*2012 Ill. App. LEXIS 72, *; 2012 IL App (1st) 103217, **

NARESH **PATEL,** Petitioner-Appellee, v. **HOME DEPOT** USA, INC., Respondent-Appellant (The **Home Depot,** Inc., and Sedgwick Claims Management Services, Inc., Respondents).

No. 1-10-3217

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FOURTH DIVISION

2012 Ill. App. LEXIS 72; 2012 IL App (1st) 103217

February 2, 2012, Decided

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Cook County, No. 09 L 51666. Honorable James C. Murray, Jr., Judge Presiding.
Patel v. **Home Depot** USA, Inc., 2011 Ill. App. Unpub. LEXIS 3235 (2011)

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellee employee filed a petition for judgment on a workers' compensation award when appellant employer failed to pay the award, and the employee also requested penalties under 820 ILCS 305/19(g) (2008). The Circuit Court of Cook County, Illinois, entered judgment against the employer for the amount of the benefits award, and later awarded the employee attorney fees, costs, and interest. The employer sought review.

OVERVIEW: The employer had been granted in the workers' compensation case a credit in excess of the amount of the benefits award, and it argued that the circuit court erred in denying its motion to dismiss and in entering judgment in favor of the employee because it had already paid more than it was obligated to pay. The court observed that the allowance of a credit within a decision or award merely served to reduce the total payment of compensation benefits. Under § 19(g), credit did not equal compensation. The fact that the employer inadvertently overpaid on the benefits for a certain time period was not something for which § 19(g) provided a remedy. The employee did not receive an award for future payments, merely an award for payments to which he was previously entitled. Just as the employer could not seek to recover the amount of the overpayment by filing a claim under § 19(g), it could not apply its credit for the overpayment to avoid an entry of judgment pursuant to § 19(g). Thus, the employer was not entitled to use the credit as an offset against

the benefits awarded to the employee under § 19(g).

OUTCOME: The court affirmed the judgment.

CORE TERMS: arbitrator, overpayment, entry of judgment, attorney fees, payment of compensation, offset, payment of benefits, time period, disability, common law remedy, benefits paid, arbitrator's decision, arbitrator's award, entering judgment, de novo, legal sufficiency, future payments, reimbursement, compensate, confirmed, claimant, overpaid, written notice, owe

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

Governments > Legislation > Interpretation

HN1 The construction of a statute is a question of law, which is reviewed de novo. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2 A reviewing court reviews de novo a lower court's ruling on a motion to dismiss. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

HN3 735 ILCS 5/2-619.1 (2008) allows a defendant to raise alternative grounds for dismissal under 735 ILCS 5/2-615 (2008) and 735 ILCS 5/2-619 (2008). More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4 A motion to dismiss under 735 ILCS 5/2-615 (2008) attacks the legal sufficiency of the complaint. Such a motion to dismiss does not raise affirmative factual defenses, but alleges defects appearing on the face of the pleadings. In ruling on a § 2-615 motion to dismiss, a court must accept as true all well-pled facts in the complaint and all reasonable inferences which can be drawn therefrom. In making this determination, the court interprets the allegations of the complaint in the light most favorable to the plaintiff. A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleading which will entitle plaintiff to recover. Moreover, if a claim is based on a written document, the document itself must be attached to the pleading as an exhibit. The exhibit is part of the pleading for purposes of a motion to dismiss. If there is an inconsistency, the exhibit controls over the factual allegations in the pleading. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

A motion to dismiss pursuant to 735 ILCS 5/2-619 (2008) is properly used to raise

HN5 affirmative matters that negate the claim and not to challenge the allegations of the plaintiff's pleading. This motion admits the legal sufficiency of a complaint, but asserts affirmative matters that avoid or defeat the allegations contained in the complaint. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN6 820 ILCS 305/19(g) provides that a party may present a certified copy of an arbitrator's award or a decision of the Illinois Workers' Compensation Commission to the circuit court, and the court shall enter a judgment in accordance therewith. 820 ILCS 305/19(g) (2008). The statute further provides that in cases where the employer refuses to pay compensation according to the final award, the court will also tax as costs against the employer the reasonable costs and attorney fees in the arbitration proceedings and in the court entering the judgment. 820 ILCS 305/19 (g). More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Credits

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN7 The plain language of 820 ILCS 305/19(g) (2008) states that the Illinois Workers' Compensation Commission's decision, on which any judgment is based, be one providing for the payment of compensation according to the Illinois Workers' Compensation Act. These express terms fairly limit the type of decision to those which provide for the payment of compensation benefits. The allowance of a credit within a decision or award merely serves to reduce the total payment of compensation benefits. Under § 19(g), credit does not equal compensation. The purpose of the Act was to provide a flow of benefits to compensate for lost wages and to compensate workers for loss of industrial earning capacity. Although the employer has a common law remedy to recover the overpayment, it does not have a statutory remedy under § 19(g). More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN8 Recoupment, restitution, or reimbursement, even if awarded by the Illinois Workers' Compensation Commission, does not constitute a decision providing for payment of benefits. Although 820 ILCS 305/19(g) (2008) states that both an employer and an employee may seek relief under § 19(g), an employee is the only one who may have a decision providing for payment of benefits. Should an employer desire to seek reimbursement from a claimant, the proper remedy would be to file suit in the circuit court based on common law remedies. More Like This Headnote

COUNSEL: For APPELLANT: John M. McAndrews, of counsel, Gurber, McAndrews and Norgle, LLC, Chicago, IL; Philip J. McGuire, of counsel, Philip J. McGuire, Chicago, IL.

For APPELLEE: Edward Adam Czapla, of counsel, Paul W. Grauer & Associates, Schaumburg, IL.

JUDGES: JUSTICE STERBA delivered the judgment of the court, with opinion. Presiding Justice Lavin and Justice Pucinski concurred in the judgment and opinion.

OPINION BY: STERBA

OPINION

[P1]** This appeal arises out of the circuit court's entry of judgment against respondent-appellant **Home Depot** USA, Inc. (**Home Depot**), pursuant to section 19(g) of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/19(g) (West 2008)). Petitioner-appellee Naresh **Patel** was injured while working for **Home Depot** and received an award of benefits from an arbitrator that was confirmed by the Illinois Workers' Compensation Commission (Commission). **Home Depot** was granted a credit by the arbitrator in excess of the amount of the benefits award. The credit was also affirmed by the Commission. When **Home Depot** did not pay the award, **Patel** filed a petition in circuit court for judgment on the award and also requested penalties under section 19(g) of the Act (820 ILCS 305/19(g) (West 2008)). The circuit court entered judgment against **Home Depot** for the amount of the benefits award, and later awarded **Patel** attorney fees, costs **[*2]** and interest. On appeal, **Home Depot** contends that the circuit court erred in denying its motion to dismiss and entering judgment in favor of **Patel** because **Home Depot** had already paid more than it was obligated to pay. For the reasons that follow, we affirm the judgment of the circuit court.

[P2]** BACKGROUND

[P3]** As a result of two separate work-related accidents, **Patel** filed claims with the Commission for benefits. The cases were heard together before an arbitrator. In January 2004, the arbitrator entered an award in **Patel's** favor in both cases. **Patel** was awarded a total of $22,798.54 in temporary total disability (TTD) benefits, penalties, and attorney fees related to the two claims. The arbitrator also granted **Home Depot** a credit of $27,357.47 pursuant to section 8(j) of the Act (820 ILCS 305/8(j) (West 2008)), for TTD benefits previously paid to **Patel.**

[P4]** The arbitrator noted that **Home Depot** paid **Patel** TTD benefits starting in November 2001. In November 2002, **Home Depot** terminated **Patel's** TTD benefits without written notice. After **Patel's** attorney demanded that TTD benefits be reinstated, **Home Depot** paid TTD benefits for several weeks before again terminating the benefits without written notice. **[*3]** This pattern repeated itself several times culminating with **Home Depot's** refusal to pay any TTD benefits after mid-February 2003. The arbitrator found that **Patel** was entitled to TTD benefits from February 14, 2003 through October 20, 2003.

