Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *October 2018*

A Word From The Practice Chair

I am writing this introductory paragraph on All Hallows Eve. If you are the sort who cannot stand trick-or-treaters and turn off your lights when you get home from work, then I do hope your house is not egged or TP'd. If you love Halloween, much like I do, I hope you have a killer costume, are ready to take your kids out, or are preparing for the parade of kids coming to your door in crazy outfits to entertain and delight. I must admit, I enjoy handing out candy and seeing all the kids (no matter the age!) dress up. I just wish we had better weather. It is never fun to put on a great costume and then cover it up with a winter coat. But, that is what Illinois is all about in October.

The Oregon Studies and Rankings are now in and available. These are put together and reported every two years. There is good news to report for the State of Illinois coming out of this report as to where we rank in comparison to the other forty-nine states. In 2016, based upon workers' compensation costs, we were ranked 8th. This year, we are ranked 22nd, a great improvement that is not attributable to any one factor, but rather many. As we have said before, the State of Illinois is heading in the right direction in controlling workers' compensation costs, but we still have a ways to go. Nevertheless, it always helps to hear some good, objective news. If you want more information about these latest rankings, please contact me.

Although more details will follow in our newsletter, I wanted to take the time to personally congratulate my partner and now managing partner, Craig Young, on assuming leadership at Heyl Royster. We are all very excited to see where Craig guides our ship over these next years. And, to my partner Dana Hughes, I am excited to congratulate you on taking over management of the workers' compensation practice group in the Peoria office. I know you will do great things.

In this month's newsletter we dive into the recent *Par Electric* decision as it relates to multiple accident dates, multiple employers, medical causation, intervening accidents, and when those intervening accidents sever causation (and what standards the court will adhere to regarding same). I think there is something for everyone to take away from this case with its a rather unique fact pattern, but that still has some general concepts which will help us in our everyday file handling.

Toney J. Tomaso
Workers' Compensation Practice Chair
ttomaso@heylroyster.com

Craig Young Becomes New Managing Heyl Royster Partner

We are pleased to announce that Craig S. Young became Managing Partner of Heyl Royster, effective October 1, 2018. Craig began his career at Heyl Royster as a summer clerk while in law school and became an associate in the firm's Peoria office in 1985. He has been with Heyl Royster his entire career, and he has been a partner in the firm since 1992. Craig has served on the firm's Board of Directors since 2015.

While Craig has been involved over a long career in many areas of our firm's practice, he is primarily known as a nationally recognized Workers' Compensation defense lawyer who has developed deep knowledge and experience in many industries, including healthcare, trucking, government, large manufacturers, school districts, and universities. He formerly served as chair of our Workers' Compensation Practice and as Chair of the National Workers' Compensation Committee of the Defense Research Institute. He also managed the workers' compensation practice in the Peoria office.

In addition to being an outstanding lawyer, Craig has an unparalleled record of community and professional service. He is a former president of the Peoria County Bar Association (2014-2015), and a recipient of the PCBA's Distinguished Community Service Award. He has served the Heart of Illinois United Way in many capacities, including as president of the board. He is past Advisory Board Chair of the Peoria Tri-County Salvation Army, and the recipient of its 2012 William Booth Award for Community Service.

Dana Hughes Manages Peoria Workers' Compensation

As of October 1, Dana Hughes now leads our Peoria office workers' compensation practice. Dana started in our Rockford office and moved to the Peoria office in 2015. She represents employers in workers' compensation claims. A graduate of Northern Illinois University College of Law, Dana frequently speaks and writes on workers' compensation law and has been named to the Leading Lawyers Emerging Lawyers list.

Recent Appellate Court Decision Rejects Request to Abandon Intervening Act Theory Where Second Accident Is Allegedly Work-Related

By Brad Elward, belward@heylroyster.com

The recent decision of *Par Electric v. Illinois Workers' Compensation Comm'n*, 2018 IL App (3d) 170656WC appears on its face to simply involve application of the long-established law regarding intervening acts. According to case law, under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245 (1970). That the other event may have aggravated the employee's condition is irrelevant. *Vogel v. Illinois Workers' Compensation Comm'n*, 354 Ill. App. 3d 780, 786 (2d Dist. 2005). An employer is relieved of liability only if the intervening cause *completely* breaks the causal chain between the original work-related injury and the ensuing condition of ill-being. *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 411 (1st Dist. 2009).

