COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 005303-97**

Raymond Marchand	Employee
Waste Mgmt of Mass., Inc.	Employer
CNA Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll and Levine)

APPEARANCES
Peter Georgiou, Esq., for the Employee
Martin J. Long, Esq., for the Insurer

MAZE-ROTHSTEIN, J. The employee appeals a decision awarding partial incapacity weekly benefits pursuant to G. L. c. 152, § 35, and reasonable and necessary medical treatment pursuant to G. L. c. 152, § 30. He also appeals the award of total incapacity benefits pursuant to G. L. c. 152, § 34, for eight-week intervals following any of the authorized surgeries that he may opt to undergo. (Dec. 544.) After a review of the evidentiary record, we reverse the decision in part and affirm in part.

Raymond Marchand, age forty-six at hearing has, since 1982, driven a seventeen and a half-ton trash truck for the employer, Waste Management of Massachusetts, Incorporated. His duties included emptying both residential and commercial dumpsters. At each stop he would climb onto the dumpster and hook it to the back of the truck. He would then return to the cab and mechanically empty the contents of the dumpster into the truck. Next he would exit the cab and unhook the cable attachment from the dumpster at the rear of the truck. The employee performed these duties twelve hours per day, five days a week. (Dec. 538.) On approximately one-half of the stops he would encounter overloaded dumpsters. He would climb to the top of the dumpster, on these

occasions, and level the contents prior to emptying the dumpster into the truck. (Dec. 537.)

On Friday, April 4, 1997, the employee stopped at a commercial dumpster that was not fully compacted. He stood atop the dumpster and operated the compactor while pushing and kicking trash into the "pit." While doing this, he slipped on some trash and fell into the compactor. On his descent, Mr. Marchand grabbed the safety bar. He snapped his neck and felt pain in his right shoulder and right knee. He immediately reported the accident to his supervisor and then completed his work activities for the day. (Dec. 538.)

The employee applied ice to his injuries throughout the weekend. His arm pain resolved; however, his shoulder and knee pain continued. That Monday, the employee reported to the hospital for treatment where he received x-rays and medication. Additionally, he was referred to a specialist who saw Mr. Marchand the following day. He had a course of physical therapy and on April 9, 1997, returned to work in a light-duty capacity. Id.

He performed light-duty, administrative tasks in the employer's business office for several months. (Dec. 538-539.) Although therapy reduced his pain, it did not eliminate it. On October 20, 1997, Mr. Marchand returned to full duty work. While at his second stop, his knee buckled and he fell against his truck. As he fell he extended his arm and felt immediate shoulder and knee pain. After reporting this injury, the employee was again assigned to light-duty, administrative tasks. (Dec. 539.) On February 20, 1998, he was sent home by his employer, due to his inability to operate the large trucks; he has not returned to work since. Id.

Since leaving work, surgery was recommended for Mr. Marchand's right shoulder and right knee. On August 24, 1998, he underwent arthroscopic knee surgery. As a result, he experiences less pain; however, he also has less mobility. Mr. Marchand climbs stairs laboriously and cannot walk or stand for periods longer than half an hour without discomfort. Due to payment issues, he has not had shoulder surgery. (Dec. 539.)

At the time of the hearing, the employee complained of limiting shoulder pain, intermittent neck pain and residual knee based limitations. Id.

Mr. Marchand filed a claim for benefits and the matter was conferenced before an administrative judge. The judge awarded § 35 partial incapacity benefits. Both parties appealed to a hearing de novo. At the time of the hearing, the original administrative judge no longer served with the Department, so the case was reassigned to another administrative judge. (Dec. 536-537.)

A doctor examined the employee pursuant to G. L. c. 152, §11A(2).[1] As that examination occurred approximately one week following the employee's knee surgery, the judge found the medical report inadequate[2] and allowed additional medical evidence to be entered into the record. (Dec. 540-541.) Each party submitted a report from a medical expert. (Dec. 541.)

The judge adopted the consistent portions of the various medical opinions to the extent that the employee's knee and shoulder ailments were causally related to the April 4, 1997 work incident and that the employee was medically disabled from his previous work.[3] (Dec. 542-543.) More specifically, the judge determined that the employee had sustained a herniated C6-7 disc, a torn right rotator cuff, carpal tunnel syndrome and a knee sprain that exacerbated his underlying degenerative arthritis. (Dec. 542.) The judge

[1] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony to meet it unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996).

[2] As the § 11A examination took place shortly after the knee surgery, the § 11A examiner could not conduct all the tests that he would have otherwise performed. (Dec. 540; Dep. of § 11A Examiner, 12.)

