

IRRATIONAL PREDISPOSITIONS

(The Fate of a Young Worker's Claim under §51 of the Massachusetts Workers' Compensation Act)

By [Terry A. Low](#)*

We all know that most judges don't want to hear cases. It's a lot of work, mistakes can be made, and they have to sit and listen. Most trial counsel have also experienced the sense, before any evidence is presented, that not only does the judge not want to hear the case, he or she doesn't like the case, doesn't like the parties or the attorneys; that he or she has a lot better things to do, the docket is very busy and why are you here anyway? You're interrupting the important work I have to do! It is rare, however, when you know, before any evidence has been submitted, that the judge has already decided against your client because he doesn't like or understand the law upon which the claim is based.

Such was the unfortunate fate of Edward Klimek's Case, Appeals Court, No. 06-P-13 (January 8, 2007), which starred a 27 year-old mechanic and student who crushed his right dominant hand beneath an engine block in 1995. The injury resulted in a permanent and disfiguring impairment yet, despite the injury, he eventually returned to work as a mechanic for the same employer, making more money. At the time of injury he was working part-time and going to school to get a diploma in automobile technology. He had passed four of eight ASE certifications toward status as master. He was involved in on-the-job training: The perfect case for an average weekly wage adjustment under M.G.L. c. 152 §51:

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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.

§51 in this form has been around since 1915. It was narrowly construed to apply to young workers injured before expected increases in earning capacity, through skills acquisition, in his or her field or in the employment in which the injury occurred. Although applicable in cases of catastrophic injury, “[t]he chief use of this section is to support an award of partial compensation based on the difference between the average weekly wage the employee would have received, but for the injury, and the amount he is able to earn with his handicap.” Nason and Koziol, M.P.S. vol.29A, §18.5. It was not until 1991 that it was amended to broaden its application:

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.

M.G.L. c. 152 §51. According to a leading scholar, the amendment was in response to an injury suffered by an aide to a former speaker of our House of Representatives. Like so many changes that have long been justified by reason, the catalyst was experiential. The change required immediacy. The injustice was close-to-home.

Freezing an injured worker’s average weekly wage at the date of injury, for purposes of calculating the compensation rate, is not a fair measure of lost earning capacity. This is particularly true where there are no applicable cost of living adjustments and where a young worker is injured before he or she has attained a wage level he or she might reasonably be expected to achieve if not for the injury. Our Supreme Judicial Court expressed the benevolent and humanitarian intent and purpose of the statute that . . . “protects young employees who are injured early in their careers

by including expected wage increases in the determination of such average weekly wage". In clarifying such purpose the court stated:

... §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 ability and prospects at the time of injury may be such that the employee could not reasonably look forward to wage increases related 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.

Sliski's Case, 224 Mass. 126, 135 (1997).

Despite Mr. Nason's assurances at M.P.S. vol. 29A, §18.5, that the amendment to the section was a "long awaited relief", judges did not favor §51 claims. Invariably the claims have to be heard. The claims are misunderstood, uncommon, and difficult to prove. And they require non-medical expert testimony. In addition, §51 claims are difficult to administer. The judge is called upon to engage in a somewhat speculative enquiry with narrow application.

But Edward Klimek's Case had all the elements of a successful claim. The facts didn't even require application of the amendment. In the hands of a masterful trial lawyer, he would prevail even when confronted with irrational predispositions. The facts were marshaled, witnesses subpoenaed, an expert in both vocational rehabilitation and wage rates was employed. No expense was spared. The client, (who had sought counsel because he heard he could get paid for some disfigurement), was thoroughly educated and coached.

The case was so well prepared that it was no longer Edward Klimek's Case; it was Employee Counsel's Case! Counsel had recognized the potential, created the claim in his mind and reinvented it! Mr. Klimek was merely involved as one of the actors. The judge would be educated and persuaded. Defense counsel who was totally out-matched would accept defeat and learn from the experience. The insurer (that

offered \$0.00) would recognize its ignorance and, in the end, thank plaintiff's counsel and pay him money including expenses. The perfect Sec. 51 claim would be tried to perfection.

Postulate #1: In an adjudicative setting, where there is an irrational predisposition against or in favor of something; a law, a set of facts, the color of someone's skin, one can expect some irrationality in the findings of fact, in order to arrive at the predisposed conclusion.

After two days of hearings the speediest Decision in the history of this judge was filed. The claim was denied because the employee had not completed the additional four ASE Certifications for master mechanic status! (You may recall that an engine block fell on his right hand causing permanent impairment) and furthermore, (despite a severely injured hand) he could not articulate during testimony why he had not completed the certifications after the injury. An "inference" was drawn from these facts that the employee would not have completed such training and therefore would not have seen the expected or anticipated increase in wages. (This "finding" was made despite the undisputed fact that the employee, upon return to work, actually received a "merit" wage increase.)

Sensing some injustice had been committed; the case was appealed to our reviewing board, which recommitted the case for a reexamination of evidence. And for "findings on the expectation of wage increases through training and skill acquisition that was not dependent upon gaining the complete ASE certification necessary to attain master technician status". The reviewing board requested that "pivotal record evidence" be addressed including the undisputed fact that upon return to work as a mechanic, the employee's wages increased due to additional experience and skills acquisition.

Postulate #2: Where there is an irrational predisposition for or against a proposition in a well tried case resulting in irrational findings and unsupported

conclusions, and the case is recommitted for further findings, a long time must pass then support must be found outside the record.

On February 18, 2005, fifteen months later, two and one half years after the first Hearing Decision, and after the author of the reviewing board decision had left the board, a second decision was filed denying the claim. The decision, non-responsive to the board's requests to address certain "pivotal record evidence," relied on new "facts". Information, not in evidence, was now to be used to justify the result. A tracer was put out to see where these new facts and conclusions could have come from and they were found buried in one of the insurer's written arguments, assertions that had never been adduced at hearing. (Could not have been adduced because they had no foundation).

Having a keen sense of injustice, counsel for the Employee appealed again to the reviewing board, whining that the judge didn't do what you told him to do and anyway, these findings of fact are nowhere to be found in the record. The board, without the author of the first decision, summarily affirmed the judge's decision.

To the Appeals Court. Wherein a larger obstacle was soon perceived. In order to convince the Appeals Court that a hearing decision was made based on facts not in evidence, the Court would actually have to look at the evidence and maybe read the transcript to see that these "facts" didn't exist. The Appeals Court has hundreds of Workers' Compensation appeals on their docket and unfortunately had no time for oral argument.

Postulate #3: Where a stubborn adherence to an irrational predisposition against a claim that is well tried leads to irrational findings of fact, unsupported conclusions and "facts" based on information not in evidence, when appealed to an even higher authority, it leads to a sublime level of unreasonableness.

In a Memorandum and Order, January 8, 2007, the Appeals Court of the Commonwealth of Massachusetts stated the issue to be decided in Edward Klimek's

Case: "...[W]hether the sum total of Klimek's partial ASE certification, his course work at [automotive school] and the [on the job training] likely would have yielded the kind of increased wages, or wage capacity, contemplated in §51." Holding: Since the administrative judge concluded (based on biased, incorrect information not in evidence) that such additional education, experience and training "did not give Klimek a marketable or improved skill set that would naturally have resulted in increased wages had he not been injured..." and because "Klimek did not receive a master mechanics certification and had no explanation for why he had failed to complete that certification's requirements, he had no genuine expectation of increased wages from potential certification." Mr. Klimek therefore failed in his burden to prove that his wages were expected to increase. Preposterous! Why else would a mechanic pay for schooling and pay for testing and certification if he did not expect that it would result in a wage increase?

Postulate #4: When there has been a stubborn adherence to an irrational predisposition against a claim that has been well tried, leading to irrational findings of fact and conclusions based on biased statements made by an advocate outside the record and these findings, by a process of sublime unreasonableness, become enshrined in an Appeals Court opinion, punt.

(Having an exquisitely sensitive sense of injustice; an appeal to our Supreme Judicial Court might lead to bad law and further erosion of an otherwise wonderful and equitable, albeit difficult to administer, law).