COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 001753-02

Jeffrey Starr	**Employee**
Maltby Company, Inc.	**Employer**
Transportation Insurance Co.	**Insurer**

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Dike.

APPEARANCES

Dino R. Santangelo, Esq., for the employee at hearing and on appeal
Scott D. Ford., Esq., for the employee at oral argument
Martin T. Sullivan, Esq., for the insurer

COSTIGAN, J. The employee appeals from a decision denying his claim for an increase in his average weekly wage, pursuant to G. L. c. 152, § 51.[1] We affirm the decision.

On January 25, 2002, the employee, a novice tree climber, was severely injured when he fell forty-five feet from a tree in which he was working. His injuries rendered him quadriplegic and ended his working career. At that time, the employee was nineteen years old and had worked for the employer for approximately fifteen months. (Dec. 3.) In prior employments he had performed

[1] The employee's original claim also sought medical benefits under §§ 13 and 30, permanent loss of bodily function and disfigurement benefits under § 36, and permanent and total incapacity benefits under § 34A. Following a § 10A conference, all such benefits were awarded, but the § 51 claim was denied. Both parties appealed but prior to the close of the record, they entered into an agreement which resolved all issues but the § 51 claim. (Dec. 2.)

general landscaping work and small scale clean-ups. Initially with Maltby, the employee worked on the ground, but he progressed to tree work, which involved climbing. (Dec. 3-4.) Although he was improving his skills in performing tree work on the job, he was not participating in any formal training, licensure or certification acquisition. (Dec. 4.)

The employee's stipulated pre-injury average weekly wage was $620.96. (Dec. 2.) The employee claimed an unspecified increase in that average weekly wage pursuant to G. L. c. 152, § 51, which 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.

As amended by St. 1991, c. 398, § 78. 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 adjustments (COLA) under § 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 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.

The judge concluded that § 51 did not apply to the employee. He found that even though the employee was at the beginning of his work life within his chosen vocation, and "would have received higher wages over time in the natural course of

his career," the "natural and anticipated result" of attaining a higher wage could not be established as of a particular date. (Dec. 6.) Without such a determination, the judge concluded, any increase in the average weekly wage would be speculative and without foundation. He wrote:

> In order for the employee to be entitled to benefits pursuant to § 51 he must be more than simply young and at the beginning of his career path. He must be actively engaged in a skill progression that has the natural and anticipated result of increasing the employee's average weekly wage on an **identifiable date** (emphasis added). See Etienne v. G.M.C. Masonry Co., Inc., 14 Mass. Workers' Comp. Rep. 51 (2000), Hughes v. D&D Electrical Contractors, Inc., 11 Mass. Workers' Comp. Rep. 314 (1997). In the case at hand the employee had made some steps towards his ultimate career goals and was acquiring some skills in the field of tree cutting. This alone is insufficient to raise his average weekly wage pursuant to § 51, however, as no definitive date for such an increase is readily determinable.

(Id.) We agree with our concurring colleague that the facts and holding in Etienne, supra, do not speak to the employee's burden of proving a date on which skill acquisition would be realized.[2] We do not agree, however, that the judge's citation to and reliance on our decision in Hughes, supra, was improper. Unlike Mr. Starr, Mr. Hughes proved to the judge's satisfaction that he "had embarked on a career as an electrician after high school; had successfully completed various steps in this career, including the examination to become a master electrician and, but for his disability related to his working as an electrician, would likely have earned a higher wage than that which he earned at the time of his industrial injury." Id. at 315. The reviewing board reversed only the date the judge used to apply § 51, holding that neither the date of the impartial medical examination nor the date of

[2] In Etienne, the employee was claiming § 51 adjustments to his average weekly wage based on biannual increases to his hourly rate of pay provided by his union's collective bargaining agreement. Citing Sliski's Case, supra, this board held that in the absence of any evidence the wage increases were related in any way to skill acquisition by the employee, such increases were "purely inflationary," and did not support application of § 51 to the employee's claim. Etienne, supra at 53.

the evidentiary hearing (the judge used both) had any relevance to when the employee's skills were enhanced. The board held the evidence established the employee completed the required courses and passed the master electrician's examination sometime in 1992-1993, but with no greater specificity in the record evidence as to when he did so, it concluded the final day of 1993 was the earliest possible date for the application of § 51. Id. at 316.[3] That the employee here fell far short of what was proven in Hughes, supra, is reflected in the judge's findings:

> The employee testified that when he left school to begin fulltime work he had intended to return to college after earning practical experience in his chosen field. I credit this testimony and find that was indeed the employee's ultimate intention. He had, however, not made any effort to return to school prior to the date of injury. Indeed there is no indication that such a return was imminent or even on the horizon.
>
> . . .
>
> Another step on his path towards job growth and skill acquisition would have been to acquire a CDL license. This would have rewarded him with an immediate raise in pay as well as provide him with a tool necessary to his overall job growth. To this end the employee had received instructional pamphlets in order to prepare for the test. He had not however studied or reviewed these pamphlets and it does not appear as if he was actively working towards his licensure at the time of his injury.