[3] The judge specifically adopted the § 11A examiner's opinion with regard to diagnosis and causal relationship. (Dec. 543.)

also adopted the consistent medical opinions finding the employee capable of performing light duty work with a candidacy for future neck, knee or shoulder surgery.[4] (Dec. 543.)

Combining the residual medical disability with the employee's vocational profile, the judge awarded § 35 partial incapacity benefits from October 20, 1997 to February 20, 1998, with the employee's actual wages as the assigned earning capacity; ongoing § 35 benefits based on an earning capacity of $241.73 per week; payment of all reasonable and necessary medical treatment, inclusive of rotator cuff surgery, neck surgery, carpal tunnel surgery and/or knee surgery and attorney's fees and expenses. Along with the order to pay for the specified surgeries, the judge incorporated an eight week closed period of total incapacity following each such medical procedure. (Dec. 544.) We have the employee's appeal of this last order.

The employee argues that the future grant of eight week periods of total incapacity following the various surgeries is speculative and without evidentiary support. (Employee's brief, 3-4.) We point out that the finding as to an eight-week period of incapacity is not entirely without some evidentiary support.[5] However, we agree that this determination of future closed periods of total incapacity benefits, after not yet undertaken surgery, is speculative. Medical conditions are dynamic and changing. It is often impossible to ascertain future circumstances with precision. See, e.g., DeFilippo v. University of Mass./Amherst, 11 Mass. Workers' Comp. Rep. 383 (1997)(the award of a specific number of future chiropractic treatments was arbitrary due to its speculative

[4] The medical experts for both the insurer and the employee agreed that the employee was capable of some light duty work. (Dec. 543.) Although the § 11A examiner opined that the employee was permanently and totally disabled, (Dec. 540), the employee conceded that he could perform light work such as dispatching and running errands. (Dec. 543.) The judge utilized this credible testimony along with the medical opinions submitted by the employee and the insurer in reaching this determination. Id.

[5] On August 24, 1998, the employee underwent surgery to his right knee. (Dec. 539.) The insurer's doctor opined that the employee's total disability continued until October 18, 1998. (Ex. 5, 4.) This was an approximate period of eight weeks total disability following the surgical procedure. It appears that the judge extrapolated from the employee's previous incapacity following surgery to determine the period of disability that would follow a future surgical procedure.

nature); McSweeney v. Morton International Inc., 14 Mass. Workers' Comp. Rep __ (October 30, 2000)(speculative to order the payment of § 34 benefits if surgery takes place in the future). Here, it cannot be said that each and every surgical procedure would result in exactly eight weeks of total incapacity. The extent of total incapacity, following each surgical procedure, is undeterminable until the incapacity becomes a reality. We thus reverse the judge's finding as to the closed eight-week awards of future § 34 total incapacity benefits.

The judge clearly set out the medical conditions that may require additional treatment. He also authorized specific surgical procedures as reasonable and necessary. (Dec. 544.) These factors enable the insurer to determine whether voluntary compensation payments are warranted. In the event that the employee does undergo one or more of the anticipated procedures, 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.

We dispose of the employee's remaining two issues in brief. The employee contends that the conclusion of partial incapacity and earning capacity assignment are without evidentiary support. (Employee's brief, 6, 8.) We disagree. In this case the only evidence addressing the employee's earning capacity, aside from medical opinions on the extent of his medical disability, was the employee's credible testimony that he could do some light duty work. (Dec. 543; Tr. 39-40.) Beyond this, the judge performed the appropriate analysis as required by Scheffler's Case, 419 Mass. 251 (1994), and G.L. c. 152, § 35D.[6] See Kelley v. General Electric Co., 12 Mass. Workers' Comp. Rep. 476 (1998)(application of

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[6] General Laws c. 152, § 35D, reads in pertinent part as follows:

For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:--

§ 35D). " '[I]n the absence of testimony as to the earning capacity of the employee, the members of the board are entitled to use their own judgment and knowledge in determining that question.' " Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988)(citations omitted). As the judge engaged in the necessary analysis to determine the extent of the employee's earning capacity, we defer to those findings on the matter.

The decision is reversed with respect to the order of § 34 benefits following future surgery; the remainder of the decision is affirmed.

So ordered.

Filed: November 17, 2000

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

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(1) The actual earnings of the employee during each week.

(2) The earnings that the employee is capable of earning in the job the employee held at the time of injury, provided, however, that such job has been made available to the employee and he is capable of performing it.

. . .

(3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it.

. . .

(4) The earnings that the employee is capable of earning.

Amended by St. 1991, c. 398, § 65.

Frederick E. Levine
Administrative Law Judge