COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 001533-83

Todd A. Bruenell	**Employee**
Town of Framingham	**Employer**
Town of Framingham	**Self-insurer**

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Horan)

The case was heard by Administrative Judge Constantino.

APPEARANCES

Edmund L. Patrican, Esq., for the employee at hearing
William C. Harpin, Esq., for the employee on appeal
Daniel M. Cunningham, Esq., for the self-insurer at hearing
Peter P. Harney, Esq., for the self-insurer at hearing and on appeal
Holly B. Anderson, Esq., for the self-insurer on brief

COSTIGAN, J. The self-insurer appeals from a decision in which the administrative judge increased the employee's weekly incapacity benefit by enhancing his average weekly wage under the provisions of G. L. c. 152, § 51.[1]

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[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.

As amended by St. 1991, c. 398, § 78, and deemed procedural by St. 1991, c. 398, § 107.

Because we agree with the self-insurer that the employee failed to meet his burden of proving the applicability of § 51 to his claim, we reverse the decision in that regard.[2]

The employee was severely injured on March 28, 1983 when he was struck by a trash compactor vehicle while working as a trash collector for the employer. He was almost twenty-three years old at the time of the injury, and had been working in that position as a provisional employee for some three to four months. The employee has not worked since his injury. In a 1993 hearing decision, the employee was found by a different administrative judge to be permanently and totally incapacitated, and was awarded § 34A benefits at the rate of $177.60 per week, based on his pre-injury average weekly wage of $266.40,[3] effective April 9, 1991.[4] (Dec. 4-5; Self-ins. br. 2.)

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[2] We therefore do not reach the self-insurer's arguments concerning its defenses of laches, late notice and late claim. (Self-ins. br. 23-25.)

[3] The administrative judge's decision lists as a stipulation of the parties that the employee's pre-injury average weekly wage was $266.00, (Dec. 3), and the judge twice again wrongly found that to have been the average weekly wage. (Dec. 4, 5.) Even the employee cited that incorrect amount. (Employee br. 2.) Later references in the decision, however, are to the correct average weekly wage of $266.40, (Dec. 8), and the enhanced average weekly wage of $277.60 found by the judge was predicated on the $266.40 base average weekly wage. (Dec. 8, 10.)

[4] Thus, the judge's award of § 51-enhanced § 34A benefits from and after March 29, 1983 was error. Cost-of-living adjustments under § 34B were also awarded in the 1993 decision, effective October 1, 1991. Subsequently, by a 1996 hearing decision on recommittal from the reviewing board, a different administrative judge found the employer's serious and willful misconduct had resulted in the employee's injury. The employee was awarded double compensation benefits under § 28. We take judicial notice of these prior hearing decisions in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

Even though the employee, as a provisional worker, was not a member of the laborers' union, the judge found that his hourly wage was governed by a collective bargaining agreement between the union and the town in effect on the date of his injury, which provided for a difference of twenty-eight cents per hour between Grade 2 laborer/Step 1 and Grade 2 laborer/Step 4; that wage increase would be realized after three years on the job as a permanent trash collector. (Dec. 8.) Of twenty-nine "Additional Subsidiary Findings of Fact" the judge made, the following are most relevant to his ultimate analysis of the employee's § 51 claim:

> · For the three plus months that Mr. Bruenell worked, this was considered to be a provisional period. He worked 111 days up to the industrial accident.
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> · It was the understanding of Mr. Bruenell that after a provisional period, his average weekly wage would increase.
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> · It was Mr. Bruenell's intent to continue to work for the Town of Framingham to save enough money to attend college or take college courses.
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> · Mr. Mark Antalak currently is an employee of the Town of Framingham and was a co-worker of Mr. Bruenell at the Sanitation Department in 1983. Mr. Antalak expected Mr. Bruenell to be hired as a permanent employee after the completion of a provisional period.
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> · Mr. Antalak testified that during the provisional period, Mr. Bruenell was a good worker for the Town of Framingham Sanitation Department. I adopt this testimony.
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> · Mr. Antalak testified that the pay grade of a permanent employee at the Town of Framingham would be higher after the completion of a provisional period. I adopt this testimony.
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> · The bargaining agreement between the Town of Framingham and the union provides for a natural progression for the employee's maximum amount of wages.