[P5]** **Home Depot** petitioned the Commission for review of the arbitrator's decision. In November 2005, the Commission confirmed the award of benefits and the credit. However, the Commission increased the amount of the credit to $32,357.47 and determined that it was *not* pursuant to section 8(j) of the Act. **Patel** then submitted a demand letter for payment of the benefits award to **Home Depot.** When **Home Depot** did not respond, **Patel** filed an application for entry of judgment and payment of compensation and penalties awarded under the Act pursuant to section 19(g) (820 ILCS 305/19(g) (West 2008)).

[P6]** **Home Depot** filed a motion to dismiss pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2008)) on the grounds that it was entitled to offset the credit against the benefit award. The circuit court denied the motion and subsequently granted **Patel's** motion for judgment on the pleadings pursuant to section 2-615 (e) of the **[*4]** Code (735 ILCS 5/2-615(e) (West 2008)). The circuit court entered judgment against **Home Depot** for $22,798.54 and set a briefing schedule to address the issues of attorney fees, costs and additional interest. In September 2010, the circuit court entered judgment in favor of **Patel** for attorney fees of $47,000, costs of $5,315.31 and interest of $13,679.08. **Home Depot** timely filed this appeal.

[P7]** ANALYSIS

[P8]** The instant case involves the construction of section 19(g) of the Act (820 ILCS 305/19(g) (West 2008)). HN1 The construction of a statute is a question of law, which is reviewed *de novo*. *Johnson v. Johnson*, 386 Ill. App. 3d 522, 534, 898 N.E.2d 145, 325 Ill. Dec. 412 (2008). Moreover, HN2 a reviewing court reviews *de novo* a lower court's ruling on a motion to dismiss. *Simmons v. Homatas*, 236 Ill. 2d 459, 477, 925 N.E.2d 1089, 338 Ill. Dec. 883 (2010).

[P9]** **Home Depot** filed its motion to dismiss under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2008)). HN3 This section allows a defendant to raise alternative grounds for dismissal under section 2-615 (735 ILCS 5/2-615 (West 2008)) and section 2-619 (735 ILCS 5/2-619 (West 2008)). Here, **Home Depot** argues that **Patel's** complaint should have been dismissed pursuant to section 2-615 or, in the alternative, the complaint **[*5]** should have been dismissed pursuant to section 2-619.

[P10]** HN4 A motion to dismiss under section 2-615 attacks the legal sufficiency of the complaint. Such a motion to dismiss does not raise affirmative factual defenses, but alleges defects appearing on the face of the pleadings. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8, 607 N.E.2d 201, 180 Ill. Dec. 307 (1992). In ruling on a section 2-615 motion to dismiss, the court must accept as true all well-pled facts in the complaint and all reasonable inferences which can be drawn therefrom. *McGrath v. Fahey*, 126 Ill. 2d 78, 90, 533 N.E.2d 806, 127 Ill. Dec. 724 (1988). In making this determination, the court interprets the allegations of the complaint in the light most favorable to the plaintiff. *Id.* A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleading which will entitle plaintiff to recover. *Reuben H. Donnelley Corp. v. Brauer*, 275 Ill. App. 3d 300, 302, 655 N.E.2d 1162, 211 Ill. Dec. 779 (1995).

[P11]** Moreover, if a claim is based on a written document, the document itself must be attached to the pleading as an exhibit. The exhibit is part of the pleading for purposes of a motion to dismiss. If there is an inconsistency, the exhibit controls over the factual **[*6]** allegations in the pleading. *F.H. Prince & Co. v. Towers Financial Corp.*, 275 Ill. App. 3d 792, 797, 656 N.E.2d 142, 211 Ill. Dec. 950 (1995).

[P12]** Conversely, HN5 a motion to dismiss pursuant to section 2-619 is properly used to raise affirmative matters that negate the claim and not to challenge the allegations of the plaintiff's pleading. *Provenzale v. Forister*, 318 Ill. App. 3d 869, 878, 743 N.E.2d 676, 252 Ill. Dec. 808 (2001). This motion admits the legal sufficiency of a complaint, but asserts affirmative matters that avoid or defeat the allegations contained in the complaint. *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 413, 794 N.E.2d 902, 276 Ill. Dec. 652 (2003).

[P13]** **Patel** filed an application for entry of judgment and payment of compensation and penalties awarded pursuant to section 19(g) of the Act (820 ILCS 305/19(g) (West 2008)). HN6 Section 19(g) provides that a party may present a certified copy of the arbitrator's award or the decision of the Commission to the circuit court and "the court shall enter a judgment in accordance therewith." 820 ILCS 305/19(g) (West 2008). The statute further provides that in cases where the employer refuses to pay compensation according to the final award, the court will also tax as costs against the employer the reasonable costs and attorney **[*7]** fees in the arbitration proceedings and in the court entering the judgment. 820 ILCS 305/19(g) (West 2008).

[P14]** **Home Depot** sought involuntary dismissal of **Patel's** application for entry of judgment on the grounds that **Home Depot** does not owe **Patel** anything. **Home Depot** claims the decisions of both the arbitrator and the Commission "destroy" **Patel's** claim, as both state an award in favor of **Patel** and also the credit that **Home Depot** is entitled to because of its previous overpayments. Because the amount of the credit exceeds the amount of the award, **Home Depot** posits that the credit offsets the award to **Patel** and therefore **Home Depot** owes

Patel nothing. We disagree.

[P15]** Although **Home Depot** may ultimately obtain the credit the arbitrator and the Commission granted, it is not entitled to that credit under section 19(g). See *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 639 N.E.2d 1282, 203 Ill. Dec. 463 (1994). In *Illinois Graphics*, Nickum filed a workers' compensation claim with the Commission for an injury she allegedly suffered in the course of her employment with Illinois Graphics. *Id.* at 472. During the pendency of the workers' compensation matter, Illinois Graphics paid Nickum a sum of money for TTD benefits. *Id.* at 473. **[*8]** Following a hearing, an arbitrator denied Nickum's claim. *Id.* Nickum appealed and the Commission subsequently affirmed the arbitrator's decision and awarded Illinois Graphics a credit for the money it had already paid to Nickum. *Id.* at 473-74. Illinois Graphics then filed a petition pursuant to section 19(g) to obtain a judgment against Nickum for the amount of the credit. *Id.* at 474.

[P16]** In *Illinois Graphics* our supreme court stated, HN7"The plain language of section 19 (g) states that the Commission's decision, on which any judgment is based, be one *'providing for the payment of compensation* according to this act.'" (Emphasis in original.) *Id.* at 480. The court went on to state, "[T]hese express terms fairly limit the type of decision to those which *provide for* the *payment of compensation benefits*." (Emphasis in original.) *Id.* The court added, "The allowance of a credit within a decision or award merely serves to reduce the total payment of compensation benefits." *Id.* The *Illinois Graphics* decision demonstrates that under section 19 (g), credit does not equal compensation. The purpose of the Act was to provide a flow of benefits to compensate for lost wages and to compensate workers for loss **[*9]** of industrial earning capacity. *Id.* at 481. Although the court in *Illinois Graphics* noted that the employer had a common law remedy to recover the overpayment, the court held that it did not have a statutory remedy under section 19(g). *Id.* at 482.

