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# BELOW THE RED LINE

## WORKERS' COMPENSATION UPDATE "WE'VE GOT YOU COVERED!"

November 2023

### A WORD FROM THE PRACTICE CHAIR

I hope everyone enjoyed their Thanksgiving break and over-ate much like I did. It is a tradition of sorts, and I always look forward to traditions, especially those that deal with great food. Undoubtedly, you were able to take some time away from your desk/computer and enjoy time with friends and family. Maybe even contemplate all those things for which you are thankful. I know I did. And, yes, I can report to you that all of you made my list. On behalf of the Workers' Compensation Team here at Heyl Royster, we are thankful for our business relationship and friendship with you. We thank you for entrusting us with your claims and business, and we hope we can make your work life easier and more manageable. We appreciate the opportunity to provide our expert services to help you with business decisions, mitigate any potential damages, and push your claims along to resolution quickly and efficiently. We love our jobs, and working with you has always been an honor. So, thank you for partnering with Heyl Royster. We look forward to a bright future filled with hard work and never-boring workers' compensation claims.

We now turn our attention to the next holiday season. Whatever holiday you celebrate, I hope you and yours have a blessed December and you appreciate the reason for the season. Although you may be taking some time off as we close out the year, please know that the Workers' Compensation Team here at Heyl Royster will be available. What is great about having a big team with a deep bench is

there will always be someone there to help you. Yes, our attorneys take time off as we encourage using vacation time, but we also realize your business and needs may not be able to wait. So, if you need anything at any time, contact me or any of our attorneys. If they cannot help you right then and there, you will be directed to whom you can talk if you have a "fire" that needs to be put out immediately.

Jenna Kobernus is an associate in our St. Louis office. She and my partner, Amber Cameron (Edwardsville office), worked on this month's newsletter. The topic is one most folks aren't familiar with, and that includes many of my fellow practitioners. Section 19(p) is a seldom-used section of the Illinois Workers' Compensation Act. However, after further review, the Commission and practitioners are coming to understand how a voluntary arbitration hearing under section 19(p) can be helpful to quickly resolve claims with specific fact patterns and issues. It allows you to move fast and get final results, which is helpful when trying to wrap up a case quickly (for settlement purposes or otherwise). After you read this article, if you think you have a case or fact pattern where section 19(p) may be just the thing for your claim, please get in touch with me or any Heyl Royster workers' compensation team member, and let's explore this option.

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# Voluntary Arbitration Under Section 19(p): What's Old Is New Again



BY AMBER CAMERON & JENNA KOBERNUS

**S**ection 19(p) has been a part of the Illinois Workers' Compensation Act ("Act") for decades but has rarely been used by parties to resolve issues within a claim. Recently, there has been a resurgence in the use of this little-known section of the Act, leaving many veteran practitioners to ask the question: what is section 19(p), and how may I use it to move my claim? Voluntary arbitration under section 19(p) of the Workers' Compensation Act and section 19(m) of the Occupational Disease Act essentially serve the same function: expedited final decision related exclusively to temporary total disability, permanent partial disability, and/or medical expenses. See 820 ILCS 305/19(p); 820 ILCS 310/19(m).

### RELEVANT STATUTES AND ADMINISTRATIVE CODES

Section 19(p) states, in part, that the parties may voluntarily agree to proceed to a hearing where the only issues in dispute are over temporary total disability, permanent partial disability, or medical

expenses. Such agreement shall be in writing in such form as provided by the Commission. All parties must sign the form, ensuring that everyone is adequately informed of their rights and the voluntary nature of proceedings under section 19(p). Most importantly, the parties must understand that by agreeing to proceed with the hearing, the findings of fact made by the arbitrator shall be conclusive, and the arbitrator's decision shall be considered the decision of the Commission. Only questions of law arising from the decision may be brought for review under section 19(f). See 820 ILCS 305/19(p) (West 2022).

