

THE POOL CUE

Volume XVII, Issue 3 August 2010

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

26th ANNUAL MEMBERSHIP MEETING

Fred L. Haring
MCRCSIP Administrator

MCRCSIP'S Annual Membership Meeting was held at the Soaring Eagle Resort in Mt. Pleasant on July 21-22.

For this year's Workshop, a panel of nine "Celebrity Experts" provided questions and answers on risk management issues relevant to Road Commissions. The panel consisted of :

Dorothy Pohl, Managing Director of Ionia County Road Commission and MCRCSIP Board Chairman; Bill Henn, Attorney with Smith Haughey Rice & Roegge; Andrea Lewis, Specialty Claims Services; Fred Haring, MCRCSIP Administrator; Ed Noyola, CRAM Deputy Director; Mike Shultz, MCRCSIP Assistant Administrator/Director of Loss Control/Training; Mike Kluck, Attorney, Michael Kluck and Associates; Mike Phillips, MCRCSIP Sr. Loss Control Specialist; and Mark Jahnke, Specialty Claims Services.



During the annual membership business meeting, I was very pleased to report that the MCRCSIP had completed another very successful year. As a result of the continuing decrease in the Pool's ultimate expected losses and favorable results from the fiscal year ended March 31, 2010, the MCRCSIP Board of Directors approved a refund of \$10,000,000. This brings the cumulative total refund amount to \$109,460,194.



Front row - Sharon Hice, Brian Gutowski, Joe Valente, Dorothy Pohl, Back row - Mike Power, Darrel Spragg, Tim Haagsma, Lonny Lutke and Chalmers McGreaham.

Elections were held for open positions on the MCRCSIP Board of Directors. Chalmers McGreaham, Iron County, was re-elected to fill an Upper Peninsula Region position for a three year term of office, Joe Valente, Marquette County, was elected to fill an Upper Peninsula Region position for a three year term of office, Brian Gutowski, Emmet County, was elected to complete one year of a Northern Region three year term of office and Dorothy Pohl was re-elected to an At-Large position for a three year term of office.

Tim Haagsma, Kent County; Sharon Hice, Eaton County; Lonny Lutke, Missaukee County; Mike Power, Huron County; and Darrel Spragg, Alpena County; complete the nine member Board.

At the Board of Directors meeting following the annual meeting, Tim Haagsma was elected Board Chairman and Darrel Spragg was elected Vice-Chairman.

I want to thank all of our Directors for their time, commitment and their dedication to the MCRCSIP.

IN THE "CUE"

1. 26th Annual Membership Meeting
2. What it Means to be "In Loco Parentis"
3. Preventing Costly Electrical System Problems
4. Give Us a Sign!
5. Supreme Court To Review Government Immunity Cases
6. Roadside Mowing Safety



WHAT IT MEANS TO BE “IN LOCO PARENTIS” UNDER THE FMLA

Wendy Hardt
Michael R. Kluck & Associates

Recently, the Wage and Hour Division of the Department of Labor issued an administrative guidance clarifying the definition of “son or daughter” under Section 101(12) of the Family and Medical Leave Act (FMLA) as it applies to an employee standing “in loco parentis” to a child. So what does “in loco parentis” mean? Black’s Law Dictionary defines the term in loco parentis as “in the place of a parent”.

By way of background, the FMLA entitles an eligible employee to take up to twelve (12) workweeks of job-protected leave, in relevant part, “[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter”, “[b]ecause of the placement of a son or daughter with the employee for adoption or foster care”, and to care for a son or daughter with a serious health condition. The FMLA defines a “son or daughter” as a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is – (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability”.

Caselaw has determined that whether an employee stands in loco parentis to a child is a fact issue dependent upon multiple factors. Courts have enumerated the following factors to be considered

in determining in loco parentis status: the age of the child; the degree to which the child is dependent on the person claiming to be standing in loco parentis; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised. The FMLA regulations define “in loco parentis” as including those with day-to-day responsibilities to care for and financially support a child. Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. The Wage and Hour Division’s interpretation was that the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. For example, where an employee provides day-to-day care for his or her unmarried partner’s child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand in loco parentis to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition. The same principles would apply to leave for the birth of a child and to bond with a child within the first twelve (12) months following birth or placement. For instance, an employee who will share equally in the raising of a child with the child’s biological parent would be entitled to leave for the child’s birth because he or she will stand in loco parentis to the child.

