**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 043971-03**

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| Steven Mills | Employee |
| OM US Inc. | Employer |
| Federal Insurance Company/Chubb Group | Insurer |

**REVIEWING BOARD DECISION**
(Judges Fabricant and Horan[1])

**APPEARANCES**
Peter M. McElroy, Esq., for the employee
Edward M. Moriarty, Jr., Esq., for the insurer at hearing and on appeal
William C. Harpin, Esq., for the insurer on appeal

**FABRICANT, J.** The employee appeals from an administrative judge's decision awarding him ongoing partial incapacity benefits, but restricting further medical benefits to treatment that is "non-invasive." The employee's sole argument on appeal is that the limitation of future medical benefits is speculative and ambiguous. We disagree, and affirm the decision.

Steven Mills, age forty-eight at hearing, was a highly compensated vice president of business development for the employer. His job required him to travel extensively. At approximately 4:00 a.m. on October 20, 2003, as he left home for the airport, he slipped on icy steps and fell, injuring his left shoulder, legs and head. The next day, he was diagnosed with a slightly displaced fracture of the inferior aspect of the glenoid. (Dec. 4-5, 7-8.) Though the employee's fracture healed, his pain worsened, and he became depressed secondary to the pain. In an attempt to obtain a definitive diagnosis, he saw a variety of specialists, was referred to two pain management centers, and was prescribed numerous medications for pain and depression. (Dec. 7, 9, 10.)

The employee's claim for compensation benefits resulted in a conference order

[1] Judge Carroll, originally assigned to this panel, did not take part in the deliberations involved in this decision due to her elevation to the position of Senior Judge.

requiring the insurer to pay him maximum § 35 benefits at the rate of $663.35 per week, based on an average weekly wage of $2,884.00, from December 15, 2003 through September 15, 2004. Both parties appealed. (Dec. 2.)

At hearing, the judge concluded the employee's injury arose out of and in the course of his employment, but did not credit the employee's testimony that he could not perform any modified work because of pain and cognitive difficulties. (Dec. 7, 19, 22-23.) Taking into account the employee's extensive and successful career, his communication skills, his knowledge of the international energy market, and his age and education, the judge found the employee was partially incapacitated. (Dec. 23.) Without determining an earning capacity, the judge awarded the employee maximum § 35 benefits from September 18, 2004 forward. (Dec. 28.)

The judge also adopted the impartial examiner's opinions regarding medical benefits and found the employee's treatment, up until the hearing, for both his physical and psychological conditions had been reasonable, necessary and causally related to his work injury. The insurer was ordered to pay for an evaluation to determine whether the employee's chronic use of narcotic analgesics could be modified in order to decrease the side effects he was experiencing and improve his mental status. With respect to future treatment, the judge found the continuation of the employee's psychiatric treatment and medications to be appropriate, but noted that "further treatment should be non-invasive." (Dec. 27-28.)

On appeal, the only issue raised by the employee is whether the judge's order restricting payment of future medical benefits to "non-invasive treatment" is speculative and ambiguous. For support, the employee refers us to our decision in Marchand v. Waste Mgt. of Massachusetts, Inc., 14 Mass. Workers' Comp. Rep. 332 (2000). There, we held that a judge's order of a future closed period of incapacity following recommended, but not yet performed, surgery, was speculative because, "[m]edical conditions are dynamic and changing. It is often impossible to ascertain future circumstances with precision . . . . The extent of . . . incapacity, following [a] surgical procedure, is undeterminable until the incapacity becomes a reality." Id. at 335.

(Citations omitted.) See also O'Neill v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 42 (2003)(same). Marchand, supra, holds only that limitations on anticipated *periods of disability* following future surgery are speculative. Id. at 335. In other cases addressing limitations on *medical treatment*, we have found orders restricting chiropractic treatments to a certain number of visits over a certain period of time speculative. See DeFelippo v. Univ. of Mass./Amherst, 11 Mass. Workers' Comp. Rep. 383 (1997)(order of not more than 104 chiropractic treatments per year is speculative and therefore arbitrary); Marticio v. Fishery Prods., Int'l., 11 Mass. Workers' Comp. Rep. 648 (1997)(order that chiropractic treatment be "limited to no more than five visits per month and 40 visits in the next 365 days" is speculative).

However, the judge's order here is different from those struck down in DeFelippo and Marticio, in that it does not restrict treatment to a certain time period, and thus may be revisited at any time. We agree with the insurer that it is more akin to an order of future chiropractic treatment at two times per week, upheld in Alpert v. Chelsea Jewish Nursing Home, 14 Mass. Workers' Comp. Rep. 479 (2000). There, we noted that, "the order is similar to an ongoing order of § 34 or § 35 weekly incapacity benefits; the order sets no time limit, and it may be revisited by either party should there be a 'change in the employee's medical picture down the road.' " Id. at 483, quoting Pagnani v. Demoulas/Marketbaskets, 9 Mass. Workers' Comp. Rep. 4, 5 (1995).

Moreover, we do not agree with the employee that the term "non-invasive" is ambiguous. The impartial examiner clearly opined that the employee was not a surgical candidate. He also clearly opined the employee should undergo a stellate ganglion block to determine whether he had reflex sympathetic dystrophy.[2] (Dec. 18.) The judge adopted his recommendations for future treatment, and thus the parameters of the authorized treatment are clear. (Dec. 26-27.) But it is important to note this finding only reflects the state of the evidence *at the time of the hearing*. The employee, of course, is not precluded from filing a future claim for surgery for his diagnosed condition (Alpert,

[2] While we recognize that a stellate ganglion block could be considered an 'invasive' procedure, the §11A examiner has acknowledged its necessity here with specificity.

supra at 483; Pagnani, supra at 5), although any such future claim must be supported by additional evidence showing that the proposed treatment is necessary, reasonable and related to the industrial accident.

Accordingly, we affirm the judge's decision.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **June 4, 2007**