[P17]** In *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 215, 713 N.E.2d 161, 238 Ill. Dec. 915 (1999), the appellate court recognized that the supreme court in *Illinois Graphics* held that section 19(g) does not enable an employer to recoup benefits paid to an employee. Instead, the *Karastamatis* court noted that *Illinois Graphics* specifically holds that any such action shall be a common law action. *Id.* HN8Recoupment, restitution, or reimbursement, even if awarded by the Commission, does not constitute a decision providing for payment of benefits. *Id.* Although section 19(g) states that both an employer and an employee may seek relief under section 19(g), an employee is the only one who may have a decision providing for payment of benefits. *Id.* The *Karastamatis* court concluded that "should [an] employer desire to seek reimbursement from [a] claimant, the proper remedy would be to file suit in the circuit court based on common law [remedies]. There is no authority under the Act **[*10]** that would allow the Commission, the circuit court, or this court to award such credit in these proceedings." *Id.*

[P18]** **Home Depot** contends that *Illinois Graphics* is distinguishable because the employer there was attempting to file a petition under section 19(g) in order to recover the amount of the credit from the employee. Here, **Home Depot** argues that it is not attempting to recover the amount of its overpayment from **Patel** but merely seeking to offset the credit against the benefits award. **Home Depot** further contends that the case cited by **Patel,** *Messamore v. Industrial Comm'n*, 302 Ill. App. 3d 351, 706 N.E.2d 44, 235 Ill. Dec. 784 (1999), for the proposition that an employer is allowed to offset a credit against permanent partial disability (PPD) benefits but not against TTD benefits does not, in fact, bar a credit against TTD benefits.

[P19]** In *Messamore*, the claimant was awarded both TTD and PPD benefits. *Id.* at 353. Due to an apparent clerical error on the part of the arbitrator, the employer overpaid the TTD benefits by approximately six months. *Id.* at 356. The Commission corrected the error and gave the employer a credit for the amount of the overpayment. *Id.* The *Messamore* court held that the employer was entitled to apply **[*11]** a credit for overpayment of TTD benefits against the PPD award. *Id.* at 359. The court stated that its reasoning applied whether the credit was sought against a permanent disability award or some other benefit paid after the TTD overpayment. *Id.*

The court explained that if the employee were to receive a windfall at the employer's expense due to an accidental overpayment of TTD benefits, it would encourage delays in payments because employers would seek to resolve every ambiguity before paying benefits. *Id.* The court noted that the decision in *Illinois Graphics* did not apply because the employer there was bringing a claim for overpayments under section 19(g), not seeking a credit against future payments. *Id.* The *Messamore* court noted that section 19(g) was not an issue in the case before it. *Id.*

[P20]** In the case *sub judice*, unlike the situation in *Messamore*, section 19(g) controls, so this court must follow the principle set forth in *Illinois Graphics*. Moreover, **Home Depot** is not seeking to apply its credit against future payments, but against the payment of benefits to which **Patel** was previously entitled. **Home Depot** paid TTD benefits for a certain time period, but refused to pay those benefits **[*12]** for an additional time period for which **Patel** was entitled to receive them, resulting in the arbitrator's award of TTD benefits. The fact that **Home Depot** inadvertently overpaid on the benefits for a certain time period is not something for which section 19(g) provides a remedy. **Patel** did not receive an award for future payments, merely an award for payments to which he was previously entitled. Just as **Home Depot** cannot seek to recover the amount of the overpayment by filing a claim under section 19(g), it cannot apply its credit for the overpayment to avoid an entry of judgment pursuant to section 19(g). Thus, **Home Depot** is not entitled to use the credit as an offset against the benefits awarded to **Patel** under section 19(g).

[P21]** Accordingly, we affirm the circuit court's decision denying **Home Depot's** motion to dismiss and entering judgment in favor of **Patel.**

[P22]** Affirmed.

*2005 Ill. Wrk. Comp. LEXIS 943, **

NARESH PATEL, PETITIONER, v. THE **HOME DEPOT,** INC.; **HOME DEPOT** USA, INC.; SEDGWICK CAIMS MANAGEMENT SERVICES, INC., RESPONDENT

NO. 01WC 59280; 01WC 59281; 05IWC C0862

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2005 Ill. Wrk. Comp. LEXIS 943

November 2, 2005

CORE TERMS: shoulder, arbitrator, pain, permanent, terminated, vocational rehabilitation, cervical, rotator, impingement, neck, cuff, temporary total disability, subacromial, injection, written notice, surgery, lifting, pound, tile, temporary, physical therapy, accommodate, recommended, symptoms, patient, repeat, workers' compensation, persistent, reinstated, maximum

JUDGES: Paul W. Rink; Barbara A. Sherman; Ilonka Ulrich; Edward Lee, Arbitrator

OPINION:

[*1] DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, Petitioner's temporary total disability, prospective medical expenses, credit and penalties and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds that Respondent is entitled to credit for its payment of $ 32,357.47. This credit is not pursuant to § 8(j) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 356.65 per week for a period of 35-4/7 weeks, that being the period of **[*2]** temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act,

this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 6,343.33 as provided in § 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 2,500.00 as provided in § 19(1) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $ 1,268.66 as provided in § 16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $ 32,357.47 however it is not pursuant to § 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for **[*3]** Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 100.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: November 2, 2005

ATTACHMENT I:

19(b) ARBITRATION DECISION

NARESH PATEL
Employee/Petitioner
v.
THE **HOME DEPOT,** INC.; **HOME DEPOT** USA., INC.; SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
Employer/Respondent

Case # 01 WC 59280

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Edward Lee, arbitrator of the Industrial Commission, in the city of Chicago, on October 20, 2003. After reviewing all **[*4]** of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
E. Was timely notice of the accident given to the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?

FINDINGS
. On **9/3/00**, the respondent **The Home Depot, et al.** ***was*** operating under and subject to the provisions of the Act.
. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.
. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.
. Timely notice of this accident ***was*** given to the respondent.
. In the year preceding the injury, the petitioner earned $ **28,078.96**; the average weekly wage was $ **534.98**.
. At the time of injury, the petitioner was **36** years of age, ***married*** with **3** children under 18.

ORDER
. The respondent shall pay the petitioner Temporary Total Disability **[*5]** benefits of $ --/week for --- weeks, from --- through ---, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.
. The respondent shall pay $ --- for medical services, as provided in Section 8(a) of the Act.
. The respondent shall pay $ --- in penalties, as provided in Section of the Act.
. The respondent shall pay $ --- in penalties, as provided in Section of the Act.
. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of Temporary Total Disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 0.97% shall accrue from the date listed below to **[*6]** the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

January 28, 2004

Date

ISSUE C -- ACCIDENT OCCURRED WHICH AROSE OUT OF AND IN THE COURSE OF PETITOINER'S EMPLOYMENT.

Petitioner testified, without contradiction, that on September 3, 2000, he was working full-time at the special services desk for Respondent, **Home Depot.** (Tr., pp. 16, 17, 19). On Sunday, September 3, 2000, the store manager, Ron Rutenburg, instructed Petitioner to unload boxes of tile inside a customer's home. (Tr. p.22).

Petitioner spent eight hours unloading flooring inside the house. (Tr. p. 23). The Pergo tile had to be removed from the boxes (bundles) and put in the home 48 hours before installation. (Tr. pp. 22-23). There were 52 bundles of tiles weighing between 30-38 pounds. (Tr. p. 22). There are 10-12 tiles per bundle. (Tr. p. 22). The laminated tiles measure 36" x 8". (Tr. p. 20).

