

# SURVEY OF ILLINOIS LAW: WORKERS' COMPENSATION—UNDERSTANDING INTEREST AND ENFORCEMENT ISSUES IN WORKERS' COMPENSATION CASES FOLLOWING AN AWARD OF BENEFITS

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- I. To What Portions of the Award Does Interest in a Section 19(g) Proceeding Attach?
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The end of a workers' compensation claim is signaled by a final decision that is no longer appealed or by the approval of a settlement contract. In cases resolved short of settlement, two of the lingering questions are whether interest is applicable to the award, once final, and if so, in what amount? Although interest is provided for by section 19(n) of the Workers' Compensation Act, the wording of the statute is not crystal clear. Moreover, the case law interpreting the interest provisions of section 19(n) is confusing and has taken many different avenues over the years. Practitioners are left wondering to what portion of the award section 19(n) interest applies. How can I avoid interest? When does the higher nine percent judgment interest rate of section 2-1303 of the Code of Civil Procedure apply?

Regardless of how a case is resolved, another significant issue arises if the party against whom the award was rendered—the employer—fails to pay the award, either at all or in a timely manner. In such cases, what are the procedures to reduce the Commission's decision to judgment and how are such awards enforced? What attorneys' fees and costs are recoverable and at what rate is interest computed on the amounts owed? Some of these questions are answered by section 19(g) of the Workers' Compensation Act, while others remain unclear.

This article touches upon two often neglected topics in Illinois workers' compensation law; the calculation of interest on a workers' compensation award and the litigation of a section 19(g) proceeding to enter judgment on a Commission decision. Both issues are significant to practitioners on both sides of the proverbial litigation fence. Unfortunately, both issues are also often neglected by case law and even when covered in decisions, are murky even to the experienced workers' compensation litigator.

## I. AWARDS OF INTEREST ON DECISIONS

An award of interest after a decision is governed by section 19(n) of the Act. According to that section:

After June 30, 1984, decisions of the Illinois Workers' Compensation Commission reviewing an award of an arbitrator of the Commission shall draw interest at a rate equal to the yield on indebtedness issued by the United States Government with a 26-week maturity next previously auctioned on the day on which the decision is filed. Said rate of interest shall be set forth in the Arbitrator's Decision. Interest shall be drawn from the date of the arbitrator's award on all accrued compensation due the employee through the day prior to the date of payments. However, when an employee appeals an award of an

Arbitrator or the Commission, and the appeal results in no change or a decrease in the award, interest shall not further accrue from the date of such appeal.

The employer or his insurance carrier may tender the payments due under the award to stop the further accrual of interest on such award notwithstanding the prosecution by either party of review, *certiorari*, appeal to the Supreme Court or other steps to reverse, vacate or modify the award.<sup>1</sup>

Under recent decisional authority, section 19(n) interest applies from the date the arbitration decision is filed through the date prior to the day of payment on those unpaid amounts under the award.<sup>2</sup> In most cases, this calculation is relatively simple and examples will be provided later in the text.<sup>3</sup>

Yet questions remain concerning the appropriate interest rate and its commencement date once the Commission's decision is reduced to judgment under section 19(g). According to one recent appellate court majority decision, section 2-1303's higher nine percent interest not only applies to a Commission's decision once it has been reduced to judgment, but the higher rate applies retroactively to all unpaid amounts of the award back to the date of the initial award. In other words, the nine percent judgment interest applies to dates prior to the entry of judgment and the employer is subjected to nine percent interest from the date of arbitration or the date of the Commission's award.

Moreover, there is a current dispute among the petitioner and respondent's workers' compensation bar in Illinois as to whether section 2-1303 judgment interest applies once the circuit court rules on a section 19(f) judicial review. Petitioner's counsel across the state have recently been demanding section 2-1303's nine percent judgment interest following the resolution of a judicial review to the circuit court or an appeal to the appellate court. This article examines that issue and rejects the reasoning of the petitioner's bar, pointing out that judgment interest can only commence once a judgment has been entered via section 19(g). The Commission's decision is not a final judgment.

#### A. Historical Perspective

The imposition of interest on an award has taken many variations over the years, and has frequently involved the interplay between the Act and the

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1. 820 ILL. COMP. STAT. 305/19(n) (2015).

2. See *Radosevich v. Indus. Comm'n*, 367 Ill. App. 3d 769, 778, 856 N.E.2d 1, 9 (4th Dist. 2006); see also *Sunrise Assisted Living v. Banach*, 2015 IL App (2d) 140037, ¶ 32.

3. See *infra* pp. 14–16 and accompanying text and notes.

various Illinois interest statutes. The following section provides a background on the imposition of interest on a workers' compensation award and shows how we have reached the point, often of confusion, that we are at with today's statutory provisions.

Prior to 1975, the provisions of the section 3 of the Interest Act applied to judgments entered on Industrial Commission awards.<sup>4</sup> According to section 3, "[j]udgments recovered before any court or magistrate shall draw interest at the rate of 6% per annum from the date of the same until satisfied."<sup>5</sup> However, section 3 judgment interest did not apply to proceedings involving reviews of a Commission decision. Thus, prior to the enactment of section 19(n), interest could only be awarded in proceedings under section 19(g) of the Act filed in the circuit court to reduce the Commission's decision to judgment.<sup>6</sup> Therefore, no interest could be awarded unless the claimant pursued a section 19(g) proceeding.<sup>7</sup>

As a result of this discrepancy, in 1975 the Illinois General Assembly enacted section 19(n) of the Act to specifically govern interest in workers' compensation cases that were beyond the reach of section 3.<sup>8</sup> Section 19(n), as then in effect, read: "[a]ll decisions of the Industrial Commission confirming or increasing an award entered by an arbitrator of the Commission shall bear interest at the rate of 6% per annum from the date of the arbitrator's award on all compensation accrued."<sup>9</sup>

As is apparent from the face of the amended Act, section 19(n) as initially enacted retained the six percent judgment interest rate used by the judgment interest statute, but simply applied it to the Commission's award from the date of arbitration through payment. Section 19(n) further permitted the employer or his insurance carrier to "tender the payments due under the award to stop the further accrual of interest on such award notwithstanding the prosecution by either party of review, certiorari, appeal to the Supreme Court or other steps to reverse, vacate or modify the award."<sup>10</sup>

In *Bray v. Industrial Comm'n*,<sup>11</sup> the appellate court commented on the interplay between the new section 19(n) and the former section 3, which by then had been superceded by section 2-1303, stating:

It seems clear that section 19(n) was enacted to provide authority for the assessment of interest in those cases which were otherwise excluded from

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4. Ill. Rev. Stat. 1973, ch. 74, §. 3.

5. *Id.* See also *Bray v. Indus. Comm'n*, 161 Ill. App. 3d 87, 93, 513 N.E.2d 1045, 1049 (1st Dist. 1987).

6. *Aper v. National Union Electric Corp.*, 165 Ill. App. 3d 482, 486, 519 N.E.2d 117, 120 (4th Dist. 1988).

7. See *Proctor Comty. Hosp. v. Indus. Comm'n*, 50 Ill. 2d 7, 9, 276 N.E.2d 342, 343 (1971) (discussing an appeal of a circuit court ruling under section 19(g) to reduce the Commission's decision to judgment and to initiate enforcement).

8. *Bray*, 161 Ill. App. 3d at 93, 513 N.E.2d at 1049.

9. Ill. Rev. Stat. 1975, ch. 48, § 138.19(n).

10. *Id.*

11. *Bray*, 161 Ill. App. 3d at 87, 513 N.E.2d at 1045.

obtaining an award of interest under the interest statute, but does not otherwise affect the applicability of that statute to awards under the Workers' Compensation Act.<sup>12</sup>

This comment from *Bray* seems to have been lost on some of the decisions rendered by the appellate court and Supreme Court during the 1980s and early 1990s, as they struggled to determine the applicability of each statutory provision.

In 1984, the General Assembly amended section 19(n), leading to the current statutory language in place today.<sup>13</sup> As amended, section 19(n) reads, in pertinent part:

After June 30, 1984, decisions of the Illinois Workers' Compensation Commission reviewing an award of an arbitrator of the Commission shall draw interest at a rate equal to the yield on indebtedness issued by the United States Government with a 26-week maturity next previously auctioned on the day on which the decision is filed.<sup>14</sup>

The amendment also provided: “[h]owever, when an employee appeals an award of an Arbitrator or the Commission, and the appeal results in no change or a decrease in the award, interest shall not further accrue from the date of such appeal.”<sup>15</sup>

Two changes are significant. First, the 1984 amendment changed the previously fixed six percent interest rate to a variable rate based on the federal yield on indebtedness.<sup>16</sup> In part, this was due to the exceeding high rates of interest that were prevalent in the early 1980s<sup>17</sup> and, at least according to one source, was due to “the obvious inequalities of the insurance companies paying merely 6 percent interest on compensation awards.”<sup>18</sup>

This aspect of the 1984 amendment was interpreted in *Hughes v. Industrial Commission*,<sup>19</sup> where the appellate court commented on the reasoning underlying the amendment, and noted that it believed section 19(n), as amended, was intended to reduce the employer's cost when not paying an award. In *Hughes*, the appellate court observed: “[o]ur review of the legislative history . . . [indicates that] the amendments to section 19(n)

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12. *Id.*

13. Ill. Rev. Stat. 1985, ch. 48, § 138.19(n).

14. 820 ILL. COMP. STAT. 305/19(n) (2015).

15. *Id.*

16. *Id.*

17. R. WAYNE HARVEY, *The “Thankless Task” of Computing Interest on Workers’ Comp Awards*, 80 ILL. B.J. 510, 512, n. 15 (1992). The author noted that the average U.S. bond yields of the day ranged from 15 percent in 1981 and 1982, to 12 and 13 percent in 1983 and 1984 respectively.

