Below the Red Line

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *March 2015*

A Word From The Practice Group Chair

Welcome to the March edition of Below the Red Line. As we send this newsletter, we are preparing for our annual workers' compensation claims seminar which will be presented in Bloomington, Illinois, on May 28, 2015. We are planning an exciting program outlining the impact of workers' compensation issues on many of the world events seen in today's headlines. Invitations will be sent shortly, so please mark your calendar and plan to attend, if possible.

In this edition of our newsletter, Brad Peterson of our Urbana office does an excellent job of outlining some recent cases addressing the traveling employee issue. Our Appellate Court is very aggressive on this issue, so please take note of Brad's practice pointers on managing traveling employee cases.

Brad also provides an update with regard to recent proposals from the Social Security Administration on mandatory reporting. Brad focuses a large part of his practice on and is our firm's most experienced practitioner on Medicare and Social Security issues, so please feel free to contact him with any questions you may have in that regard.

Now that the weather is finally starting to turn, we hope you enjoy your spring. We look forward to seeing you at our seminar in May and we appreciate the opportunity to keep you updated on developing workers' compensation issues. If you need assistance on any workers' compensation matter, please feel free to contact me or our other workers' compensation attorneys.

Craig S. Young
Chair, WC Practice Group
cyoung@heylroyster.com

SAVE THE DATE!

Thursday, May 28, 2015

Heyl, Royster, Voelker & Allen
30th Annual Claims Handling Seminar

CONCURRENT SEMINARS:
Casualty & Property
Workers' Compensation
Governmental
1:00 – 4:30 p.m.
Doubletree Hotel, Bloomington, Illinois

Agendas will be available soon

In this issue . . .

WHEN DOES A TRAVELING EMPLOYEE ACTUALLY BEGIN TO "TRAVEL?"

In *Pryor v. Illinois Workers' Compensation Commission*, 2015 IL App (2d) 130874WC, the Illinois Appellate Court, Workers' Compensation Commission Division, addressed the issue of whether a traveling employee's injury "arose out of" and "in the course of" his employment when the injury occurred while moving a suitcase into his personal vehicle while still at his residence. *Pryor*, 2015 IL App (2d) 130874WC, ¶ 7. The appellate court concluded that while a traveling employee has a lower threshold of reasonableness concerning his actions, under the facts of this case, where the claimant came to his employer's premises prior to commencing his job as a truck driver, the employee was not a traveling employee until he reached his employer's premises which triggered the start of his work day as a delivery driver. Thus, the employee's injury while loading a suitcase into his personal vehicle prior to going to work to retrieve his work truck was not compensable, as it did not "arise out of" or "in the course of" his employment..

The claimant, Lanyon Pryor, was employed by Cassen Transport and his duties included delivering new automobiles to various Chrysler dealerships. *Id*. ¶ 5. The claimant's responsibilities included loading automobiles onto an 18 wheel car-hauling tractor trailer at the employer's terminal in Belvidere, Illinois, and driving to various dealerships where the vehicles were unloaded. *Id*. ¶ 5. The claimant would usually drive his personal vehicle from his home to the Belvidere terminal. *Id*. Two nights a week, the claimant would spend the night at a hotel while on the road delivering to dealerships. *Id*. ¶ 6. When he anticipated an overnight stay, he would pack a suitcase with a change of clothes. *Id*. Once he arrived at the terminal, he would place his suitcase into the semi-tractor and proceed with deliveries. *Id*.

On July 21, 2008, the claimant planned to drive to the Belvidere terminal that morning to "start [his] work." *Id*. ¶ 7. The claimant had packed a suitcase with his change of clothes and took it to his personal vehicle at his residence. *Id*. The claimant set the suitcase down and after opening the car door, reached down to pick up the suitcase to load it into his personal vehicle. He then "bent and turned to the back seat of the car" and felt "unbearable" pain throughout his back and legs. *Id*.