Petitioner felt numbness in his left shoulder after installing the tile. (Tr. p. 24). Petitioner drove back to **Home Depot** and punched out. (Tr. p. 24). The next day Petitioner returned to **[*7]** work complaining of left shoulder soreness to his supervisor, Dave Olsen. (Tr. pp. 24, 25). Dave

Olsen filled out an accident report which Petitioner signed. (Tr. pp. 25-26). Respondent's failure to introduce the accident report is further evidence that Petitioner was injured at work.

Petitioner's testimony is consistent with the history contained in the medical records admitted into evidence. The history reflected on the September 4, 2000 emergency room visit at Northwest Community Hospital lists a **September 3, 2000** date of injury and describes the accident as follows: "left shoulder injury at work", "overextended left shoulder yest." (Px.13). Similarly, the initial history recorded by Dr. Kim "**states that he (Petitioner) was lifting some heavy flooring, approximately 38 pounds. Approximately 10 minutes later when he was driving, he noticed pain in the left shoulder with some numbness and tingling in the index and middle fingers on the left side. This occurred on September 3, 2000.**" Respondent failed to present any evidence to contradict Petitioner's testimony. Therefore, the Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course **[*8]** of his employment with Respondent, **Home Depot.**

ISSUE E -- NOTICE.

Petitioner testified that he reported the accident the next day, September 4, 2000, to Dave Olsen, at **Home Depot.** (Tr. pp. 24-25). Petitioner told Dave Olsen he injured his left shoulder lifting Pergo flooring at a customer's house the night before. (Tr. p. 25). Dave Olsen filled out an accident report which Petitioner signed. (Tr. pp. 25-26). Dave Olsen then sent Petitioner to Northwest Medical Center for medical treatment. (Tr. p. 26). The medical records from Northwest Community Hospital identify the injury as a workers' compensation claim with **Home Depot.** Therefore, the Arbitrator finds that Petitioner provided Respondent with timely notice of his September 3, 2000 work injury.

ISSUE F -- CAUSATION / CAUSAL CONNECTION.

Petitioner testified that he originally injured his left shoulder on September 3, 2000 lifting Pergo flooring into a customer's house. (Tr. pp. 19-23). Petitioner spent the entire day (8 hours) removing the laminated tiles from their boxed bundles. (Tr. pp. 22-23). Petitioner moved 520 to 624 tiles weighing between 30-38 pounds each into the customer's home. (Tr. p. 22). **[*9]** Thus, Petitioner unloaded some somewhere between 15,600 and 23,712 pounds of flooring on September 3 2000.

Petitioner reported the accident to his supervisor, David Olsen, the following day, Monday, September 4, 2000. (Tr. p. 25). David Olsen filled out an accident report and directed Petitioner to Northwest Community Hospital for medical treatment. (Tr. p. 26). At Northwest Community Hospital Petitioner's left shoulder was examined and x-rayed. (Px. 13) (Tr. p. 27). Petitioner was released with work restrictions of no use left hand/arm for five days. (Px.). Petitioner returned to Northwest Community Hospital on September 8, 2000 and was referred to Dr. Thomas Kim, an orthopedic surgeon. (Tr. p. 27).

Dr. Kim examined Petitioner on September 8, 2000 and noted a positive impingement sign in the left shoulder. (Px. 14). Dr. Kim's initial impression was "left rotator cuff tendonitis." (Px. 14). Petitioner was started on a course of physical therapy and issued light duty work restrictions of no lifting, pushing, pulling over ten pounds, no overhead work. (Px. 14) (Tr. p. 28). Respondent accommodated Petitioner's work restriction by providing him with an assistant at the special **[*10]** services desk. (Tr. p. 29).

Petitioner completed the physical therapy treatment for his left shoulder between September and November 2000. (Tr. p. 28). On September 29, 2000, Dr. Kim injected the subacromial space of the left shoulder with a celestone / lidocaine mixture. (Px. 14). Dr. Kim next saw Petitioner on October 27, 2000. (Px. 14). The injection did not help Petitioner, who continued to complain of left shoulder pain and restrictions in movement. (Px. 14). X-rays taken of the left shoulder revealed a mild type II acromion. (Px.14). Dr. Kim continued the physical therapy, maintained Petitioner's work restrictions and ordered an MRI of the left shoulder. (Px. 14).

The MRI of the left shoulder performed on November 4, 2000 was normal. (Px. 14). Dr. Kim saw Petitioner on November 6, 2000 and released him to return to work in three weeks without restrictions. (Px. 14). Petitioner was scheduled to return to Dr. Kim in three weeks but chose to see his family physician instead.

Petitioner continued to experience left shoulder problems at work and saw his family physician, Dr. Calvin Fischer, on November 17, 2000 complaining of left shoulder pain and stiffness. (Px. 15). Dr. Fischer's **[*11]** impression was a cervical and trapezius strain. (Px. 15). Petitioner was given a script for flexeril and cervical exercises. (Px. 15). Petitioner was seen by Dr. Fischer on November 24, 2000 and noted to be improving. Dr. Fischer recommended Petitioner continue the cervical exercises and return in one week. (Px. 15).

Petitioner testified that he had no prior left should problems, had no prior medical treatment for the left shoulder and had not injured his left shoulder prior to September 3, 2000. (Tr. pp. 26-27). Therefore, based on Petitioner's testimony at trial, along with the treating physician's medical records, the Arbitrator finds a causal connection between the September 3, 2000 work injury and Petitioner's condition of ill-being.

ATTACHMENT II:

19(b) ARBITRATION DECISION

NARESH PATEL
Employee/Petitioner
v.
THE **HOME DEPOT,** INC.; **HOME DEPOT** USA., INC.; SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
Employer/Respondent

Case # 01 WC 59281

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Edward Lee, arbitrator of the Industrial Commission, in the city of Chicago **[*12]** , on October 20, 2003. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is the petitioner's present condition of ill-being causally related to the injury?
K. What amount of compensation is due for Temporary Total Disability?
L. Should penalties or fees be imposed upon the respondent?
M. Is the respondent due any credit?
N. Other Vocational Rehabilitation and future surgery.

FINDINGS
. On 5/3/01, the respondent **The Home Depot, et al.** ***was*** operating under and subject to the provisions of the Act.
. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.
. On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.
. Timely notice of this accident ***was*** given to the respondent.
. In the year preceding the injury, the petitioner earned $ **28,078.96**; the average weekly wage was $ **534.98**.
. At the time of injury, the petitioner was **37** years of age, ***married*** with 3 **[*13]** children under 18.

. To date, $ **27,357.47** has been paid by the respondent on account of this injury.

ORDER
. The respondent shall pay the petitioner Temporary Total Disability benefits of $ **356.65** /week for **35-4/7** weeks, from 2/14/03 through 10/20/03, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19 (b) of the Act.
. The respondent shall pay $ ---- for medical services, as provided in Section 8(a) of the Act.
. The respondent shall pay $ 6,343.33 in penalties, as provided in Section 19(k) of the Act.
. The respondent shall pay $ 2,500.00 in penalties, as provided in Section 19(l) of the Act.
. The respondent shall pay $ 1,268.66 in attorney's fees, as provided in Section 16 of the Act.
. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of Temporary Total Disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition* **[*14]** *for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 0.97 % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

January 28, 2004

Date

ISSUE F -- CAUSATION /

ISSUE N -- FUTURE SURGERY

Petitioner testified, without contradiction, that he was injured lifting a 100 pound box at work with a co-worker. (Tr. p. 31). The box for the wardrobe cabinet was 5 feet long and 3-1/2 ft. wide. (Tr. p. 33). Petitioner was asked by the store manager, James Davis, to help another employee lift the heavy wardrobe cabinet. (Tr. pp. 31-32). While moving the cabinet to the cart, the other employee dropped his end leaving Petitioner holding the entire weight of the cabinet. (Tr. pp. 32-34). The weight of the cabinet pulled down Petitioner's left arm. (Tr. p. 34).