Once the parties have chosen to submit their case to voluntary binding arbitration, the statute further outlines the process of choosing an arbitrator to hear the case. The Advisory Board established under section 13.1 shall compile a list of certified Commission arbitrators, and the Chairman shall select five (5) persons from that list to serve as arbitrators under section 19(p). 820 ILCS 305/19(p). By agreement, the parties shall select one arbitrator from among the five persons selected by the Chairman. *Id.* If, for whatever reason, the parties

agree to voluntary arbitration but are unable to agree on one of the five Commission arbitrators to hear the case, the parties may, by agreement, select an arbitrator of the American Arbitration Association, whose fee shall be paid by the State in accordance with rules promulgated by the Commission. *Id.*

The Rules Governing Practice before the Workers' Compensation Commission gives additional direction on the use of voluntary arbitration under section 19(p) of the Workers' Compensation Act and section 19(m) of the Workers' Occupational Disease Act. 50 IL ADC 9030.100 (2016). Section 9030.100 outlines the process for selection of arbitrators chosen to hear voluntary arbitration cases, how to request a voluntary arbitration before the Commission, the conduct of hearings, and the option for using the services of an outside arbitrator with the American Arbitration Association if the parties are unable to agree on one of the Commission certified arbitrators.

### IMPORTANT PROCEDURAL POINTS

Voluntary arbitration under section 19(p) of the Workers' Compensation Act or section 19(m) of the Occupational Disease Act (hereinafter "voluntary arbitration") allows the parties to proceed before a chosen arbitrator for a final decision on the issues of temporary total disability (TTD), permanent partial disability (PPD), and/or medical expenses. All parties to the claim, including the petitioner, respondent, and their counsel, must agree to proceed with a voluntary arbitration. The parties must *all* sign the voluntary arbitration form (IC36) and file the form with the Commission. The form indicates that the parties all understand it is a voluntary choice to proceed, and by doing so, they are waiving their right to appeal the arbitrator's decision as to questions of fact. Once the IC36 form is completed, it is submitted to the Chairman's office (currently Annette Roti, Chief of Staff), who will assign the case to the chosen arbitrator's next status call.

Decisions under voluntary arbitration are binding on the parties and are a *final* decision of the Commission.

The decision cannot be appealed to the Commission like those under other sections of the Act. If the parties agree to move forward with voluntary arbitration on one or more of the limited issues allowed, the parties must also agree on one of the five (5) designated persons selected by the Chairman of the Commission from a list compiled by the Workers' Compensation Advisory Board to conduct the voluntary arbitration. 50 IL ADC 9030.100 (a). As of the date of this publication, there are actually six (6) designated arbitrators: Arbitrator Paul Cellini, Arbitrator Stephen Friedman, Arbitrator Gerald Granada, Arbitrator Gerald Napleton, Arbitrator Dennis O'Brien, and Arbitrator Jeffrey Huebsch. There is no set term for the chosen arbitrators, and if a vacancy occurs among those selected, the Chairman shall select an arbitrator from the Advisory Board list to fill the vacancy. If the parties are unable to agree upon one of the five certified arbitrators, the parties may select an arbitrator from the American Arbitration Association to conduct the hearing with the fee for the arbitrator to be paid by the State. 50 IL ADC 9030.100 (a),(d). While the option to choose an AAA arbitrator is written into statute, it is difficult to think of a scenario where the parties would prefer this, and one of the designated Commission arbitrators would not suffice.



Once the parties have signed and filed the voluntary arbitration form, the Commission assigns the claim to the chosen arbitrator, and the hearing may proceed in any venue where the arbitrator is assigned. Therefore, if the parties choose an arbitrator who is currently



assigned to Zone 5, they must appear at one of the Zone 5 venues before that arbitrator for the hearing. However, since the issues are limited and the facts are usually uncontroverted, testimony by deposition or affidavit is often used when travel is inconvenient. If a Statement of Testimony is submitted, it is important to remember it is not a Statement of Facts that the arbitrator must accept, rather the arbitrator still has the duty to review the evidence and testimony and make a finding of facts based upon the same.

Given that voluntary arbitration decisions are not appealable as to questions of fact, there are no reported decisions. However, it is clear the most common reason parties choose to proceed with voluntary arbitration is to facilitate a quick and efficient means of resolving issues with medical bills prior to the ultimate settlement of the claim on all other issues. A growing number of workers' compensation claims involve payments by Medicare and ERISA plans, which usually will not negotiate payment of bills and require reimbursement of any expenses potentially related to a workers' compensation injury. Due in part to more employees deferring retirement, parties are more frequently tasked with protecting Medicare's interests pursuant to the Medicare Secondary Payer (MSP) laws. All parties in a workers' compensation case have significant responsibilities under the MSP laws to protect Medicare's interests when resolving cases that include future medical expenses with a Medicare-eligible or soon-to-be-eligible employee. If there are future treatment recommendations at the time of settlement, the options available to the parties in the workers' compensation claim are to leave medical benefits open in a contract for settlement, obtain a Medicare Set-Aside (WCMSA), or proceed with a hearing for a final decision on the issues of future medical expenses. A hearing pursuant to voluntary arbitration allows the parties to quickly obtain a final decision on the reasonableness, necessity, causal connection, and liability for prior and future medical expenses, and the parties may then proceed with settlement of all other issues in the claim. Once the voluntary arbitration decision