Later that day, the claimant's wife drove him to his chiropractor's office with whom he had began treating six days earlier on July 15, 2008. *Id*. ¶ 8. The claimant said that his pain originally arose on July 10, 2008, while chaining a car onto the car-hauling truck. *Id*. ¶ 8, n. 1. Dr. Kassim's chiropractic chart, however, failed to document any such work related accident. *Id*. Dr. Kassim recommended that the claimant go to the emergency room and the claimant proceeded to Saint Alexis Hospital and received an injection for pain relief. *Id*. ¶ 8-9. Eventually, the claimant was able to return to work as of August 18, 2008, and at arbitration on March 14, 2011, testified that his low back was "fine." *Id*. ¶ 9.

At arbitration, Cassen Transport's Operations Manager, Charles Anderson, testified that the claimant called in sick on July 14, 15 and 16, reporting sciatic nerve problems due to a "motorcycle ride." *Id*. ¶ 11. On cross examination, the claimant acknowledged that he could not recall if he made such a statement to Anderson and admitted that he rode his motorcycle approximately 250 miles to Wisconsin and back on July 12, 2008. *Id*.

The Arbitrator found that the claimant failed to prove he sustained an accident that "arose out of" and "in the course of" his employment on July 21, 2008. *Id*. ¶ 12. The Arbitrator concluded that the claimant "would be considered a traveling employee from when he arrives at [the employer's] terminal, loads his vehicle, delivers his vehicles to a destination, and returns to the terminal." *Id*. The Arbitrator concluded that "lifting an overnight bag is not sufficient to put [the claimant] "in the course of" his employment." *Id*. The Arbitrator relied upon the Supreme Court's decision in *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38 (1987), wherein it was noted that for an injury to arise out of the employment, the risk must be peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. *Pryor,* 2015 IL App (2d) 130874WC, ¶ 12. Additionally, the Arbitrator concluded that the claimant's condition was not causally related to the lifting incident of July 21, 2008. *Id*. ¶ 13.

The Commission unanimously affirmed the Arbitrator's decision, and the circuit court confirmed the Commission's decision. *Id*., ¶¶ 2, 3.

On appeal, the claimant argued that he was a "traveling employee" as his job required him to travel and that he was "in the course of" his employment from the moment he left his house as opposed to when he arrived at the terminal. *Id*. ¶ 14. He further argued that his injury "arose out of" his employment under the traveling employee doctrine as it was reasonable and foreseeable that he would load a bag into his car in preparation for his work travels. *Id*.

The appellate court began its analysis by noting that the question was governed by a *de novo* standard of review because the facts were undisputed or susceptible of but a single inference. *Id*. ¶ 18. The court noted that the general rule is that an injury incurred by an employee while going to or returning from the place of employment does not "arise out of" or "in the course of" the employment citing *The Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 16. The appellate court stated that the rationale for this rule is that an employee's trip to and from his work is the product of his own decision as to where he wants to live, which is a matter over which the employer ordinarily has no interest. *Pryor*, 2015 IL App (2d) 130874WC, ¶ 19. An exception exists for traveling employees as the traveling employee is deemed to be "in the course of" his employment from the time he leaves his home until he returns. *Id*. ¶ 20. Injuries to a traveling employee arise out of their employment if the injury occurs while engaging in conduct that is reasonable and foreseeable e.g. conduct that "might normally be anticipated or foreseen by the employer." *Id*.

The court then addressed the issue of whether the claimant Pryor's injury occurred while engaging in conduct that was reasonable and foreseeable to his employer. *Id*. ¶ 21. The court framed the issue as whether the claimant was traveling for work at the time of his injury. *Id*. ¶ 22. The court stated that a work-related trip must be more than a regular commute from the employee's home to the employer's premises. *Id*. Otherwise, every employee who commutes from his home to a fixed workplace that is owned or controlled by his employer would be deemed a "traveling employee." *Id*. If this were the case, the exception for traveling employees would "swallow the rule barring recovery for injuries incurred while traveling to and from work." *Id*.