The co-worker reported the accident **[*15]** to the store manager, James Davis, who filled out an accident report which Petitioner signed. (Tr. p. 35). Petitioner continued working and iced his left shoulder until seeing his family physician, Dr. Fischer, on May 14, 2001. (Tr. p. 36).

The initial history taken by Dr. Fischer reflects the following: **"L shoulder pain since injury 1-1/2 weeks ago at work. He injured the same shoulder six months ago while at work. He was helping lift a cabinet and his partner lost his grip causing his arm to be jerked downward."** (Px. 15).

Petitioner continued to follow up with Dr. Fischer complaining of neck and left shoulder pain. (Px. 15). X-rays were taken of the left shoulder and Petitioner was given light duty work restrictions. (Px. 15). Petitioner was treated conservatively with a course of medication, including naprosyn, flexeril, and daypro. (Px. 15). Dr. Fischer noted mild numbness and tingling in Petitioner's left hand and fingers and referred Petitioner to Barrington Orthopedics where Petitioner began a course of treatment with Dr. Cirrincione on June 1, 2001. (Px. 16).

shoulder pain and restrictions in movement. (Px. 16). A second functional capacity evaluation was ordered by Dr. Cirrincione which Petitioner completed on October 16, 2002. (Px. 16). Petitioner's lifting capacity decreased significantly since his initial FCE. (Px. 16). Testing determined that Petitioner only qualifies for a **light-medium** physical demand level while his position at the special services desk is a **heavy** demand level. (Px.16). Thereafter, on October 29, 2002, Dr. Cirrincione examined Petitioner and noted continued tenderness in the left trapezial area and upper back with restrictions in range of motion of the left shoulder. (Px. 16). Dr. Cirrincione issued Petitioner permanent work restrictions as follows:

Occasional lifting --	35 pounds;
Frequent lifting --	15 pounds;
Over-head lifting --	10 pounds.

[*20]

(Px. 16).

Dr. Rabinowitz examined Petitioner on November 5, 2002 and noted that Petitioner had reached maximum medical improvement from spine care treatment and discharged Petitioner consistent with the permanent work restrictions issued by Dr. Cirrincione. (Px. 16).

Petitioner continued to experience left shoulder pain and had difficulty sleeping. (Tr. 49). Consequently, on November 19, 2002, Petitioner returned to Dr. Fischer complaining of left shoulder pain. (Px. 15). Dr. Fischer referred Petitioner to Dr. Martin Saltzman for a second orthopedic opinion. (Px. 15).

On November 20, 2002, Dr. Saltzman examined Petitioner and observed slight paresthesias into the left hand, left shoulder pain with range of motion, crepitation and a positive impingement sign in the left shoulder indicating the rotator cuff muscle was getting pinched between the head of the humerus and the acromion. (Px. 18 and Dr. Saltzman dep. p. 10). Dr. Saltzman's initial impression was persistent left arm and shoulder pain, possibly secondary to a persistent or recurrent rotator cuff tear and/or persistent cervical radiculopathy. (Px. 18).

Dr. Saltzman reviewed Petitioner's medical records and noted **"the patient [*21] has really not been able to go back to work because he continues to complain of left shoulder and neck pain with some occasional numbness into his arm, and evidently Dr. Cirrincione feels like this is coming from the neck, and Dr. Rabinowitz feels like it is coming from the shoulder. The patient is kind of caught in the middle."** (Px. 18). Physical examination on January 15, 2003 revealed posterior shoulder pain over the supraspinatus and infraspinatus muscle that radiates upwards into the neck and paracervical and trapezius muscles. (Px. 18). Petitioner was given an injection to the subacromial bursa and a script for an EMG study. (Px. 18). Petitioner was restricted from all work activity pending his response to the injection. (Px. 18).

The EMG study performed on January 18, 2003 revealed left C5-C6 radiculopathy. (Px. 18). Thereafter, Petitioner was seen by Dr. Saltzman on February 10, 2003. The office note reflects **"he (Petitioner) continues to have symptoms that I believe are primarily secondary to impingement. I did a subacromial injection of the left shoulder about three weeks ago, and he said it helped about 60 or 70 percent at the time. It only lasted a couple of days. [*22] This kind of confirms my impression that the patient probably has a recurrent impingement syndrome and that the symptoms are not really related to any type of cervical radiculopathy."** (Px. 18). It was Dr. Saltzman's impression that "he (**Petitioner**) probably had an inadequate decompression performed. (Px. 18). Dr. Saltzman continued Petitioner's off-work status and recommended a repeat arthroscopy of the left shoulder. (Px. 18).

Dr. Saltzman testified that the symptoms Petitioner was experiencing were related to the May 2001 work injury and that the impingement was a result of that injury. (Dr. Saltzman dep,. p.

Dr. Cirrincione examined Petitioner's left shoulder and issued light duty work restrictions. (Px. 16). An arthrogram **[*16]** and MRI of the left shoulder were ordered, along with a course of physical therapy treatment. (Px. 16). The MRI did not evidence a rotator cuff tear but was questionable for mild supraspinatus tendinosis. (Px. 16).

Petitioner continued to complain of left shoulder and left side neck pain. X-rays of the cervical spine revealed decreased disc space at C5-C6 with loss of normal lordosis. (Px. 16). Dr. Cirrincione noted continued shoulder impingement and recommended a cervical MRI study along with physical therapy for the neck and shoulder. (Px. 16). MRI of the cervical spine taken June 28, 2001 revealed mild diffuse bulging of disk material at C5-C6 with mild encroachment on the ventral margin of the thecal sac diffusely. (Px. 16).

Petitioner continued to experience left shoulder and neck pain and received a subacromial injection in the left shoulder on July 13, 2001. (Px. 16). Pursuant to Dr. Cirrincione's recommendation, Petitioner received a series of cervical epidural injections from Dr. Jagmin at St. Alexius Medical Center on August 13, 2001, September 17, 2001 and October 3, 2001. (Px. 16). The injections failed to relieve Petitioner's left shoulder and neck pain.

Petitioner remained **[*17]** on light duty work restrictions which Respondent accommodated. (Px. 16). Dr. Cirrincione ultimately recommended left shoulder arthroscopic surgery. On November 29, 2001, Dr. Cirrincione performed left shoulder arthroscopic surgery, including arthroscopic repair of the superior labral ligament complex, debridement of the rotator cuff tear, neer subacromial decompression, consisting of excision of the coracoacromial ligament, bursectomy with partial anterior acrominectomy, and insertion of a pain buster catheter. (Px. 16). The operative findings revealed **"a complex tear of the superior labrum, the superior labral complex was torn all the way from the eleven o'clock position anteriorally to the two o'clock position posteriorly."** (Px. 16). Severe impingement and a partial tear of the rotator cuff were also noted. (Px. 16).

Following surgery, Petitioner was restricted from all work activity and continued to see Dr. Cirrincione. Petitioner was prescribed additional physical therapy for the left shoulder and neck which failed to relieve the pain. (Px. 16). Consequently, Dr. Cirrincione referred Petitioner to his associate, Dr. Rabinowitz, on January 30, 2002 for evaluation of the cervical **[*18]** spine. (Px. 16).

