

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD Nos. 058024-99
020421-99**

Deborah Lee O'Neill
BJ's Wholesale Club
City of Medford

Employee
Employer/Self-insurer
Employer/Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Levine and Wilson)

APPEARANCES

Brian Curley, Esq., and Theresa M. Meltzer, Esq., for the employee at hearing
Theresa M. Meltzer, Esq., for the employee on brief
Mark J. Kelly, Esq., for self-insurer/BJ's Wholesale Club at hearing and on brief
Salvatore J. Perra, Esq., for self-insurer/City of Medford at hearing

MCCARTHY, J. Deborah Lee O'Neill, a forty-six year old, married mother of one adult child at the time of the administrative judge's decision, has an eleventh grade education and a diverse employment history. She has worked as an assembler, a packer, a nurses' aide, a kennel cleaner, a cashier and a food server. (Dec. 277.)

In September 1997, Ms. O'Neill started working part-time as a cafeteria helper for the City of Medford School Department (The City). Then, in November 1998, the employee began concurrent work at BJ's Wholesale Club (BJ's) in its food court area. (Dec. 278.) She was responsible for cooking and serving hot dogs and pizza. (Dec. 277.) On May 13, 1999, while in the course of her employment at BJ's, the employee lifted a box of pizza dough and felt a snap in her left shoulder. She notified her supervisor and went home for the day. She first treated for the injury seven days later, on May 20, 1999. Ms. O'Neill was referred to an orthopedist and underwent a course of physical therapy without success. Neck surgery has been recommended. She has not returned to work at

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BJ's since the May 13, 1999 incident. (Dec. 278.) There were no traumatic incidents while working for the city.

On November 12, 1999, the employee filed a claim for compensation against BJ's. Following a § 10A conference, the employee was awarded a closed period of §34 temporary, total incapacity benefits from which cross appeals were taken. (Dec. 276.) BJ's motion to join Medford was allowed.

The § 11A examiner, Dr. James V. Bono, examined the employee for the second time on May 15, 2001. He found left, upper extremity radiculopathy and causally related the symptoms to the work incident at BJ's. Doctor Bono opined that the employee was not at a medical end result and recommended epidural steroid injections following another course of physical therapy. If this did not result in a successful recovery, the doctor recommended surgical decompression. The doctor opined that any aggravation caused by employment with Medford was temporary in nature and that Ms. O'Neill had returned to her baseline condition. The judge decided that the employee suffered a work-related injury on May 13, 1999 while in the employment of BJ's which resulted in ongoing partial incapacity. (Dec. 281.) He adopted the § 11A medical expert's opinion that any aggravation caused by Ms. O'Neill's employment at the city quickly resolved, and that she had returned to baseline. The judge made note that surgery had been recommended several times over a considerable period, but that no surgery had taken place due to the pendency of this case. (Dec. 282.)

The judge then established an earning capacity of \$135.00 per week and ordered BJ's to pay partial incapacity benefits under § 35 from May 13, 1999 and continuing. The judge also ordered BJ's to pay for all reasonable and necessary medical treatment, including the recommended surgery, related to the May 13, 1999 work injury. In addition, BJ's was directed to pay § 34 temporary, total, incapacity compensation from the date of the anticipated surgery to a date eight weeks after the operation. Further, the judge awarded a fee and costs to employee's counsel. The joined claim against the city was denied and dismissed. (Dec. 282-283.) We have the case on appeal by the employee, who raises only one issue.

The employee contends that the administrative judge's order of a closed period of total incapacity benefits following the anticipated surgery is speculative and not supported by the evidence. The employee cites Marchand v. Waste Mgmt. of Mass., Inc., 14 Mass. Workers' Comp. Rep. 332 (2000), in support of her position, arguing that the facts of that case are virtually identical to the case at hand. (Employee's brief, 4.) The employee requests that the future award of eight weeks of § 34 benefits be reversed and vacated. (Employee's brief, 5.) The self-insurer, BJ's, is in agreement. (Self-insurer's brief, 3.) We, too, agree that Marchand, supra, is dispositive of this case.

In Marchand, surgery was recommended for the injured employee. In both Marchand and the present case, the hearing judge awarded an eight week closed period of future § 34 benefits following the recommended surgery. Marchand, supra at 334-335; (Dec. 283.)¹ We affirmed the administrative judge's decision in Marchand except for the order of eight weeks of § 34 benefits following a recommended but as yet unperformed surgery. Marchand, supra at 336.

The present determination of a future period of incapacity following a surgical procedure is inevitably speculative where the surgery has not been performed. "It is often impossible to ascertain future circumstances with precision The extent of total [or partial] incapacity, following [a] surgical procedure, is undeterminable until the incapacity becomes a reality." Marchand, supra at 335 (citations omitted). Here, the judge authorized a related, surgical procedure as reasonable and necessary. Id.; (Dec. 283.) What was said in Marchand applies equally here:

In the event that the employee does undergo [the surgical procedure], the insurer would arguably have an obligation to pay total incapacity benefits for some period of time thereafter. That period can be established by an agreement of the parties. Failing an agreement, the parties are free to file a further claim with the Department. Barring such action, the order of § 35 benefits stands.

Marchand, supra at 335.

¹ It is interesting to note that the hearing judge in this case also heard and decided Marchand.

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We reverse the administrative judge's decision with respect to the order of an eight week closed period of future § 34 benefits following the recommended surgery. The judge's decision is otherwise affirmed.

So ordered.

William A. McCarthy
Administrative Law Judge

Filed: **February 13, 2003**

Frederick E. Levine
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge