the employee's having passed four of the eight tests necessary for ASE Certification.[4] (Dec. 3, 4.) The judge also referred to the employee's inability to explain why (after the industrial injury and despite residual manual limitations) he did not complete the certification process, but made no findings, on pivotal evidence which described an increase in wages, that may have applied to Mr. Klimek whether he obtained master mechanic status or not. (Dec. 3.) Although the employee testified that he never completed the four remaining certification examinations necessary to fulfill the ASE requirements of Master Technician, he did continue his education by completing course work at Porter and Chester Institute, through his employer, in the Toyota Certification Program as well as the ASE program. (Dec. 3, Tr. 51-52.)[5] Furthermore, during the period of time after February 1997 when the employee resumed his full duties as a mechanic, Mr. Klimek testified that his wages increased due to the four certifications he had completed by January 1996, additional experience and skills acquired on the job. (Tr. 54.) The $ 360.00 dollar average weekly wage, to which the judge refused to apply § 5, reflected the employee's wages prior to the 1995 industrial injury, and consequently did not reflect post- injury incremental wage improvements based on certification training and experience, acknowledged by the employer only after the employee's return to work in 1997.

The judge's failure to address this pivotal record evidence makes the case appropriate for recommittal. See Robinson v. E. L. Harvey & Sons., 13 Mass. Workers'

[4] The National Institute for Automotive Excellence offers ASE Certification and requires testing in eight specific areas to obtain master technician status. (Dec. 3; Employee Ex. 4.)

[5] Although the judge alludes to the employee's testimony relevant to his training at Porter and Chester Institute, he fails to address what impact that may have on the § 51 claim.

Comp. Rep. 5, 6 (1999)(failure to address pivotal evidence regarding whether employment involved an identifiable condition not common or necessary to all or a great many occupations was error); D'Agostino v. City of Worcester Parks and Recreation Dept., 17 Mass. Workers' Comp. Rep. 288, 289 (2003)(judge's findings regarding work in employee's company deficient requiring recommittal), appeal docketed No. 03-J-329, (Mass. App. Ct. July 7, 2003). When a judge fails to weigh evidence on a pivotal question, the decision must be recommitted for further findings. Roldan v. H & W Motor Lines, 8 Mass. Workers' Comp. Rep. 410, 412 (1994).

On recommittal, the judge must re-examine the evidence and make specific findings on the expectation of wage increases through training and skill acquisition that was not dependent upon gaining the complete ASE Certification necessary to attain master technician status. It is only after this evidence is addressed and factual determinations are made that the judge's § 51 legal analysis will enable proper appellate review. Cicerone v. Quincy Adams Restaurant & Pub, Inc., 14 Mass. Workers' Comp. Rep. 62, 66 (2000)("It is the duty of an administrative judge to make such specific and definite findings, based on the evidence, as will enable the reviewing board to determine . . . whether correct rules of law have been applied").

For the above reasons, we reverse the decision and recommit the case for a decision consistent with this opinion.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: November 14, 2003

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Martine Carroll
Administrative Law Judge