

BELOW THE RED LINE

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ROYSTER

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

A Newsletter for Employers and Claims Professionals

September 2017

A WORD FROM THE PRACTICE CHAIR

The summer heat has broken. We can finally open our windows and let the air conditioner take a break. You may even be thinking about finding your local pumpkin patch and picking out some beautiful pumpkins for the front stoop! Never pass up an opportunity to carve a pumpkin with family; "old school fun" is like no other! So, I hope you are getting outside to enjoy the crisp mornings and gazing at the leaves as they begin to change colors.

I want to take a moment and call your attention to a rather significant event at the Commission that is right around the corner—the statutory rotation of the Arbitrators around the State of Illinois. Arbitrators are required, per the Act, to rotate every three years. That will happen on January 1, 2018. The Commission does a good job of keeping these changes under wraps. So, no rumor spreading will be done here. But, I promise that as soon as we know about those changes and can identify which Arbitrators are going to which zones, we will update you accordingly. And, you can count on the Heyl Royster attorney handling your workers' compensation claim to provide you with analysis and thoughts on how that Arbitrator change might impact your case. We take great pride in covering every docket call in this state and knowing each of the Arbitrators. Based upon our wealth of experience and the number of attorneys Heyl Royster has in our Workers' Compensation Practice Group, we can provide keen insight as to each Arbitrator and how that may play into handling any particular file.

This month's newsletter features an article by my partner Brad Elward. Brad reviews and analyzes the recent decision by the Appellate Court, Workers' Compensation Commission Division, in *Dukich*. The case deals with a slip-and-fall accident on rain-soaked pavement. I am happy to report the appellate court affirmed the Commission's denial of compensation for this claimant and found no evidence he experienced an "increased risk" while walking on the pavement. Our advice to you when dealing with slip and falls, is to view your claims with an eye towards demonstrating that the risk faced by the claimant at the time of the accident was a common risk which the general public deals with every day.

As always, we are here for questions or analysis on point to assist you in your claims handling.



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



HEYL ROYSTER WORKERS' COMPENSATION UPDATE

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Editors, Brad Elward and Lynsey Welch

APPELLATE COURT ISSUES EMPLOYER-FAVORABLE DECISION IN SLIP AND FALL ON RAIN-SOAKED PAVEMENT CASE

By: Brad A. Elward, Peoria Office

On September 19, 2017, the Illinois Appellate Court, Workers' Compensation Commission Division, issued an opinion in *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC, affirming the Commission's decision to deny benefits in a case involving an employee's fall on wet pavement at the employer's premises while walking to her car en route to lunch. The appellate court applied a neutral risk analysis to conclude that the risk of walking on wet pavement, absent some defect in the employer's premises or some evidence of increased qualitative or quantitative risk associated with the employment, was not a risk faced by the claimant to a greater degree than members of the general public. Presiding Justice William Holdridge authored the court's unanimous opinion.

Short Facts

The claimant worked as an attendance clerk for Fenton Community High School and was injured when she fell as she was walking from the school building where she worked to her car, which was parked in a designated parking space in a parking lot controlled by her employer. The claimant had exited her building and began walking toward her car. As she walked down a handicap ramp between the building's entrance and the street level, she lost her footing on the wet ramp and fell face first, injuring her head and nose. When asked at arbitration what caused her to fall, she answered, "[t]he rain. The water." *Dukich*, 2017 IL App (2d) 160351WC, ¶ 8.

The Commission concluded there were no defects on the paved surface where the claimant fell – no holes, depressions, uneven surfaces, loose gravel, or

puddles of rainwater. It also concluded that the area where the fall occurred was free of any snow or ice and that the surface was "merely wet from the rain." *Id.* ¶ 35. According to the Commission's findings of fact, there was no evidence that the employer had required the claimant to walk in the particular area where she fell and no evidence that the employer otherwise controlled the route taken by the claimant to her car.