is issued, the 19(p) arbitrator retains jurisdiction for a limited period. Therefore, if the parties have reached a compromised settlement on all other issues within that time, the parties will submit the settlement contract for approval with that arbitrator.

When submitting evidence for voluntary arbitration, the parties usually stipulate the submission of excerpts of medical and other evidence necessary for the arbitrator to make a finding of fact on the issues. The parties may also submit a joint proposed voluntary arbitration decision. In this manner, the arbitrator does not have to sift through documents irrelevant to the issues at hand and can expedite the decision. However, it is important to ensure the arbitrator has enough evidence available in the record to make their findings.

## CONCLUSIONS

As interest by arbitrators and practitioners in voluntary arbitration proceedings continues to grow, it is important to understand the process's advantages and risks. It can be an efficient way, by a joint effort of the parties, to obtain a final decision from the Commission when required for limited issues, especially medical bills. Both the petitioner and respondent, as well as their counsel, must affirmatively agree to proceed with the voluntary arbitration and certify on the Commission form their joint agreement as to the issue(s) in dispute, the designated arbitrator to assign the claim, and their understanding that the decision of the chosen arbitrator as to all issues of fact is final and unappealable. By proceeding with voluntary arbitration, though, the parties may be able to streamline the hearing issues, obtain a decision quickly, and then close all other issues through a negotiated settlement contract.

Please contact any of our experienced workers' compensation attorneys if you have any questions about this topic or any other workers' compensation issues. We look forward to hearing from you.



## ABOUT THE AUTHORS



### [Amber Cameron](#)

#### **Partner in Edwardsville, IL and St. Louis, MO**

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***Amber is a seasoned trial attorney representing the interests of employers of all sizes throughout southern Illinois and Missouri.***

Amber Cameron concentrates her practice on Workers' Compensation and toxic tort litigation. A Partner working out of the firm's Edwardsville and St. Louis offices, she is a seasoned trial attorney representing the interests of employers of all sizes throughout southern Illinois and Missouri. She also devotes a portion of her practice to defending asbestos personal injury suits and representing the firm's clients at depositions, hearings, and procedural matters.

Amber regularly provides educational seminars to insurance companies, third-party administrators, and self-insured employers on a wide range of topics concerning Workers' Compensation claim defense. With a keen eye for detail and a tactical approach, Amber works diligently with her clients to develop creative resolution strategies for her claims.

Before joining Heyl Royster in 2015, Amber was a staff attorney at the Illinois Workers' Compensation Commission, assisting Commissioners in deciding Workers' Compensation claims. At the Commission, she drafted hundreds of opinions on review and on remand, gaining advanced knowledge in Workers' Compensation law. Amber gained additional experience while working at a mid-sized defense firm in the St. Louis Metro East, where she represented clients in defense of Workers' Compensation and human rights claims throughout Illinois and Missouri.

Amber earned her law degree and a certificate in dispute resolution from the University of Missouri-Columbia School of Law. As a law student, she served as Vice-Justice of the Lawson Chapter of Phi Alpha Delta Law Fraternity and excelled in legal writing, winning Best Brief in the Board of Advocates Moot Court Competition.

Outside the office, you will find Amber spending time with her husband and two boys, having a hearty belly laugh, and experiencing new adventures and cultures through travel. If she can combine these three, then she is in her happy place.



### [Jenna Kobernus](#)

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***Jenna defends Workers' Compensation claims in Illinois and Missouri from the investigation phase through trial and appeal, believing in the importance of thoroughly investigating claims and aggressively defending her clients.***

Working diligently to represent clients and see claims from the investigation phase through trial and appeal, Jenna dedicates her practice to defending employers in Workers' Compensation cases throughout Missouri and Illinois. She understands that investigating claims thoroughly and taking an aggressive approach to defending her clients is crucial to achieving successful outcomes.