18. *Id.* at 512.

19. *Hughes v. Indus. Comm’n*, 196 Ill. App. 3d 143, 147, 553 N.E.2d 113, 150 (4th Dist. 1990).

were intended merely to decrease the interest rate applicable to those sums . . . [and] to save the employer community an estimated \$40 million per year.<sup>20</sup>

This seems to contradict some of the remarks made during the legislative discussions of the amendment, notably that by Senator George E. Sangmeister, who stated that “the interest rate will be . . . at six month T-bill rates from the time the decisions is filed.”<sup>21</sup> At that time, the section 19(n) interest rate would have been thirteen percent.<sup>22</sup>

As a second change, the 1984 amendment stopped the accrual of interest on an award where: (1) the claimant appeals the arbitration or Commission decision; and (2) the appeal results in no change or a decrease in benefits.<sup>23</sup> Thus, if the employee appealed an award of fifty percent permanent partial disability as to a leg, and the decision was affirmed or reduced on appeal, the employer would owe no interest from the time of the appeal forward, but rather only from the date of the arbitrator’s decision to the filing of the appeal. This litigation stands in contrast to the 1975 version of section 19(n), which terminated the accrual of interest only when the Commission reduced, but not when it affirmed, the arbitrator’s award. Moreover, the pre-1984 version did not make any distinction between an appeal initiated by the claimant or the employer.<sup>24</sup>

Although no proposals for modifying section 19(n) are currently in Springfield, it is worth noting that the courts have routinely held that the version of the statute controlling any given case depends on the version in effect on the date of the award.<sup>25</sup> Thus, it was possible for a 1981 accident, if the arbitrator’s award was not entered until after June 1984, to have interest determined under the 1984 amendments.

## B. Questions Emanating from the Current Statute

Due to the often confusing decisions rendered over the past twenty-five years, a number of questions remain as to how section 19(n) works and when interest is awardable—and at what rate—on a Commission’s decision. In the paragraphs below, we attempt to provide some answers, and at a minimum, identify for the reader controversies that still remain some thirty years after the passage of the current section 19(n).

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20. *Id.*

21. *Harvey*, *supra* note 17, at 512, n. 18 (quoting Minutes from Senate Floor Session, June 30, 1984).

22. As pointed out later in this article, the current August 2015 interest rates, based on the 26-month T-bills, is roughly 0.21 %.

23. *Harvey*, *supra* note 17, at 512.

24. *See, e.g.*, *Kuhl v. Indus. Comm’n*, 147 Ill. App. 3d 519, 524, 498 N.E.2d 240, 243 (3d Dist. 1986).

25. *Id.* at 519, 526–27; *Fregeau v. General Foods Corp.*, 224 Ill. App. 3d 764, 766, 585 N.E.2d 627, 629 (3d Dist. 1992).

1. *How is the interest rate set?*

The current version of section 19(n) retreated from the higher six percent interest rate of its predecessor and adopted a floating rate based on the indebtedness yield of United States Treasury Bills “with a 26-week maturity next previously auctioned on the day on which the decision is filed.”<sup>26</sup> These rates are now set forth on the Internet and are much easier to locate than in prior years.<sup>27</sup> Under the current statutory language, an arbitrator’s decision filed on August 27, 2015, would use the Treasury rate for August 26, 2015, of 0.20 percent.<sup>28</sup>

The rate is almost always stated within the arbitrator’s decision and is worded as follows: “[i]f the Commission reviews this award, interest of XX percent shall accrue from the date listed above 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.”<sup>29</sup> If the arbitrator’s decision does not contain this rate, a practitioner may call the Commission and ask for the rate or may consult the chart listed on the Internet. Under no circumstances, however, is the arbitrator or Commission’s failure to include a statement as to section 19(n) interest fatal to the claimant’s ability to recover section interest.<sup>30</sup>

It is also worth noting that interest under section 19(n) is self-executing and therefore, no motion for interest is necessary under the Act.<sup>31</sup> That being said, the cases appear to suggest that the Commission is without authority to enforce an award of interest.<sup>32</sup> In *Saldana v. American Mutual Corp.*,<sup>33</sup> the Appellate Court, First District, held that the Commission lacked the authority to enter judgment for the payment of interest, and thus, the claimant was not required to go before the Commission to exhaust all administrative remedies prior to seeking interest under section 19(g).<sup>34</sup>

In *Hughes v. Industrial Comm’n*, the Appellate Court, Fourth District, reached the opposite conclusion, rejecting *Saldana* and finding that the

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26. 820 ILL. COMP. STAT. 305/19(n) (2015).

27. U.S. DEP’T OF THE TREASURY, DAILY TREASURY BILL RATES DATA, available at <http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billrates>.

28. *Id.* (see rates for 2015).

29. This is typical language found in an arbitration and Commission decision.

30. Fregeau, 224 Ill. App. 3d at 766, 585 N.E.2d at 629. (“[T]he Commission’s failure to affirmatively provide for interest in its decision is ... not material.”).

31. *Saldana v. Am. Mutual Corp.*, 97 Ill. App. 3d 334, 339, 422 N.E.2d 860 863 (1st Dist. 1981) (interpreting the 1977 version of section 19(n)).

32. *See id.*

33. *Id.*

34. *Id.*

Commission did have such authority.<sup>35</sup> Relying on the prior Illinois Supreme Court decision in *Keystone Steel & Wire Co. v. Industrial Comm'n*,<sup>36</sup> which said that interest accrued under section 19(n) “should properly be computed by the Industrial Commission,”<sup>37</sup> the *Hughes* court found that the Commission does have jurisdiction to determine interest due under section 19(n). However, in *Keystone*, the Court was construing a petition brought under section 8(f) to modify a prior permanent total disability award and not a motion to enforce interest. The Commission in *Keystone* had awarded section 19(n) interest as part of its overall penalty against the employer. Whether *Hughes*’ interpretation is truly correct is unknown. However, re-reading *Saldana*’s reasoning shows that it is in fact consistent with the decisions holding that a Commission’s decision is not a judgment and, therefore, not enforceable absent a section 19(g) proceeding.<sup>38</sup> If a Commission decision must be reduced to a judgment per section 19(g) before it can be enforced, then *Saldana*’s remarks that the Commission does not have the power to enter judgment or enforce collection make perfect sense.<sup>39</sup>

## 2. When is interest owed?

Interest is owed on the *unpaid* amounts of the award through the day prior to the date of payment.<sup>40</sup> Specifically, section 19(n) provides: “[i]nterest shall be drawn from the date of the arbitrator’s award on all accrued compensation due the employee through the day prior to the date of payments.”<sup>41</sup>

However, when an employee appeals an arbitrator or Commission award, and the appeal results in no change or a decrease in the award, “interest shall not further accrue from the date of such appeal.”<sup>42</sup>

In *Hillyer v. Owens Illinois Glass Co.*, the Appellate Court, Third District, held that the employers’ obligation to pay interest ceased where the

35. 196 Ill. App. 3d 143, 145, 553 N.E.2d 113, 114 (4th Dist. 1990).

36. 85 Ill. 2d 178, 421 N.E.2d 918 (1981) (interpreting the 1977 version of section 19(n)).

37. *Id.* at 188, 421 N.E.2d at 922.

38. *See, e.g.*, *Blacke v. Indus. Comm’n*, 268 Ill. App. 3d 26, 28, 644 N.E.2d 23, 24 (3d Dist. 1994).

39. *See Saldana*, 97 Ill. App. 3d at 339, 422 N.E.2d at 863.

40. 820 ILL. COMP. STAT. 305/19(n) (2015); *Radosevich v. Indus. Comm’n*, 367 Ill. App. 3d 769, 778, 856 N.E.2d 1, 8 (4th Dist. 2006). Here, after reviewing several of the prior appellate court decisions interpreting section 19(n), the appellate court stated, “[c]ases such as *Ballard* and *Folks* are cited for the proposition that a claimant is not entitled to section 19(n) interest on benefits that accrued after the arbitrator’s award. *Radosevich*, 367 Ill. App. 3d at 778, 856 N.E.2d at 8. However, upon further review of these cases and the clear language of section 19(n), specifically that ‘[i]nterest shall be drawn from the date of the arbitrator’s award,’ we decline to follow *Ballard*, *Folks* and cases with similar holdings.” *Id.* Although not specifically stated in the *Radosevich* opinion, it appears the court, when stating “cases with similar holdings,” may have been referring to the decisions in *Fregeau*, *Ponthieux v. Fernandes*, 278 Ill. App. 3d 104, 662 N.E.2d 169 (4th Dist. 1996), and *Pierce v. Tee-Pak, Inc.*, 196 Ill. App. 3d 544, 553 N.E.2d 1104, (4th Dist. 1990), all of which made similar rulings bifurcating the period to which interest applies.

41. 820 ILL. COMP. STAT. 305/19(n) (2015).

42. *Id.*



employers filed an appeal challenging a Commission decision, but the claimants filed a cross appeal seeking an increase in permanency benefits.<sup>43</sup> There, in consolidated cases, the appellate court affirmed the Commission's decisions, including the amount of permanency, resulting in no change in the award. The employers in both cases paid the award, but no interest. Both claimants filed section 19(g) actions seeking interest, as well as costs and attorneys' fees. The circuit court declined to award interest, finding that the claimants had filed an appeal under section 19(n), even though it was a cross appeal. The appellate court affirmed, noting that both parties had appealed the Commission's decision, which brought the case within the language of section 19(n).<sup>44</sup>

### 3. On what amounts of an award is interest owed?

The question on what amounts is interest applicable was only recently settled with the December 2005 appellate court decision of *Vulcan Materials Co. v. Industrial Comm'n*.<sup>45</sup> Prior to *Vulcan Materials*, interest was not available on medical benefits because these were not considered "compensation" under the Act, and interest applied only to awards of benefits such as total temporary disability and permanency disability benefits.<sup>46</sup> *Vulcan Materials* clarified the law, holding that medical benefits are indeed compensation and accordingly interest does attached to the award of medical benefits.<sup>47</sup> Thus today, an arbitrator or Commission decision awarding TTD benefits, medical benefits, and permanency draws interest on *all* aspects of the award from the date of the decision forward.

To illustrate, suppose the arbitrator's decision issues an award as follows:

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43. 183 Ill. App. 3d 864, 866, 539 N.E.2d 854, 855 (3d Dist. 1989).

44. *Id.* at 867, 539 N.E.2d at 855. Of interest, the appellate court also denied any interest under section 2-1303, finding that the claimants had failed to raise it in the circuit court, and thus waived the issue. *Id.* at 867, 539 N.E.2d 856. Moreover, the appellate court upheld the circuit court's denial of attorneys' fees and costs, noting that the employers had paid the outstanding award, and that under section 19(g), had paid the compensation due. *Id.*

45. *Vulcan Materials Co. v. Indus. Comm'n*, 362 Ill. App. 3d 1147, 1151, 842 N.E.2d 204, 207 (1st Dist. 2005). The *Vulcan Materials* court relied heavily upon *McMahan v. Indus. Commission*, 183 Ill. 2d 499, 702 N.E.2d 545 (1998), which held that medical benefits are "compensation" under the Act, and *Legris v. Indus. Commission*, 323 Ill. App. 3d 789, 754 N.E.2d 402 (4th Dist. 2001), which held that medical benefits were compensation for the purposes of determining compliance with the statute of limitations under section 6(d) of the Act. *Vulcan Materials Co.*, 362 Ill. App. 3d at 1150-51, 842 N.E.2d at 207.

46. *Folks v. Hurlburt's Wholesale Siding & Roofing, Inc.* 93 Ill. App. 3d 19, 22, 416 N.E.2d 745, 748-49 (4th Dist. 1981). In *Folks*, the appellate court held that the furnishing of medical services was not "compensation" within the meaning of section 8(a) and thus not compensation under section 19(n). *Id.*

47. *Vulcan Materials*, 362 Ill. App. 3d at 1152, 842 N.E.2d at 207.

Total temporary disability benefits	\$22,578.00
Medical benefits	\$76,112.00
Permanency benefits	\$97,650.00
Total award =	\$196,340.00

If the decision was filed on January 17, 2013, the section 19(n) interest rate would be 0.11 percent. Annual interest on this award would then be \$215.97, and daily interest would be \$0.59.

Even so, an employer's credits must be taken into account. Thus, if a decision involves a credit to the employer for overpayment of TTD benefits or medical or an advance of permanency benefits, those amounts must be subtracted from the total amount of the award before interest can be calculated.<sup>48</sup> Using the above example as an illustration, if the employer had paid a portion of the TTD benefits and a portion of the medical benefits, the amount of the award subject to interest would be less. If the employer had paid \$15,000 in TTD benefits and \$55,250 in medical benefits, the adjusted unpaid balance would equal \$126,090, and section 19(n) interest calculated on that amount would be \$138.70 annually, or \$0.38 per day.

Another aspect of the interest puzzle occurs where the Commission, on review, increases a portion of the award over and above that rendered by the arbitrator. In such a case, how is interest calculated on the modified award? Does interest apply on the entire award, as increased by the Commission, back to the date of the initial arbitration award, or does interest on the added amount commence only upon the Commission's ruling modifying and increasing the overall award? The same question applies when a lower tribunal decision—that of the arbitrator or the Commission—is modified and increased by the circuit court on judicial review.

This question was answered in *Kuhl v. Industrial Comm'n*,<sup>49</sup> where the arbitrator awarded total temporary disability (TTD) benefits, which were reduced by the Commission on review. On judicial review to the circuit court, the TTD benefits were reinstated and further increased. On the employer's appeal, the circuit court's order was affirmed. The employee then sought to enforce the judgment and the payment of interest for the entire cause. The circuit court awarded interest under section 19(n). On appeal, the appellate court held that there were two distinct periods of interest to which section 19(n) applied. The first period covered the original arbitration award of TTD benefits from its award through payment.

48. See *Fregeau v. General Foods Corp.*, 224 Ill. App. 3d 764, 766, 585 N.E.2d 627, 628 (3d Dist. 1992), for discussion that interest does not accrue on amounts paid, only those remaining unpaid.

49. *Kuhl v. Indus. Comm'n*, 147 Ill. App. 3d 519, 498 N.E.2d 240 (3d Dist. 1986).

The second period covered the circuit court's increase in benefits, and interest on that amount commenced upon the circuit court's order, and not the date of the original arbitration award. *Kuhl* makes sense in that the employer, prior to the circuit court's order, did not owe the additional amounts and could not, even had it wanted to, tender any amounts to toll that interest.

A different result occurs, however, where the initial arbitration award is categorized as a permanent partial disability (PPD) award and that award is modified by the Commission into a wage differential award. In *Ponthieux v. Fernandes*, the appellate court responded to this scenario by ordering that interest was due on the wage differential award from the date of the original arbitration award, despite the fact that the original award was rendered as a PPD benefit rather than a wage differential.<sup>50</sup>

Another situation of interest occurs where the arbitrator and Commission deny the claim, thus awarding no benefits, and the rulings are reversed by the circuit court on judicial review, and a new Commission decision is issued finding the claim compensable and awarding benefits. This exact scenario was presented in *Poe v. Industrial Comm'n*, where the appellate court held that interest would accrue only from the date of the Commission's second decision.<sup>51</sup> In support of its position, the appellate court stated: "[u]pon remand the exact amount of the employer's liability, if any, could not have been known until the Commission's subsequent decision had been rendered."<sup>52</sup>

The court then added:

Until the Commission's decision upon remand was rendered, the extent of the employer's liability and obligation was not settled. In short, while the cause was pending upon remand, a definite amount had not been set so that the employer had a reasonable opportunity to avoid accruing interest. Therefore, the circuit court properly denied the claimant an award of interest for the period of time from March 3, 1986, the date of the Commission's original award, to June 17, 1988, the date of the Commission's decision upon remand.<sup>53</sup>

Thus, under *Poe*, if the employer prevails until the matter goes on appeal, section 19(n) interest will not accrue until the Commission, on

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50. See 278 Ill. App. 3d 104, 114–15, 662 N.E.2d 169, 176 (4th Dist. 1996). Of interest, the court, in part per agreement of the parties, used the bifurcated interest formula from *Ballard* (which applies section 19(n) interest to those portions of the award that were accrued at the time of arbitration and applies section 2-1303 judgment interest to those portions of the award that accrued after the date of arbitration). Moreover, *Ponthieux* was an appeal following a section 19(g) proceeding.

53. *Poe v. Indus. Comm'n*, 230 Ill. App. 3d 1, 10, 595 N.E.2d 593, 599 (2d Dist. 1992).

52. *Id.* at 8–9, 595 N.E.2d at 598.

53. *Id.* at 8–9, 595 N.E.2d at 598.

remand, makes a determination as to the award. Interest will not begin on the date of the original arbitration.

#### 4. *An Example of How to Calculate Section 19(n) Interest.*

Most workers' compensation cases take years to resolve. This means there is often considerable time between the date of the arbitrator's award and the conclusion of the review/appeal process and ultimately payment of the award. Even assuming that the employer immediately pays an award following the conclusion of an unsuccessful appeal, interest calculations can be challenging.

To illustrate how to calculate the payment of interest over a multi-year case, assume the following example:

The claimant suffers a significant back injury on April 6, 2009. A claim is filed and the case is arbitrated in May 2011, resulting in an arbitration decision filed on July 11, 2011. The award breaks down as follows:

TTD benefits	=	\$119,117.13 (\$636.99 x 187 weeks)
Medical benefits	=	\$165,010.07
PPD benefits	=	\$214,875.00 (\$573 x 375 weeks (75% person))
Total award	=	\$499,002.20

The applicable interest rate per section 19(n) is set at 0.07 percent based on the yield for July 9, 2011. The case is appealed without success by the employer to the Commission, circuit court, and ultimately the appellate court, which affirms the Commission's award on August 10, 2014. The employer pays the award on August 14.

Because no payments were made and there were no credits applicable, interest is calculated on the *entire* amount due and owing of \$499,002.02, which yields \$349.30 per year, or \$0.96 per day. The total interest owed is \$1,078.62, representing three years and 32 days the time between the arbitration award on July 11, 2011 and payment on August 12, 2014.

A more difficult calculation ensues if the award is for a wage differential or for a permanent total disability benefit, which are paid weekly. In most cases, there is some period of time between the claimant reaching maximum medical improvement (MMI) and the award of permanency benefits, so there will usually be a small lump sum paid representing the permanency owed from MMI to the arbitration date, and then the weekly amounts commence thereafter. The interest calculation remains the same for the amounts paid per lump sum, but interest payable

on the weekly benefits, to be completely accurate, must be calculated individually. For example, if the wage differential is \$275 per week and the employer owed the claimant for 60 weeks (\$16,500) representing the time post arbitration for any review, the first weekly payment owed would have interest calculated at 60 weeks; the second weekly payment owed (one week later) would have interest calculated at 59 weeks, and so forth.

Theoretically, applying the interest rate to the total amount owed of \$16,500 for the entire 60 weeks produces a windfall for the employee. Realistically, however, with the interest rates currently so low, most employers simply use this methodology and pay interest on the \$16,500 based on the entire 60 weeks rather than spend the attorneys' fees calculating the interest based on individual weeks. Just to illustrate, using the 0.07 percent rate from the example above would yield interest of \$11.55 on the \$16,500. In contrast, calculating interest based on a stream of payments would be much less, but would likewise be cost-prohibitive to calculate, once we factor in attorneys' fees to make the calculation.

