

ILLINOIS POLLUTION CONTROL BOARD
June 19, 2008

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 05-61
)	(IEPA No. 59-05-AC)
TIMOTHY PEARCE)	(Administrative Citation)
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

Today the Board finds that respondent, Timothy Pearce (Pearce), violated Section 21(p)(7) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(7) (2006)). An administrative citation issued by complainant, the Illinois Environmental Protection Agency (Agency), alleged that the violation took place on February 16, 2005, at 241 N. Willow Road in Flora, Clay County. The site is known to the Agency as “Flora/Pearce, Timothy” and is designated with Site Code No. 0258105003.

Pearce filed a petition to contest the administrative citation, but has stopped participating in this proceeding. Since Pearce’s participation ceased, the Agency served Pearce with both a request to admit facts and a motion for summary judgment. Pearce did not respond to either. Based on this record, the Board finds that there are no genuine issues of material fact and that the Agency is entitled to judgment as a matter of law. The Board grants the Agency’s unopposed motion for summary judgment. Pearce violated Section 21(p)(7) the Act by causing or allowing the opening dumping of waste in a manner resulting in the deposition of general or clean construction or demolition debris. Pearce is therefore subject to the statutorily-mandated \$1,500 civil penalty.

Below, the Board first provides the legal framework for administrative citations, followed by the procedural history of this case. The Board then describes the Agency’s administrative citation and Pearce’s petition. Next, the Board discusses the Agency’s request to admit facts and sets forth the Board’s findings of fact. The Board then rules on the Agency’s motion for summary judgment, rendering legal conclusions on the alleged violation and civil penalty.

LEGAL FRAMEWORK

Under the Act, an administrative citation is an expedited enforcement action brought before the Board seeking civil penalties that are fixed by statute. Administrative citations may be filed only by the Agency or, if the Agency has delegated the authority, by a unit of local government, and only for limited types of alleged violations at sanitary landfills or unpermitted

open dumps. *See* 415 ILCS 5/3.305, 3.445, 21(o), (p), 31.1(c), 42(b)(4), (4-5) (2006); 35 Ill. Adm. Code 108.

The Agency or delegated local authority must serve the administrative citation on the respondent within “60 days after the date of the observed violation.” 415 ILCS 5/31.1(b) (2006); *see also* 35 Ill. Adm. Code 108.202(b). The Agency or delegated local authority also must file a copy of the administrative citation with the Board no later than ten days after serving the respondent. *See* 415 ILCS 5/31.1(c) (2006). To contest the administrative citation, the respondent must file a petition with the Board no later than 35 days after being served with the administrative citation. If the respondent fails to do so, the Board must find that the respondent committed the violations alleged and impose the corresponding civil penalty. *See* 415 ILCS 31.1(d)(1) (2006); 35 Ill. Adm. Code 108.204(b), 108.406.

If the respondent timely contests the administrative citation, but the complainant proves the alleged violations at hearing, the respondent will be held liable not only for the civil penalty but also for the hearing costs of the Board and the complainant. *See* 415 ILCS 5/42(b)(4-5) (2006); 35 Ill. Adm. Code 108.500. However, if the Board finds that the respondent “has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty.” 415 ILCS 5/31.1(d)(2) (2006); *see also* 35 Ill. Adm. Code 108.500(b).

Because the Act (415 ILCS 5/42(b)(4-5) (2006)) specifies the civil penalty for a violation in an administrative citation action, the Board cannot consider mitigating or aggravating factors when determining penalty amounts. *See, e.g., IEPA v. Stutsman*, AC 05-70, slip op. at 2 (Sept. 21, 2006). The appellate court in *Miller v. PCB*, 267 Ill. App. 3d 160, 642 N.E.2d 475 (4th Dist. 1994), described the Board’s administrative citation process as follows: “the administrative citation proceeding is to the Act as traffic citations are to the body of criminal law.” *Miller*, 267 Ill. App. 3d at 167, 642 N.E.2d at 482.

PROCEDURAL HISTORY

On March 28, 2005, the Agency filed the administrative citation. The Agency site inspection resulting in the citation took place on February 16, 2005. The Agency served Pearce with the administrative citation on April 15, 2005. On May 19, 2005, Pearce filed with the Board a petition to contest the administrative citation. In a June 2, 2005 order, the Board accepted the petition for hearing.

Board Hearing Officer Carol Webb held telephonic status conferences on June 28, 2005; August 30, 2005; November 8, 2005; January 4, 2006; March 9, 2006; April 24, 2006; May 18, 2006; June 29, 2006; August 1, 2006; September 5, 2006; October 3, 2006; November 1, 2006; December 18, 2006; January 22, 2007; February 20, 2007; March 20, 2007; April 19, 2007; May 16, 2007; June 19, 2007; July 16, 2007; August 15, 2007; September 25, 2007; November 21, 2007; January 9, 2008; February 5, 2008; March 6, 2008; and April 7, 2008. Pearce last participated in a status call on August 1, 2006. *See generally* Hearing Officer Orders dated Sept. 5, 2006 through May 5, 2008.

On August 15, 2007, the Agency filed a request to admit facts, which was mailed to Pearce on the same date. Pearce has not responded to the request. On March 6, 2008, the Agency filed a motion for summary judgment, which was mailed to Pearce on March 3, 2008. Pearce has not responded to the motion. The case has not been to hearing.

ADMINISTRATIVE CITATION AND PETITION TO CONTEST

In the administrative citation, the Agency alleged that Pearce violated Section 21(p)(7) of the Act (415 ILCS 5/21(p)(7) (2006)) by causing or allowing the open dumping of waste in a manner resulting in the deposition of general construction or demolition debris or clean construction or demolition debris at 241 North Willow Road, Flora, Clay County. The Agency asked the Board to impose a \$1,500 civil penalty on Pearce for the alleged violation. Attached to the administrative citation is an inspection report (Narrative, Photos) supported by the affidavit of Garrison Gross (Gross), a field inspector with the Agency's Land Pollution Control Division.

In the petition to contest, Pearce denied the allegations of the citation. He maintained that he did not cause or allow the open dumping of waste and that any materials observed at the site constituted neither waste nor the deposition of general construction or demolition debris or clean construction or demolition debris.

REQUEST TO ADMIT FACTS

The Board's procedural rules provide that a "party may serve a written request for admission of the truth of specific statements of fact on any other party." 35 Ill. Adm. Code 101.618(d). The request must include in its first paragraph the following language:

Failure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney. 35 Ill. Adm. Code 101.618(c).

The Agency's August 15, 2007 request to admit (Requ.) contained this notice. Requ. at 1.

The Agency's request asked that Pearce admit the truth of numerous statements concerning the site and Pearce's relationship to the site. Requ. at 1-2. Under the Board's procedural rules:

Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters, or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. 35 Ill. Adm. Code 101.618(f).

Pearce has not responded to the Agency's request to admit of August 15, 2007. The Board accordingly finds that under Section 101.618(f), Pearce is deemed to have admitted the factual statements of the Agency's request.

FACTS

On February 16, 2005, Pearce owned and operated the property at 241 North Willow Road in Flora, Clay County. Requ. at 1, ¶¶ 1, 2. On that date, Gross, an Agency field inspector, inspected Pearce's site. Gross did so as a follow-up to a previous site inspection and a telephone complaint about "additional open dumping" at the property. Narrative at 1. The most recent prior inspection of the site by the Agency took place on October 19, 2004. *Id.*

During the February 16, 2005 inspection, the site contained an approximately 515 cubic yard pile of debris from construction or demolition activities. Narrative at 1; Requ. at 1-2, ¶¶ 3, 4. The debris was located in a field. Photos 001, 002. The pile was of varying heights and its base was irregularly shaped. The material was not separated or processed. Photos 001-004. Some of the concrete material contained protruding metal bars. Photo 004. Debris observed on October 19, 2004 was still present. Narrative at 1, Photos 001, 002. Also, additional material, primarily busted concrete, had been deposited on the site since the previous inspection. Narrative at 1. Tire tracks led to the newer piles of debris. *Id.*, Photos 003, 004. Pearce does not have a permit from the Agency to manage waste at the site. Requ. at 2, ¶ 9.

