COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024061-02**

Nichole LePage	Employee
Department of Environmental Management	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Bean.

APPEARANCES
James H. Sandman, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer
Radha Tilva, Esq., for the self-insurer on brief

KOZIOL, J. The self-insurer appeals from a decision awarding the employee various periods of § 35 partial incapacity benefits, followed by § 34A permanent and total incapacity benefits from May 28, 2009, and continuing, as well as three separate upward adjustments to the employee's average weekly wage pursuant to § 51,[1] on May 21, 2005, September 6, 2005, and May 28, 2009.[2] Although the self-insurer does not dispute that § 51 applies to this case, (Self-ins. br. 8), it argues the judge erred in

[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.

[2] There are three volumes of transcripts for the two day hearing. Hereinafter, we reference the transcripts as follows: February 2, 2010, stenographer Karen DeGregorio, as Tr. I; February 2, 2010, stenographer Maryellen Moulaison, as Tr. II; and February 22, 2010 as Tr. III.

awarding each of the three identified § 51 increases.[3] We affirm.[4]

In the summer of 2002, the employee was working as a lifeguard for the employer when she suffered a severe closed head injury in a work-related motor vehicle accident. At that time, the employee was a college student who had completed two years and was on target to graduate. (Dec. 247.) She was planning to enter the field of either teaching or law.[5] The employee's average weekly wage as a lifeguard, when spread over a 52 week period, was $88.93. (Dec. 245.)

The industrial accident left the employee with major cognitive and psychiatric impairments. As a result of her injury, the employee's progress in obtaining her college degree was delayed, and she graduated from Salem State College in 2005, rather than 2004. (Dec. 247-248.) After graduation, the employee obtained professional employment, securing a total of ten jobs during the period of 2005 through 2008.[6] The employee was unable to work at any job for more than a few

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[3] The self-insurer also argues the judge erred in failing to find the matter medically complex pursuant to § 11A(2), because the impartial medical examiner testified that it was. (Ex. 3, at 6, 38-39.) We summarily affirm the decision on this issue. See LaFountain's Case, 80 Mass. App. Ct. 1102 (2011)(Memorandum and Order Pursuant to Rule 1:28).

[4] Because the Supreme Judicial Court granted further appellate review of the decision in Wadsworth's Case, 78 Mass. App. Ct. 101 (2010), further rev. granted, 459 Mass. 1101 (2011), the parties were notified at oral argument, that the reviewing board would accept supplemental briefs filed within thirty days of the court's decision in Wadsworth. See Wadsworth's Case, 461 Mass. 675 (2012). No briefs were submitted.

[5] Although the employee's vocational expert testified about wages the employee subsequently earned in a teaching related position, see infra, the employee did not seek to establish her entitlement to wage enhancement based upon expected wages in either teaching or the legal profession; rather, she presented evidence of wages earned by college graduates with Bachelor of Arts degrees. (Dec. 251-252.)

[6] In 2007, the employee earned a master's degree in psychological studies from Cambridge College. (Dec. 250.) The judge found the employee "sought an advanced degree in mental health counseling, but was not allowed to pursue that course of study." (Dec. 250.) The employee testified she was unable to complete the internship portion of her education. (Tr. I, 39-40.) Upon the advice of her student advisor, the employee's major was then changed to psychological studies. (Tr. I, 39-40, 70-71.)

months, and held some jobs for only a few days. (Dec. 248-250.) The continued effects of her work injury, including episodes of rage, anxiety, aggression, and other anti-social behaviors, caused her inability to maintain employment. (Dec. 251-254.) She ultimately stopped working on March 12, 2008. (Dec. 250.) Simply put, the employee is incapable of working with others in a conventional work environment.