Par Electric involves an employer's challenge to the intervening act theory in cases where the subsequent accident occurs while the petitioner is working for another employer. In that case, should the Commission look at the case from the prospective of the first employer, thus utilizing the intervening act analysis, or should the Commission consider the second employer and the doctrine that an employer takes an employee as it finds him (pre-existing condition)?

Par Electric resolves this issue.

Background Facts

In *Par Electric*, the petitioner worked as an apprentice lineman through the International Brotherhood of Electrical Workers. On June 16, 2014, claimant was assigned to work for Par Electric building new lines. On that date, as the petitioner was getting out of a bucket lift, he slipped and attempted to catch himself by grabbing something when he felt his right shoulder come out of the socket, resulting in significant pain.

The petitioner was diagnosed with a right rotator cuff strain, placed on modified duty, and eventually underwent physical therapy. Nevertheless, he continued to experience pain with overhead activity and certain shoulder motions, which led his physician to order an MRI of the right shoulder. The MRI suggested a diffuse labral tear, but no rotator cuff tear.

The petitioner was referred to Dr. Lawrence Li, an orthopedic surgeon, for further treatment. He diagnosed a right shoulder labral tear due to dislocation and later performed a right shoulder arthroscopy with debridement of extensive tenosynovitis and repair of a capsulolabral Bankart-type separation. By mid-January 2015, the petitioner reported to his physical therapist that the pain in his right shoulder was at level two on a ten-point scale.

In February 2015, the petitioner was evaluated by Dr. George Paletta and at that time was still experiencing mild discomfort to the anterior aspect of the shoulder, but reported making significant improvement in work conditioning. Upon physical examination, Dr. Paletta noted that claimant demonstrated minimal motion losses, excellent strength and function, and good stability. He recommended an additional two weeks of work conditioning, followed by a return to full-duty work without restriction or limitation. Dr. Paletta opined that the petitioner's right shoulder condition was causally related to the June 2014 work accident.

The petitioner was discharged from work conditioning on March 10, 2015. At that time, the therapist recorded that claimant had progressed rapidly during the final three weeks of work conditioning, had met all of his goals, and was prepared to return to work full duty. On March 11, 2015, Dr. Li released the petitioner to full duty without restrictions and instructed him to follow up in four weeks. The petitioner testified that although his shoulder had progressed, it was still weak and painful. Nevertheless, claimant returned to work because he was released to do so and he thought that his condition would improve with work.

The petitioner was hired by Henkels & McCoy on or about March 23, 2015 and worked for Henkels as an apprentice lineman—the same position he had with Par Electric. On April 1, 2015, the petitioner was still experiencing pain and weakness in his right shoulder. On that date, he threw a large roll of electric tape to a coworker in a bucket lift. He testified that he felt his shoulder "roll and come out of [the] socket," causing a lot of pain. The petitioner ignored the pain because he did not want to think he reinjured his shoulder. He finished his work shift, but "babied" his shoulder the rest of the day.

The petitioner returned to work the next day, although his shoulder was sore. On April 3, 2015, a Friday, he threw a wire grip to a coworker in a bucket lift. He estimated that he tossed the wire grip 15 to 20 feet. According to the petitioner, when he threw the wire grip his shoulder "did the exact same thing as it had done" on April 1 – he felt his shoulder "roll" and

"come out of the socket" and he experienced pain. He finished the workday but had to "baby" his right shoulder.

The petitioner was diagnosed a labral tear with biceps anchor or SLAP lesion involvement. Dr. Paletta opined that the previous area of repair was "likely intact" and that the recent injury appeared to be "an extended labral tear that involves a new area of the labrum not previously involved with the initial tear." Dr. Paletta found that the mechanism of injury described by claimant "would be appropriate for propagating or creating an extended labral tear." Dr. Paletta opined that claimant had reached maximum medical improvement (MMI) following the June 2014 injury and returned to full duty and that the need for the revision surgery was "related to the more recent injury and not as a result of the initial tear from 6-16-14 which clearly involved a different part of the labrum."