DISCUSSION

Motion for Summary Judgment

In its motion for summary judgment (Mot.), the Agency argues that it has demonstrated Pearce's violation of Section 21(p)(7) of the Act. The Agency bases its position on the inspection report attached to the administrative citation and Pearce's failure to respond to the request to admit. Mot. at 3. According to the Agency, Pearce "was the owner and operator of the site on which the open dumping was observed," and he caused or allowed "waste to be open dumped there." *Id.* at 2-3, citing Requ. at 1-2, ¶¶ 1-3, 5-8. The Agency further states that Pearce "admitted that the open dumped waste included general or clean construction or demolition debris." *Id.*, citing Requ. at 2, ¶ 4.

Summary Judgment Standard of Review

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Dowd & Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment “is a drastic means of disposing of litigation,” and therefore the Board should grant it only when the movant’s right to the relief “is clear and free from doubt.” Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Putrill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Alleged Violation

The Agency’s administrative citation alleges that Pearce violated Section 21(p)(7) of the Act (415 ILCS 5/21(p)(7) (2006)). Section 21(p)(7) provides:

No person shall: In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

(7) deposition of:

(i) general construction or demolition debris as defined in Section 3.160(a) of this Act; or

(ii) clean construction or demolition debris as defined in Section 3.160(b) of this Act. 415 ILCS 5/21(p)(7) (2006).

Section 21(a) of the Act, which is referred to in Section 21(p), provides:

No person shall:

Cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (2006).

“Open dumping” is defined as “the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.” 415 ILCS 5/3.305 (2006). “Refuse” means “waste” (415 ILCS 5/3.385 (2006)) and the Act defines “waste” as:

[A]ny garbage . . . or other discarded material, including solid . . . material resulting from industrial, commercial, mining and agricultural operations, and from community activities 415 ILCS 5/3.535 (2006).

The terms “general construction or demolition debris” and “clean construction or demolition debris,” which are referred to in Section 21(p)(7), are defined in the Act:

(a) “General construction or demolition debris” means non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous

painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed or other asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals incidental to any of those materials.

General construction or demolition debris does not include uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads provided the uncontaminated soil is not commingled with any general construction or demolition debris or other waste.

(b) “Clean construction or demolition debris” means uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities. Clean construction or demolition debris does not include uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads provided the uncontaminated soil is not commingled with any clean construction or demolition debris or other waste.

415 ILCS 5/3.160(a), (b) (2006).

Pearce did not respond to the Agency’s motion for summary judgment and therefore is deemed to have waived any objection to the Board granting the motion. *See* 35 Ill. Adm. Code 101.500(d). Further, as explained above, Pearce has by rule admitted the truth of the facts set forth in the Agency’s request to admit by not responding to the request. *See* 35 Ill. Adm. Code 101.628(f).

The Board finds that there are no genuine issues of material fact and that the Agency is entitled to judgment as a matter of law. Pearce owned and operated the site located at 241 N. Willow Road in Flora, Clay County. The site was under Pearce’s control and unpermitted. As of the February 16, 2005 inspection, approximately 515 cubic yards of debris from construction or demolition activities had been accumulated on the site in a sprawling pile. The materials were located in a field and not separated or processed. The debris included busted concrete, some of which had protruding metal bars. Debris had been added to the pile since an Agency inspection four months earlier. Narrative at 1, Photos 001, 002.

Even considering the record in the light most favorable to Pearce, the Board finds that Pearce caused or allowed the opening dumping of waste in a manner resulting in the deposition of general or clean construction or demolition debris. The Board therefore finds that Pearce violated Section 21(p)(7) of the Act (415 ILCS 5/21(p)(7) (2006)) and grants the Agency’s unopposed motion for summary judgment.