The employee filed a claim seeking § 34A permanent and total incapacity benefits from 2008 onward, along with prior closed periods of § 35 partial incapacity benefits resulting from her intermittent employment.[7] The employee's claim included the issue of § 51 weekly wage enhancement. (Dec. 245.) As noted supra, the self-insurer did not dispute that § 51 applied to the employee's claim. The issues were, and remain, the amount of the enhanced wages available under that provision, and whether the employee is entitled to seek more than one wage enhancement.

In his initial May 21, 2010, decision, the judge awarded the employee § 34A benefits, commencing May 28, 2009, at a rate based on a $890 average weekly wage, which the judge found to be the median wage within the range of wages offered by the employee's vocational expert for a woman with a 2005 B.A., working in 2010. (Dec. 252-253, 256.) In an addendum filed June 16, 2010, the judge awarded the employee other increases in her weekly wage for the four years prior to 2009, starting with an increase to an average weekly wage of $813 upon her graduation from college in May of 2005, and an additional increase to $847.55 in September of 2005. (Dec. 274-275.) The addendum indicates these additional § 51 wage enhancements were based on "stipulated facts" appearing in the parties' post-hearing "Stipulation to Amend Hearing Decision of May 21, 2010."[8] (Dec. 273.) That document referred

[7] The parties stipulated to the employee's earning capacities, which increased from May 21, 2005 to March 13, 2008, and served as the basis for the partial incapacity awards for the period, May 21, 2005 to May 27, 2009. (Dec. 273-274.)

[8] The following paragraphs of that document are pertinent to the issues raised on appeal:

> 2. That the United States Department of Labor, Bureau of Labor Statistics, Table 17, median wage earnings for female college graduates with a bachelor's degree during

the judge to wage data reported by the United States Department of Labor, Bureau of Labor Statistics, but also expressly reserved the parties' rights to challenge any issue contained in that document.

The self-insurer argues, 1) the amount of the § 51 wage increase commencing on May 21, 2005, was erroneous because the increase should be based on wage data from 2004 graduates of Salem State College, rather than wage data compiled by the Bureau of Labor Statistics for 2005 college graduates with the employee's credentials; and, 2) the employee was entitled to only one increase in her average weekly wage tied to receipt of her college degree.[9]

> the years 2005-2008 were as follows: 2005-$813; 2006-$839; 2007-$860; and 2008-$878.
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> 3. That the employee's average weekly wage from May 21, 2005, the date of her graduation from college and thus the date her entitlement under s.51 of the Act should have been $813.00, such increase being based upon the applicability of s.51 of the Act and the median wage earnings in 2005 for female college graduates referenced in paragraph Two above.
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> 4. That from May 21, 2005 to September 5, 2005, the employee's average weekly wage be increased to $813.00 such increase being based upon the applicability of s.51 of the Act and the median wage earnings in 2005 for female college graduates referenced in paragraph Three above.
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> 6. That the employee's arrearage entitlement from September 6, 2005 to March 12, 2008 is $43,997.78, based upon an increased average weekly [sic] of $847.55 and an agreed-upon earning capacity and actual weekly wages of $289.00.
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> 10. That the parties reserve their respective rights to appeal the amended hearing decision notwithstanding the execution of this Stipulation to Amend Hearing Decision and specifically reserve their rights to appeal any issue contained in the Stipulation to Amend Hearing Decision.

[9] The self-insurer also appears to argue that the judge erred in relying on the employee's vocational expert's opinions and in accepting, as fact, the employee's testimony that she had a grade point average of 3.14 prior to her injury. (Tr. I, 13-14; Dec. 247.) The evidence in the record supports the findings made by the judge; we do not disturb findings of fact that are neither arbitrary nor capricious.

The self-insurer's argument regarding the May 21, 2005 wage increase is two-fold. First, it maintains that the judge could properly award a § 51 increase only based on wages earned by other Salem State College graduates. Second, it asserts that § 51 requires the judge to order wage enhancement as of the date the employee would have been expected to achieve the wage increase, but for the injury; therefore, the judge was limited to making a finding based on wage data for 2004 graduates.