*5. Is section 2-1303's interest applicable to a circuit court judicial review decision?*

As mentioned above, a recent development in Illinois workers' compensation practice has been the effort by a sizeable number of petitioner's attorneys to demand section 2-1303's statutory nine percent judgment interest on a Commission award once confirmed by the circuit court on appeal. According to these attorneys, once the circuit court confirms the lower tribunal's decision awarding benefits, the Code of Civil Procedure applies and section 19(n) interest ceases to be applicable.

Despite these assertions, the law is clear that a Commission's decision is not a judgment.<sup>54</sup> A circuit court on judicial review exercises special jurisdiction and may only exercise those powers conferred by the statute.<sup>55</sup> In a judicial review, that statute is section 19(f), which empowers the circuit court to confirm or set aside the Commission's decision.<sup>56</sup> According to the Illinois Supreme Court, "[i]f it confirms the decision it has no authority to enter a money judgment for the amount of the award nor to order execution to issue."<sup>57</sup> Moreover, the Supreme Court said, "[i]n a proceeding to review

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54. *Blacke v. Indus. Comm'n*, 268 Ill. App. 3d 26, 28, 644 N.E.2d 23, 24 (3d Dist. 1994); see *Sunrise Assisted Living v. Banach*, 2015 IL App (2d) 140037, ¶ 32.

55. *Grollemond v. Indus. Comm'n*, 5 Ill. 2d 541, 550, 126 N.E.2d 211, 217 (1955).

56. 820 ILL. COMP. STAT. 305/19(f) (2015).

57. *Interlake Steel Corp. v. Indus. Comm'n*, 60 Ill. 2d 255, 262, 326 N.E.2d 744, 748 (1975). *Interlake Steel* involved a judicial review of a Commission decision wherein the claimant sought to impose interest on the employer as part of the circuit court's entry of judgment confirming the Commission's decision.

an award of the Industrial Commission the circuit court has no authority to tax interest in entering its judgment confirming the award.”<sup>58</sup>

That section 2-1303 judgment interest is unavailable until the commencement of a section 19(g) proceeding makes sense, when one considers that the Commission’s decision, without more, is *not* a judgment.<sup>59</sup> By its own terms, section 2-1303 is limited in application to judgments, which on its face disqualifies section 2-1303 until a judgment is entered on the Commission award through an appropriate section 19(g) proceeding. An additional compelling ground also exists for this conclusion applying section 19(n) to all interest issues on an award prior to the entry of judgment pursuant to section 19(g) is wholly consistent with limiting section 2-1303 to those instances where unpaid awards remain following entry of the section 19(g) judgment order. In reading each statute in this manner, both are given effect and neither statute is rendered meaningless. Indeed, interpreting section 2-1303 as applying in any setting beyond that of a section 19(g) judgment would infringe upon the scope of section 19(n), and render it meaningless. As case law has held, “[s]tatutes which relate to the same thing or to the same subject or object are in *pari materia*, and should be construed together as though they were one statute, even though enacted at different times.”<sup>60</sup>

On a similar note, applying section 19(n) to all aspects of a workers’ compensation case through the resolution of appeal, and short of entry of an order of judgment from a section 19(g) proceeding, is consistent with the purpose behind enacting section 19(n). Clearly the passage of section 19(n) was intended to create a specific interest rate applicable to workers’ compensation decisions. The general rules of statutory construction clearly dictate that a specific statute governs over a more general statute.<sup>61</sup> Here, in some respects both section 19(n) and section 2-1303 are specific statutes—both have a targeted period to which they apply. Section 19(n) applies specifically to awards rendered by the arbitrator or Commission, while section 2-1303 applies specifically to judgments. In an overall sense, both are general statutes and give way to the other when they conflict.

Thus, section 19(n) interest applies through and until the award is paid, and until the claimant moves in a separate circuit court proceeding under section 19(g) to enter judgment and to enforce the judgment.<sup>62</sup>

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58. *Id.*

59. *Blacke*, 268 Ill. App. 3d at 28, 644 N.E.2d at 24; *Sunrise Assisted Living*, 2015 IL App (2d) 140037, ¶ 32.

60. *Spring Hill Cemetery v. Ryan*, 20 Ill. 2d 608, 614, 170 N.E.2d 619, 622 (1960). While a specific statutory provision controls over a general provision on the same topic, when two statutes relate to the same subject matter they should be construed harmoniously where possible. In *re Marriage of Pick*, 119 Ill. App. 3d 1061, 1065, 458 N.E.2d 33, 36 (2d Dist. 1983).

61. *People ex rel. Madigan v. Burge*, 2014 IL 115635, ¶ 31 (“The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.”) (quoting *Rad/LAX Gateway Hotel, LLC v. Amalgamated Bank*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2065, 2071 (2012)).

62. *Sunrise Assisted Living*, 2015 IL App (2d) 140037, ¶ 32.

Section 2-1303 judgment interest is not applicable to an arbitrator or Commission award until that award has been reduced to judgment via a section 19(g) proceeding.

6. *What Does "Accrued" Mean and does section 2-1303 interest apply to those amounts that had not yet accrued at the time of arbitration?*

A line of appellate court decisions beginning with *Folks v. Hurlbert's Wholesale Siding & Roofing, Inc.*,<sup>63</sup> and culminating in *Ballard v. Industrial Comm'n*,<sup>64</sup> created a two-tiered system for determining interest on a workers' compensation award based on whether the award had accrued at the time of arbitration or afterwards.<sup>65</sup> In *Folks*, the arbitrator awarded total temporary disability (TTD) benefits, medical benefits, and a permanent partial disability (PPD) benefits was based on a weekly rate.<sup>66</sup> The employer tendered payment of the TTD benefits with interest, medical benefits without interest, and PPD benefits without interest. The claimant then filed a section 19(g) action to collect interest.

The appellate court held that section 19(n) interest applied only to those non-medical portions of the award that had "accrued" on the date of the arbitration award.<sup>67</sup> According to the *Folks* court, section 19(n)'s use of the past tense term "accrued" is significant.<sup>68</sup> "When read in conjunction with the clause which immediately precedes it, clearly interest is due only on those sums which have 'accrued' on the date of the award."<sup>69</sup> As a result, the appellate court found that interest could not be awarded on weekly PPD payments coming due after the arbitrator's award.<sup>70</sup>

Building on the *Folks* ruling, the appellate court in *Ballard* went one step further and not only applied section 19(n) interest to those portions of the "accrued" award remaining unpaid, but then awarded section 2-1303 judgment interest to those amounts accruing *after* the date of the arbitration award.<sup>71</sup> According to the court, section 19(n) applied only to the date of the award as to accrued benefits. Those benefits which accrued after the date of the arbitrator's award were not subject to section 19(n). The procedural history in *Ballard* was straightforward. The arbitrator had found the claim compensable and awarded TTD benefits and PPD benefits of 7-1/2 percent of a person for a low back injury. The Commission reversed

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63. 93 Ill. App. 3d 19, 416 N.E.2d 745 (4th Dist. 1981).

64. 172 Ill. App. 3d 41, 526 N.E.2d 675 (3d Dist. 1988).

65. *Ballard*, 172 Ill. App. 3d at 44, 526 N.E.2d at 677.

66. *Folks*, 93 Ill. App. 3d at 21, 416 N.E.2d at 747.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Ballard*, 172 Ill. App. 3d at 44-45, 526 N.E.2d at 677-78 (emphasis added).

based on a lack of causal connection, and alternatively, reduced permanency to three percent of a person. The circuit court reversed and remanded the case back to the Commission, which found the claimant permanently and totally disabled. The employer paid the award but refused to pay interest on the award following remand.

The *Ballard* court acknowledged that section 19(n)'s six percent interest applied to the original arbitration award, but noted that section 19(n), based on *Folk*, did not apply to the subsequent Commission decision award because it had not accrued at the time of the arbitration award.<sup>72</sup> Without any true explanation of its actions, the appellate court concluded:

Despite the fact section 19(n) does not apply, claimant is still entitled to interest on the amount of unpaid benefits accruing after November 21, 1980, calculated from May 30, 1985, through June 10, 1987. Since section 19(n) does not apply, interest is properly taxed at 9% under section 2-1303 of the Code.<sup>73</sup>

The court continued:

Under the rationale of those cases, section 19(n) of the Act and section 2-1303 of the Code must be considered *in pari materia*. We agree that the purpose of assessing interest is to encourage prompt payment of awards and there should be as much incentive for a defendant to make the periodic payments which accrue after the arbitrator's award as there is to pay those sums which accrue in the award.<sup>74</sup>

According to the court, “[n]othing in section 19(n) suggests a change in the applicability of section 2-1303 to judgments on Industrial Commission awards as opposed to awards which are covered in section 19(n).”<sup>75</sup> *Ballard* also found its conclusion was “in complete harmony” with the *Kuhl* decision, where the appellate court held that interest on an award which was increased by the Commission was properly calculated at the rate of six percent.<sup>76</sup>

The *Ballard* court seems to have overlooked the plain language of section 2-1303, which limits its application to judgments.<sup>77</sup> The Commission's decision, regardless of the stage of the direct appeal, is not a judgment and it cannot be executed absent a circuit court order entered under section 19(g). Moreover, *Ballard's* reliance on *Kuhl* seems misplaced given that the court in *Kuhl* appears to have applied the pre-1984

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72. *Id.*

73. *Id.* at 45, 526 N.E.2d at 678 (citing *Proctor Comty. Hosp. v. Indus. Comm'n*, 50 Ill. 2d 7, 276 N.E.2d 342 (1971) and *Bray v. Indus. Comm'n*, 161 Ill. App. 3d 87, 513 N.E.2d 1045 (1st Dist. 1987)).

74. *Id.* (citing *Folks*, 93 Ill. App. 3d at 21, 416 N.E.2d at 747).

75. *Id.* (citing *Bray*, 161 Ill. App. 3d 87, 513 N.E.2d 1045 and *Aper v. Nat'l Union Elec. Corp.*, 165 Ill. App. 3d 482, 519 N.E.2d 117 (4th Dist. 1988)).

76. *Id.*

77. 735 ILL. COMP. STAT. 5/2-1303 (2015).



amendment 6 percent section 19(n) rate. It does not appear that *Kuhl* applied the statutory judgment interest rate. Even so, *Kuhl* was examining the interest obligations under a section 19(g) proceeding, which if judgment was entered on the Commission's award would justify application of the section 2-1303 judgment interest provision.

*Ballard*, as well as *Folks* and similar decisions advocating the two-period interest approach, have been seriously called into question by *Radosevich* and *Sunrise Assisted Living*, whereby the appellate court applied section 19(n) interest to *all* aspects of the underlying workers' compensation case and limited section 2-1303's application to judgments entered on Commission decisions following a section 19(g) proceeding.<sup>78</sup> *Radosevich* and *Sunrise Assisted Living* are much more logical in their approach and consistent with the General Assembly's intention of creating an interest rate applicable to workers' compensation proceedings short of the entry of judgment.

#### C. What Constitutes a Tender So as to Preclude The Accrual Of Interest?

The last portion of section 19(n) states that "[t]he employer or his insurance carrier may tender the payments due under the award to stop the further accrual of interest on such award notwithstanding the prosecution by either party of review, certiorari, appeal to the Supreme Court or other steps to reverse, vacate or modify the award."<sup>79</sup> Generally speaking, a tender must include "everything to which the creditor is entitled" and "a tender of any less sum is nugatory and ineffective as a tender."<sup>80</sup> A tender must also include interest and costs due as accrued. If an employee is entitled to interest, and the employer fails to tender it, the circuit court may conclude the tender is not effective to stop the accrual of interest and, a circuit court may potentially enter judgment under section 19(g).

Procuring the award, with today's very low interest rates, makes little sense for most employers, especially if the tender is made directly to the claimant.<sup>81</sup> And while an escrow account may be utilized, there is still little advantage to the employer. Of special note, even if an employer or its carrier does tender payment to stop the accrual of interest, there is nothing which would exempt the employer from its independent obligation to

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78. *Radosevich*, 367 Ill. App. 3d at 778, 856 N.E.2d at 8; *Sunrise Assisted Living*, 2015 IL App (2d) 140037, ¶¶ 31–32.

79. 820 ILL. COMP. STAT. 305/19(n) (2015).

80. *Smith v. Gen Corp.*, 11 Ill. App. 3d 106, 109, 296 N.E.2d 25, 28 (3d Dist. 1973).

81. A tender to the claimant directly may well simply disappear and if the Commission's decision is reversed, may then be beyond recovery.

procure an appeal bond supported by a surety, as required in order to prosecute an appeal under section 19(f).<sup>82</sup>

As explained earlier in this article, a tender of at least some portion of the award, or payment of some benefits owed, means that interest will only accrue on the amounts yet unpaid.<sup>83</sup> This is true whether the question is the application of section 19(n) interest or judgment interest under section 2-1303. However, as noted below, an employer may still be subject to a section 19(g) proceeding if there is a refusal by the employer to pay the remaining award or if the refusal to pay interest is found to lack good faith.

#### D. Conclusions on Interest

Hopefully this segment of the article provides better insight into how interest is calculated on a workers' compensation award and puts to rest some of the arguments advanced that section 2-1303 judgment interest applies at any time prior to the entry of judgment on the Commission's decision as part of a section 19(g) proceeding. Certainly there is room for clarification of section 19(n). Indeed, a legislative effort to modify section 19(n) would be welcomed to eliminate any remaining confusion as to the application of interest to a workers' compensation award.

The authors hereby suggest the following amendment to section 19(n) to alleviate many of the problems highlighted herein:

Interest shall be awarded on all compensation, including medical benefits, awarded by the Arbitrator or Commission, and payable at the rate of X percent per annum, from the date of the award through the day prior to the date of payments. Said rate of interest shall be set forth in the Arbitrator's Decision. However, when an employee appeals an award of an Arbitrator or the Commission and the appeal results in no change or a decrease in the award, interest shall not further accrue from the date of such appeal.<sup>84</sup>

The employer or his insurance carrier may tender the payments due under the award to stop the further accrual of interest on such award notwithstanding the

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82. 820 ILL. COMP. STAT. 305/19(f) (2015). Some practitioners continue to post the amount of the award (or bond amount) with the circuit court in escrow in lieu of obtaining an appeal bond backed by a surety, as required by section 19(f). There is no authority supporting the sufficiency of such a course of action, and anyone who so proceeds does so at his or her own risk. If the judicial review is not properly secured by a valid bond, the circuit court will lack subject matter jurisdiction.

83. *Poe*, 230 Ill. App. 3d at 11, 595 N.E.2d at 599; *Ponthieux*, 278 Ill. App. 3d at 112, 662 N.E.2d at 174.

84. The authors take no stance on the third sentence of the proposed statutory revision, but note that with recent decisions such as *Jacobo v. Illinois Workers' Compensation Comm'n*, most employers will tender payment of the amounts due and owing while the appeal proceeds on the employee's issues. 2011 IL App. (3d) 100807WC, 959 N.E.2d 772 (2011). In *Jacobo*, the appellate court found that the employer had no legitimate reason to delay payment of the undisputed awards for TTD, PTD, and medical expenses, while it pursued an appeal of other unrelated issues. *Id.* at 25, 959 N.E.2d at 783. It then found that if any part of an employee's undisputed benefits were not promptly paid, the employer was subject to penalties and attorney fees under 820 ILL. COMP. STAT. 305/19(l). *Id.* at 26, 959 N.E.2d at 783.

prosecution by either party of review, judicial review, appeal to the Supreme Court or other steps to reverse, vacate or modify the award.

Over the years, the appellate court and Supreme Court have handed down many confusing, and at times conflicting, decisions interpreting section 19(n) and its interplay with section 2-1303. In part, that is due to the confusion between actions for interest as a part of a workers' compensation claim, and actions under section 19(g), which are clearly subject to section 2-1303 judgment interest.<sup>85</sup>

Another problem with the plethora of appellate court decisions is that some were rendered by the various appellate court districts, while others were rendered by the Appellate Court, Workers' Compensation Commission Division. To better clarify the law and to promote consistency in the interpretation of section 19(g) as well as interest, the authors strongly recommend that all appeals involving the interpretation of section 19(g) be channeled to the Workers' Compensation Division, which has expertise in workers' compensation law and is better suited to addressing such issues.<sup>86</sup>

## II. SECTION 19(G) ACTIONS TO ENFORCE

### A. What Type of Relief Does Section 19(g) Afford?

Section 19(g) of the Illinois Workers' Compensation Act provides parties to a workers' compensation claim with a mechanism for enforcing the final award by reducing it to judgment in circuit court by simply providing the court with a certified copy of the final award.<sup>87</sup> A final award may be achieved at many procedural stages. An arbitrator's decision becomes final once thirty days has lapsed after receipt of the decision without either party reviewing the award to the Commission. A Commission decision becomes the final award when it is not reviewed to the circuit court within twenty days of receipt of the decision.<sup>88</sup> The circuit and appellate courts can also issue final decisions during review proceedings, the finality of those decisions are determined on a case-by-case basis and depend on whether the case is remanded to the Commission for further proceedings, in which case the Commission's decision will

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85. See *supra* Part II, for the authors' discussion of the application of section 2-1303 judgment interest in the context of a section 19(g).

86. Illinois Supreme Court Rule 22(i) created the Appellate Court, Workers' Compensation Commission Division, in 1984, and empowered it to hear all cases arising under the Act. ILL. SUP. CT. R. 22(j). The purpose of the rule was to promote consistency and uniform application of the law across the state.

87. 820 ILL. COMP. STAT. 305/19(g) (2015).

88. § 305/19(f).

constitute the final award.<sup>89</sup> An approved settlement contract also has the legal effect of a Commission decision and is the equivalent of an award for purposes of section 19(g).<sup>90</sup>

Section 19(g) does not allow parties to collaterally attack the accuracy of the Commission decision; that remedy is afforded through direct appeal in section 19(f).<sup>91</sup> Rather, it simply provides for speedy entry of judgment on the award. The timeframe for review under section 19(f) of the Act is tight—twenty days from the date on which the party receives the Commission’s decision.<sup>92</sup> The interplay between these sections became muddled a bit in *Gurnitz v. Lasits-Rohline Service, Inc.*, when the plaintiff sought to correct an “irreconcilable inconsistency” in the Commission’s decision using section 19(g).<sup>93</sup> In the underlying action, the Commission unequivocally found the claimant permanently totally disabled under section 8(f), but ordered benefits be paid at the permanent partial disability rate which was inconsistent with its permanent total disability finding.<sup>94</sup> The case was appealed all the way to the appellate court on its merits. About one year after the court affirmed the Commission’s order of permanent total disability at the incorrect permanent partial disability rate, the claimant sought to reduce the “Commission’s will” to a judgment and in doing so, sought to correct the permanent disability rate.<sup>95</sup>

The employer argued that the claimant’s cause of action was improper under section 19(g) because claimant effectively sought to challenge the Commission’s decision, which is grounded explicitly in section 19(f).<sup>96</sup> In support of its position, the employer cited a number of cases which held that the plaintiff’s cause of action under section 19(g) was actually an improperly filed section 19(f) action challenging the Commission’s award.<sup>97</sup> Each decision cited by the employer involved an employer who sought to introduce additional substantive evidence to challenge the Commission’s decision on its *merits*, while none of the decisions involved a true “irreconcilable inconsistency” on the face of the decision, like that involved in *Gurnitz*.<sup>98</sup>

Correcting a true, facial irreconcilable inconsistency under *Burns* or *Gurnitz* is proper under section 19(g) and does not constitute a modification

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89. *Stockton v. Indus. Comm’n*, 69 Ill. 2d 120, 124–125, 370 N.E.2d 548, 550 (1977).