The petitioner underwent a second surgery on July 8, 2015, performed by Dr. Li, which consisted of a right shoulder arthroscopy with debridement and chondroplasty of the humeral head, arthroscopic repair of the anterior and anterior inferior labrum, repair of a SLAP tear, a biceps tenodesis, and the removal of a loose anchor.

Dr. Li—a board-certified orthopedic surgeon specializing in shoulders, hands, and knees—testified that the trauma claimant sustained as a result of the work accident in June 2014 caused inflammation of the tenosynovium tissue; damage to the glenohumeral joint of the shoulder, which is commonly referred to as the ball and socket joint; and a complete tear of the capsulolabral complex "from about two to six o'clock." Dr. Li testified that these findings are consistent with someone who fell with an outstretched arm and whose shoulder was dislocated and relocated. Dr. Li testified that someone with this type of pathology is at "significant risk" for future dislocations. As a result, Dr. Li recommended surgery, which the petitioner underwent on September 24, 2014.

Dr. Li was asked whether claimant's need for the second surgery and treatment resulted from the June 2014 accident or whether the accidents in April 2015 constituted intervening accidents which broke the chain of causal connection. Dr. Li testified that claimant's condition was partly attributable to sequelae of the June 2014 injury, adding that there was some worsening of claimant's condition from the subsequent dislocation. Dr. Li further responded:

> I think the original surgery had not fully healed. The construct which he had for his shoulder at the time that he was throwing the tape and throwing the grip was weaker than he was—than it was before his first accident, and those actions caused the capsule to—well, the shoulder to dislocate and the capsule to pull away and the anchor to pull out.
>
> So because in my second surgery I was able to see the anchor pulled out I would have to relate it to that this would be a consequence of the treatment from his first injury, so therefore I relate it to his first injury.

Par Electric, 2018 IL App (3d) 170656WC, ¶ 22.

Dr. Li further opined that because the subsequent labral tear was adjacent to the tear claimant sustained as a result of the June 2014 accident, the subsequent tear was an extension of the previous tear "up to the region of the SLAP tear" and was related to the first accident. Dr. Li also cited the proximity in time between claimant's first accident, his release to work, and his subsequent accidents as a factor in finding causation "because it's certainly within the time frame of incomplete healing." *Id*.

On cross-examination, Dr. Li acknowledged that the extended tear was not the result of the June 2014 accident, but rather the April 2015 accidents. Dr. Li agreed that if claimant did not perform the throwing actions in April 2015, it is unlikely he would have re-dislocated his shoulder. Dr. Li also agreed that claimant

did not have a SLAP tear as a result of the first accident and that the tear from the first injury did not extend as high as what would be required to perform a biceps tenodesis. Dr. Li was unaware of claimant having a history of dislocations prior to the 2014 accident.

Nevertheless, Dr. Li testified that the extension of the tear being related to the first injury is based in large part on the fact that the injuries in April 2015 loosened the anchor he installed during the first operation. Dr. Li further testified that the second surgery most likely would not have happened if the first injury had not happened.

Arbitration and Commission Decisions

The arbitrator found that the petitioner had sustained an accident on all three dates and further found that the April 1 and 3 claims were independent acts that severed causation from the 2014 accident. The Commission reversed the two April accident claims, finding that the two accidents did not constitute intervening accidents sufficient to break the causal connection and denied benefits for each date. The Commission placed sole responsibility on the original injury while the petitioner was working for Par Electric.

Appeal

On appeal, the circuit court confirmed and the appellate court affirmed. But the interesting part of the case came from the arguments made by Par Electric. In support of its position on appeal, Per Electric asserted that there is a conflict between "the line of cases that hold an employer takes an employee as they [sic] find them [sic] and intervening accident cases where the subsequent work-related accidents occur." It requested that the appellate court resolve this alleged conflict "with an interpretation that distinguishes between subsequent work-related and non-work-related accidents." *Id*. ¶ 55. In other words, Par Electric argued that the intervening act analysis should not apply where the subsequent accident occurred while the petitioner was working for another employer.

According to the appellate court, employers take their employees as they find them. *Id*. ¶ 56 (citing *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 199 (2002)). Thus, even though an employee has a preexisting condition that may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as the employee establishes that the employment was a causative factor in the resulting condition of ill-being. *Par Electric*, 2018 IL App (3d) 170656WC, ¶ 56 (citing *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003)). For this reason, the relevant inquiry in preexisting-condition cases is whether the employee's condition is attributable solely to a degenerative process of the preexisting condition or to the aggravation or acceleration of the preexisting condition resulting from a work-related accident. *Par Electric*, 2018 IL App (3d) 170656WC, ¶ 56.