Dr. Rabinowitz examined Petitioner on February 11, 2002 and recommended a myelogram, post-myelogram CT and evoked potential studies of the upper extremities. The myelo/post myelo CT showed C6 nerve root impingement secondary to foraminal narrowing and a combination of a hard disc herniation. (Px. 16). The somatosensory evoked potential studies revealed evidence of C6 radiculopathy and nerve root delay. (Px. 16). Based on the persistent symptoms of C6 radicular pain, the electrophysiological tests which confirm C6 radiculopathy, along with imaging studies showing evidence of C6 nerve root impingement, Dr. Rabinowitz recommended an anterior cervical diskectomy and fusion at the C5-C6 level. (Px.16).

Thereafter, on May 2, 2002, Dr. Rabinowitz performed a C5-C6 anterior cervical diskectomy and fusion with tricortical allograft and anterior cervical plate. (Px. 16 and Px. 17). Petitioner continued to see Dr. Cirrincione for his left shoulder and Dr. Rabinowitz for his cervical spine. Petitioner continued to receive physical therapy treatment for the shoulder and neck and was restricted from all work activity. (Px. 16).

Petitioner completed a functional capacity evaluation **[*19]** on July 16, 2002 which qualified him to perform safely at the **medium** work level. (Px. 16). However, since the physical demand level of Petitioner's job is **heavy** as determined by his job description, a further course of work conditioning was recommended. (Px. 16).

Petitioner completed an extensive course of work-hardening but continued to experience left

28). It is Dr. Saltzman's opinion that Petitioner "did indeed sustain an injury consistent with a rotator cuff injury mechanism. The patient continues to have impingement symptoms. . . . as documentation for the persistent impingement; the patient did have 60 to 70% improvement following the subacromial injection. (Saltzman dep., p. 25). The basis for Dr. Saltzman's opinion relating Petitioner's symptoms to the impingement is the simple fact that "Petitioner had a relatively good response, although temporarily, to the subacromial injection." (Dr. Saltzman dep., p. 27). **[*23]**

Dr. Saltzman testified that the SLAP lesion repair done by Dr. Cirrincione was not adequate enough to alleviate the symptoms. (Saltzman dep., p. 20). According to Dr. Saltzman, "there's something that is filling the space between the rotator cuff and the acromion that's not allowing this patient to bring his arm up to the side." (Dr. Saltzman dep., p. 20). Thus, it is Dr. Saltzman's opinion **"based on the physical examination, physical findings, and the patient's response to the subacromial injection that he (Petitioner) has persistent impingement and would benefit from a subacromial decompression."** (Saltzman dep., p. 26). The description of Petitioner's injury wherein the co-worker dropped the other end of the load is consistent with a rotator type mechanism of injury and therefore, the need for the repeat arthroscopic surgery is the underlying injuries Petitioner sustained at work. (Dr. Saltzman, dep., p. 29).

Petitioner was examined at Respondent's request, by Dr. Asselmeier pursuant to § 12 of the Act on April 16, 2003. Dr. Asselmeier's examination of Petitioner's left shoulder revealed the following objective findings:

1) Restriction of passive range of motion;

2) Tenderness **[*24]** over AC joint;

3) Evidence of slight shoulder girdle and deltoid muscular atrophy;

4) Ongoing irritability left shoulder;

5) Ongoing inflammation left shoulder;

6) Pain to deep palpation through his upper trapezius and medial scapular border;

7) Trace scapholothoracic crepitation to left shoulder;

8) Atrophy to the scapula, trapezius deltoid and deeper rotator cuff muscles;

9) Prominence on the left AC joint with moderate pain to palpation consistent with rotator cuff syndrome, and

10) Pain over the rotator interval with difficulty in shoulder use.

(Dr. Asselmeier dep., pp. 9 and 28-33).

Based on his examination, Dr. Asselmeier was of the opinion that Petitioner **"had a degree of ongoing rotator cuff syndrome"** consistent with his prior medical treatment. (Dr. Asselmeier dep., p. 11). From an orthopedic standpoint **"he (petitioner) had some ongoing irritability and inflammation of his rotator cuff which was causing him pain in his shoulder."** (Dr. Asselmeier dep., p. 11).

At the time of his initial examination, Dr. Asselmeier did not have Petitioner's complete medical records. (Dr. Asslemeier dep., pp. 25 and 28). In fact, Dr. Asselmeier relied upon a medical chronology' prepared **[*25]** by Respondent's counsel. (Dr. Asselmeier dep., pp. 22-24). Consequently, Dr. Asselmeier stated in his April 16, 2003 report that he would hold on any

opinions until he received the medical records from Dr. Saltzman. (Rx. 2).

Dr. Asselmeier only examined Petitioner on one occasion and did not record a complete history of Petitioner's work injuries. (Dr. Asselmeier dep., p. 41). Furthermore, Dr. Asselmeier was impeached on several issues during his deposition. Dr. Asselmeier testified that Petitioner's left shoulder was at maximum medical improvement at the time of the April 16, 2003 examination. (Dr. Asselmeier dep., pp. 11-112). However, Dr. Asselmeier held no such opinion at that time and nowhere is the opinion contained in the April 16, 2003 IME report. (Rx. 2 and Dr. Asselmeier dep., p. 34).

Dr. Asselmeier testified that the July FCE correctly stated Petitioner's physical restrictions to perform **medium** level work. (Dr. Asselmeier dep., pp. 17-18, 51). However, Dr. Asselmeier's IME report clearly states that **"I would tend to be of the opinion that FCE parameters outlined in October 16, 2002,** (light-medium level work) **would, in fact, be more consistent with Mr. Patel's [*26] true function."** (Rx. 2 and Dr. Asselmeier dep., p. 38).

Consequently, the Arbitrator finds Dr. Saltzman to be more credible than Dr. Asselmeier. The Arbitrator notes that Petitioner has continued to experience left shoulder pain since the arthroscopic surgery for which he has received continued medical treatment. It is clear from Dr. Saltzman's medical records that Petitioner continues to experience left shoulder problems as a result of the May 2001 injury at work. Petitioner had no prior left shoulder injury other than the September 3, 2000 and May 3 2001 work injuries. (Tr. p. 26). Therefore, based on the Petitioner's testimony at trial, the treating physician's medical records and the testimony of Dr. Saltzman, the Arbitrator finds causal connection between the September 3, 2000 and May 3, 2001 work-related injuries and Petitioner's present condition of ill-being.

Finally, § 8(a) of the Act authorizes the award to claimant of compensation for prescribed, but unperformed surgical services. *Plantation Manufacturing Co. v. Industrial Commission*, 294 Ill.App.3d 705, 691 N.E.2d 13 (2nd Dist. 1998). Thus, based on the Petitioner's current **[*27]** neurological and orthopedic limitations to the left shoulder as testified to by both, Dr. Saltzman and Dr. Asselmeier, the Arbitrator awards Petitioner compensation for repeat arthroscopic surgery of the left shoulder.

ISSUE K -- TEMPORARY TOTAL DISABILITY

Respondent paid Petitioner TTD benefits during the period November 29, 2001 through October 29, 2002 as stipulated at trial. Respondent did not dispute Petitioner's shoulder surgery with Dr. Cirrincione or neck surgery with Dr. Rabinowitz. Dr. Cirrincione placed Petitioner on permanent work restrictions as outlined in the Functional Capacity Evaluation of occasional lifting -- **35 pounds**; frequent lifting -- **15 pounds**, and overhead lifting -- **10 pounds**. (Px. 16???). The FCE qualified Petitioner to perform **light-medium** level work while the physical demand of Petitioner's job at **Home Depot** is a **heavy** physical demand. (Rx. 16).

