

Workers' Compensation Report

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Employers Not Entitled to Temporary Total Disability Credit in § 19(g) Proceedings

The Illinois Workers' Compensation Commission does not have authority to enforce awards that it enters. Enforcement is vested with the circuit court under § 19(g) of the Act. Section 19(g) provides a procedure in which 'either party' may seek entry of a judgment on an award of the arbitrator or decision of the Commission, 820 ILCS 305/19(g). Although rare, employers have sought relief under § 19(g). *See, e.g., Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 639 N.E.2d 1282 (1994).

Recently the Illinois Appellate Court, First District, addressed the issue of whether an employer may be entitled to a credit and, in essence, a reduced judgment in § 19(g) proceedings. In *Patel v. Home Depot USA, Inc.*, 2012 IL App (1st) 103217, the appellate court held that an employer, Home Depot, was not entitled to a credit for temporary total disability (TTD) overpayments against an award for unpaid TTD, and was further subject to attorneys' fees and costs as a penalty for not paying the award.

In *Patel*, the arbitrator entered an award for the petitioner for \$22,798.54 in TTD benefits, penalties, and attorneys' fees. The arbitrator also granted Home Depot a credit for \$27,357.47 pursuant to § 8(j) for TTD benefits previously paid. Home Depot had periodically paid and terminated TTD benefits from November 2001 through mid February 2003. Home Depot refused to pay TTD benefits after mid February 2003. Upon arbitration the arbitrator found that the petitioner was entitled to TTD benefits from February 14, 2003 through October 20, 2003. Home Depot sought review of the arbitrator's decision and successfully secured a Commission decision increasing the credit to \$32,357.47. The Commission further noted that the credit was not a credit under § 8(j) of the Act. The petitioner sought payment of the original award of \$22,798.54. Home Depot refused to respond presumably based upon the credit exceeding the award.

The petitioner filed a petition in the circuit court under § 19(g) seeking entry of judgment and payment of the award. Home Depot sought dismissal of the application for judgment on the grounds that Home Depot did not owe Patel anything as the credit exceeded the original award. The circuit court denied Home Depot's motion and ultimately entered judgment in favor of the petitioner for unpaid TTD of \$22,798.54, attorneys' fees of \$47,000, costs of \$5,315.31 and interest of \$13,679.08. Home Depot appealed the circuit court's order arguing that the court improperly denied its motion to dismiss. The appellate court disagreed.

The appellate court found that, "although Home Depot may ultimately obtain the credit the arbitrator and Commission granted, it is not entitled to a credit under § 19(g)." *Patel*, 2012 IL App (1st) 103217, ¶ 15. Relying upon *Illinois Graphics Co. v. Nickum*, the court pointed out that under *Illinois Graphics* a judgment under § 19(g) must be a judgment 'providing for the payment of compensation according to this Act.' *Patel*, 2012 IL App (1st) 103217, ¶ 16 (citing *Nickum*, 159 Ill. 2d at 480. *Illinois Graphics* sought a judgment for what was a TTD credit for TTD paid on a claim found non-compensable by the arbitrator and Commission. *Id.* at 473-74. The *Patel* court pointed out that under *Illinois Graphics* the remedy under [§] 19(g) is limited to decisions which "provide for the payment of compensation benefits." *Id.* at 480. Accordingly since the sole

issue before the *Illinois Graphics* court was a TTD credit, it was not properly brought under §19(g) as the underlying Commission decision did not “provide for the payment of compensation.” In *Patel*, the court pointed out that under *Illinois Graphics* the employer’s remedy was at common law.

The *Patel* court further relied upon the post *Illinois Graphics*’ decision of *Karastamis v. Industrial Commission*, 306 Ill. App. 3d 206, 713 N.E.2d 161 (1st Dist. 1999). In *Karastamis* the appellate court noted that issues of recoupment restitution or reimbursement are not decisions “providing for payment of benefits.” 306 Ill. App. 3d at 215. The *Karastamis* court acknowledged that although § 19(g) states that both an employer and an employee may seek relief under § 19(g) it is only an employee who may have a decision providing for the payment of benefits. *Id.* Home Depot argued that, unlike *Illinois Graphics*, they were not attempting to recover an overpayment from the petitioner but were merely seeking to offset the credit against the benefits award. Home Depot relied, in part, upon the court’s decision in *Messamore v. Industrial Comm’n*, 302 Ill. App. 3d 351, 706 N.E.2d 44 (4th Dist. 1999). In *Messamore*, the employer overpaid a TTD award which had been miscalculated due to a clerical error by the arbitrator. On review, the Commission corrected the error and awarded the defendant a credit for the payment against the PPD award. The *Messamore* court held that an employer can apply a TTD credit against an award for PPD *or other benefit paid after the TTD overpayment*. The *Messamore* court further distinguished *Illinois Graphics* by pointing out that in *Illinois Graphics* the defendant brought the § 19(g) claim for overpayment and was not, in fact, seeking a credit against future payments.