Jenna joined the firm's St. Louis office when it opened in 2018. Early in her career, she experienced a wide array of cases, including casualty and tort litigation, medical malpractice, toxic tort, professional liability, and trucking. In her time at Heyl, Jenna has found her niche working primarily with the Workers' Compensation Practice Group. She has gained valuable experience handling cases from the file intake phase through trial and the appellate process.

While in law school, Jenna held multiple leadership positions, including Public Interest Law Group (Two-time Auction Co-Chair), Student Bar Association (Chief of Staff), Business Law Association (Treasurer), Student Mentor, and Admissions Student Ambassador. After her 1L year, Jenna gained valuable legal experience as an intern for Chief United States District Judge of the United States District Court for the Central District of Illinois, James Shadid, in Peoria. Jenna also gained courtroom experience by using her 7-11 license the summer after her 2L year as an intern at the Peoria County State's Attorney's Office, prosecuting traffic and misdemeanor courts. In her final year of law school, Jenna was a member of the Civil Litigation Clinic. In that role, she argued in front of the Western District of Missouri Court of Appeals, drafted a Missouri Court of Appeals Appellate Brief, researched and drafted a federal court reply brief, and handled civil litigation cases throughout St. Louis County.

A Peoria native, Jenna maintains close relationships with the community where she and her sister grew up watching their parents volunteer at Easter Seals Central Illinois. At a very young age, they followed their parents' footsteps and have remained volunteers for over 15 years. In her free time, Jenna enjoys running and biking on her Peloton. She resides in St. Louis with her husband, Kent, and their Sheepadoodle puppy, Millie.

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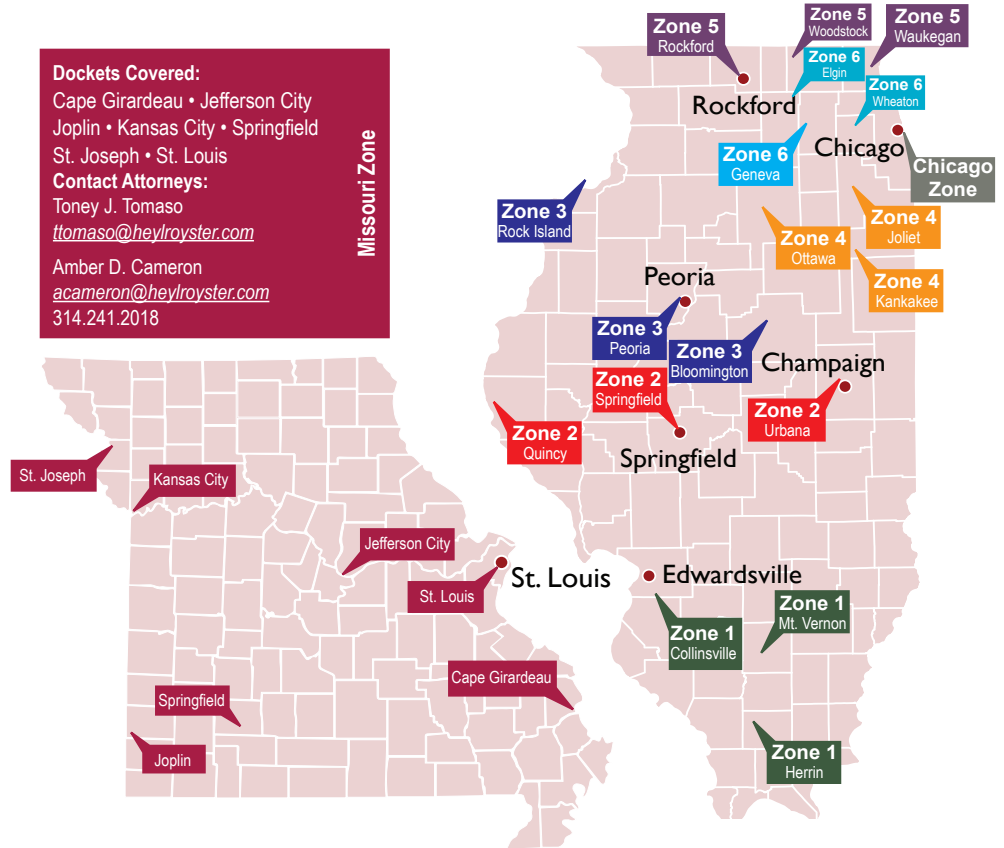
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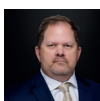
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