In arguing that there is a conflict between these two lines of cases, Par Electric asserted that under a preexisting-condition analysis, a petitioner "would not have [been] prevented … from claiming Henkels was liable for a work-related injury if he had hypothetically originally injured his shoulder at home as opposed to while working for [respondent]" whereas "the intervening accident case law, and the 'whether work-related or not' language cited in [intervening-accident cases], likely leads to an opposite result – that the pre-existing condition precludes a finding that Henkels is liable." *Id*. ¶ 57.

The court pointed out that, although unartfully phrased, Par Electric seemed to suggest that a conflict exists between these lines of cases because recovery is permitted under a preexisting-condition analysis if the employee establishes that his or her employment was a causative factor in the resulting condition of ill-being, but under an independent intervening cause analysis, an employer is relieved of liability only if the intervening event completely breaks the causal chain between the original work-related injury and

the ensuing condition of ill-being. In other words, respondent would have us limit an employer's liability in intervening cause cases if a subsequent event was a causative factor in the employee's resulting condition of ill-being. *Id*.

The appellate court rejected Par Electric's argument, noting that it had cited no authority for such a position. "Indeed, this is clearly not the law in Illinois," said the court, citing to *International Harvester*, 46 Ill. 2d at 247, where the court rejected rejecting apportionment of compensation involving multiple accidents, and *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, ¶ 26, where the court observed that, "Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury." *Par Electric*, 2018 IL App (3d) 170656WC, ¶ 57. According to the appellate court, Par Electric advanced "no cogent reason to overturn this well-established precedent." *Id*.

After rejecting this challenge, the appellate court went on to affirm the Commission's decision on causation, relying on Dr. Li's opinions, which stated that the April incidents were causally related to the original injury. According to the appellate court, the Commission's decision was supported by the record and an opposite result was not clearly apparent.

Conclusions

Par Electric is an important case because it solidifies that the intervening act analysis does not change simply because the subsequent accident takes place while the petitioner is working for another employer. The Commission's focus in such cases should be on the *initial injury* and whether it had placed the employee is a condition wherein he or she is susceptible to further injury. This approach makes much sense in light of traditional intervening act jurisprudence. While the arguments offered by Par Electric were unique, adoption of those positions would have led to a dual standard – one where the outcome of the intervening act analysis depended on whether the subsequent accident happen while the claimant worked for another employer. Such a ruling would have constituted a substantial departure from the traditional analysis and made the evaluation of workers' compensation claims more difficult for all involved.

Brad Elward - Peoria

Brad concentrates in appellate practice and has a significant sub-concentration in workers' compensation appeals. He has authored more than 300 briefs and argued more than 225 appellate court cases, resulting in more than 100 published decisions. Brad is Past President of the Appellate Lawyers' Association. He has taught courses on workers' compensation law for Illinois Central College as part of its paralegal program and has lectured on appellate practice before the Illinois State Bar Association, Peoria County Bar, Illinois Institute for Continuing Legal Education, and the Southern Illinois University School of Law. Brad is the Co-Editor-In-Chief of the IICLE volume on Illinois Civil Appeals: State and Federal, and authored the chapter on Workers' Compensation appeals.

HEYL ROYSTER

REGIONAL ZONE MAPS

Chicago Zone

Contact Attorney:
Brad A. Antonacci
bantonacci@heylroyster.com
Kevin J. Luther
kluther@heylroyster.com
312.971.9807

Zone 6

Dockets Covered:
Elgin • Geneva • Wheaton
Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Zone 5

Dockets Covered:
Rockford • Waukegan • Woodstock
Contact Attorneys:
Kevin J. Luther
kluther@heylroyster.com
Lynsey A. Welch
lwelch@heylroyster.com
815.963.4454

Zone 4

Dockets Covered:
Kankakee • New Lenox • Ottawa
Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Zone 3

Dockets Covered:
Bloomington • Rock Island • Peoria
Contact Attorney:
Craig S. Young
cyoung@heylroyster.com
309.676.0400