Moreover, there was no evidence that there was any aspect of the claimant's employment that enhanced the risk of walking over the wet pavement. As the appellate court explained:

For example, the claimant was not rushing to complete a work task at the time of her accident. Although she was carrying an umbrella and a purse at the time, the employer did not require her to carry those items.

Id.

Accordingly, the court found that "the risk that the claimant confronted at the time of her accident was the risk of walking on wet pavement in the rain on property owned and controlled by her employer." *Id.* Thus, the question before the appellate court was "whether an injury caused by an exposure to that risk, standing alone, is compensable under the Act." *Id.*

Appellate Court Analysis

The appellate court agreed with the Commission majority, finding that the "dangers created by rainfall are dangers to which all members of the public are exposed [to] on a regular basis." *Id.* ¶ 36. These dangers, the court observed, "unlike defects or particular hazardous conditions located at a particular worksite, are not risks distinctly associated with one's employment." *Id.* As such, the court proceeded to analyze the claim under neutral risk principles – recovery may only be allowed "if the claimant can establish that she was exposed to the risks of injury

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from rainfall to a greater degree than the general public by virtue of her employment." *Id.*

Applying this analysis to the facts of the case, the appellate court concluded that the claimant had failed to present any evidence of increased risk. While the court acknowledged the employer had provided the claimant a designated parking space in the parking lot, "there is no evidence that the employer exercised any control over the particular route the claimant took to her car or required the claimant to traverse the particular handicap ramp on which she was injured." *Id.* Additionally, there was no evidence presented suggesting that the claimant's work duties "somehow contributed to her fall or enhanced the risk of slipping on wet pavement," and no evidence she was carrying any work-related items or hurrying to complete a work-related task when she slipped and fell. *Id.*

The appellate court further mentioned that even assuming the claimant was required to traverse the same path multiple times per day to get to her car, "she still could not recover benefits because there is no evidence that the wet pavement she encountered on that path was any different or more dangerous than any other wet pavement regularly encountered by members of the general public while walking in the rain." *Id.* ¶ 37. In reaching its conclusion, the court pointed to the Illinois Supreme Court's decision in *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 59 (1989), the claimant had twisted his ankle while stepping off a curb as he was walking from his workplace to the employee parking lot on the employer's premises. The *Dukich* court noted that in *Caterpillar*, the Court acknowledged that the claimant had regularly crossed the curb on which he had fallen to reach his car, but nevertheless denied benefits because "'[c]urbs, and the risks inherent in traversing them, confront all members of the public' and there was 'nothing in the record to distinguish [the curb upon which the claimant was injured] from any other curb.'" *Dukich*, 2017 IL App (2d) 160351WC, ¶ 37.

(quoting *Caterpillar*, 129 Ill. 2d at 62-63). The *Dukich* court noted that the wet pavement upon which the claimant fell "was no different from any other wet pavement." *Dukich*, 2017 IL App (2d) 160351 WC, ¶ 38.

Additionally, the appellate court noted that its conclusion that the claim was not compensable was not altered by the fact that the handicap ramp on which the claimant fell was sloped. "[T]he claimant presented no evidence suggesting that the paved handicap ramp upon which she fell was somehow different from or more hazardous than any other wet handicap ramp that members of the general public traverse every day." *Id.*

Finally, the appellate court rejected the claimant's suggestion that the wet pavement alone was a hazardous condition on the employer's premises. Noting the case law holding that an accidental injury sustained on property that is either owned or controlled by an employer within a reasonable time before or after work is generally considered to "arise out of" and "in the course of" the employment, the court found those cases distinguishable because the condition of wet pavement, without a defect on the premises, is not a hazardous condition. Moreover, each of the cases cited by the claimant involved accumulations of ice or snow, or wet surfaces within the employer's building, none of which were present here. The claimant's fall occurred outside on wet pavement.