It should be noted that the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the “son or daughter” of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave. Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. Where an employer has questions about whether an

employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship.

In conclusion, it was the Administrator's interpretation that either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child. Notably, the Administrator did not regard an employee caring for a child while the child's parents are on vacation as standing in loco parentis to the child, undoubtedly because of the limited and temporary nature of that care. The Administration noted that, in all cases, whether an employee stands in loco parentis to a child will depend on the particular facts. Employers would be wise to review such facts with legal counsel before denying requests for FMLA leave by those claiming "in loco parentis" status.

HOW TO PREVENT COSTLY ELECTRICAL SYSTEM PROBLEMS

What You Can Do To Keep Your Electrical System Safe:

Focus your electrical preventive maintenance program on the most common and frequent problems leading to electrical fires and equipment failure. That includes inspection and preventive measures to ensure electrical apparatus is kept **clean, cool, dry and tight**.

Keep It Clean

- Electrical apparatus and equipment rooms should be free of excessive dust and dirt accumulation.
- Don't use electrical equipment rooms for storage.

- Limit access to authorized operations and maintenance personnel.
- Maintain proper lighting to ensure correct and efficient operation and maintenance.

Keep It Cool

- Prevent excessive heat buildup in electrical apparatus enclosures and equipment rooms. Exceeding design temperatures could be a fire hazard, and can also shorten the life of equipment.
- Keep ventilation openings in equipment enclosures clean and free from obstruction.
- Change or clean any installed filters according to the manufacturer's recommendations.

Keep it Dry

- Keep equipment rooms dry and protect equipment from moisture. Persistent exposure and direct contact with moisture can cause equipment to fail or shorten its life.
- Check equipment for moisture contamination. If found, examine equipment for damage and get necessary repairs made. Identify and eliminate the source of moisture.

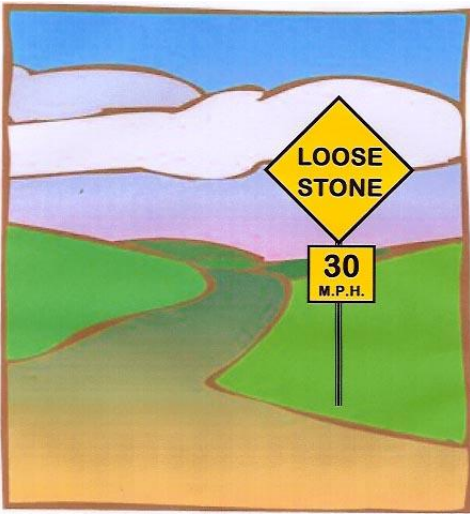
Keep It Tight

- Loose connections are the most common source of electrical equipment failure.
- Get an infrared imaging survey to test for loose connections.
- Follow any applicable manufacturer's instructions for tightening.

Remember, any maintenance and repairs of your electrical system only should be performed by fully qualified personnel or an electrical contractor.

*Reprinted from Hartford Steam Boiler
Inspection & Insurance Company
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Give Us A Sign!

Mark D. Jahnke
Specialty Claims Services, Inc.

The dog days of summer are finally upon us. Along with trying to maximize our engagement in late summer leisure activities like golf, tennis, swimming and boating, this is the time of year that road commissions perform sealcoat operations on many of their roads.

While the intent of sealcoating or chip-sealing is to provide an improved road surface on which to travel for the motoring public, the operation often results in a variety of claims presented against member road commissions. The most serious of those claims arise from motorists, often motorcyclists, who lose control due to the “marble effect” created by the loose stone. Bodily injury claims can, and do, arise from these accidents that involve significant damages.

To strengthen our defense to these claims, we recommend that “Loose Stone” warning signs with speed advisories of no more than 35 m.p.h. remain posted on the sealcoated roads until loose stone is no longer present. If we’re able to point to the presence of a warning sign and speed advisory on a recently sealcoated road, we are better able to prove that the road was “reasonably safe” and are also better able to prove comparative negligence on the

part of the motorist who lost control. Although a claimant *cannot* argue that the *lack* of signing equates to liability on the part of the road commission (pursuant to *Evans* vs. *Shiawassee CRC*), we *can* cite the *presence* of signing to strengthen our defense to these types of claims. Similarly, “Loose Stone” warning signs with speed advisories also serve to strengthen our defense to the more run-of-the-mill, but more common, claims from motorists who sustain damage to their vehicles in the form of chipped paint, broken windshields, etc.

Understandably, roadways that undergo sealcoating, chip-sealing and crack-sealing need to be re-opened to public travel ASAP after the completion of the operation. However, by leaving “Loose Stone” warning signs with speed advisories posted until loose stone is no longer present, we will prevent some of the incidents that give rise to claims and, in those situations in which claims do arise, we will be in a much stronger position to build a successful defense to those claims.

MCRC SIP Board Meeting Schedule

August 26, 2010
Best Western Dockside
Mackinaw City

November 11-12, 2010
Doherty Hotel
Clare





SUPREME COURT TO REVIEW TWO GOVERNMENTAL IMMUNITY CASES

Bill Henn, Attorney
Smith Haughey Rice & Roegge

The Michigan Supreme Court has ordered oral argument in two governmental immunity cases: *Plunkett v Department of Transportation* and *Pollard v Suburban Mobile Authority for Regional Transportation (SMART)*.

The first case, *Plunkett v Department of Transportation*, involves multiple highway exception issues, including the standard for proximate cause, and whether rutting on a highway surface which allegedly causes vehicles to hydroplane is an actionable defect under the highway exception to governmental immunity.

Underlying the case is a single vehicle accident that occurred on a state trunkline highway. While driving in a light rain, Holly Plunkett lost control of her minivan and struck a tree. She died as a result of her injuries. Her husband filed suit against MDOT, alleging that rutting of the pavement surface, combined with the rain and inadequate cross slope and superelevation, rendered the highway unsafe for vehicular travel and proximately caused the crash. MDOT subsequently filed a motion for summary disposition, arguing that the plaintiff had failed to plead a cause of action in avoidance of governmental immunity. The trial court denied MDOT's motion.

The Court of Appeals, relying on *Haliw*, stated that in a case such as this—where an alleged highway surface defect allows a natural accumulation of water or snow or ice that in turn

allegedly causes a crash—to show that the surface defect was a proximate cause of the crash the plaintiff must demonstrate that the defect was “persistent” and acted “in tandem” with the natural accumulation. “Persistent” means that the defect renders the highway unsafe at all times and under all conditions. Acting “in tandem” means that the surface defect contributed to the crash in a more direct way than merely allowing the water to accumulate. The Court reversed the trial court, concluding that plaintiff had failed to meet the *Haliw* standard because he did not offer evidence to show that the rutting of the road was a “persistent” defect. The Court further determined that plaintiff's claims concerning superelevation and cross slope were allegations of negligent design, and therefore were not actionable under the highway exception.

The Supreme Court issued an Order on May 28, 2010 directing oral argument on whether the highway exception applies to “an alleged failure to maintain a highway to correct rutting that allegedly resulted in the accumulation of water on the rutted portion of the pavement, causing hydroplaning and the loss of control of the vehicle that led to the fatal accident.” Oral argument is expected to occur in September or October of this year, and a decision is likely to shortly follow. MCRCSIP is preparing an amicus brief to be filed in support of MDOT.

The second case, *Pollard v Suburban Mobile Authority for Regional Transportation (SMART)*, involves whether statutes that require a plaintiff to provide notice of a claim to a government agency must be strictly enforced. The Supreme Court directed oral argument specifically for the purpose of determining whether to overturn *Rowland v Washtenaw Co. Rd. Comm.*, which held that notice of a highway exception claim must be provided within the 120 day or 180 day timeframe created in MCL 691.1404, and that a highway authority need not show “actual prejudice” as a result of delayed notice to be entitled to dismissal.

Continued on page 6.....

Pollard involves a bus passenger who sustained injuries when he fell after the bus driver sped up and then suddenly applied the brakes. The plaintiff filed suit against SMART, but had not sent notice of the claim to SMART within 60 days of the incident, as required by MCL 124.419. The trial court denied summary disposition to SMART, but the Court of Appeals reversed, citing *Rowland* for the proposition that notice statutes must be strictly applied, and that therefore because notice had not been given to SMART within the 60-day timeframe, no claim could be pursued.

In its Order, the Supreme Court has directed the parties to address whether *Rowland* was correctly decided. As with *Plunkett*, oral argument in *Pollard* will occur in the fall of 2010. MCRCSIP is preparing an amicus brief to be filed in support of SMART.



MCRCSIP MEMBER PROPERTY APPRAISALS

Thank you to those of you that have updated your property schedule to the appraised building values. We sincerely appreciate your help in making sure that your properties are scheduled at the current replacement cost in case there was ever a loss.