Zone 2

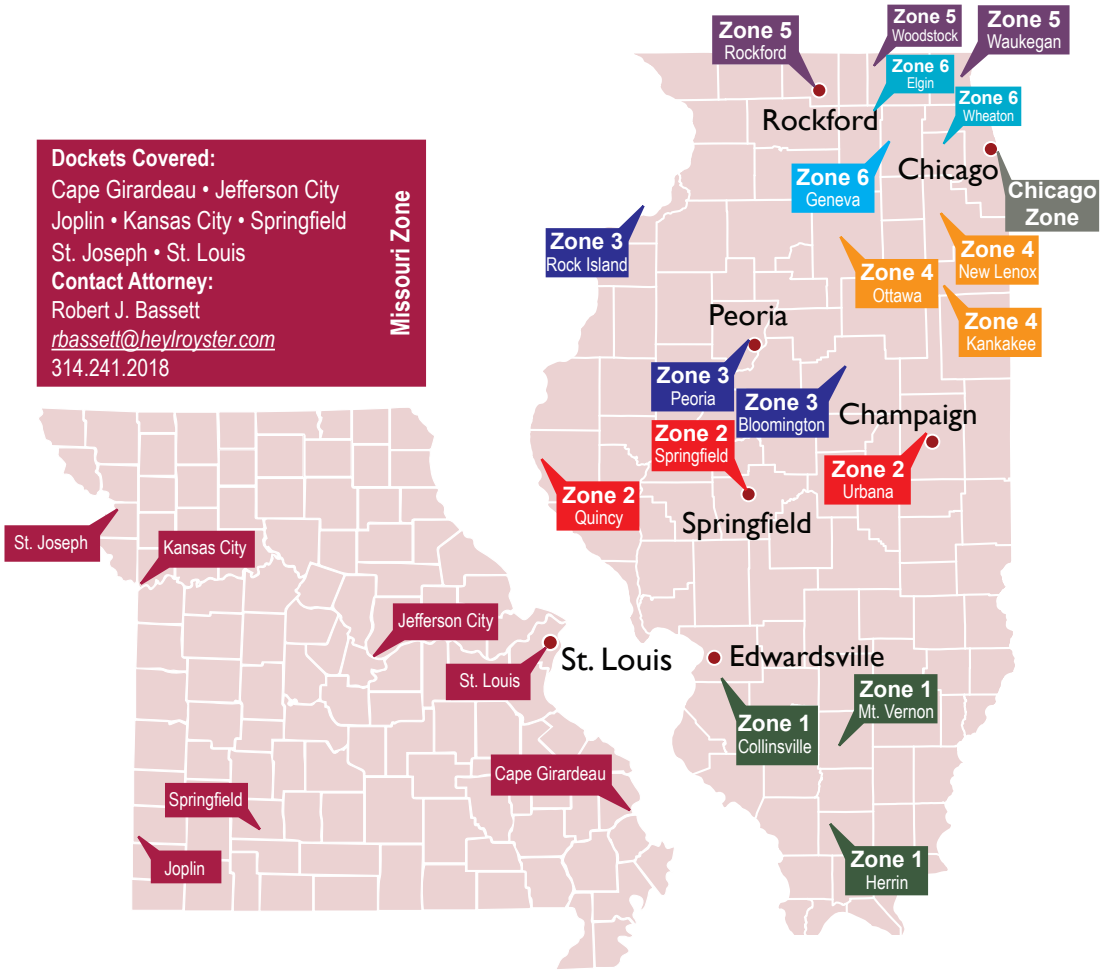
Dockets Covered:
Quincy • Springfield • Urbana
Contact Attorney:
Bruce L. Bonds
bbonds@heylroyster.com
217.344.0060

Zone 1

Dockets Covered:
Collinsville • Herrin • Mt. Vernon
Contact Attorneys:
Toney J. Tomaso
ttomaso@heylroyster.com
618.656.4646

Missouri Zone

Dockets Covered:
Cape Girardeau • Jefferson City
Joplin • Kansas City • Springfield
St. Joseph • St. Louis
Contact Attorney:
Robert J. Bassett
rbassett@heylroyster.com
314.241.2018



Workers' Compensation Practice Chair

Contact Attorney:
Toney Tomaso - ttomaso@heylroyster.com
217-344-0060

State of Wisconsin

Contact Attorney:
Kevin J. Luther - kluther@heylroyster.com
815-963-4454

Workers' Compensation Appellate

Brad A. Elward - belward@heylroyster.com
Patricia L. Hall - phall@heylroyster.com
309-676-0400

Jones Act Claims

Contact Attorney:
Ann Barron - abarron@heylroyster.com
618-656-4646

OFFICE LOCATIONS

Champaign
301 N. Neil St.
Suite 505
PO Box 1190
Champaign, IL
61803
217.344.0060

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

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

Peoria
300 Hamilton Blvd.
PO Box 6199
Peoria, IL
61601
309.676.0400

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

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

St. Louis
701 Market St.
Peabody Plaza
PO Box 775430
St. Louis, MO
63177
314.241.2018

WWW.HEYLROYSTER.COM

WORKERS' COMPENSATION PRACTICE GROUP

Practice Group Chair
Toney Tomaso
ttomaso@heylroyster.com

Champaign Office

Contact Attorney:
Bruce Bonds
bbonds@heylroyster.com

John Flodstrom
jflodstrom@heylroyster.com

Joseph Guyette
jguyette@heylroyster.com

Bradford Peterson
bpeterson@heylroyster.com

Toney Tomaso
ttomaso@heylroyster.com

Peoria Office

Contact Attorney:
Dana Hughes
dhughes@heylroyster.com

Bradford Ingram
bingram@heylroyster.com

James Manning
jmanning@heylroyster.com

Jessica Bell
jbell@heylroyster.com

Brad Elward
belward@heylroyster.com

Chicago Office

Contact Attorney:
Brad Antonacci
bantonacci@heylroyster.com

Kevin Luther
kluther@heylroyster.com

Lynsey Welch
lwelch@heylroyster.com

Fallon Sommerfeld
fsommerfeld@heylroyster.com

Rockford Office

Contact Attorney:
Kevin Luther
kluther@heylroyster.com

Lynsey Welch
lwelch@heylroyster.com

Patricia Hall
phall@heylroyster.com

Jordan Emmert
jemmert@heylroyster.com

Scott Hall
shall@heylroyster.com

St. Louis Office

Contact Attorney:
Bob Bassett
rbassett@heylroyster.com

Toney Tomaso
ttomaso@heylroyster.com

Amber Cameron
acameron@heylroyster.com

Edwardsville Office

Contact Attorney:
Toney Tomaso
ttomaso@heylroyster.com

John Flodstrom
jflodstrom@heylroyster.com

Amber Cameron
acameron@heylroyster.com

Springfield Office

Contact Attorney:
Dan Simmons
dsimmons@heylroyster.com

John Langfelder
jlangfelder@heylroyster.com

Jessica Bell
jbell@heylroyster.com

Brett Siegel
bsiegel@heylroyster.com

AJ Sheehan
ajsheehan@heylroyster.com

Appellate

Contact Attorney:
Brad Elward
belward@heylroyster.com

Patricia Hall
phall@heylroyster.com

AJ Sheehan
ajsheehan@heylroyster.com

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

Business and Commercial Litigation
John Heil
jheil@heylroyster.com

Business Organizations & Transactions
Ken Davies
kdavies@heylroyster.com

Casualty/Tort Litigation
Nick Bertschy
nbertschy@heylroyster.com

Civil Rights Litigation/Section 1983
Keith Fruehling
kfruehling@heylroyster.com

Construction
Mark McClenathan
mmcclenathan@heylroyster.com

Employment & Labor
Brad Ingram
bingram@heylroyster.com

Governmental
Andy Keyt
akeyt@heylroyster.com

Healthcare
Roger Clayton
rclayton@heylroyster.com

Insurance Services
Patrick Cloud
pcloud@heylroyster.com

Long Term Care/Nursing Homes
Tyler Robinson
trobinson@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
Toney Tomaso
ttomaso@heylroyster.com

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

Champaign
301 N. Neil St.
Suite 505
PO Box 1190
Champaign, IL
61803
217.344.0060

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

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

Peoria
300 Hamilton Blvd.
PO Box 6199
Peoria, IL
61601
309.676.0400

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

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

St. Louis
701 Market St.
Peabody Plaza
PO Box 775430
St. Louis, MO
63177
314.241.2018