90. *Ahlers v. Sears, Roebuck Co.*, 73 Ill. 2d 259, 265, 383 N.E.2d 207, 209–10 (1978).

91. 820 ILL. COMP. STAT. 305/19(f) (2015); *see, e.g.*, *Franz v. McHenry Cnty. College*, 222 Ill. App. 3d 1002, 1006, 584 N.E.2d 536, 539 (2d Dist. 1991) (explaining the court may not review the commission’s decision and that 19(f) is the proper channel for review).

92. 820 ILL. COMP. STAT. 305/19(f) (2015).

93. 368 Ill. App. 3d 1129, 1134, 859 N.E.2d 1156, 1161 (3d Dist. 2007).

94. *Id.* at 1136, 589 N.E.2d at 1162.

95. *Id.* at 1135–36, 589 N.E.2d at 1160–61.

98. *Id.* at 1134, 589 N.E.2d at 1162.

99. *Id.*

98. *Id.*; *see Burns v. Indus. Comm’n*, 95 Ill. 2d 272, 277–78, 447 N.E.2d 802, 802–5 (1983) for a holding an irreconcilable inconsistency within the Commission’s award examined under section 19(g) requires the court to interpret what the Commission had actually awarded within the four corners of the decision.

of the Commission's award because the correction is intended to align the Commission's intentions with its words.<sup>99</sup> The absolute and limited purpose of section 19(g)—the Commission's will be done, literally—limits the court's inquiry solely to whether the requirements of the section have been met. The court is not permitted under section 19(g) to review the Commission's decision or otherwise construe the Act, unless the responding employer establishes fraud or lack of jurisdiction.<sup>100</sup>

The court cannot modify the Commission's decision under section 19(g) even when the decision appears too large on its face.<sup>101</sup> Similarly, section 19(g) actions cannot be initiated to modify an award when the limitations period for a Section 19(h) proceeding has run even if the end result appears unfair. Section 19(h) of the Act allows an employer to challenge a section 8(d)1 wage differential award within 60 months of the date of the award (30 months within the date of the award if the work accident occurred before February 1, 2006) where the claimant's disability has diminished or ended.<sup>102</sup> In *Dallas*, the claimant filed a section 19(g) action to enforce his wage differential award after his former employer stopped his section 8(d)1 benefits.<sup>103</sup> The employer responded that wage differential benefits were no longer due and owing because as soon as the limitations period for a section 19(h) challenge ran, the claimant went back to pre-accident work which is exactly what the Commission found him incapable of doing, earning more than pre-accident wages. The court, hands tied, found that the employer had refused to pay the award and entered judgment under section 19(g). It declined to award discretionary attorneys' fees for the claimant's appeal.

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99. The next logical inquiry for any workers' compensation practitioner or scholar in this scenario is: Should not the plaintiff have noticed and sought clarification of this inconsistency during the course of the underlying appeal? The *Gurnitz* court noted that the plaintiff filed the action to address the incorrect, lesser rate within one year of receiving the incorrect amount which was reasonable. *Gurnitz*, 368 Ill. App. 3d at 1136–37, 589 N.E.2d at 1162–63.

100. 820 ILL. COMP. STAT. 305/19(g) (2015); *Franz v. McHenry County College*, 222 Ill. App. 3d 1002, 1006, 584 N.E.2d 536, 539 (2d Dist. 1991).

101. *Aurora East School Dist. v. Dover*, 363 Ill. App. 3d 1048, 1055, 846 N.E.2d 623, 629–30 (2d Dist. 2006).

102. *Dallas v. Ameren CIPS*, 402 Ill. App. 3d 307, 313, 929 N.E.2d 1267, 1272 (4th Dist. 2010). The employee can challenge the award as well within this time frame if his disability has recurred or increased. 19(h) confers ongoing jurisdiction on the Commission in these instances where installment awards, like those under section 8(d)(1), are awarded. Contrast ongoing jurisdiction for permanent total disability awards under section 8(f), also installment awards, which lasts the duration of the payments, i.e., the life of the claimant. The authors advocate for ongoing jurisdiction for life of section 8(d)(1) awards which, under the current Act, are payable until age 67 or five years after entry of the award, whichever is later.

103. *Id.*

## B. Who are the Parties?

Section 19(g) provides remedy for either party to file a petition with the circuit court to request that a judgment be entered on the final Commission decision, whether that be an arbitration decision, Commission decision following a review of an arbitrator's decision, or an approved settlement contract. For all intents and purposes, workers' compensation claimants file section 19(g) petitions against their employers for allegedly refusing to pay final awards. The employee brings the action in his own name against the employer in its name. The circuit court will exercise subject matter jurisdiction against only those parties involved in the underlying action at the Commission.

For example, an employee cannot bring the action against the employer's insurance carrier unless the insurance carrier was a named party in the underlying action before the Commission.<sup>104</sup> Due process precludes a workers' compensation claimant from enforcing an award against the employer's insurance carrier without first filing a separate action and obtaining an award against the carrier.<sup>105</sup> The rationale for this is that the insurance carrier, if not initially sued in the underlying action, does not have an opportunity to defend the action, investigate the case before the hearing, obtain an independent medical examination, cross-examine the claimant or present witnesses on its own behalf. This protective mechanism exists even though the carrier is identified by the Illinois Workers' Compensation Commission as having coverage for the claim and, practically speaking, has likely been involved in the underlying action and is probably contractually bound to the employer to pay at least part of the award.

The plain language of section 19(g) precludes an enforcement action against the State of Illinois as well.<sup>106</sup> This seems to be rooted in principles of sovereign immunity and consistent with the public policy that a judgment against the State shall not control its actions or subject it to liability.<sup>107</sup> Only where the State has consented to be sued will the State be sued and in section 19(g), the State has clearly stated its intent to be exempt from statutory enforcement proceedings, by stating that the relief afforded by section 19(g) is available to parties, "[e]xcept in the case of a claim against the State of Illinois."<sup>108</sup> Sovereign immunity will not only bar State employees' attempts to enforce awards entered against the State, the courts have also interpreted the language to also preclude actions against the State Treasurer as the administrator of the Injured Workers' Benefit Fund.<sup>109</sup>

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104. *Aber v. Am. Home Assurance*, 2011 IL App. (4th) 110194-U, ¶ 1; *McAnally v. Butzinger Builders*, 263 Ill. App. 3d 504, 509, 636 N.E.2d 19, 23 (5th Dist. 1994).

105. 820 ILL. COMP. STAT. 305/4(g) (2015).

108. § 305/19(g).

107. *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶¶ 20–22.

108. 820 ILL. COMP. STAT. 305/19(g) (2015) (emphasis added).

109. *Dratewska-Zator*, 2013 IL App (1st) 122699, ¶ 22. The Fund is a special statutory fund created by the Act which is intended to compensate injured workers employed by entities who are

### C. What Must Be Filed?

Section 19(g) provides little guidance on what is expected on either party when filing a proceeding to reduce the Commission's decision to judgment. Nevertheless, a party seeking to do so must file a complaint with the circuit court in the appropriate venue<sup>110</sup> and attach thereto a certified copy of the Commission's decision. The latter document can be obtained from the Commission in Chicago. The complaint should allege the appropriate dates of the underlying awards, the amounts due under those awards and amounts remaining outstanding, that payment has been requested and denied or simply not made, and then set forth any alleged entitlement to attorneys' fees, costs, and appropriate interest.

The proceeding, although emanating from section 19(g) of the Workers' Compensation Act, will be otherwise governed by the Code of Civil Procedure. This includes service of process and any rules governing motion practice. Once filed, and properly responded to by the defendant, the matter should be set for either an appropriate motion hearing (if one is filed) or an evidentiary hearing, whereby the plaintiff presents evidence to establish the various allegations. The circuit court serves as trier of fact and receives deference on any appeal therefrom. Appeals should be filed with the Appellate Court, Workers' Compensation Commission Division, through the appropriate geographic appellate court.<sup>111</sup>

### D. Is There a Limitations Period?

While the Illinois Workers' Compensation Act does not include a limitations period within Section 19(g), the courts have sought guidance and found solution in the Code of Civil Procedure and illustrative case law. In *Blacke*, the court established a five year statute of limitations for section 19(g) enforcement actions seeking judgment on an arbitrator's award.<sup>112</sup> Here, the claimant prevailed at arbitration and the award was affirmed by the Commission in January of 1984. The employer never made payment on the award, so in 1992 the claimant brought additional action before the Commission seeking penalties pursuant to Sections 19(k) and 19(l) of the Act. In March of 1993, the claimant filed a Section 19(g) action seeking payment of both the underlying award and the subsequent penalties award.

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unlawfully uninsured. The Fund is comprised of monetary penalties collected from employers who violate insurance requirements of the Act.

110. Section 19(g) provides venue for such actions, stating that such claims shall be filed in the circuit court of the county "in which such accident occurred or either of the parties are residents. . . ." 820 ILL. COMP. STAT. 305/19(g) (2015).

111. ILL. SUP. CT. R. 22(i).

112. *Blacke v. Indus. Comm'n*, 268 Ill. App. 3d 26, 27, 644 N.E.2d 23, (3d Dist. 1994).

The court denied the claimant's petition finding it untimely pursuant to Section 13-205 of the Code.