In *Patel*, the court distinguished *Messamore* pointing out that the provisions of § 19(g) were not at issue in *Messamore*. Unlike *Messamore* the provisions of § 19(g) controlled the *Patel* court’s analysis. The court concluded:

The fact that Home Depot inadvertently overpaid on the benefits for a certain time period is not something for which § 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 overpayment by filing a claim under § 19(g), it cannot apply its credit for the overpayment to avoid an entry of judgment pursuant to § 19(g).

Patel, 2012 IL App. (1st), 103217, ¶ 20.

The appellate court’s decision creates an artificial distinction between awards for benefits to the petitioner versus an employer credit for overpayment. Moreover, the court refused to recognize that the underlying decision of the Commission *specifically* found that the petitioner’s award of \$22,798.54 was subject to the credit of \$32,357.47. The net sum that should be payable to the employee is zero under the terms of the award and subsequent Commission decision. According to the *Patel* court, however, the language of § 19(g) precludes the court from recognizing the employer’s credit. As stated by the court, “although Home Depot may ultimately obtain the credit the arbitrator and the Commission granted, it is not entitled to that credit under § 19(g).” The appellate court appears to leave open the issue of whether an employer may be entitled to a credit for overpaid TTD benefits against an award for future PPD benefits in a § 19(g) proceeding. The court distinguished *Messamore* in part by pointing out that the *Messamore* case involved a credit against *future* PPD payments.

The *Illinois Graphics* case is, in fact, distinguishable from *Patel*. In *Illinois Graphics*, the issue was whether *Illinois Graphics* could acquire a judgment against *Nickum* solely for the overpaid benefits. In *Patel*, however, it was the employee/petitioner, Naresh Patel, who was seeking judgment under that portion of the decision that awarded TTD. In essence, Home Depot merely asked that the circuit court and appellate court enforce the Commission decision *as entered*. That decision left the employee with a net recovery of zero. As stated by the Supreme Court in *Illinois Graphics*, the allowance of a credit within a decision or award merely serves to reduce the total payment of compensation benefits. That very concept was not at issue before the court in *Illinois Graphics v. Nickum, Id.* That issue, however, was presented by the credit claimed by Home

Depot. Furthermore, unlike *Illinois Graphics*, the court in *Patel* did not face an issue of an employer seeking “full recoupment, restitution or reimbursement” as was presented in the *Illinois Graphics* case.

An unjust result certainly arises when a petitioner is allowed to seek entry of judgment for benefits that were granted while ignoring the employer’s credit as awarded to the employer in that award or decision. The result becomes even more troubling when, as in *Patel*, the employee also receives attorneys’ fees, costs and interest in the § 19(g) judgment. The employer’s remedy as noted in *Patel*, is to bring an action against the employee at common law. Unfortunately, that places the employer in the difficult position of possibly never recovering the award.

Pursuant to the *Patel* decision, employers who receive a credit for overpayment of TTD benefits will effectively be required to pay the gross amount awarded to the petitioner in order to avoid 19(g) proceedings. If § 19(g) proceedings are filed, the employer risks additional damages of attorney’s fees, interest and costs. The employers’ remedy, according to the *Patel* court, is to file a civil action against the employee for the amount of the credit. One may seriously question whether such a result is consistent with the legislators’ intent when drafting § 19(g). Hopefully this question will be pushed to the Illinois Supreme Court. If anything, this underscores the need for *all* appeals involving § 19(g) cases to be heard by the Appellate Court, Workers’ Compensation Commission Division, which has specialized knowledge in the workers’ compensation system.

About the Author

Bradford J. Peterson is a partner in the Urbana office of *Heyl Royster Voelker & Allen, P.C.* Brad concentrates his practice in the defense of workers’ compensation, construction litigation, auto liability, premises liability and insurance coverage issues. In recent years, Brad has become a leader in the field on issues of Medicare Set Aside trusts and workers’ compensation claims. He has written and spoken frequently on the issue. He was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers’ compensation claims “Medicare, Workers’ Compensation and Set Aside Trusts,” *Southern Illinois Law Journal* (2002).

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