Dr. Rabinowitz released Petitioner from his care on November 5, 2002 consistent with the permanent work restrictions issued from Dr. Cirrincione. (Rx. 16). From a spine perspective, Dr. Rabinowitz believed Petitioner had reached maximum medical attention. (Rx. 16). **[*28]**

Respondent continued to pay Petitioner TTD benefits until they were terminated without written notice on November 28, 2002. (Tr. 51 and Px. 8). Petitioner's counsel demanded that the TTD benefits be reinstated and requested a modified position of employment consistent with Petitioner's permanent work restrictions. (Px. 8). Respondent then paid Petitioner TTD benefits for the period November 29, 2002 through December 18, 2002. (Tr. p. 51 and Px. 9). Respondent did not respond to the request for job accommodations.

Respondent stopped Petitioner's TTD benefits again without written notice to Petitioner on December 19, 2002. (Tr. p. 51 and Px. 9). Petitioner's counsel demanded that TTD benefits be reinstated, and "formally requested a written vocational rehabilitation plan be initiated pursuant

to § 8(a) to assist Petitioner in securing alternative employment." (Px. 9). Petitioner's TTD benefits were reinstated and paid during the period December 19, 2002 through January 8, 2003. (Tr. p. 54). Respondent failed to respond to Petitioner's request for vocational rehabilitation and maintenance benefits.

Respondent stopped Petitioner's TTD benefits on January 9, 2003 without written **[*29]** notice. (Tr. p. 54 and Px. 10). Petitioner's counsel demanded, for a third time, that Respondent reinstate Petitioner's TTD benefits and initiate a written vocational rehabilitation plan in light of Respondent's refusal to return Petitioner to work at **Home Depot.** (Px. 10). Respondent was given copies of Petitioner's off-work notes from Dr. Saltzman for the periods January 15, 2003 through February 14, 2003 and February 15, 2003 through March 17, 2003. (Px. 10).

A formal request for approval for repeat arthroscopic shoulder surgery with Dr. Saltzman was also made at that time. (Px. 10). Respondent did not offer Petitioner vocational rehabilitation and refused approval for the repeat shoulder surgery. Respondent issued TTD benefits for the period January 10, 2003 through February 13, 2003 and then terminated TTD benefits without written notice to Petitioner. (Tr. p. 54 and Px. 11).

Respondent terminated Petitioner from his position of employment at **Home Depot** on November 25, 2002. (Px. 7). Respondent refused to accommodate Petitioner's permanent work restrictions or provide a meaningful vocational rehabilitation plan to assist Petitioner in returning to gainful employment. Respondent **[*30]** refused all requests for maintenance benefits and has denied TTD benefits since February 14, 2003. (Tr. p. 58). Consequently, Petitioner filed his 19(b) Petition and Petition for Penalties and Attorney's Fees in February 2003.

Dr. Saltzman continued to restrict Petitioner from all work activity, pending approval of the shoulder surgery from January 15, 2003 through the date of trial. (Tr. p. 56 and Px. 18). At Respondent's request, Petitioner was examined by Dr. Asselmeier on April 16, 2003 pursuant to § 12 of the Act. Dr. Asselmeier did not offer any opinions in his first report, but rather requested additional medical records before rendering any opinions. (Dr. Asselmeier dep.,. p. 34 and Rx. 2). Thereafter, on June 4, 2003, Petitioner's counsel received a copy of the May 22, 2003 report from Asselmeier, wherein he states that Petitioner has reached maximum medical improvement. (Rx. 2).

Temporary Total Disability is that temporary period following an accident during which the injured employee is totally incapacitated by reason of the injury and it is considered temporary in the sense that the disabling condition exists until the employee is as far restored as the injury's permanent **[*31]** character will permit. *Mount Olive Coal Co. v. Industrial Commission*, 295 Ill.429, 129 N.E. 103 (1920). Temporary Total Disability compensation shall be paid as long as the temporary total disability lasts. 820 ILCS 305/8(b). The Illinois Supreme Court has held that an employee is not required to prove a complete inability to perform all work in order to actually receive TTD benefits. *Sun Choi v. Industrial Commission*, 182 Ill.2d 387, 695 N.E.2d 862.

There is no dispute at trial that Petitioner's position of employment at the special services desk is a **heavy** physical demand. (Px. 16 and Rx. 2). The July 16, 2002 FCE qualified Petitioner to perform safely at the **medium** work level and the October 16, 2002 FCE qualified Petitioner to work a **light-medium** physical demand level. (Px. 16). Under either evaluation Petitioner was unable to return to his former position of employment and was issued permanent work restrictions.

Respondent terminated Petitioner and refused to accommodate his permanent work restrictions. (Px. 7). Joyce Kindt, Human Resource Manager for **Home Depot,** testified **[*32]** at trial that the **Home Depot** 52-week leave of absence policy required an employee to return to work within one year or be terminated. Ms. Kindt testified that had Mr. Patel contacted the store, his work restrictions would have been accommodated. Mr. Kindt further testified that Mr.

Patel failed to contact anyone about returning to work.

Ms. Kindt's self-serving testimony at trial is contradicted by the September 11, 2002 letter of correspondence directed to her from Petitioner's counsel. (Px. 6). After Petitioner received a "Notice of Leave Expiration" from Respondent advising him that he would be terminated from **Home Depot** if he did not return to work by October 6, 2002, Petitioner's counsel immediately contacted Joyce Kindt on the telephone. (Px. 6). Mr. Kindt advised Petitioner's counsel that the third party administrator was treating the claim as a work-related injury and that "Notice of Leave Expiration" should not have been sent to Petitioner. (Px. 6). Ms. Kindt further advised that Petitioner would not be terminated since this was a work-related injury. (Px. 6).

Thereafter, on December 13, 2002, Petitioner received an unsigned "Notice of Termination" from **Home Depot. [*33]** (Tr. pp. 51-53). Petitioner tried to contact Human Resources at the (800) number listed on the letter but received no response back. (Tr. pp. 53-54). Moreover, on December 16, 2002, Petitioner's counsel requested in writing to the third party administrator, that Respondent accommodate Petitioner and return him to "a modified position of employment consistent with Petitioner's permanent work restrictions." (Px. 8). During the next 5 months, Petitioner continued to request that Respondent accommodate his permanent work restrictions or in the alternative, provide vocational rehabilitation training and maintenance benefits pursuant to § 8(a). (See 1/7/03 letter/Px. 9); (2/19/03 letter/Px. 10) (3/21/03 letter/Px. 11); and (4/18/03 letter/Px. 12).

The Arbitrator finds that Respondent failed to accommodate Petitioner's permanent work restrictions or provide Petitioner with vocational rehabilitation benefits. Despite Joyce Kindt's testimony to the contrary, the evidence at trial overwhelmingly demonstrates that Petitioner made numerous attempts through his attorney to return back to work or obtain alternative employment. (Px. 6, 8, 9, 10, 11, and 12). In fact, Petitioner testified that despite **[*34]** the **"off-work"** restrictions from Dr. Saltzman, he conducted a job search this spring and contacted **100-150** prospective employers. (Tr. pp. 58-61). Petitioner filled out job applications on-line with CareerBuilder.com. and introduced into evidence job search records detailing his efforts. (Px. 4 and Tr. p. 60). Petitioner was unable to secure alternative employment. (Tr. pp. 59-61). Respondent offered no evidence to rebut the Petitioner's attempts to find work and refused all demands for TTD and/or maintenance benefits.

