

# THE POOL CUE

Volume XVII, Issue 4 November 2011

## MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

### 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."

### FOCUS

Gayle A. Pratt  
Interim Administrator



*"That's been one of my mantras – focus and simplicity. Simple can be harder than complex: You have to work hard to get your thinking clean to make it simple. But it's worth it in the end because once you get there, you can move mountains."*

**Steve Jobs**

Sometimes there are so many things in front of us, that it is difficult to keep our focus. And, without the proper focus it is difficult to succeed at anything. We have to be able to concentrate on what we are doing in order to achieve goals and minimize mistakes. When prioritizing becomes difficult and things get overlooked, we tend to skip the details and suffer the consequences.

The governor and the legislature have certainly given us a lot to discuss lately. And, because the issues

are vitally important to all of us, it would be very easy to become absorbed in those issues to the exclusion of all others. It is important to remember to remain focused on the goals and objectives we have set for ourselves and our organizations.

For the first half of this policy year, we have had 38 first-party claims. There are already 10 liability claims and 4 Employment Practices/D&O claims filed. All are indications that this year may be a busy year. Especially in the Employment Practices area. All of you are working with Loss Control and your staff to continue to minimize exposures in those areas. And most of you have been diligently working with Kay to make sure all of your buildings and content values are updated to the appraised numbers. We have always been impressed with how attentive our members are to their asset schedules. We are now reporting over \$1.6 billion in assets to our reinsurers. Taking care of those assets requires your attention.

So, while we deal with the politics, personal issues, scandals and celebrations, we need to make sure that we remember what it is that we do. For more than 100 years, Michigan's county road commissions have provided safe and efficient transportation networks. We need to continue to provide the highest level of care in our work. We need to continue to treat our co-workers and citizens in a courteous and respectful manner. And, we need to continue to focus on performing our work safely and with consideration to others in order to meet our goals.

### IN THE "CUE"

1. Focus
2. Winter Maintenance - Snowplow Safety
4. Top 10 Claims List
6. Supreme Court Examines Definition of "Highway"
7. Drug Testing Following Lay-offs
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## WINTER MAINTENANCE – SNOWPLOW SAFETY

### “DON’T LET SNOWPLOWING TRIP YOU UP!”

Mike Shultz  
Director of Loss Control/Training

Winter will soon be upon us, with that four letter word “S-N-O-W” falling from the sky. When most of us are thinking about clearing snow from our sidewalks and driveways, the Michigan County Road Commissions have the monumental task of clearing thousands of miles of state and local roads. The good news is that we have experienced supervisors and snow plow operators, gearing up for the annual snow fight that will soon be upon us!



(The photo above illustrates the front plow elevated a few inches to allow for safe and effective plowing. **NOTE:** The plow shoe is being used and adjusted properly.)



(This photo illustrates what can happen when the plow digs into a soft shoulder. The plow trips the truck, causing it to careen out of control. **NOTE:** This was an actual plowing accident. No trick or staged photography was used for this article.)

In the world of road commission risk management and loss prevention, it would be outstanding to experience a full winter season without a truck/equipment accident. However, we recognize that vehicle accidents will eventually occur. Not if, but when! We are optimistic that each driver/operator will apply what they have learned from their many years of experience on the road, the awareness training they have received, and the advice of their supervisors.

Always keep in mind that annual refresher training is available to our MCRCSIP and CRASIF members. The training covers a wide variety of topics that benefit your truck drivers and equipment operators. Subjects include (but not limited to), safe backing, wearing seatbelts, driver fatigue, distracted driving and RXR crossing safety.

The photographs illustrated are “post accident” reminders of what can happen when an ordinary winter day goes wrong. The truck is thrown on its side in the roadway. Similar accidents have caused plow trucks to careen into ditches, open fields and front lawns. In this event, the driver was seat belted and no individuals (i.e. motorists, pedestrians, property owners) were injured.

As a result of recent discussions with a number of members from around the state, we offer the following four common causes and preventive measures.

#### 1. Excessive travel speed, thinking faster is better.

Prevention - SLOW DOWN!



**2. Unthawed ground caused snow plow to dig in.**

Prevention – Avoid using front plows when the ground is thawed (i.e. too early or too late in the winter season).

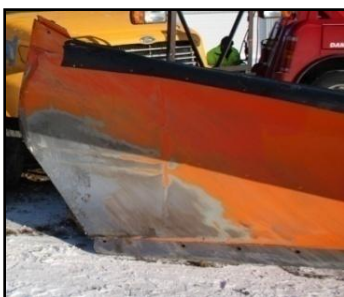


**3. Elevated objects in the roadway (i.e. manhole covers, etc.).**

Prevention – Become familiar with your route. When possible, identify obvious hazards with marking stakes or other techniques. Take time to repair problem areas when/if possible!

**4. Plow leading edge is allowed to scrape the road surface.** Warning signs include dirt/mud accumulation and/or plow edge wear.

Prevention – Adjust (level surface) and maintain the plow so that it is elevated only a few inches. Remember, if you are using plow shoes, maintain them correctly. Additional clearance is necessary for areas such as railroad crossings.



**NOTE:** To help identify the plow height from the driver's seat, several members indicated that they have installed visual devices and/or created identification markings on the plow. Both very good ideas!

In summary, preparing for that first winter storm requires many activities. Along with monitoring your plow routes, drivers should take time to monitor their plow hookup points and make necessary adjustments and/or replace any worn parts. Supervisors need to continuously monitor and remind operators to maintain that proper clearance height. The difference between a normal winter work day and one that may bring costly injuries and property damage can sometimes be measured in just a few inches.

**WORD SEARCH**

D	P	H	E	L	Y	S	T	A	T	W
E	L	E	V	A	T	E	D	B	C	I
L	O	O	A	A	I	C	N	R	N	G
S	W	E	E	T	L	G	O	S	U	P
L	A	W	S	H	I	U	U	F	D	G
F	O	C	U	S	B	R	E	M	E	P
P	I	S	C	R	A	P	E	S	E	L
R	O	N	S	N	I	V	C	L	P	A
E	P	O	C	C	L	A	I	M	S	I
V	N	E	L	M	O	R	U	D	Y	N
E	E	G	U	P	T	N	N	S	C	T
N	F	H	K	C	U	R	T	F	I	I
T	R	A	I	L	S	C	H	R	L	F
I	E	F	T	C	L	P	A	D	O	F
O	Y	S	T	E	L	K	W	A	P	L
N	O	G	T	K	A	E	E	O	J	W
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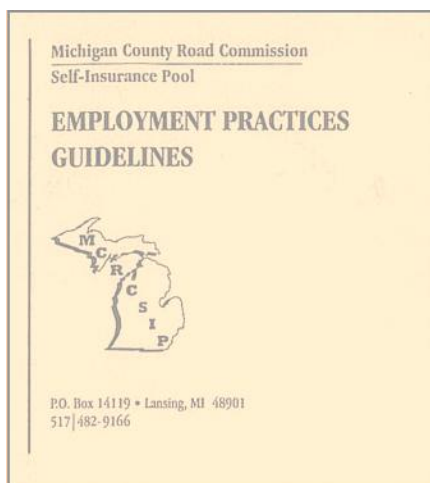
Claims	Insurance	Pool	Sweet
Defect	Laws	Post	Test
Drug	Liability	Prevention	Trail
Eave	Loss Control	Road	Truck
Elevated	Plaintiff	Scrape	Unthawed
Fall	Plow	Sign	Values
Focus	Policy	Speed	Vehicle

# TOP 10 CLAIMS LIST

Mark D. Jahnke  
Specialty Claims Services, Inc.

For the November issue, the editors of the Pool Cue requested that we share with the membership the types of claims that are presented most frequently. Recognizing an excellent idea when we see one and in deference to David Letterman, here's our Top Ten Claims List!

- #10 Auto liability claims arising from motorists' collisions with road commission vehicles that are stopped on the roadway, operating against the flow of traffic, etc. (actions that are *permitted* pursuant to the Emergency Vehicle Statute, provided the activity is done *safely!*).
- #9 Discrimination claims based on age, disability, race, national origin & sex. (MCRCSIP's *Employment Practices Guidelines* provides an excellent resource for road commission employees who are minimizing claims exposure in this area).



- #8 Retaliation claims brought by employees who have complained about workplace discrimination or harassment. (In 2010, retaliation claims, nationally, surpassed race for the first time as the most frequently filed charge filed with the U. S. Equal Employment Opportunity Commission. MCRCSIP's *Employment Practices Guidelines* includes a section that specifically addresses Unlawful Retaliation and provides recommendations for road commissions to successfully deal with this issue).
- #7 General liability claims arising from motorcyclists who lose control after encountering loose stone on paved road surfaces, especially on horizontal curves (the "marble effect" that affects the coefficient of friction of the road surface - please be mindful of these recurrent claims and take the steps necessary to eliminate this potential road hazard).
- #6 Auto liability claims arising from distracted road commission drivers rear-ending other motorists, running red lights, etc. (no matter the task, the first and foremost obligation of road commission employees who are operating vehicles or equipment is to be mindful of the road ahead!).
- #5 Flooding claims. There has been a marked increase in claims from property owners who allege that improperly maintained roadside drainage ditches and culverts caused flooding to their property. Although these property damage claims have more limited exposure than claims involving bodily injury, the statute enacted in 2002 that provides an exception to governmental immunity for "sewage disposal system events" (which includes *storm water drain systems*) is gaining popularity!



# 4 Auto liability claims arising from backing accidents involving road commission dump trucks (drivers should keep track of vehicles traveling behind the road commission vehicle – also, exercise caution while backing and listen for horn from motorist who may be hidden in the blind spot behind the truck).

# 3 General liability claims arising from accidents involving potholes and other road surface irregularities from **all users** of the road. A road commission's duty to maintain its roadways in reasonable repair extends not only to motor vehicles, but also to pedestrians, bicyclists and motorcycles (a tall order indeed, but exposure can be reduced via keeping road specific maintenance records, foreman's diaries, adhering to a regular road inspection schedule, maintaining a formalized, responsive, citizen complaint system, etc.).

# 2 Auto liability claims arising from turning accidents – collisions with vehicles overtaking a left or right-turning road commission vehicle (drivers should *clearly* signal their intentions and watch for vehicles approaching from the rear).

**And, the #1 claim on MCRCSIP's Top Ten Claims List is.....**

Auto liability claims arising from road commission vehicles failing-to-yield at intersections. Without doing a scientific study, we conservatively estimate that 95% of these claims involve motorists approaching the road commission vehicle **from the right** (road commission drivers need to recognize and *respect* the vision obstruction caused by the passenger side view mirror, look to the right more than once before proceeding into the intersection, lean forward to gain a different view, etc.).

As can be seen, the Top Ten Claims List includes a wide variety of claims that are presented against member road commissions including General Liability (road defect) claims, Auto Liability (accidents involving road commission vehicles and equipment) and Employment Practices Liability. By informing the Membership of the types of claims that are presented most often, our goal is for steps to be taken at your road commission to reduce or eliminate the frequency of these claims. If additional information is desired relative to any of the claim scenarios that are included on the list, please contact the Pool office or Specialty Claims Services and we will be happy to discuss your situation with you and provide any assistance that you may require.

### REMINDER!

Please remove the Post Office Box Number from our mailing address. Any correspondence should be sent to:

**MCRCSIP  
417 Seymour Avenue  
Suite #2  
Lansing, Michigan 48933**

Please continue to send payments to:

**Dept. #77943  
MCRCSIP  
P.O. Box 77000  
Detroit, MI 48277-0943**



## SUPREME COURT EXAMINES DEFINITION OF “HIGHWAY”

William L. Henn, Attorney  
Smith Haughey Rice & Roegge

On July 30, 2011, the Michigan Supreme Court decided *Duffy v Michigan Dep’t of Natural Resources*. In that decision, the Court examined whether a “trailway” under the jurisdiction of the State of Michigan could constitute a “highway” for purposes of the Governmental Tort Liability Act. Hinged on that question was whether liability could arise under the highway exception for the alleged failure to repair and maintain the trailway.

The plaintiff, Beverly Duffy, was injured while riding an off-road vehicle on the Little Manistee Trail. Plaintiff was riding with a group of people. As she prepared to negotiate a left turn, she ran over exposed wooden boards that had been partially buried. Her ORV bounced into the air, and she was thrown against nearby trees. She suffered spinal injuries.

The Trail is owned by the State of Michigan, and is maintained by the MDNR. It serves a variety of uses, and is designated variously as an ORV route, an ORV trail, and a snowmobile trail. Plaintiff was injured on the portion of the Trail designated as an ORV route, which signifies that it is open to any licensed motor vehicle.

Plaintiff sued both the State and the MDNR, advancing a number of theories for why governmental immunity did not protect the defendants. A central tenet of Plaintiff’s argument was that the defendants had the duty to maintain the Trail in reasonable repair pursuant to the highway

exception because a “trailway” falls within the statutory definition of “highway” under MCL 691.1401(e).

The Supreme Court treated the argument as an issue of first impression because it was “unaware of any case in which a person who has been injured while riding an off-road vehicle on a state trail has claimed that the trail constitutes a ‘highway’ for purposes of the highway exception.” The majority of the Court concluded that the Trail is not a “highway” pursuant to MCL 691.1401(e). Although the majority conceded that the Trail is properly classified as a “trailway” under Michigan statutes regulating trailways, for governmental immunity purposes it focused on the fact that the Trail is not “on the highway” as is required to impose a duty to repair and maintain under the highway exception. According to the majority, the Trail is not “adjacent to” any highway, and is at best miles away from any highway. On that basis, the majority of the Court concluded that an alleged defect within the Trail does not give rise to liability against the State.

In dissent, the remaining three Justices borrowed an adage from poet James Whitcomb Riley: “When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.” According to the dissent, because the Trail is a thoroughfare that looks like a road, is signed like a road, and is used by the public as a road, it should be called a road. In short, the dissent would have concluded that the Trail—regardless of whether it is a trailway “on the highway”—qualifies independently as a “road” for purposes of the highway exception, and therefore can give rise to liability.

In the final analysis, *Duffy* shows that the majority of the Michigan Supreme Court continues to construe the exceptions to governmental immunity narrowly. At the same time, *Duffy* highlights the ideological division within the Court, and serves as a reminder of how slender the margin of decision oftentimes is.



## **DRUG TESTING FOLLOWING LAY-OFFS AND THE EMPLOYMENT PRACTICES GUIDELINES**

Wendy S. Hardt, Attorney  
Michael R. Kluck & Associates

In these difficult economic times, more and more road commissions are finding it necessary to lay-off road workers. Fortunately, in some instances, recall notices are thereafter issued. When that occurs, is the road commission required to subject that employee to a pre-employment drug test? The answer in some circumstances is yes.

49 CFR §382.301(a) provides that, prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the driver has participated in a controlled substances testing program that meets the requirements of the regulations within the previous 30 days and, while participating in that program, either: (1) was tested for controlled substances within the past 6 months, or (2) participated in the random controlled substances testing program for the previous 12 months. The employer must also ensure that no prior employer of the driver of whom the employer has knowledge has record of a violation of the regulations within the previous 6 months.

The interpretation for this regulation provides that a controlled substances test must be administered any time employment has been terminated for more than 30 days, even if the driver is returning to his previous employer. For a driver who does not work for an extended period of time due to a layoff, if the driver is considered to be an employee during the layoff period, a pre-employment test is not required so long as the driver has been included in the employer's random testing program during the layoff period. However, if the driver was not considered to be an employee at any point during the layoff period, or was not covered by the random testing program, or was not covered for more than 30 days, then a pre-employment test would be required.

Drug and alcohol testing generally is addressed in an update to the Employment Practices Guidelines, which update was issued in 2009. The original Employment Practices Guidelines were issued by the Pool to each of its members in 2003. These Guidelines cover a wide variety of employment-related topics and should be regularly consulted by Pool members in addressing personnel matters. Doing so will almost certainly reduce the number of employment-related claims which the Pool faces. Whenever in doubt about the appropriate way in which to handle an employment-related issue, you should contact your legal counsel.

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HAPPY THANKSGIVING!  
HAPPY THANKSGIVING!



**Michigan County Road Commission Self-Insurance Pool**  
**417 Seymour Avenue, Suite #2**  
**Lansing, Michigan 48933**

**The next MCRCSIP Board meeting will be held:**

**February 23-24, 2012**  
**Doubletree Hotel – Bay City**

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**Lansing, Michigan 48933**

**Past and current issues of the Pool Cue are available on the MCRCSIP website – [www.mcrcsip.org](http://www.mcrcsip.org).**





THINK SAFETY

# CRASIF

## Connection

November 2011

Dear CRASIF Member,

On behalf of the Board of Trustees and staff, we want to thank all the members who attended our annual meeting on September 7<sup>th</sup>! Fifty-two (or 70%) of our members attended the meeting. Members gave us good reviews for an interactive seminar entitled "Safety Excellence." At the board meeting, the membership elected previous appointees Fred Chapman (Ionia) and Doug Robidoux (Mason); re-elected Bob Ottenhoff (Luce) and Don Spray (Cheboygan); and elected a new board member Mike Larrabee (Delta). Joyce Randall (Mecosta) was elected Board Chair and Dale Linton (Montcalm) was elected Vice Chair. Thanks goes to John Strauss (Kent) for serving on the board for the last 4 years. A shout out also goes to Don Spray for the last two years of excellent leadership as Board Chair during a significant transitional period in our history.

**Support HB 5002!** The Michigan Workers' Compensation Act has not been revised in nearly 100 years and is in need of some dramatic changes to reflect the numerous years of legal, economic and medical developments affecting the Act. The goal

of the legislation is to stabilize, clarify and modernize statutory ambiguities and conflictual case law. Both employees and employers will benefit from a more clear, more efficient and more stable workers' compensation environment. Staff has reviewed the substitute bill recently released and find the changes acceptable. Please call your state representative and ask them to support HB 5002 (H-1). Thanks to CRAM for working with us and keeping track of the bill!

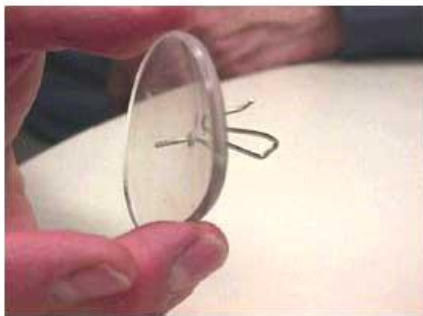
We will be conducting a number of surveys in the next quarter. We would appreciate your help in completing them. One survey will address attendance at our annual meeting and the other survey will be a customer satisfaction survey. Please take a moment out of your busy schedule to give us some feedback so we can improve our services to you.

Please call us should you have any questions.

Standing Ready to Serve You,

James L. deSpelder ARM JD  
Fund Administrator

## **EYE PROTECTION IN THE WORKPLACE**



Every day an estimated **1,000** eye injuries occur in American workplaces. **The financial cost of these injuries is enormous-- more than \$300 million per year** in lost production time, medical expenses, and workers' compensation. However, no dollar figure can adequately reflect the personal toll these accidents take on injured workers.

### **WHAT CONTRIBUTES TO EYE INJURIES AT WORK?**

- Not wearing eye protection. It is estimated that three of every five workers injured were not wearing eye protection at the time of the accident.
- About 40% of the injured workers were wearing some form of eye protection when the accident occurred. These workers were most likely to be wearing eyeglasses with no side shields or the wrong eye protection.

### **WHERE DO ACCIDENTS OCCUR MOST OFTEN?**

Potential eye hazards can be found in nearly every industry. Almost 50% of the injured workers were employed in manufacturing; about 20% were in construction.

### **HOW CAN EYE INJURIES BE PREVENTED?**

**Always wear proper, effective eye protection.** To be effective, the eyewear must be of the appropriate type for the hazard encountered and properly fitted. Workers injured while not wearing protective eyewear most often said they believed it was not required by the situation. Training is paramount. Even though the vast majority of employers furnished eye protection at no cost to employees, about 40% of the workers received no eye safety training on where and what kind of eyewear should be used. Eye protection must be properly maintained. Scratched and dirty eye protection reduces vision, causes glare and may contribute to accidents.

### **SAFETY IS 24/7/365!!!**

Safety doesn't begin and end at the workplace door. You are more likely to be hurt at home than on the job. **Practice safety at home as well!**

Buz Haltenhoff, REM  
Senior Loss Control Consultant  
The ASU Group

10/18/11