On appeal, the claimant argued that compensability was supported by the appellate court's prior holding in *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App. (3d) 120411WC. In *Mlynarczyk*, the claimant was employed by a cleaning service and was walking to her company provided minivan to return to a jobsite when she slipped and fell, fracturing her wrist. *Mlynarczyk,* 2013 IL App (3d) 120411WC, ¶ 16. The fall occurred on a public sidewalk leading from the house to the driveway. *Pryor*, 2015 IL App (2d) 130874WC, ¶ 24. The appellate court there found that claim compensable, noting that the injury was reasonable and foreseeable as the accident occurred while walking to the vehicle used to transport her to her work assignment for the employer and the claimant's walk to the minivan "constituted the initial part of her journey to her work assignment." *Id*. ¶ 24.

In *Pryor*, the appellate court distinguished *Mlynarczyk,* as there, the claimant was departing her residence to travel to a jobsite to provide cleaning services whereas in *Pryor* the claimant was intending to drive to the Belvidere terminal where he would then begin his work. *Id.* ¶ 29.

The claimant also relied upon the appellate court's previous holding in *Complete Vending Services, Inc. v. Industrial Comm'n*, 305 Ill. App. 3d 1047 (2d Dist. 1999), where the claimant was a service technician who was on call 24 hours a day, 7 days a week and was injured in an auto accident while traveling to a service call. *Pryor*, 2015 IL App (2d) 130874WC, ¶ 26. In *Complete Vending Services*, the claimant departed his home in a company vehicle and intended to stop by the employer's office on his way to the service call to inquire as to whether there were any additional service calls to be made at that time. *Complete Vending Services*, 305 Ill. App. 3d at 1048-1049. It was noted that the company office was directly on the route to the service call that the claimant was making. *Id*. The appellate court distinguished *Complete Vending Services* noting that the driving to the Belvidere terminal was a regular commute to a fixed jobsite as opposed to the claimant in *Mlynarczyk*, who had no such "fixed jobsite." *Pryor*, 2015 IL App (2d) 130874WC, ¶ 29. Accordingly, the *Pryor* court concluded that the trip to the Belvidere facility was not part of a continuous trip from his home to a jobsite away from the employer's premises. *Id*. Likewise, the court noted that Pryor's injury did not occur on a trip from the employer's premises to a distinct work location such as in *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, nor did the injury occur during travels from a remote jobsite to the claimant's residence such as in *Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 546 (1st Dist. 2010).

The *Pryor* decision illustrates the degree to which subtle fact differences can lead to different results in accidents involving traveling employees. The proper analysis must include several factors such as: (1) Was the claimant traveling to a company facility as opposed to a remote jobsite? (2) Was the claimant operating a company vehicle? (3) Was the claimant injured while on a public street and exposed to a "street risk?" (4) Was the claimant carrying work related materials at the time of injury? (5) Was the claimant "on call" and departing the personal residence pursuant to a service call?

ARE TRAVELING EMPLOYEES AT INCREASED RISK OF TRIPPING OVER CURBS?

On February 27, 2015, the appellate court reversed the circuit court's finding of non-compensability where a traveling employee simply tripped over a curb. In *Nee v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 132609WC, the claimant was a plumbing inspector for the City of Chicago who inspected approximately 5-7 sites per day. *Nee*, 2015 IL App (1st) 132609WC, ¶ 3. On July 27, 2009, after completing an inspection, he tripped on a curb and fell while walking back to his car. *Id*. ¶ 4. Initially, the claimant testified that the curb may have been higher than the sidewalk, but he later acknowledged on cross examination that he did not know if it was higher or cracked. *Id*. As a result of the occurrence, the claimant suffered a medial collateral ligament strain in the knee. *Id*. ¶ 10.

At arbitration, the claimant's injuries were found to have arisen out of and "in the course of" his employment. *Id*. ¶ 15. On review, the Commission reversed and found unanimously that the claimant failed to prove that he sustained accidental injuries "arising out of" and "in the course of" his employment. *Id*. ¶ 16. The circuit court confirmed the commission decision. *Id*. ¶ 17. On appeal, the appellate court held that the Commission's decision was against the manifest weight of the evidence.

The appellate court began its analysis by concluding that the risk presented by the curb was a neutral risk and as such, it would not be compensable unless the employee was exposed to the risk to a greater degree than the general public. *Id*. ¶ 24. The court found nothing in the record to suggest that some aspect of the claimant's employment contributed to the risk of traversing a curb. *Id*. ¶ 25. It noted that although there was evidence he was carrying a clipboard, there was no evidence presented that this caused or contributed to his trip and fall. *Id*. The court therefore proceeded to analyze the case in terms of whether, as a traveling employee, the claimant was exposed to a risk of tripping on a curb more frequently than the general public. *Id*.