Implications

The appellate court's decision makes it clear that when analyzing the risks posed by exposure to the elements or "acts of God," it will apply neutral risk principles. In such cases, "[t]he employee's injuries ... are compensable only if the claimant shows that he was exposed to some increased risk by virtue of his employment." *Id.* ¶ 42. As with all cases considering increased risk, the court will consider the quantitative

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(how frequently encountered) and qualitative (how physically encountered) nature of the risk as it relates to the employment.

Dukich is a good case for employers when dealing with premises-related accidents caused by exposure to the elements. Moreover, it provides an excellent overview of what factors the Commission should consider when evaluating such claims.

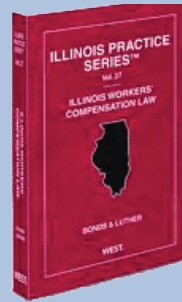
If you have any questions or would like to discuss this further, please do not hesitate to contact any member of our statewide workers' compensation team.



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.

New Edition in Print



Bruce Bonds and **Kevin Luther** co-authored the recently released "Illinois Workers' Compensation Law, 2017 Edition," Volume 27 of the Illinois Practice Series published by Thomson Reuters. This publication provides an up-to-date assessment of Illinois workers' compensation law in a practical format that is useful

to practitioners, adjusters, arbitrators, commissioners, judges, lawmakers, students, and the general public. It also contains a summary of historical developments of the Illinois Workers' Compensation Act.

Mr. Bonds concentrates his practice in the areas of workers' compensation, third-party defense of employers, and employment law. He is a member of the Illinois Workers' Compensation Commission's Rules Review and Revisions Committee and an adjunct professor of law at the University of Illinois College of Law, where he has taught workers' compensation law to upper-level students since 1998. Mr. Luther supervises the employment law, employer liability, and Workers' Compensation practices in the firm's Rockford and Chicago offices. He has represented numerous employers before the Illinois Human Rights Commission, arbitrated hundreds of workers' compensation claims, and tried numerous liability cases to jury verdict.

ILLINOIS WORKERS' COMPENSATION RATES

PEORIA Craig Young cyoung@heyloyroyster.com (309) 676-0400	CHAMPAIGN Bruce Bonds bbonds@heyloyroyster.com (217) 344-0060	CHICAGO Brad Antonacci bantonacci@heyloyroyster.com (312) 853-8700	EDWARDSVILLE Toney Tomaso ttomaso@heyloyroyster.com (618) 656-4646	ROCKFORD Kevin Luther kluther@heyloyroyster.com (815) 963-4454	SPRINGFIELD Dan Simmons dsimmons@heyloyroyster.com (217) 522-8822
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TTD, DEATH, PERM. TOTAL & AMP. RATES

ACCIDENT DATE	MAX. RATE TTD, DEATH, PERM. TOTAL, AMP.	MIN. RATE DEATH, PERM. TOTAL, AMP.
7/15/11 to 1/14/12.....	1261.41.....	473.03.....
1/15/12 to 7/14/12.....	1288.96.....	483.36.....
7/15/12 to 1/14/13.....	1295.47.....	485.80.....
1/15/13 to 7/14/13.....	1320.03.....	495.01.....
7/15/13 to 1/14/14.....	1331.20.....	499.20.....
1/15/14 to 7/14/14.....	1336.91.....	501.34.....
7/15/14 to 1/14/15.....	1341.07.....	502.90.....
1/15/15 to 7/14/15.....	1361.79.....	510.67.....
7/15/15 to 1/14/16.....	1379.73.....	517.40.....
1/15/16 to 7/14/16.....	1398.23.....	524.34.....
7/15/16 to 1/14/17.....	1428.74.....	535.79.....
1/15/17 to 7/14/17.....	1435.17.....	538.19.....