The Arbitrator finds that Petitioner has not reached maximum medical improvement from the injuries he sustained to his left shoulder. The Arbitrator relies on the opinion of Dr. Saltzman that Petitioner has not reached maximum medical improvement. (Dr. Saltzman dep., pp. 27-28). According to Dr. Saltzman, Petitioner needs a second arthroscopy of the left shoulder and a repeat subacromial decompression. (Dr. Saltzman dep., p. 27). Therefore, the Arbitrator finds that Petitioner is entitled to TTD benefits from February 14, 2003 through the date of trial, October 20, 2003.

ISSUE L -- PENALTIES AND ATTORNEYS' FEES IMPOSED UPON THE RESPONDENT

While recovering **[*35]** from his shoulder and neck surgery, Petitioner received a "Notice of Leave Expiration" advising him that he would be terminated if he failed to return to work by October 6, 2002. (Px. 5 and Tr. p. 63). Petitioner was still under the care of both Drs. Cirrincione and Rabinowitz and had not been released to return to work. Petitioner's counsel telephoned Joyce Kindt to resolve the matter and followed up with a letter to her on September 11, 2002. (Px. 6). Joyce Kindt confirmed that the "Notice of Leave Expiration" should not have been sent and that Petitioner would not be terminated. (Px. 6).

On November 28, 2002, Respondent terminated Petitioner's TTD benefits without written notice to Petitioner in violation of § 7110.70 of the Workers' Compensation Act. (Tr. p. 51 and Px. 8). Thereafter, on December 13, 2002, Petitioner received an unsigned termination letter from **Home Depot.** (Px. 7 and Tr. p. 65). Petitioner called the (800) telephone number on the letter but was unable to contact anyone at **Home Depot.** (Tr. pp. 53-54).

Consequently, on December 16, 2002, Petitioner's counsel requested in writing that Respondent reinstate Petitioner's TTD benefits and/or provide Petitioner with a **[*36]** modified position of employment consistent with his permanent work restrictions. (Px. 8). Respondent reinstated Petitioner's TTD benefits but refused to accommodate his permanent work restrictions and return him to work at **Home Depot.** (Tr. pp. 53, 69-70).

Respondent terminated Petitioner's TTD benefits a **second** time without written notice on December 19, 2002. (Tr. p. 51 and Px. 9). On January 7, 2003 Petitioner's counsel requested Respondent reinstate TTD benefits and demanded a vocational rehabilitation program be initiated pursuant to § 8(a). (Px. 9). Respondent reinstated Petitioner's TTD benefits but refused the request for vocational rehabilitation. (Tr. pp. 54 and 70).

Respondent terminated Petitioner's TTD benefits a **third** time without written notice on January 9, 2003. (Tr. p. 54 and Px. 10). On February 19, 2003, Petitioner's counsel requested that Respondent reinstate TTD benefits and renewed Petitioner's request for vocational rehabilitation. (Px. 10). Respondent reinstated Petitioner's TTD benefits but continued to deny vocational rehabilitation benefits. (Tr. pp. 54 and 70).

Respondent terminated Petitioner's TTD benefits a **fourth** and last time **[*37]** without written notice on February 14, 2003. (Tr. p. 54 and Px. 11). Consequently, Petitioner filed a 19(b) Petition for Immediate Hearing on February 24, 2003 and Petition for Penalties and Attorneys Fees on February 27, 2003. Petitioner's counsel wrote to Respondent on March 21, 2003 complaining of Respondent's vexatious and unreasonable denial of workers' compensation benefits. (Px. 11). Respondent's continued refusal of maintenance and/or vocational rehabilitation benefits without any supporting medical reports or opinions on which to form a good faith basis for denial of Petitioner's benefits is malicious and unreasonable. (Px. 11). Respondent did not obtain any supporting medical opinion until June 2003. Respondent refused all requests to assist Petitioner in obtaining alternative employment consistent with his permanent work restrictions.

A delay in payment of 14 days or more creates a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(1). Respondent repeatedly delayed Petitioner's TTD benefits and has refused all benefits since February 13, 2003. Therefore, the Arbitrator awards Petitioner § 19(1) penalties **[*38]** in the amount of **$ 2,500** pursuant to statute.

Moreover, when an employer chooses to delay payment of compensation, it has the burden of showing that it had a reasonable belief that the delay was justified. *Lester v. Industrial Commission*, 256 Ill.App.3d 520, 524, 628 N.E.2d 191 (1993). It is well settled that whether an employer acted unreasonably or vexatiously in refusing to pay benefits is a question of fact to be determined by the Commission. *Crockett v. Industrial Commission*, 218 Ill.App.3d 116, 578 N.E.2d 140, 161 Ill.Dec. 13 (1st Dist. 1991.)

Respondent not only delayed and repeatedly terminated Petitioner's TTD benefits without written notice in violation of § 7110.70 but refused all workers' compensation benefits after February 13, 2003 without any supporting medical evidence on which to support their denial of benefits. Respondent refused to approve the arthroscopic shoulder surgery for over **four** months without any supporting medical report.

Petitioner was issued permanent work restrictions of **light** to **light-medium** physical demand as reflected **[*39]** in the Functional Capacity Evaluations. Despite the fact that Petitioner's job at **Home Depot** is a **heavy** physical demand level, Respondent refused to accommodate Petitioner's work restrictions and failed to allow him to return to work. There is no dispute that Petitioner was terminated by Respondent. Moreover, Respondent refused all requests for vocational rehabilitation and maintenance benefits under § 8(a).

Therefore, the Arbitrator finds that Respondent unreasonably and vexatiously denied approval

for the repeat arthroscopic shoulder surgery and payment of Petitioner's workers' compensation benefits. *McMahan v. Industrial Commission*, 183 Ill.2d 499, 702 N.E.2d 545, 234 Ill.Dec. 205 (1998). The Arbitrator awards Petitioner 19(k) penalties in the amount of $ 6,343.33 (TTD benefits $ 12,686.55 x 50% = $ 6,343.33) along with § 16 attorney's fees in the amount of $ 1,268.66 representing 20% of the 19(k) penalty.

ISSUE M -- 8(J) CREDIT

Respondent offered into evidence an itemized summary of the workers' compensation benefits paid to Petitioner, along with copies of the cancelled checks. (Rx.1). The itemized **[*40]** summary of benefits contains both TTD payments and **permanency** payments (advances) paid to Petitioner. (Rx. 1).

The matter comes before the Arbitrator pursuant to Petitioner's 19(b) Petition for Immediate hearing and the nature and extent of Petitioner's permanent injuries are not an issue at trial. Therefore, Respondent is not entitled to an 8(j) credit for permanency payments against the workers' compensation benefits awarded pursuant to the 19(b) Petition for Hearing. Consequently, the Arbitrator finds that Respondent is entitled to an 8(j) credit of $ 27,357.47 as reflected in Rx. 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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CASE # 01 WC 059280 CONNECTED HEARING LOCATION
EMPLOYEE PATEL, NARESH MCHENRY GOVERNMENT CENTER
EMPLOYER THE HOME DEPOT INC 2200 N SEMINARY ROOM A140
SETTING WOODSTOCK WOODSTOCK IL 60098
ARBITRATOR ERBACCI, ANTHONY ACCIDENT DATE 09/03/00
COMMISSIONER DONOHOO, DANIEL CASE FILED 10/25/01
BODY PART MULTIPLE PARTS N/A

EMPLOYEE ATTORNEY	EMPLOYER ATTORNEY
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STATUS CONTINUED AT ARBITRATION

STATUS CALL	FIRST	12/12/01	LAST	10/05/11	NEXT	03/07/12
REVIEW	FIRST	00/00/00	LAST	00/00/00	NEXT	00/00/00
RETURN	FIRST	07/02/04	LAST	00/00/00	NEXT	07/02/04
ORAL	FIRST	08/01/05	LAST	00/00/00	NEXT	00/00/00

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