On appeal, the plaintiff argued that no statute of limitations was applicable to his section 19(g) action or, alternatively, that a section 19(g) action was subject to a ten year statute of limitations. In arguing for no statute of limitations, the claimant contended that the purpose of statutes of limitations in general—to prevent false or stale claims when evidence to refute those claims may be lost or unavailable due to time—would be served. Because the claimant's underlying claim had already proceeded on the merits, a statute of limitations was in applicable to his claim to enforce the award following the claim on the merits. Furthermore, section 19(g) does not provide for statute of limitations. However, to the extent the legislature did not include a statute of limitations within the Illinois Workers' Compensation Act, the court will look to the Code.<sup>113</sup>

The right to bring a section 19(g) action is statutory by definition therefore subjecting it to a five year limitations applicable to the "catch-all" provision set forth in section 13-205 of the Code of Civil Procedure encompassing "all civil actions not otherwise provided for."<sup>114</sup> The courts have settled this issue with respect to statutory rights of actions in other contexts.<sup>115</sup> For the claimant in *Blacke*, this cause of action accrued 20 days following the Commission's affirmance of the arbitrator's January 1984 award. Therefore, his cause of action was tolled under the five year limitations period set forth in section 13-205 no later than February of 1989. His claim was certainly untimely when filed in March of 1993 and properly denied.<sup>116</sup>

Section 19(g) actions to enforce the terms of approved settlement contracts are subject to the ten-year statute of limitations for written contracts.<sup>117</sup> Section 13-206 of the Code of Civil Procedure provides that actions on written contracts shall be commenced within ten years after the cause of action accrued. In section 19(g) actions that seek to enforce a settlement contract, the statute begins to run on the date on which the alleged breach of contract occurred. For example, in *Gassner*, the settlement contract left section 8(a) medical treatment benefits open to the claimant for life for treatment related to the underlying worker's compensation claim. Subsequent to the contract approval, the claimant incurred additional medical treatment expenses which he claimed were related to his work injury. The employer disagreed and a dispute arose as to whether the employer would be responsible for payment of those medical treatment charges because section 8(a) medical benefits were ongoing

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113. *Blacke*, 268 Ill. App. 3d at 28.

114. *Id.*

115. *See Powles v. Cnty. of Alexander*, 310 Ill. App. 602, 604, 35 N.E.2d 92, 94 (4th Dist. 1941), for a holding that a suit to collect unpaid benefits pursuant to a statute to protect the blind was subject to five year statute of limitations for civil action not otherwise provided for in Section 13-205.

116. *Blacke*, 268 Ill. App. 3d at 3.

117. 735 ILL. COMP. STAT. 5/13-206 (2015); *Gassner v. Raynor Mfg. Co.*, 409 Ill. App. 3d 995, 1004, 948 N.E.2d 315, 324 (2d Dist. 2011).



under the terms of the settlement contract. The claimant incurred the medical treatment expenses on May 1, 2003 which is the date on which his action accrued and started the clock on the statute of limitations. When he filed his section 19(g) petition with the trial court on October 31, 2008, the responding employer argued that a five year statute of limitations barred the plaintiff's section 19(g) claim.

The employer argued that a Commission-approved settlement contract is the equivalent of an arbitration award subject to enforcement under section 19(g) as an action arising from statute and therefore subject to the five year statute of limitation articulated in *Blacke*.<sup>118</sup> The *Gassner* court rejected that argument finding that the reasoning in *Givens* supported a ten year limitations period because the action was premised on a written contract.<sup>119</sup>

#### E. How Can an Employer Attack a Section 19(g) Petition?

Generally, an employer responding to a section 19(g) petition can utilize a responsive pleading just as it would in any other civil case. The Code of Civil Procedure provides for disposition of a pleading, and in some cases an entire cause of action, for various reasons which can be utilized to attack section 19(g) enforcement actions, particularly sections 2-615 and 2-619. Section 2-615 challenges the legal sufficiency of the complaint whereas section 2-619 admits the legal sufficiency but asserts certain defenses to the pleading.<sup>120</sup> When faced with a section 2-615 motion to dismiss, the court must construe the allegations in the light most favorable to the plaintiff and determine whether they are sufficient to state a cause of action.<sup>121</sup> Examples of defenses asserted in section 2-619 motions to dismiss in the section 19(g) context are sovereign immunity (asserted by the State) failure to exhaust administrative remedies, and lack of subject matter jurisdiction. Another affirmative defense is payment of the award.<sup>122</sup>

#### F. What Defenses are Available?

The employer's most significant affirmative defense to a section 19(g) action and corresponding award of attorneys' fees and costs is the employer made full payment on the entire award. The employer may be able to claim

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118. *Blacke*, 268 Ill. App. 3d at 27; *but see also* *Givens v. Givens*, 192 Ill. App. 3d 97, 101, 548 N.E.2d 571, 574 (1st Dist. 1989), for a holding that an action to enforce an approved settlement contract was an action based on a written contract for which a ten year limitations period was appropriate; *see also* 735 ILL. COMP. STAT. 5/13-206 (2015).

119. *Gassner*, 409 Ill. App. 3d at 1004, 948 N.E.2d at 324.

120. *Bayview Loan Serv'g, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 10.

121. *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, at ¶ 14.

122. *Voorhees v. Indus. Comm'n*, 31 Ill. 2d 330, 332, 201 N.E.2d 382, 388 (1964).

it had a legitimate basis not to pay the award which may provide a defense. In determining whether the employer legitimately did not pay the award so as to avoid entry of a judgment under section 19(g) or, more practically, to avoid imposition of an uncertain amount of attorneys' fees and costs, the circuit court may consider several factors: (1) whether the plaintiff has made demand for payment of the Commission's decision; (2) the length of time that transpired between the date the Commission decision became final and the date the section 19(g) petition was filed in circuit court; (3) the negotiations and communications between the parties which took place during that relevant time period; (4) whether the Commission's decision leaves room for a good faith disagreement between the parties as to the amounts due and owing to the plaintiff by the defendant; and (5) whether the defendant made a good faith offer of settlement and when that offer was made.<sup>123</sup>

#### G. Can the Employer Claim a Credit Against Past Payments to Avoid Judgment?

Whether the responding employer can claim credit against past payments when defending these enforcement actions is a question of fact for the circuit court that will be weighed in the overall analysis of whether the employer has fully satisfied its obligations under the final award. If credits are available, they arguably must be stated within the final award or they will not be available. In the context of section 8(j), which is a main means of credit for employers under the Act for payments made pursuant to its group insurance policies where the employer has paid some portion of the policy premium on the employee's behalf, the credit must be clearly established by the record. This credit is often stipulated by the parties at arbitration, and must "clear, certain, and definite in its material provisions, and it is essential to that it be assented to by the parties or those representing them."<sup>124</sup>

In *Sanchez*, the responding employer could not prove that it was entitled to section 8(j) credit, which would account for its failure to pay that portion of the award that subjected it to section 19(g) enforcement proceedings.<sup>125</sup> The court held that the parties never assented to the arbitrator's comment: "I think it has already been stipulated that Respondent will get credit for all the amounts paid under [s]ection 8(j)."<sup>126</sup> Further, the employer exhausted its review proceedings and never

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123. *McGee v. Ractian Const. Co.*, 231 Ill. App. 3d 929, 935, 596 N.E.2d 1261 (4th Dist. 1992).

124. *Sanchez v. Pactiv, LLC*, 2015 IL App (1st) 132570-U, ¶ 10 (*citing* *In re Marriage of Galen*, 157 Ill. App. 3d 341, 344, 510 N.E.2d 597, 599 (2d Dist. 1987)).

127. *Id.* at ¶ 13.

126. *Id.* at ¶ 9. It is clear from the decision that section 8(j) credit was identified as an issue on the parties Request for Hearing form as it often is, which identifies the issues before the arbitrator, but the amount was left blank and the agreement even if general, was not confirmed on the record.

challenged the credit issue until raising it as a defense a section 19(g) enforcement proceeding as a collateral attack which is prohibited.<sup>127</sup>

Generally, responding employers have a difficult time using credit for past payments to avoid judgment under section 19(g). This is because the circuit court's inquiry under section 19(g) is so limited to whether the requirements of the section have been met, i.e., whether the underlying award has been paid in full.<sup>128</sup> In *Burns*, the plaintiff estate had received payments pursuant to federal statute and under the Illinois Workers' Compensation Act to compensate the estate for decedent's death related to coal exposure. The employer argued it had reached an agreement with the decedent's estate that the payments made pursuant to the federal claim under would offset the amounts payable pursuant to the award rendered final at the Commission. The estate argued it was entitled to additional benefits from the state claim, notwithstanding any payments made in the federal claim. In siding with the estate, the court acknowledged the federal mechanism available to the employer for recoupment of any overpayment made under the federal black lung claim but ultimately held the employer simply could not use any overpayment to avoid entry of judgment under section 19(g) due to the plain language of the statute.<sup>129</sup>

The *Estate of Burns* court relied heavily on the decision in *Patel*, rendered three years prior. Addressing a similar situation involving credits for past payments, the *Patel* court reached an even harsher conclusion for employers: that past payments made as a result of the *underlying workers' compensation claim* could not be used to defeat a section 19(g) claim. The *Patel* court held that section 19(g) did not afford employers a mechanism for claiming credits for past workers' compensation payments against entry of judgment on the award. Rather, "the Commission's decision, on which any judgment is based, be one *providing for the payment of compensation* according to this act," and a "credit does not equal compensation."<sup>130</sup> The court went on to conclude, "[a]lthough Home Depot may ultimately obtain the credit the arbitrator and the Commission granted, it is not entitled to that credit under section 19(g)."<sup>131</sup> These decisions illustrate the narrow mission of the court when deciding a section 19(g) enforcement action: to determine whether the award has been paid and if it has not, enter judgment swiftly.

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127. *Id.* at ¶ 14 (citing *Bettis v. Oscar Mayer Foods Corp.*, 242 Ill. App. 3d 689, 691, 610 N.E.2d 1354, 1355 (4th Dist. 1993)).

128. *Estate of Burns v. Consolidation Coal Co.*, 2015 IL App (5th) 140503, ¶ 19.