Remember, when updating your content values, the appraiser uses a formula based on the size and the use of your buildings to *estimate* your contents. The appraised values should just be used as an analytical tool to check the accuracy of your building contents. A detailed list should be kept on file that agrees with the content value that you record on your schedule in case there is ever a loss.



ROADSIDE MOWING SAFETY

Mike Phillips
Sr. Loss Control Specialist

Mowing the lawn is a time honored rite of passage for many young people. It marks the transition from lesser chores such as raking and weeding to the adult realm of power tools. Many of us first learned the value of a dollar by putting in time behind an old push mower. In my case, it wasn't even motorized.

Operating a roadside mower on a big tractor in the public right of way requires a little more consideration than we gave our grandparent's lawn. There are hazards to the operator, the motorists, and pedestrians we cannot ignore. This article will highlight some of those hazards and offer strategies on how to avoid problems on the road.

Safety for any operation begins at the door. Coming to work well rested and alert is key to having a safe and productive day. Being under the influence of illegal substances while on the job is a hazard for everyone and cannot be tolerated by management or the work crew. People suspected of being under the influence of an illegal or controlled substance should be dealt with according to the Road Commission's reasonable suspicion policy for drugs and alcohol. With that said, it's time to get into the basics of roadside mowing safety.

Do a pre-trip inspection. An inspection checklist helps prevent anything from being overlooked. Repairs and maintenance should be done by qualified personnel using proper lock out procedures. In addition to the basic mechanical functions of the equipment, make sure that all guards are in place, beacon lights are working, and a slow moving vehicle sign is mounted on the back of the tractor. The mower blades, the PTO, and any belt and pulley assemblies may be especially hazardous to unwary employees. Don't forget that safety equipment, like a radio or cell phone, a fire extinguisher, and a first aid kit.

Know the equipment you're working with. This starts with the owner's manual. Never use equipment in a way that is contrary to the manufacturer's guidelines. A little time spent in preparation can save a lot of time later on. Before you set out, familiarize yourself with controls and gauges. Adjust your mirrors. Remember your blind spots, in particular when backing.



Keep your Hi-Vis garment with you in the cab. You never know when you may have to step out to talk to someone or to address a hazard. Once outside the tractor, you're in the right of way and must have your Hi-Vis garment on so motorists can see you. Wear other personal protective equipment. Most mowers today have enclosed cabs and the need for PPE is minimal. A hazard assessment should be made to determine what PPE is required.

Buckle up! MIOSHA standards require seatbelts to be worn. During my work zone tours, I

consistently find mower operators who fail to put on their seat belts. If you feel the tractor tipping, stay in your seat. The ROPS is designed to protect the operator in the event of a rollover accident. Trying to climb out will only risk further injury by the mower rolling over you!

Operate at safe speeds. Rollover accidents on slopes are common. The center of gravity for a tractor is very different from an automobile, so know the limitations of your equipment.

Go with the flow. Operate the mower with traffic. Motorists have sometimes become confused when faced with an oncoming mower, leading to accidents.

Be on your guard. As part of your defensive driving routine, train yourself to recognize distracted drivers. Look for cars weaving in and out of the lane, going faster or slower than traffic, or that have any other obvious signs that the drivers are focusing on things other than driving. Don't let yourself become distracted. Answer the phone and use the radio only when safe to do so. Save meals and snacks for break time.

Look out for pedestrians. Flying debris from a mower can seriously injure or kill. Adults may try to get your attention and may unknowingly come too close to your operation. Children may be preoccupied with play or may find your mower operations of interest. Generally, it is best to shut down until pedestrians are out of harm's way. Move debris to locations designated by your supervisor or mark for later removal. The importance of mower deck guards cannot be overemphasized in this regard. If damaged or worn, these guards should be replaced.

Roadside mowing operations may not be the most hazardous job, but it is one that is best served by employees who are knowledgeable and careful about what they do. This article is only a brief overview of what every mower operator should know. MCRCSIP offers many support materials in the form of operator's guides, videos, and even on-site training programs to assist you in keeping roadside mowing operations safe.

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MCRCSIP MISSION STATEMENT

"The Mission of the Michigan County Road Commission Self-Insurance Pool is to administer a self-insurance program and to assist members with risk management efforts."

**Past and present issues of the Pool Cue are available on the
MCRCSIP website www.mcrcsip.org.**

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