(Dec. 4.) [4] The judge found the employee's *intentions* in regard to furthering his education and obtaining a commercial driver's license were unavailing to his claim

---

[3] "On the record before us, the conclusion must be that the employee is entitled to the increased § 51 average weekly wage of $770.00 no sooner than December 31, 1993. In view of the employee's burden of proving every element of his claim, we note this date represents the last possible date supported by the pertinent evidence [as to when the employee's skills were enhanced]."

[4] The employee contends the judge improperly focused on CDL certification in denying his § 51 claim. (Employee br. 5.) We note, however, that the employee

under § 51. (Dec. 7.) This was soundly within his discretion as a fact finder, and not contrary to law. See Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 213 (2001)(in absence of evidence as to when employee would have obtained heavy equipment operator license, his testimony as to intention to obtain license, even if believed, insufficient to warrant application of § 51). The road to § 51 applicability must be paved with something more than good intentions.

It is the employee's burden to prove not only the amount, but the timing, of the increase in average weekly wage that is sought by way of § 51. See Hughes, supra at 316. That burden necessarily includes a temporal aspect, as all changes in benefit entitlement must be "anchored in the evidence." Makris v. Jolly Jorge's, Inc., 4 Mass. Workers' Comp. Rep. 360, 362 (1990). Plainly a specific date must be chosen as the effective date for average weekly wage enhancement under § 51, for the obvious reason that the resulting increase in weekly incapacity benefits must commence on a date certain. Even the employee does not dispute that he bears the burden of proving when, but for the injury, his wages would have increased. (Employee br. 1, 5-7.) Rather, he contends "[i]t was an error of law for the Hearing Judge to conclude that an identifiable date of wage could not be readily determined." (Employee br. 5.)

Specifically, the employee argues that the judge erred by failing to make findings on the testimony of Justin Donahue, a former Maltby employee and co-worker of the employee. Donahue testified that he had reached his maximum earning potential as a tree climber with Maltby after four years on the job, when he was earning $23.50 per hour. He left "because I wanted to make more money. And the only way you make more money is to be an owner of a tree service." (1/20/06 Tr. 17.)

That the judge did not discuss Donahue's testimony does not avail the employee. Mr. Donahue is listed as a witness. (Dec. 1.) Beyond that, there is no requirement that an administrative judge comment on every piece of evidence or every

---

conceded a CDL was necessary in order to advance in the arborist field. (12/12/05 Tr. 25.)

witness's testimony introduced at hearing. Hilane v. Adecco Employment Serv., 17 Mass. Workers' Comp. Rep. 465, 471 (2005). In any event, we agree with the insurer that in the absence of any foundation that the employee and Donahue "share[d] similar intelligence, aptitude, ambition, business acumen, and opportunities," (Ins. br. 3), even if the judge credited Donahue's testimony, it provided no basis on which the judge could have determined when the *employee's* anticipated increase in wages due to skill acquisition would have come about, if at all.[5]

The decision is affirmed.

So ordered.

_____

Patricia A. Costigan
Administrative Law Judge

_____

Bernard W. Fabricant
Administrative Law Judge

Filed: **February 2, 2009**

HORAN, J., (concurring). I agree the decision should be affirmed, because the record contains no evidence as to when, for example, the employee's developing skill as a tree climber would have likely produced an increase in his earnings working for the employer, or in the open labor market. I write separately to note the judge's rationale for denial of the claim is based, explicitly, on a standard of proof higher than what § 51 requires.

[5] The employee and the insurer offered into evidence reports prepared by their respective vocational experts. (Dec. 2, 5; Ex. 4 and Ex. 5.) The judge's findings on this evidence reflect the experts opined as to the salary range an arborist or certified arborist working in Massachusetts could anticipate, but neither expert spoke to when the employee would likely have become an arborist or achieved certification. (Dec. 5.)

The judge below relies on our decisions in Etienne and Hughes, supra, to support his conclusion that, under § 51, the employee's likely increase in earnings based on skill acquisition must be proven as of a "definitive date" which is also "readily determinable." (Dec. 6.) Etienne and Hughes do not stand for this proposition. Insofar as the judge suggests that, in order to prevail under § 51, the employee must prove his entitlement to a specific wage as of a specific date, he requires proof beyond what the statute, and the case law, contemplate. To require such exacting proof unduly restricts the statute's application and undermines the legislature's obvious beneficent intent.

By its nature, § 51 permits findings based on competent evidence of a reasonable prognostication of what the injured worker would likely have earned, based on future skill acquisition, but for the injury. Accordingly, once the statutory predicates are met, the judge may select a date supported by the evidence, and any reasonable inferences drawn therefrom. However, as this record contains no evidence respecting how long it normally takes for someone, such as the employee,[6] to acquire the skills necessary to support a finding under § 51, the judge's error is harmless.

_____

Mark D. Horan
Administrative Law Judge

Filed: **February 2, 2009**

[6] Although the judge's decision does not address the issue, the record does contain sufficient evidence to support a finding that, but for his injury, the employee possessed the basic skills, physicality, intelligence and drive to succeed as a tree climber.