Civil Penalty

When the Board finds a violation in an administrative citation proceeding, the Board is required to impose a civil penalty. Administrative citation penalties for violations of Section 21(p) of the Act are fixed by Section 42(b)(4-5) of the Act:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) of Section 21 of this Act shall pay a civil penalty of \$1,500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency, except that the civil penalty amount shall be \$3,000 for each violation of any provision of subsection (p) of Section 21 that is the person's second or subsequent adjudicated violation of that provision. 415 ILCS 5/42(b)(4-5) (2006).

The Agency asks that the Board impose a \$1,500 civil penalty for Pearce's violation of Section 21(p)(7). There is no indication in the record that this is a second or subsequent adjudicated violation for Pearce. Therefore, the civil penalty is statutorily set at \$1,500. *See* 415 ILCS 5/42(b)(4-5) (2006). Below, the Board will order Pearce to pay the penalty. As this case is being disposed of on a motion for summary judgment, there are no hearing costs to assess. *Id.*

CONCLUSION

As described above, there are no genuine issues of material fact in this case and the Agency is entitled to judgment as a matter of law. The Board grants the Agency's unopposed motion for summary judgment. The Board finds that Pearce violated Section 21(p)(7) of the Act by causing or allowing the open dumping of waste in a manner resulting in the deposition of general or clean construction or demolition debris. Having found the violation in this administrative citation action, the Board requires Pearce to pay the statutory civil penalty of \$1,500.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board grants the Agency's motion for summary judgment.
2. The Board finds that Pearce violated Section 21(p)(7) of the Act (415 ILCS 5/21(p)(7) (2006)).
3. The Board assesses the statutory civil penalty of \$1,500 for the violation. Pearce must pay \$1,500 no later than August 4, 2008, which is the first business day following the 45th day after the date of this order. Pearce must pay this amount by certified check or money order made payable to the Illinois Environmental Protection Trust Fund. The case number, case name, and Pearce's social security number or federal employer identification number must be included on the certified check or money order.

4. Pearce must send the certified check or money order to:

Illinois Environmental Protection Agency
Attn.: Fiscal Services
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

5. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2006)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2006)).
6. Payment of this penalty does not prevent future prosecution if the violation continues.

IT IS SO ORDERED.

Section 41(a) of the Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify the Board's final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 19, 2008, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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CLERK'S OFFICE

MAR 28 2005

ADMINISTRATIVE CITATION

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Complainant,)
v.)
TIMOTHY PEARCE,)
Respondent.)

AC 05-61
(IEPA No. 59-05-AC)

JURISDICTION

This Administrative Citation is issued pursuant to the authority vested in the Illinois Environmental Protection Agency by Section 31.1 of the Illinois Environmental Protection Act, 415 ILCS 5/31.1 (2002).

FACTS

1. That Timothy Pearce ("Respondent") is the present owner and operator of a facility located at 241 North Willow Road, Flora, Clay County, Illinois. The property is commonly known to the Illinois Environmental Protection Agency as Flora/Pearce, Timothy.
2. That said facility is an open dump operating without an Illinois Environmental Protection Agency Operating Permit and is designated with Site Code No. 0258105003.
3. That Respondent has owned and operated said facility at all times pertinent hereto.
4. That on February 16, 2005, Garrison Gross of the Illinois Environmental Protection Agency's Marion Regional Office inspected the above-described facility. A copy of his inspection report setting forth the results of said inspection is attached hereto and made a part hereof.

VIOLATIONS

Based upon direct observations made by Garrison Gross during the course of his February 16, 2005 inspection of the above-named facility, the Illinois Environmental Protection Agency has determined that Respondent has violated the Illinois Environmental Protection Act (hereinafter, the "Act") as follows:

- (1) That Respondent caused or allowed the open dumping of waste in a manner resulting in deposition of general construction or demolition debris; or clean construction or demolition debris, a violation of Section 21(p)(7) of the Act, 415 ILCS 5/21(p)(7) (2002).

CIVIL PENALTY

Pursuant to Section 42(b)(4-5) of the Act, 415 ILCS 5/42(b)(4-5) (2002), Respondent is subject to a civil penalty of One Thousand Five Hundred Dollars (\$1,500.00) for each of the violations identified above, for a total of One Thousand Five Hundred Dollars (\$1,500.00). If Respondent elects not to petition the Illinois Pollution Control Board, the statutory civil penalty specified above shall be due and payable no later than April 30, 2005, unless otherwise provided by order of the Illinois Pollution Control Board.

If Respondent elects to contest this Administrative Citation by petitioning the Illinois Pollution Control Board in accordance with Section 31.1 of the Act, 415 ILCS 5/31.1 (2002), and if the Illinois Pollution Control Board issues a finding of violation as alleged herein, after an adjudicatory hearing, Respondent shall be assessed the associated hearing costs incurred by the Illinois Environmental Protection Agency and the Illinois Pollution Control Board. Those hearing costs shall be assessed in addition to the One Thousand Five Hundred Dollar (\$1,500.00) statutory civil penalty for each violation.

Pursuant to Section 31.1(d)(1) of the Act, 415 ILCS 5/31.1(d)(1) (2002), if Respondent fails to petition or elects not to petition the Illinois Pollution Control Board for review of this Administrative Citation within thirty-five (35) days of the date of service, the Illinois Pollution Control Board shall adopt a final order, which shall include this Administrative Citation and findings of violation as alleged herein, and shall impose the statutory civil penalty specified above.

When payment is made, Respondent's check shall be made payable to the Illinois Environmental Protection Trust Fund and mailed to the attention of Fiscal Services, Illinois Environmental Protection Agency, 1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276. Along with payment, Respondent shall complete and return the enclosed Remittance Form to ensure proper documentation of payment.

If any civil penalty and/or hearing costs are not paid within the time prescribed by order of the Illinois Pollution Control Board, interest on said penalty and/or hearing costs shall be assessed against the Respondent from the date payment is due up to and including the date that payment is received. The Office of the Illinois Attorney General may be requested to initiate proceedings against Respondent in Circuit Court to collect said penalty and/or hearing costs, plus any interest accrued.

PROCEDURE FOR CONTESTING THIS
ADMINISTRATIVE CITATION

Respondent has the right to contest this Administrative Citation pursuant to and in accordance with Section 31.1 of the Act, 415 ILCS 5/31/1 (2002). If Respondent elects to contest this Administrative Citation, then Respondent shall file a signed Petition for Review, including a Notice of Filing, Certificate of Service, and Notice of Appearance, with the Clerk of the Illinois Pollution Control Board, State of Illinois Center, 100 West Randolph, Suite 11-500, Chicago, Illinois 60601. A copy of said Petition for Review shall be filed with the Illinois Environmental Protection Agency's Division of Legal Counsel at 1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276. Section 31.1 of the Act provides that any Petition for Review shall be filed within thirty-five (35) days of the date of service of this Administrative Citation or the Illinois Pollution Control Board shall enter a default judgment against the Respondent.

Renee Cipriano
Renee Cipriano, Director *by wcc*
Illinois Environmental Protection Agency

Date: 3/24/05

Prepared by: Susan E. Konzelmann, Legal Assistant
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

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CLERK'S OFFICE

MAR 28 2005

STATE OF ILLINOIS
Pollution Control Board

REMITTANCE FORM

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Complainant,)
v.)
TIMOTHY PEARCE,)
Respondent.)

AC 05-61
(IEPA No. 59-05-AC)

FACILITY: Flora/Pearce, Timothy

SITE CODE NO.: 0258105003

COUNTY: Clay

CIVIL PENALTY: \$1,500.00

DATE OF INSPECTION: February 16, 2005

DATE REMITTED:

SS/FEIN NUMBER:

SIGNATURE:

NOTE

Please enter the date of your remittance, your Social Security number (SS) if an individual or Federal Employer Identification Number (FEIN) if a corporation, and sign this Remittance Form. Be sure your check is enclosed and mail, along with Remittance Form, to Illinois Environmental Protection Agency, Attn.: Fiscal Services, P.O. Box 19276, Springfield, Illinois 62794-9276.