The court acknowledged that the risk of tripping over a curb is a risk to which the general public is also exposed. *Id*. ¶ 26. It noted, however, that under the Street Risk Doctrine, the risk of injury associated with the street becomes a risk of employment for traveling employees. The court stated that "when a traveling employee, such as the claimant in this case, is exposed to the risk while working, he is presumed to have been exposed to a greater degree than the general public." *Id*. ¶ 27. The court therefore concluded that as a traveling employee, the claimant was subjected to an increased risk of tripping over the curb and therefore, his injury "arose out of" his employment.

The *Nee* case illustrates the distinct analysis that must be undertaken when determining whether a traveling employee's injury "arises out of" and "in the course of" their employment. Cases which at first blush appear non-compensable may very well be found compensable where they involve claimants deemed traveling employees. In *Nee*, the court noted that traveling employee cases are governed by different rules than are applicable to other claimants, but noted that the claimant still has the burden of proving that his injury "arose out of" his employment. The test for determining whether an injury to a traveling employee "arises out of" and "in the course of" employment is the reasonableness of the conduct in which the employee was engaged and whether it might normally be anticipated or foreseen by the employer. In most instances, the mere act of stepping over a curb would not make for a compensable claim where the curb does not, itself, present a defect or increased risk. Traveling employees, however, are deemed at increased risk by virtue of injuries that occur while exposed to "street risk."

SOCIAL SECURITY ADMINISTRATION PROPOSES MANDATORY REPORTING OF WORKERS' COMPENSATION BENEFITS

The Social Security Administration has published its proposed 2016 budget, which also includes as an appendix, several legislative proposals. http://www.socialsecurity.gov/budget/FY16files/2016BFS.pdf. The legislative agenda includes a proposal that would require states, local governments and private insurers to report to the Social Security Administration workers' compensation benefits that would affect the offset of social security disability benefits. The proposal states:

> Current law requires SSA to reduce an individual's Disability Insurance (DI) benefit if he or she receives workers' compensation (WC) or public disability benefits (PDB). SSA currently relies upon beneficiaries to report when they receive these benefits. This proposal would improve program integrity by requiring states, local governments, and private insurers that administered WC and PDB

> to provide this information to SSA. Furthermore, this proposal would provide for the development and implementation of a system to collect such information from states, local governments and insurers.

FY 2016 Budget Overview, Appendix A – Legislative Proposals – Summaries, p. 22-23.

When social security disability recipients also receive workers' compensation benefits, the Social Security Administration is entitled to offset those benefits pursuant to the Social Security Act, 42 U.S.C. §424a. Generally, the Social Security Act requires that the total amount of social security disability and workers' compensation or public disability benefits be reduced by an amount necessary to insure that the sum of the benefits does not exceed 80 percent of the individuals pre-disability average current earnings. 42 U.S.C. §424a(a)(5).

Currently, the Social Security Administration does not have a means to independently determine whether a disability beneficiary is also receiving workers' compensation benefits or governmental disability benefits. The Social Security Administration relies upon the beneficiary to report when they are receiving such benefits. The potential for fraud or underreporting is very apparent.

The proposal would call for the creation of a system for governments and insurers to report the nature and amount of the benefit received by the social security disability beneficiary. The proposal does not address the issue of how the insurers or governmental entities are to determine whether the claimant is, in fact, a social security disability beneficiary.

This proposal is substantially similar in principle to the MMSEA §111 mandatory reporting requirement for reporting benefits and settlements to Medicare. While the goal of reducing fraud is certainly meritorious, the proposal will shift the burden of reporting workers' compensation and public disability benefits from the claimant/beneficiary to government entities and workers' compensation insurers. The burden may be increased if the Social Security Administration requires insurers and public entities to acquire releases from the claimant/beneficiaries prior to disclosure of their workers' compensation or public disability benefit. It is likely that this proposal will receive widespread support. The proposal does not suggest an effective date; however, it is quite likely that the effective date would be approximately 12-18 months after any such legislative proposal became law.

Brad Peterson - Urbana Office

Brad's practice is divided between workers' compensation, civil litigation and Medicare Secondary Payer Act compliance. He is experienced in the defense of construction and motor carrier liability, insurance coverage, workers' compensation, and Medicare Secondary Payer Act compliance. For over a decade Brad has had a special interest in Medicare Set-Aside Trusts and the Medicare Secondary Payer Act. He has written and spoken extensively on these issues. Brad was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers' compensation claims: "Medicare, Workers' Compensation and Set-Aside Trusts," *Southern Illinois Law Journal* (2002). He has also closely followed developments regarding the need for Medicare Set-Aside accounts in liability cases. In 2010, his article entitled "Medicare's Interests in Future Medical Expense Under Liability Settlements and Judgments" was published in the *Illinois Bar Journal* (January 2010). Brad is a member of the ISBA Workers' Compensation Section Council where he served as Chairman in 2012-2013 and he is a past editor of the Workers' Compensation Section Newsletter. He currently serves as the contributing editor of the Workers' Compensation Report for the *Illinois Defense Counsel Quarterly*. He has spent his entire legal career with Heyl Royster beginning in 1987 in the Urbana office.

Workers' Compensation Group

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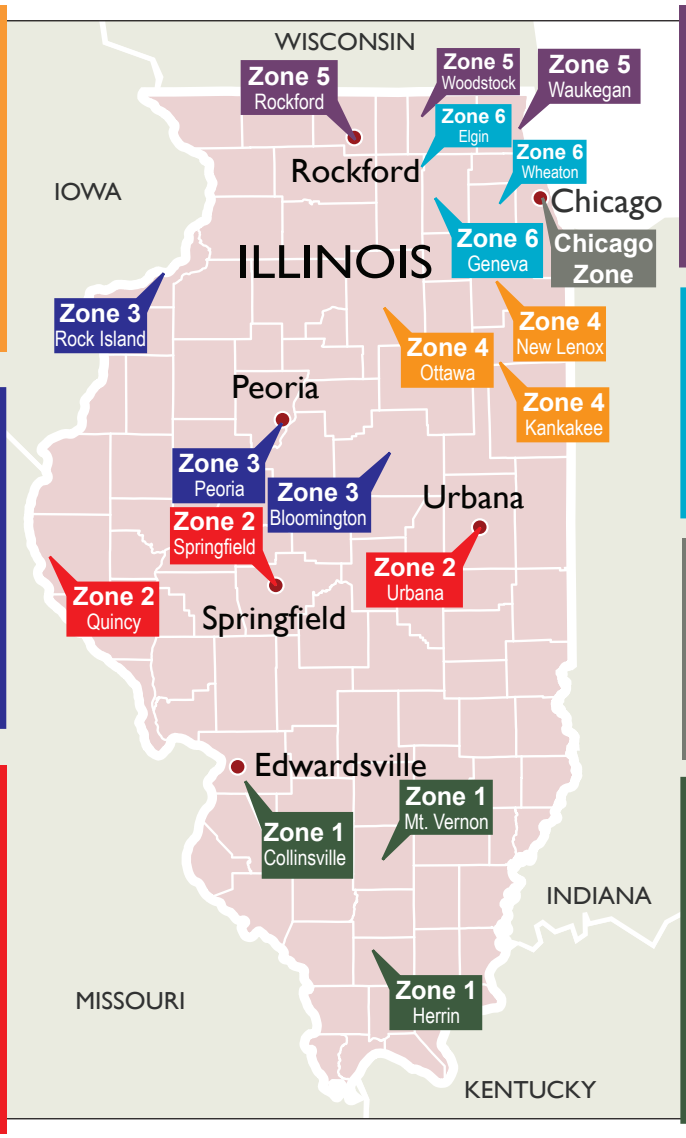
ILLINOIS ZONE MAP



Zone 4

Dockets Covered:
Kankakee • New Lenox • Ottawa

Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Bruce L. Bonds
bbonds@heylroyster.com
217.344.0060

Zone 3

Dockets Covered:
Bloomington • Rock Island • Peoria

Contact Attorneys:
Bradford B. Ingram
bingram@heylroyster.com
309.676.0400

Craig S. Young
cyoung@heylroyster.com
309.676.0400

Zone 2

Dockets Covered:
Quincy • Springfield • Urbana

Contact Attorneys:
Bruce L. Bonds
bbonds@heylroyster.com
217.344.0060

Daniel R. Simmons
dsimmons@heylroyster.com
217.522.8822

Zone 5

Dockets Covered:
Rockford • Waukegan • Woodstock

Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Zone 6

Dockets Covered:
Elgin • Geneva • Wheaton

Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Chicago Zone

Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Zone 1

Dockets Covered:
Collinsville • Herrin • Mt. Vernon

Contact Attorneys:
Bruce L. Bonds
bbonds@heylroyster.com
217.344.0060

Toney J. Tomaso
ttomaso@heylroyster.com
618.656.4646

Statewide Workers' Compensation Contact

Contact Attorney:
Craig S. Young - *cyoung@heylroyster.com*
309-676-0400

Statewide Appellate

Contact Attorney:
Brad A. Elward - *belward@heylroyster.com*
309-676-0400

heylroyster.com

Office Locations

Peoria
Suite 600
124 SW Adams St.
PO Box 6199
Peoria, IL 61601
309.676.0400

Chicago
Seventh Floor
33 N. Dearborn St.
Chicago, IL 60602
312.853.8700

Edwardsville
Suite 100
Mark Twain Plaza III
105 W. Vandalia St.
PO Box 467
Edwardsville, IL 62025
618.656.4646

Rockford
Second Floor
120 W. State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

Urbana
Suite 300
102 E. Main St.
PO Box 129
Urbana, IL 61803
217.344.0060

HEYL ROYSTER

Below is a sampling of our practice groups highlighting a partner who practices in that area – For more information, please visit our website
www.heylroyster.com

Appellate Advocacy
Craig Unrath
cunrath@heylroyster.com

Arson, Fraud and First-Party Property Claims
Dave Perkins
dperkins@heylroyster.com

Business and Commercial Litigation
Tim Bertschy
tbertschy@heylroyster.com

Business and Corporate Organizations
Deb Stegall
dstegall@heylroyster.com

Civil Rights Litigation/Section 1983
Theresa Powell
tpowell@heylroyster.com

Class Actions/Mass Tort
Patrick Cloud
pcloud@heylroyster.com

Construction
Mark McClenathan
mmcclenathan@heylroyster.com

Employment & Labor
Brad Ingram
bingram@heylroyster.com

Governmental
John Redlingshafer
jredlingshafer@heylroyster.com

Insurance Coverage
Jana Brady
jbrady@heylroyster.com

Liquor Liability/Dramshop
Nick Bertschy
nbertschy@heylroyster.com

Long Term Care/Nursing Homes
Mike Denning
mdenning@heylroyster.com

Mediation Services/Alternative Dispute Resolution
Brad Ingram
bingram@heylroyster.com

Product Liability
Rex Linder
rlinder@heylroyster.com

Professional Liability
Renee Monfort
rmonfort@heylroyster.com

Railroad Litigation
Steve Heine
sheine@heylroyster.com

Toxic Torts & Asbestos
Lisa LaConte
llaconte@heylroyster.com

Trucking/Motor Carrier Litigation
Matt Hefflefinger
mhefflefinger@heylroyster.com

Workers' Compensation
Craig Young
cyoung@heylroyster.com

Scan this QR Code for more information about our practice groups and attorneys

---

Peoria
Suite 600
Chase Building
124 S.W. Adams Street
PO Box 6199
Peoria, IL 61601
309.676.0400

Chicago
Seventh Floor
33 N. Dearborn Street
Chicago, IL 60602
312.853.8700

Edwardsville
Suite 100
Mark Twain Plaza III
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025
618.656.4646

Rockford
2nd Floor
PNC Bank Building
120 West State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

Urbana
Suite 300
102 E. Main St.
PO Box 129
Urbana, IL 61803
217.344.0060