COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 021202-04

Jackson L. Ellis, Jr.	Employee
Briggs Landscape Construction Co.	Employer
Granite State Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge McManus.

APPEARANCES
Charles E. Berg, Esq., for the employee
Thomas F. Finn, Esq., for the insurer

COSTIGAN, J. The employee appeals from the administrative judge's decision denying his claim for an increase in his average weekly wage pursuant to G. L. c. 152, § 51. Seeing no error, we affirm.

The employee, then age twenty-seven, suffered an industrial injury to his right major wrist on April 28, 2004, while working as a landscaper. Although the insurer initially resisted the claim, the parties ultimately agreed to adjust the claim in late 2007, with the insurer paying the employee § 34 total incapacity benefits from June 25, 2004 to January 2, 2007, based on a stipulated average weekly wage of $480. (Dec. 2-3.) Shortly thereafter, the employee filed a claim seeking application of § 51 to increase his average weekly wage by an unspecified amount,[1] and a concomitant increase in the total incapacity benefits he received for the closed period.

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

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[1] The employee claimed that but for his injury, he would have realized his career goal of becoming a police officer. His vocational expert testified the salary range for police officers was $21.33 per hour to $34.98 per hour, with an average hourly rate of $24.80. In the Town of Barnstable, on Cape Cod, where the employee resided and hoped to secure employment, the lowest reported annual salary for a police officer was $40,466, and the highest, for an experienced officer, inclusive of overtime and paid details, was $134,906. (Dec. 6.)

> 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 worked for Briggs Landscape since approximately 1998 or 1999, and had performed similar work -- manual labor and general landscaping duties -- for two previous employers.[2] He alleged, however, that he did not intend to remain in that line of work and, at the time of his injury, was planning a career in law enforcement as a police officer. He had received an associate's degree in criminal justice from Cape Cod Community College in 2001. The employee took the civil service examination for police officer in 2001. Although his name was reportedly placed on a civil service list, he was never called for an interview. The result was similar when he took the exam again in 2003. The employee scored a passing grade on an exam for appointment to the Barnstable Sheriff's Department, but reportedly was ranked 78th on the list, and did not pass the physical fitness test. He had also been discharged from military service in February 1996, after five-plus months of training, for failing to pass the physical fitness test. (Dec. 3-5, 7.)

Based on these facts, the judge determined the employee's vocational profile did not merit an application of the wage-enhancing provisions of § 51:

> While the Employee may have had an interest in pursuing a law enforcement career, and did take and pass the civil service exam on two occasions, it was arguable as to whether his scores on these exams made him a competitive candidate. The 2001 score was not described by the Employee's vocational expert as a "competitive" score, and while the 2003 was, it was still unclear if this assisted his ranking among the applicant pool. [Footnote omitted.] And while the employee did possess a gun license, this evidence standing alone does not support the application of § 51. [Citation and footnote omitted.] An employee must do more than assert the fact that he may have been qualified to obtain specialized licensure prior to the industrial accidents [sic], in order to be

[2] The employee testified he had no prior experience in the area of law enforcement, (Tr. 9), the majority of his past employment having been in the field of landscaping. (Tr. 20-21.)

entitled to an increase in average weekly wage. [Citation omitted.]

(Dec. 8.) The judge also considered the employee's demonstrated difficulties with physical fitness training, and his seeming lack of motivation and interest. She noted: "[a]t the time of his injustrial injury in 2004, the Employee did not have any pending applications for employment with any law enforcement agency," (Dec. 4); "there is no indication that the Employee has attempted to determine how else he might utilize his Associate's Degree in criminal justice;" and at the time of the hearing, and since April 2007, he had been employed as an exterminator. (Dec. 9.) The judge concluded:

> Given the adopted evidence, I do not find the Employee was any closer to obtaining employment as a police officer than he was pre-industrial injury, and certainly given the evidence at hand, it is purely speculative to assume the Employee would have successfully completed all required aspects of the process and be selected for the job. [Citation omitted.]
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> . . .
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> Having carefully reviewed all of the testimony and evidence offered, and having reviewed the prevailing case law, I find the Employee has not proven his claim and find that the evidence does not support the Employee's claim that he could reasonably have anticipated an increased wage due to his obtaining employment as a police officer, but for the industrial injury. I therefore deny and dismiss the Employee's claim for increased wages under § 51 of the Statute.

(Dec. 7-8, 9.)

The judge correctly decided the issue, even though she did not have the benefit of the Appeals Court's reasoning in Wadsworth's Case, No. 09-P-1085 (October 15, 2010). Analyzing a claim for "the imputed loss of expected income enhancement authorized by" § 51, the court stated:

> No evidence in the record shows that Wadsworth either had acquired sufficient training or skills or had begun a path to skill acquisition at the time of his injury that would have supported a reliable projection of increased wages over time. . . . [T]he record does not show that Wadsworth's early trade courses progressed to increased marketable skills or upgraded jobs or that his naval experience resulted in an occupational specialty. His preinjury jobs as a farm laborer, short order cook, and welder did not form a trend of rising wages. Upon this evidence we cannot conclude that the board's rejection of the

administrative judge's § 51 determination was arbitrary or capricious. Ibid.[3]

So too, in this case, the judge saw no evidence that in the near period prior to his injury, the employee was participating in active training to acquire the skills necessary to enter a career in law enforcement. Although he had obtained his associate's degree in criminal justice in 2001, the employee continued to work in landscaping for the next three years, demonstrating no "increased marketable skills or upgraded jobs." Although he possessed a gun license, that licensure did not result "in an occupational specialty." At best, the employee had undertaken only preliminary steps, which the judge found insufficient to satisfy his burden of showing he reasonably had an expectation of wage increases within any potential law enforcement position. His mere intention to attempt to enter that line of work cannot support his claim under § 51. "[E]conomic projections under § 51 [must] reflect expectations regarding skill development and job progression." Sliski's Case, 424 Mass. 126, 135 (1997).

The judge properly concluded that nothing in the evidence persuaded her the

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[3] In an earlier, unpublished opinion, the Appeals Court held:

> Critical elements of an employee's claim cannot be left to "surmise, conjecture or speculation." Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000). . . . [A]t the time of his accident Starr had taken no active steps towards increasing his value as an arborist. [Footnote omitted.] As the review [sic] board correctly concluded, an employee's stated intentions, unsupported by any extrinsic evidence, are insufficient to establish a claim under § 51. Were we to reverse the board and grant relief on such scant evidence, we would be engaging in impermissible conjecture.

Starr's Case, 76 Mass. App. Ct. 1119 (2010)(Memorandum and Order Pursuant to Rule 1:28), affirming our decision in Starr v. Maltby Co., Inc., 23 Mass. Workers' Comp. Rep. 39, 43 (2009)("The road to § 51 applicability must be paved with something more than good intentions").

employee's wages would have increased due to the acquisition of any particular skill anticipated at the time of his injury. Accordingly, we affirm her decision.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: