COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023558-05**

John Martin	Employee
Cox Engineering Co., Inc.	Employer
United States Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge Tirrell.

APPEARANCES
Peter T. Toland, Esq., for the employee
James P. McKenna, Esq., for the insurer at hearing
David M. O'Connor, Esq., and Joseph C. Abate, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from a decision in which the administrative judge awarded weekly incapacity benefits pursuant to §§ 34 and 35, but denied the employee's claim for benefit enhancement pursuant to § 51.[1] The employee also challenges the judge's retroactive modification of benefits. We agree that this retroactive modification violates Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354 (1995)(order of discontinuance may go back no further than filing date of complaint). Accordingly, we reverse the decision in part. We also agree that the judge's analysis under § 51 was too narrowly focused on the employee's age. We therefore recommit the case for further findings.

The employee was a sheet metal worker at the time of his industrial accident on July 22, 2005. In order to attain journeyman status, the employee entered a union

[1] General Laws c. 152, § 51, provides, in pertinent part:

> 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.

apprenticeship program in 2004. The program takes sheet metal workers through a number of progressive wage steps, until a $38.00 per hour journeyman status is achieved. The employee was fifty years old, and in his first year of that program, when he injured his knee. (Dec. 4-5, 11.)

Surgery performed after the accident left the employee with significant knee pain. As a result, the employee ultimately returned to light duty work as an electroplater for a different employer, at a lower wage. (Dec. 5-6.) The judge denied the employee's claim for an enhanced average weekly wage pursuant to § 51, concluding that the employee's age precluded its application. (Dec. 11.) The employee argues that § 51 does not limit the age at which the benefit enhancement mechanism afforded by the statute may apply. We agree.

The judge construed the statute's reference to age too narrowly by applying a literal interpretation to the broad language of Sliski's Case, 424 Mass. 126 (1997), limiting the scope of the statute only to "young employees."[2] However, there is no specific age limitation for the statute's application. Although we proffer no opinion on whether this case falls within the purview of § 51, we think the judge should determine its application by weighing all relevant factors, and not by disqualifying the employee based solely upon his age at the time of injury. Age is but one of several factors to be considered for the application of the statute, including the employee's reasonable expectation of wage increases due to skill acquisition, Sliski, supra at 135, completion of educational and vocational steps in that career pursuit, Hughes v. D&D Elec. Contr., Inc., 11 Mass. Workers' Comp. Rep. 314, 315 (1997), the connection between such skill acquisition and training and higher wages, Klimek v. Wilbraham Toyota Volkswagen, 17 Mass. Workers' Comp. Rep. 527, 530 (2003), and the time frame in which such wage increases would become effective. Starr's Case, 76 Mass.

[2] Section 51 "protects young employees who are injured early in their careers by including expected wage increases in the determination of [their] average weekly wage." Sliski, supra at 127. Sliski was eighteen years old at the time of his injury. Id.

App. 119 (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).[3]

As noted above, the judge erred by modifying the employee's benefit entitlement from § 34 to § 35 retroactive to March 8, 2007. The filing date of the insurer's complaint, May 17, 2007, is the earliest date that any change in payments can commence. See Cubellis, supra. We therefore reverse the order of modification prior to May 17, 2007, and recommit the case for further findings consistent with this opinion.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

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[3] Although the insurer addresses some of these factors on appeal, we are not in the position to review those arguments absent proper findings of fact made by the administrative judge. Cf. Bruenell v. Town of Framingham, 23 Mass. Workers' Comp. Rep. 133, 135-136 (2009)(judge's detailed findings on evidence presented in support of § 51 claim clearly erroneous as a matter of law; decision reversed).