We find no error in the judge's award of an increase in the average weekly wage to $813 per week, commencing on May 21, 2005. The self-insurer does not contest that the employee proved she "was of such age and experience when injured that, under natural conditions, in the open labor market, [her] wage would be expected to increase." G. L. c. 152, § 51; Wadsworth's Case, supra, at 681-682 (setting forth parameters for determining eligibility for § 51 wage enhancement.) Yet it provides no legal authority for its contention that the judge was limited to considering evidence of wages collected by the employee's alma mater pertaining to its graduates.[10] Nor do we view § 51 as imposing any such limitation.

At the hearing, the employee's vocational expert testified that he and other experts in his field look to public information, and in particular, the Bureau of Labor Statistics (BLS) for information on average weekly wage or earning capacity for individuals based on education and age. (Tr. II, 10-11; 22-25.) He also testified that BLS provides information that is "delineated multiple ways so we can look at it in several factors" including "males, females" and "educational and achievement levels."[11] (Tr. II, 10-11.) The self-insurer raised no objection to the vocational

[10] The self-insurer presented alumni salary survey records for Salem State College's graduating classes of 2004 and 2005, which provided only twelve responses from students who shared the same major as the employee and graduated in 2004, and only seven responses from those who shared the same major as the employee and graduated in 2005. (Ex. 7; Self-ins. br. 5-6.) The vocational expert testified that his recollection was that Salem State College's data was "based upon a salary survey of the graduates if they respond to it." (Tr. II, 14.)

[11] The vocational expert testified that he couldn't independently confirm actual wages for particular jobs as, "[m]ost places will not give you [sic] until you are going in for an actual

expert's testimony providing his opinions based on wage data compiled by the Bureau of Labor Statistics. As the finder of fact, the judge was charged with weighing this evidence; as such, his findings adopting the median wage published by the Bureau of Labor Statistics pertaining to the May 21, 2005 increase were neither arbitrary nor capricious.

The second prong of the self-insurer's first argument asserts that the judge erred in adopting wages for 2005 college graduates, rather than wages for 2004 graduates, the date the employee was expected to graduate but for the injury. The argument conflates two components of the § 51 analysis that are usually both matters of prognostication, but in the unique circumstances of this case, actually occurred. Wadsworth, supra, at 684 ("the employee must prove that he was on a path to realize that potential [for wage growth] and likely would have done so within a foreseeable time frame but for the interruption due to his injury").

The first component of the analysis looks to threshold eligibility for claiming entitlement to the wage enhancement, which Wadsworth instructs is set at the moment the employee is injured:

> Through the mechanism furnished by § 51, where an injured employee has proved by a preponderance of the evidence that, but for his work-related injury, he would have earned a higher wage in the open labor market than he was earning at the time of the injury, the employee is entitled to compensation based on the higher wages he would be expected to earn when he would have expected to earn them
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> . . .
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> [S]ection 51 "plainly speaks to the employee's vocational profile 'when injured,' " so the employee's post-injury training and activities may not be used in determining an employee's *eligibility* for a § 51 wage enhancement.

Wadsworth, supra, at 681-682 (emphasis supplied). Once threshold eligibility is established, the second component of the analysis looks to the anticipated timing of

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interview talk about salary ranges. So you are sort of stuck at looking what the public information is for average salaries are [sic] for individuals." (Tr. II, 22.) He also testified that the wages reported by the BLS were nationwide averages and he would expect the wages in Massachusetts to be somewhat higher than those reported by the BLS. (Tr. II, 19, 25.)

the wage enhancement event. Here, the employee's eligibility for § 51 wage enhancement is not in dispute;[12] indeed, the self-insurer does not contest that the employee's entitlement to an enhanced wage would be triggered upon her graduation from college. (Self-ins. br. 8.)