> · I find that Mr. Bruenell is intelligent and articulate and that he makes a positive impression.
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> · I find that if it was not for the industrial injury that [sic] Mr. Bruenell would have taken post secondary courses and would have done well.
>
> · It is the belief of Mr. Bruenell that his pay would significantly increase once he was made a permanent not provisional town employee.
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> · It was the intent of Mr. Bruenell to attain a Class II driver's license so as to increase his pay rate.
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> · It is the understanding of Mr. Antalak if someone became a permanent employee in the sanitation department that the pay grade would be W-3.
>
> · Mr. Joy of the Framingham Human Resource Department testified that a person hired as a laborer for the sanitation department would be W-4 on the salary scale.

(Dec. 5-7.) Proceeding to his analysis of the applicability of § 51, the judge found:

> The result of [the employee's] required experience and training as discussed above would be his permanent position once this was attained. He would progress to the highest level of Grade 2 Step 4. He seeks the pay rates in effect on date [sic] of his injury not future rates set by future negotiations. **His requested increase has nothing to do with inflation or collective bargaining in the future.** He seeks adjustment for only that which he has already embarked upon and had taken training for.
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> The employee has presented all elements required for award of increase in the A.W.W. in accordance with Section 51 of the act. He was of an age and career level to require Section 51 be considered. **He had embarked on a career course of training and experience to qualify for permanent status and increase in wage to Grade 2 Step 4.** He intended to remain on that job for what might have been an indefinite period.

(Dec. 9; emphases added.)

The judge's analysis and conclusions are clearly erroneous. The "experience and training as discussed above" does not, in fact, refer to anything of substance for § 51 purposes. Other than noting that Mr. Bruenell was a "good employee," who was "resourceful," "intelligent" and "articulate," (Dec. 6), and who *intended* "to attain a Class II driver's license so as to increase his pay rate,"[5] (Dec. 7), the judge made no finding as to what training, if any, was necessary for advancement in the job of trash collector. Contrary to the judge's view, the wage differential of twenty-eight cents more per hour for a Grade 2/Step 4 permanent employee, as compared to a Grade 2/Step 1 provisional employee, was based solely on the length of time a worker would remain in the job classification of trash collector. Richards v. Walbaum's Food Market, 10 Mass. Workers' Comp. Rep. 328 (1996). There is not a scintilla of evidence in the record that training or skill acquisition was a component of that wage increase. See Wadsworth v. New England Concrete Pipe Co., 23 Mass. Workers' Comp. Rep. ___ (March 30, 2009). Moreover, the employee did not claim or attempt to prove that, at the time of his industrial injury, he had a reasonable expectation of moving up from the ranks of a laborer to a supervisory position.

Finally, the judge's finding that, but for the industrial injury, the employee "would have taken post secondary courses and would have done well," (Dec. 6), is not only rank speculation but entirely unavailing of the employee's claim that he would have acquired "any particular skill anticipated at the time of his injury." Id. In any event, the employee was not engaged in any educational pursuit at the time of his injury.

Under the case law construing § 51, a necessary factor in the analysis is the coupling of projected wage increases with skill acquisition, not just inflationary adjustments or union contract step raises. "Section 51 benefits attempt to compensate young workers for the economic opportunities they would have had if

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[5] There was no evidence that the employee had embarked upon the steps necessary to attainment of a Class II driver's license. Cf. Klimek v. Wilbraham Toyota Volkswagon, 17 Mass. Workers' Comp. Rep. 527, 531 (2003)(that employee was halfway through automobile mechanics certification program at time of his injury was pertinent factor in § 51 analysis).

their careers had not been interrupted [by an industrial injury] so early. . . . [E]conomic projections under § 51 will reflect expectations regarding skill development and job progression." Sliski's Case, 424 Mass. 126, 135 (1997). The court characterized wage increases unrelated to skill acquisition as "purely inflationary," and therefore not within the purview of § 51. Id. Here, there has been no showing that the twenty-eight cent per hour increase in the union wage was anything but purely inflationary.

The decision is reversed, and the award of permanent and total incapacity benefits enhanced pursuant to § 51 is vacated. The employee's § 34A benefit shall be paid from and after April 9, 1991, (see footnote 4, supra), in accordance with his original average weekly wage of $266.40, subject to the doubling of his weekly benefit under § 28 and any applicable § 34B cost-of-living adjustments to which he may be entitled. The self-insurer may recoup the overpayment resulting from this decision in accordance with G. L. c. 152, § 11D(3).

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **April 7, 2009**