MINIMUM TTD & PPD RATES

# of dependents, including spouse	7/15/07- 7/14/08	7/15/08- 7/14/09	7/15/09- 7/14/10	7/15/10- 7/14/17
0.....	200.00.....	206.67.....	213.33.....	220.00.....
1.....	230.00.....	237.67.....	245.33.....	253.00.....
2.....	260.00.....	268.67.....	277.33.....	286.00.....
3.....	290.00.....	299.67.....	309.33.....	319.00.....
4+.....	300.00.....	310.00.....	320.00.....	330.00.....

MAXIMUM PERMANENT PARTIAL DISABILITY RATES

ACCIDENT DATE	MAXIMUM RATE
7/1/08 to 6/30/10.....	664.72.....
7/1/10 to 6/30/11.....	669.64.....
7/1/11 to 6/30/12.....	695.78.....
7/1/12 to 6/30/13.....	712.55.....
7/1/13 to 6/30/14.....	721.66.....
7/1/14 to 6/30/15.....	735.37.....
7/1/15 to 6/30/16.....	755.22.....
7/1/16 to 6/30/17.....	775.18.....

MAXIMUM 8(D)(1) WAGE DIFFERENTIAL RATE

ACCIDENT DATE	MAXIMUM RATE
7/15/13 to 1/14/14.....	998.40.....
1/15/14 to 7/14/14.....	1002.68.....
7/15/14 to 1/14/15.....	1005.80.....
1/15/15 to 7/14/15.....	1021.34.....
7/15/15 to 1/14/16.....	1034.80.....
1/15/16 to 7/14/16.....	1048.67.....
7/15/16 to 1/14/17.....	1071.58.....
1/15/17 to 7/14/17.....	1076.38.....

SCHEDULED LOSSES (100%)

Effective 2/1/06 (and 7/20/05 to 11/15/05)	Effective 2/1/06 (and 7/20/05 to 11/15/05)
Person as a whole.....500 wks	Leg.....215 wks
Arm.....253 wks	Amp at hip joint.....296 wks
Amp at shoulder joint.....323 wks	Amp above knee.....242 wks
Amp above elbow.....270 wks	Foot.....167 wks
Hand.....205 wks	Great toe.....38 wks
Repetitive carpal tunnel claims.....190 wks	Other toes.....13 wks
Benefits are capped at 15% loss of use of each affected hand absent clear and convincing evidence of greater disability, in which case benefits cannot exceed 30% loss of use of each affected hand.	Hearing
Thumb.....76 wks	Both ears.....215 wks
Index.....43 wks	One ear.....54 wks
Middle.....38 wks	Eye
Ring.....27 wks	Enucleated.....173 wks
Little.....22 wks	One eye.....162 wks
	Disfigurement.....162 wks

Death benefits are paid for 25 years or \$500,000 whichever is greater.

As of 2/1/06, burial expenses are \$8,000.

The current state mileage rate is \$0.535 per mile.

WORKERS' COMPENSATION PRACTICE GROUP



Practice Group Chair

Toney Tomaso

ttomaso@heyloyroyster.com

Peoria Office



Contact
Attorney:

Craig Young

cyoung@heyloyroyster.com



Bradford Ingram

bingram@heyloyroyster.com



James Manning

jmanning@heyloyroyster.com



Brad Elward

belward@heyloyroyster.com



Dana Hughes

dhughes@heyloyroyster.com



Jessica Bell

jbelle@heyloyroyster.com



Vincent Boyle

vboyle@heyloyroyster.com

Champaign Office



Contact
Attorney:

Bruce Bonds

bbonds@heyloyroyster.com



John Flodstrom

jflodstrom@heyloyroyster.com



Bradford Peterson

bpeterson@heyloyroyster.com



Joseph Guyette

jguyette@heyloyroyster.com



Toney Tomaso

ttomaso@heyloyroyster.com

Chicago Office



Contact
Attorney:

Brad Antonacci

bantonacci@heyloyroyster.com



Kevin Luther

kluther@heyloyroyster.com



Lynsey Welch

lwelch@heyloyroyster.com



Bide Akande

bakande@heyloyroyster.com



Mohit Khare

mkhare@heyloyroyster.com

Edwardsville Office



Contact
Attorney:

Toney Tomaso

ttomaso@heyloyroyster.com



Amber Cameron

acameron@heyloyroyster.com



Dirk Hennessey

dhennessey@heyloyroyster.com

Rockford Office



Contact
Attorney:

Kevin Luther

kluther@heyloyroyster.com



Lynsey Welch

lwelch@heyloyroyster.com



Mohit Khare

mkhare@heyloyroyster.com



Lindsey D'Agnolo

ldagnolo@heyloyroyster.com

Springfield Office



Contact
Attorney:

Daniel Simmons

dsimmons@heyloyroyster.com



John Langfelder

jlangfelder@heyloyroyster.com



Brett Siegel

bsiegel@heyloyroyster.com



Jessica Bell

jbelle@heyloyroyster.com

WORKERS' COMPENSATION GROUP

"WE'VE GOT YOU COVERED!"

Contact Attorney:

Brad A. Antonacci
bantonacci@heyloyster.com
Kevin J. Luther
kluther@heyloyster.com
312.971.9807

Chicago Zone

Dockets Covered:

Elgin • Geneva • Wheaton

Contact Attorney:

Kevin J. Luther
kluther@heyloyster.com
815.963.4454

Zone 6

Dockets Covered:

Rockford • Waukegan • Woodstock

Contact Attorneys:

Kevin J. Luther
kluther@heyloyster.com
Lynsey A. Welch
lwelch@heyloyster.com
815.963.4454

Zone 5

Dockets Covered:

Kankakee • New Lenox • Ottawa

Contact Attorney:

Kevin J. Luther
kluther@heyloyster.com
815.963.4454

Zone 4

Dockets Covered:

Bloomington • Rock Island • Peoria

Contact Attorney:

Craig S. Young
cyoung@heyloyster.com
309.676.0400

Zone 3

Dockets Covered:

Quincy • Springfield • Urbana

Contact Attorney:

Bruce L. Bonds
bbonds@heyloyster.com
217.344.0060

Zone 2

Dockets Covered:

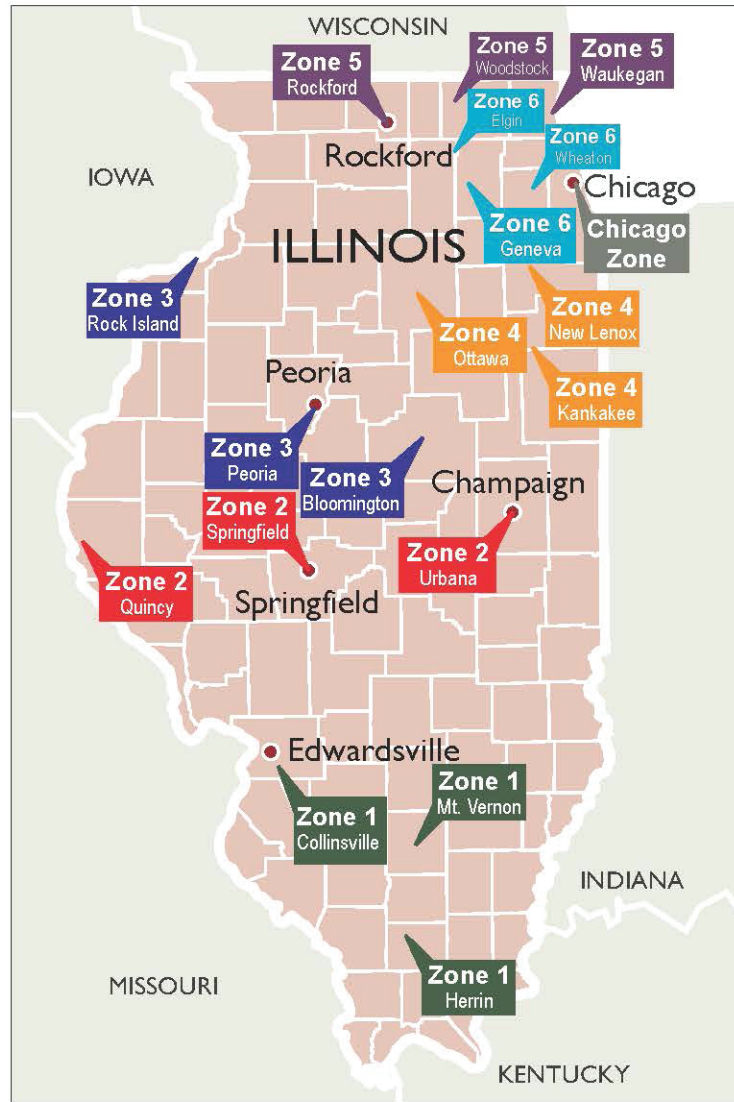
Collinsville • Herrin • Mt. Vernon

Contact Attorneys:

Toney J. Tomaso
ttomaso@heyloyster.com
618.656.4646

Zone 1

ILLINOIS ZONE MAP



Statewide Workers' Compensation Contact

Contact Attorney:

Toney Tomaso - ttomaso@heyloyster.com
217-344-0060

Statewide Appellate

Contact Attorney:

Brad A. Elward - belward@heyloyster.com
309-676-0400

State of Missouri

Contact Attorney:

Toney Tomaso - ttomaso@heyloyster.com
217-344-0060

State of Wisconsin

Contact Attorney:

Kevin J. Luther - kluther@heyloyster.com
815-963-4454

Jones Act Claims

Contact Attorney:

Ann Barron - abarron@heyloyster.com
618-656-4646

OFFICE LOCATIONS

Peoria

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

Champaign

301 N. Neil Street
Suite 505
PO Box 1190
Champaign, IL 61824
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

Rockford

120 W. State St.
Second Floor
PO Box 1288
Rockford, IL 61105
815.963.44542

Springfield

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

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



Appellate Advocacy

Craig Unrath
cunrath@heyloyster.com



Arson, Fraud and First-Party Property Claims

Dave Perkins
dperkins@heyloyster.com



Business and Commercial Litigation

Tim Bertschy
tbertschy@heyloyster.com



Business and Corporate Organizations

Deb Stegall
dstegall@heyloyster.com



Civil Rights Litigation/Section 1983

Keith Fruehling
kfruehling@heyloyster.com



Class Actions/Mass Tort

Patrick Cloud
pcloud@heyloyster.com



Construction

Mark McClenathan
mmcclenathan@heyloyster.com



Employment & Labor

Brad Ingram
bingram@heyloyster.com



Governmental

John Redlingshafer
jredlingshafer@heyloyster.com



Insurance Coverage

Jana Brady
jbrady@heyloyster.com



Liquor Liability/Dramshop

Nick Bertschy
nbertschy@heyloyster.com



Long Term Care/Nursing Homes

Mike Denning
mdenning@heyloyster.com



Mediation Services/Alternative Dispute Resolution

Brad Ingram
bingram@heyloyster.com



Product Liability

Rex Linder
rlinder@heyloyster.com



Professional Liability

Renee Monfort
rmonfort@heyloyster.com



Railroad Litigation

Steve Heine
sheine@heyloyster.com



Toxic Torts & Asbestos

Lisa LaConte
llaconte@heyloyster.com



Trucking/Motor Carrier Litigation

Matt Hefflefinger
mhefflefinger@heyloyster.com



Workers' Compensation

Toney Tomaso
ttomaso@heyloyster.com



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

Peoria

300 Hamilton Boulevard
 PO Box 6199
 Peoria, IL 61601
 309.676.0400

Champaign

301 N. Neil St.
 Suite 505
 PO Box 1190
 Champaign, IL 61824
 217.344.0060

Chicago

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

Edwardsville

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

Rockford

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

Springfield

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