In the typical § 51 case, however, the timing of the likely achievement of the milestone warranting the award of a wage enhancement is a matter of sheer prognostication because the injury typically robs the employee of the ability to continue to engage in the steps necessary to reach that milestone, regardless of whether those steps take the form of, "the acquisition or development of skills, education, or work experience." In the unique circumstances of this case, rather than robbing the employee of the ability to engage in the steps necessary to achieve the milestone triggering the assignment of the enhanced wage, the injury robbed the employee of the ability to *use* the education she was on the path to obtaining, and was likely to obtain, at the time of the injury. Here, the 2004 graduation date advocated by the self-insurer provided the earliest date upon which a wage enhancement could be set. However, the evidence also showed that the employee's graduation from college occurred in 2005. The date to be used to set the wage enhancement was a question of fact for the judge to resolve and where there was no dispute that the wage enhancement would be triggered upon graduation from college, the judge, as finder of fact, was well within his discretion and fact-finding authority to choose the 2005 date. Cf., Starr v. Maltby, Co., Inc., 23 Mass. Workers' Comp. Rep. 39, 44-45 (2009) (where record provided "no evidence respecting how long it normally takes for someone, such as the employee, to acquire the skills necessary to support a finding

[12] A quick review of the evidence shows that when the employee was injured, she was nineteen years old, working as a lifeguard, and earning an average weekly wage of $88.93. She was already in college, and studying to obtain a Bachelor of Arts degree. Thus, considering her vocational profile when injured, the employee was "on a path before [her] injury that, for a person of [her] age and experience under natural conditions, likely would have led to a wage increase in the open labor market based on acquisition or development of skills, education, or work experience." Wadsworth, supra, at 681-682.

under § 51"), aff'd Starr's Case, 76 Mass. App. Ct. 1119 (2010)(Memorandum and Order Pursuant to Rule 1:28).

Moreover, the self-insurer has failed to show that its rights were somehow prejudiced by the judge's choice of the employee's 2005 graduation date. Indeed, in light of the evidence presented in this case, its argument regarding the assigned May 21, 2005 wage is largely academic. The self-insurer presented data from Salem State College regarding salary ranges for 2004 graduates, including those who, like the employee, obtained B.A. degrees in history. The 2004 data from those students with Bachelor of Arts degrees who majored in history, and who responded to the College's salary inquiry, provided a range of salaries from $28,000 through $42,999, yielding a 52 week rate ranging from $538.46 through $826.90 per week. (Ex. 7.) The $813 wage assigned by the judge, based on salaries reported by the Bureau of Labor Statistics for 2005, clearly fell within that range of wages.[13]

The self-insurer's final argument challenges the judge's award of additional increases in the average weekly wage after the original increase. (Self-ins. br. 8, 9, 11.) It argues the employee is entitled to only one wage increase because she could not show that at the time of her injury, she was on a path to earn any wages beyond the initial increase tied to her graduation from college.

We begin by noting that nothing in § 51 indicates, as a matter of law, that an employee is entitled to seek only one average weekly wage increase. Sliski's Case, 424 Mass. 126, 130 (1997)(noting that anticipated "periodic reexaminations would be necessary to reassess [the employee's] wage projections over time," and observing that "such reexaminations" were "a virtual certainty"). Moreover, contrary to the self-

[13] In addition, the employee's vocational expert testified that the hourly rate of pay for 2004 graduates was about the same as that for 2005 graduates. (Tr. II, 11.) Lastly, as a practical matter, the self-insurer's argument advocating for a wage enhancement tied to a 2004 commencement date is perplexing. Because § 51 wage increases are based on projected skill acquisition, Wadsworth's Case, 461 Mass. 677, 682 (2012), choosing to award wage enhancement tied to the receipt of a diploma in 2004 would have the effect of providing the employee with credit for an additional year of experience in the labor market, and arguably the potential to claim additional higher wages based on work experience alone, than those individuals who achieve the same degree at a later date.

insurer's argument, (Self-ins. br. 9), the employee's vocational expert did provide evidence that the employee's college degree would provide her with the ability to earn entry level wages, which would be expected to increase as she gained experience in the workforce. (Tr. II, 20-21.) "[T]he employee must demonstrate that, [she] was on a path before [her] injury that, for a person of [her] age and experience under natural conditions, likely would have led to a wage increase in the open labor market based on the acquisition or development of skills, education, or *work experience,* or from anticipated job progression such as the transition from an apprentice to a journeyman to a master." Wadsworth, supra, at 682 (emphasis supplied). Thus, we conclude the judge did not err in determining that the employee would be entitled to seek additional increases in her wage after obtaining the initial increase tied to her graduation from college.

Because the employee is entitled to seek more than one increase in her weekly wage, even if the self-insurer's brief could be read as challenging the amount and timing of the second wage enhancement to $847.55 on September 6, 2005, we conclude that wage enhancement should stand as both the figure and date were facts stipulated to by the parties in their "Stipulation to Amend Hearing Decision of May 21, 2010." The self-insurer has made no specific request to vacate the stipulation, reserving only its right to challenge any "issue" contained in the stipulation, not the facts themselves. Indeed, the self-insurer appears to acknowledge as much, and we discern no argument pertaining specifically to the second wage enhancement. Rather, it argues that the judge's "selection of a wage estimate from 2009 was also erroneous." (Self-ins. br. 11); Costa v. TGI Fridays, 24 Mass. Workers' Comp. Rep. 79, 83-84 (2010)("While it is true that a trial or appellate court may vacate a stipulation if it is found 'improvident or not conducive to justice,' the request to vacate a stipulation needs to be made 'in the course of a single action' ").

The third wage enhancement, ordered to take effect on May 28, 2009, appeared in the judge's original decision and was not part of the parties' "Stipulation to Amend Hearing Decision of May 21, 2010." The employee's vocational expert testified to

the $890 figure as being representative of the wage the employee would be expected to earn in 2009, based solely on "experience" in the workforce. (Tr. II, 21.) Wage increases based on the acquisition of "work experience" are clearly contemplated by § 51. See Wadsworth, supra, at 682. In addition, there was no evidence that the anticipated wage increase was the result of inflationary forces.[14] Accordingly, we affirm the decision.

The self-insurer shall pay counsel for the employee a § 13A(6) attorney's fee in the amount of $ 1,517.62.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

FABRICANT, J., dissenting in part. I agree with the majority in all respects but one. I would not affirm the judge's adoption of vocational evidence supporting the assignment of an $813 average weekly wage based on 2005 labor statistics. At the time of the employee's work injury, she was earning her B.A. with the expectation that she would graduate in 2004, and the plain language of § 51 establishes this as the focus of inquiry:

[14] Had the expert conceded the figure included an inflationary component, the employee would have been obligated to demonstrate to what extent the rate increase was attributable to experience versus inflation. Wadsworth, supra, at 682 ("An anticipated wage increase to offset a reduction in purchasing power arising from inflation is not enough to support a wage enhancement under § 51; the employee must demonstrate that his earning capacity would likely have increased beyond the rate of inflation").

> "if it be established that the injured employee was of such age and experience *when injured* that, under natural circumstances, in the open labor market, [her] wage would be expected to increase . . ."

M. G. L. c. 152, § 51 (emphasis added). A one year delay in the employee's graduation does not change the date of injury for the purposes of determining eligibility under § 51, as well as for calculating her expected wage increase. See Starr's Case, supra ("at the time of his injury, [the employee] had taken no active steps towards increasing his value as an arborist"). Cf. § 51A (statutory language directs judge to change rate of compensation calculation from date of injury to date of decision).

On recommittal, I would have the judge look to graduation in 2004, as was expected on the date of injury, as the proper time frame for the application of § 51.

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***May 23, 2012***