129. *Id.*

130. *Patel v. Home Depot USA, Inc.*, 2012 IL App (1st) 103217, ¶3.

131. *Id.* at ¶ 15.

#### H. When Will the Court Assess Attorneys' Fees and Penalties Against the Employer?

Attorneys' fees and penalties are discretionary and can be ordered when the plaintiff shows that the defending employer refused to pay the underlying award. The employer's defense to an award of attorneys' fees following a section 19(g) action is its defense to the judgment on the award—that it did not refuse to pay the award. In *Wirth* and *Poe*, disputes over interest lead to disagreement over the amount due and owing pursuant to the award.<sup>132</sup> The courts held these legitimate disputes did not constitute a refusal to pay compensation within the meaning of the Act and did not warrant section 19(g) attorneys' fees. An additional legitimate dispute arose where the arbitrator and Commission each failed to designate the rate of section 19(n) interest.<sup>133</sup>

A clear-cut rule for calculating reasonable attorneys' fees as part of a section 19(g) judgment is not found in the decisions. However, the courts have suggested that the plaintiff is entitled to costs and attorneys' fees for the employer's "refusal to pay" which suggests that the courts will not only uphold but also encourage fees representing the entire prosecution of the claimant's case, not just the section 19(g) enforcement action. In *McAnally*, the employer appealed the arbitrator's award to the appellate court. When it refused to pay the award after its appeal was exhausted, citing ambiguous language in the arbitrator's decision, the claimant brought a section 19(g) petition to enforce the award. The employer lost the section 19(g) action and the appellate court remanded the matter to the circuit court for entry of judgment and assessment of attorneys' fees associated with the "employer's refusal to pay" and instructed that the fees award "shall include those incurred in prosecuting the appeal."<sup>134</sup> The court reasoned:

The right to appeal is important and should not be circumscribed, but of equal importance is an injured worker's right to be promptly compensated for the full amount of a final award. Plaintiff was injured seven years ago; if the workers' compensation's goal of prompt payment of legitimate claims is to be achieved, and if employers are to be encouraged to work toward that goal, then the legislative imperative of the imposition of costs and attorneys fees on employees (sic employers) who refuse to pay such awards must be implemented.<sup>135</sup>

The *McAnally* decision seems to mandate that, if awarded at all, costs and fees for prosecuting the workers' compensation claim from arbitration through appeal should be calculated and included.

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132. *Wirth v. Indus. Comm'n*, 63 Ill. 2d 237, 241, 347 N.E.2d 136, 138 (1976); *Poe v. Indus. Comm'n*, 230 Ill. App. 3d 1, 9, 595 N.E.2d 593, 598 (2d Dist. 1992).

133. *McGee v. Ractain Contr. Co.*, 231 Ill. App. 3d 929, 935, 596 N.E.2d 1261, 1261 (4d Dist. 1992).

134. *McAnally v. Butzinger Builders*, 263 Ill. App. 3d 504, 509, 636 N.E.2d 19, 22 (5th Dist. 1994).

135. *Id.* (citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180–81, 384 N.E.2d 353, 356–57 (1978)).

The approach to attorneys' fees articulated by the *McAnally* court provide an additional penalty against employers for defending underlying workers' compensation claims, where the Workers' Compensation Act already provides for statutory penalties under sections 16, 19(k) and 19(l) for unreasonable and vexatious delay in paying benefits associated with the claim.<sup>136</sup> Given the availability of those penalties and attorneys' fees, section 19(g) reasonable attorneys' fees and costs should be awarded for the prosecution of the section 19(g) enforcement action alone. Any attorneys' fees and costs above and beyond that represent a modification of the underlying award, which is expressly prohibited by section 19(g) itself.

#### I. To What Portions of the Award Does Interest in a Section 19(g) Proceeding Attach?

As we discussed in the first section of this article concerning interest, the law is clear that judgment interest applies to a judgment rendered pursuant to section 19(g). The more perplexing question is whether that judgment interest, set at nine percent by section 2-1303 of the Code of Civil Procedure, applies to those unpaid amounts of the award retroactive to the date of the arbitrator's award. Unfortunately, the 2006 decision in *Radosevich* answers this question in the affirmative, which appears to be wholly contrary to Illinois respecting the status of the Commission's decision and the availability of pre-judgment interest.<sup>137</sup>

In *Radosevich*, the appellate court majority held that section 2-1303's nine percent judgment applied to an unpaid arbitrator's award retroactive to the date of the award.<sup>138</sup> The dissenting justice, now federal district court judge Sue Meyerscough, disagreed, and argued that the Commission's decision was not a judgment until entry of the section 19(g) order.<sup>139</sup> "The award itself is not a judgment."<sup>140</sup> Justice Meyerscough then stated, "because a workers' compensation award is not a judgment, only after the workers' compensation judgment has been entered of record in the circuit court does section 2-1303 interest apply."<sup>141</sup>

Recently one counsel has advocated the retroactive application of section 2-1303 based on this sentence of section 2-1303: "[w]hen judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment."<sup>142</sup>

136. See 820 ILL. COMP. STAT. 305/16, 19(k), 19(l) (2015).

137. *Radosevich v. Indus. Comm'n*, 367 Ill. App. 3d 769, 778, 856 N.E.2d 1, 9 (4th Dist. 2006).

138. *Id.*

139. *Id.* at 779–85, 856 N.E.2d at 9–15.

140. *Id.* at 779, 856 N.E.2d at 10.

141. *Id.* at 780, 856 N.E.2d at 10.

142. 735 ILL. COMP. STAT. 5/2-1303 (2015).

According to counsel, section 2-1303 specifically refers back to the arbitration award by stating “from the time when made or rendered to the time of entering judgment upon the same.”<sup>143</sup> Yet using this language to reach back to a point before the entry of judgment runs directly afoul of section 19(n) of the Act, which is meant to provide for interest on an award until payment, and prior to the entry of judgment.<sup>144</sup> Section 2-1303 clearly refers to judgment interest and in most civil settings, purports to award interest for the period between the rendering of the verdict through the order entering judgment. In most cases these are the same date, but in any event are rarely more than a few days apart. To allow judgment interest to reach back what in many cases will be years, is unwarranted and infringes on section 19(n).

The *Radosevich* dissent is much more solidly reasoned and should, in the end, prevail. Unfortunately, due to Illinois jurisprudence concerning the precedential impact of appellate court decisions, *Radosevich* applies to circuit court proceedings in the Fourth District. However, all employers should raise the arguments that section 2-1303 interest commences only with the entry of the section 19(g) judgment order, because the more well-reasoned approach recognizes that the Commission’s decision is not a judgment, and therefore, section 2-1303 judgment interest can only apply post-judgment. Otherwise the court is awarding pre-judgment interest, which is obtainable only where provided by statute or by agreement.<sup>145</sup> The *Radosevich* majority decision fails to recognize this point and amounts what can only be described as a penalty to the employer. Future appellate court rulings should limit the application of judgment into to actual judgments. Thus, following a section 19(g) proceeding, interest should run from the award through the date of entry of the section 19(g) order, and then section 2-1303 interest should apply from that date forward until the unpaid balances are satisfied.

#### J. When Can A Section 19(g) Action Be Filed?

The answer to when a section 19(g) proceeding may be filed seems clear enough based on the language of the statute—it says “when the [Commission decision] has become final, when no proceedings for review are pending, . . . .”<sup>146</sup> On its face, the Act seems clear that the full appellate process following a Commission decision must be exhausted before a section 19(g) action may be filed. In *Sunrise Assisted Living v. Banach*,<sup>147</sup> the appellate court rendered its decision on review of the workers’ compensation decision, and the employer paid the award plus section 19(n)

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143. *Id.*

144. 820 ILL. COMP. STAT. 305/19(n) (2015).

145. *First Arlington Nat’l Bank v. Stathis*, 115 Ill. App. 3d 403, 416, 450 N.E.2d 833, 843 (1st Dist. 1983).

146. 820 ILL. COMP. STAT. 305/19(g) (2015).

147. 2015 IL App (2d) 140037.

interest through the day prior to payment. Prior to the issuance of mandate, the employee filed a section 19(g) complaint, seeking section 2-1303 nine percent interest on the award.

To add an interesting twist, the employer opposed the proceeding on jurisdictional grounds, arguing that the case was still on review, because the claimant-employee had filed, while the case was pending on appeal, a section 19(h) proceeding seeking an increase of the award. According to the *Sunrise Assisted Living* case, a proceeding under section 19(h) does not constitute a “proceedings for review” under section 19(g).<sup>148</sup> According to the court, “[a]n order entered by the Commission under Section 19(h) is one for future modification based on a material change in the employee’s disability, rather than a review of the original finding of disability.”<sup>149</sup>

#### K. Closing Thoughts on Section 19(g)

Although not nearly as murky an area as is interest, there is nevertheless a need for clarification and perhaps even legislative intervention, concerning actions to enter and enforcement judgment respecting a workers’ compensation decision. The most significant aspects needing modification relate to the employer’s credit, the applicable rate of interest for amounts due pre-judgment, and the scope of attorneys’ fees awardable. Section 19(g) should be modified to permit the employer to offset any credit for overpayment or for payment of section 8(j) benefits. The notion that there exists any real remedy against the employee, if payments are made and collection is sought, is simply unrealistic. Moreover, section 19(g) should be amended to clarify that section 19(n) interest applies prior to the entry of judgment and that section 2-1303 judgment interest applies thereafter. Judgment interest should not commence from the date of the award forward. Finally, attorneys’ fees and costs should only be awarded for the enforcement and collection efforts, and not for any aspect of prosecuting the underlying claim.

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148. *Id.* at ¶ 17.

149. *Id.* at ¶ 18; *see also* Ahlers v. Sears, Roebuck Co., 73 Ill. 2d 259, 262, 383 N.E.2d 208 (3d Dist. 1978).

