COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 33583-93**

Eric Etienne	Employee
G.M.C. Masonry Co., Inc.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Leonard Y. Nason, Esq., for the employee
Ralph J. Cafarelli, Esq., for the insurer

WILSON, J. The insurer appeals from a decision in which the administrative judge awarded § 34A benefits at rates reflecting the expectation of wage increases in accordance with the provisions of § 51.[1] The insurer contends that the judge's application of § 51 was contrary to law. We agree. We reverse the adjustments to the employee's average weekly wage, and award benefits based on the employee's average weekly wage under § 1(1).

We recount only the facts that are relevant to the § 51 issue. The employee was forty-four years old at the time of the § 34A hearing. The insurer had accepted the September 16, 1993 industrial injury to the employee's back, and had paid § 34 benefits to exhaustion based on a stipulated $706.00 average weekly wage. (Dec. 3.)

[1] General Laws c. 152, § 51, 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.

The employee had become a union construction worker in 1983, in which capacity he worked variously as a laborer, carpenter, mason, bricklayer and concrete worker. From August 1993, the employee worked as a mason tender for the employer. (Dec. 3.) At the time of the hearing, the employee continued to be a member of the Laborer's International Union of North America, AFL-CIO, Local #22. Under the Building and Site Construction Agreement that went into effect on June 1, 1997 through May 31, 2000, (Employee's Ex. 3), the employee would have been entitled to biannual increases in his hourly rate: $19.80 on June 1, 1997; $19.90 on September 1, 1997; $20.25 on December 1, 1997; $20.60 on June 1, 1998; $20.85 on December 1, 1998; $21.35 on June 1, 1999; and $22.10 on December 1, 1999. (Dec. 4.) The employee claimed that his average weekly wage should be increased, pursuant to § 51, to reflect these periodic increases provided by the union contract. (Dec. 7.)

The judge agreed with the employee and concluded:

> In this case it can be said that it is certain that the employee's wages would have increased by a definite amount. These circumstances cry out for application of § 51. I find that the employee was of such age and, more particularly, experience, that he would come within the purview of the automatic increases provided for in the labor contract that went into effect from June 1, 1997 to May 31, 2000. Accordingly, his wages would certainly be expected to increase in the open labor market as provided in that contract.

(Dec. 8.) The judge noted that "training leading to reasonably anticipated higher wages support[s] wage enhancement under § 51," but that she did not read § 51 as being limited to such circumstances. (Dec. 8.)

The insurer argues that the judge misconstrued § 51, in that an employee's progression in his field, through experience and training, is necessary to the statute's application, and that a union contract merely providing periodic raises without considering progression of the employee in his field is insufficient to support a § 51 adjustment. In this case, the insurer submits, the employee had been a union laborer for ten years at the time of his injury, and could not reasonably be included in the category of workers that § 51 was intended to benefit. We agree. The Supreme Judicial Court's

recent interpretation of § 51 points to the error in the judge's award of § 51 benefits. Section 51 "protects young employees who are injured early in their careers by including expected wage increases in the determination of such average weekly wage . . . ." Sliski's Case, 424 Mass. 126, 127 (1997). The court's view of § 51 is particularly telling in the following analysis of the distinction between § 34B cost-of-living increases and the benefit increases available under § 51:

> The board's judgment that COLA benefits and compensation under § 51 for expected wage increases serve the same purpose is neither obvious nor necessarily correct. 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 the injury may be such that the employee could not reasonably look forward to wage increases related to skill acquisition, so that wage increases would be purely inflationary. In other cases, however, economic projections under § 51 will reflect expectations regarding skill development and job progression. Because the purposes of § 34B and § 51 are not identical, they cannot be labeled mutually exclusive and decisions regarding their proper interplay must be made on a case-by-case basis.

Id. at 134-135. Thus, the court's reasoning is that § 51 increases are only due when the projected wage increases are "related to skill acquisition," rather than "purely inflationary." We are unable to find any evidence in the record that would support the proposition that the employee's claim for wage increases under the union contract was based in anything related to skill acquisition. As we stated in Richards v. Walbaum's Food Mart, 10 Mass. Workers' Comp. Rep. 328, 331 (1996), "[t]he employee merely offered evidence of a union contract expectation without any evidence as to its relationship to the elements required for a successful § 51 claim. [Citations omitted.] Although expectation of a union contract could be considered in making a § 51 determination, it cannot in isolation support a favorable § 51 finding." We see no difference between such an anticipation of a union contract and wage increases under a current union contract, which do not "reflect expectations regarding skill development and job progression." Sliski, supra.

The award of various increases in the employee's average weekly wage based on § 51 is reversed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: February 29, 2000

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William A. McCarthy
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge