THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

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Sleep Apnea Testing for CDL Holders

WENDY HARDT
MICHAEL R. KLUCK & ASSOCIATES

Some medical examiners are requiring sleep studies before certifying CDL drivers as being physically qualified to drive a commercial motor vehicle. In part, the drivers who are being selected in this regard are those over a certain age (42) and BMI (body mass index of 33 or greater), who have a history of either high blood pressure, diabetes, heart disease, loud snoring, or a neck size greater than 17 inches (15.5 inches for women). While usually a cautionary approach to public safety is welcome, the problem here is that these sleep studies are very expensive, usually not covered by insurance, and are not necessarily warranted by the regulations.

The Federal Motor Carrier Safety Regulations (FMCSRs) state:

> 391.41 (b) A person is physically qualified to drive a commercial motor vehicle if that person:
>
> (5) Has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely.

There is nothing in the regulations which would indicate that a medical examiner should make a diagnosis of such respiratory dysfunction or require a sleep study just because a driver is over a certain age and BMI, with other risk factors.

The medical examiners who are requiring sleep studies are doing so based on a regulatory guidance which was issued by the Federal Motor Carrier Safety Administration (FMCSA) in 2012. In that guidance, FMCSA laid out a minimum waiting period for certification or recertification of an individual with a chronic sleep condition after starting treatment. There was a one-month waiting period after starting a continuous positive airway pressure device (called a CPAP). Individuals with surgical treatment were to wait a minimum of three months before certification or recertification. Medical examiners were to certify the driver for only one year. As for sleep studies, after someone was diagnosed with a chronic sleep condition, the medical examiner was only to certify or recertify a driver who has started nonsurgical treatment and has had "multiple sleep latency testing values within the normal range." This proposed regulation was quickly withdrawn.

On October 5, 2013, a sleep apnea bill was signed into law by President Obama, forbidding FMCSA from using guidance alone to address sleep apnea screening for drivers. The law requires that, if FMCSA were to take action regarding sleep apnea

Continued on Page Two

IN THE CUE

Sleep Apnea

Continued From Page One

screening, it must do so via the formal rulemaking process. Thereafter, in February 2016, FMCSA did publish another notice of proposed rulemaking on the sleep apnea issue. The proposed regulations would have required sleep apnea testing in circumstances similar to what was described above. However, in August 2018, this notice of proposed rulemaking was withdrawn, and there is currently no plan to issue any new proposed regulations on this issue.

Medical examiners are now encouraged to refer drivers for sleep apnea testing if they "believe the driver's respiratory condition is in any way likely to interfere with the driver's ability to safely control and drive a commercial motor vehicle." Obviously, this is a somewhat gray area and leaves much to the discretion of the medical examiner. What is clear for Road Commissions is that they may not put a driver behind the wheel of a commercial motor vehicle without a current valid medical certificate. If an employee is unable to obtain one without first having a sleep study done, then the employee will have to have one done. If, on the other hand, the employee produces a valid medical certificate, by a certified medical examiner, indicating that he/she is physically qualified to drive a commercial motor vehicle, then, in most circumstances, he/she should be allowed to do so, even if a different medical examiner would require a sleep study.

Certainly, if a Road Commission has objective reason to believe an employee is falling asleep behind the wheel, it should proceed cautiously and require further physical examination of the employee to determine if he/she is safe to drive a commercial motor vehicle. In such circumstances, Road Commissions would be well-advised to consult with legal counsel to determine what testing and employment action is appropriate under the factual circumstances. Similarly, if a Road Commission is faced with competing medical opinions on whether a driver is physically qualified to drive a commercial motor vehicle, it should consult with its legal counsel on how to proceed.

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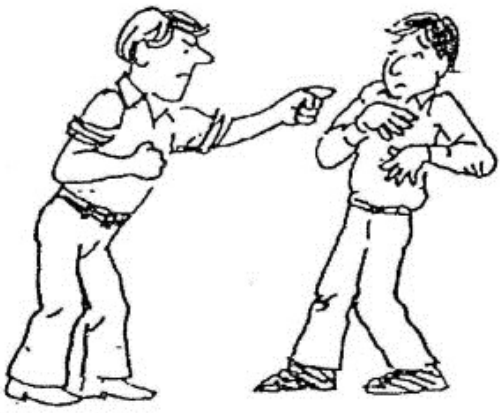
… To Intentionally Impact Your Workplace

One Way to make a positive impact on your work culture is to insist on the **respect**ful treatment of all employees. **Respect** is still the number one contributor to job satisfaction. Employees desire **respect** from others, and studies show we all do our best work for people we think **respect** us. You show **respect** to others when you:

- Listen to them and develop an open dialogue
- Make sure they know you hear them
- Help each other – as your employees and as people
- Accept them for who they are….their real personalities

Treating your employees with obvious **respect** will boost employee morale, encourage them to do their best, and make them feel they are a connected part of your team – and reinforce you as a Leader. According to Leadership guru John Maxwell, "When leaders show **respect** for others – especially for people who have less power or a lower position than theirs – they gain **respect** from others."



How Far is Too Far?
When Citizen Complaints Turn Threatening

CHARLES PIKE
SMITH HAUGHEY RICE & ROEGGE

As employees and representatives of a governmental entity, you undoubtedly have and will continue to receive some criticism and/or complaints by members of the general public. Road Commissions have a difficult job and a finite amount of resources to accomplish that job. Members of the public have the right and may voice their complaints regarding lingering roadway projects, potholes, or any number of issues, by simply calling the Road Commission. Other times, a citizen may email a specific member or members of the Road Commission and voice their discontent. While some criticism is expected, Road Commission employees do not have to subject themselves to constant, continued or escalated verbal abuse or threats.

Once a citizen goes beyond a general complaint and begins harassing or threatening a Road Commission employee, it may be appropriate to exercise one of several options. For instance, it may be appropriate to contact the local Sheriff's Department and file a police report. Doing so would consist of meeting with a law enforcement officer and informing him or her of the various threats made by the subject citizen. The police agency would then file a report and (typically) inform the citizen that he or she should cease contact with the Road Commission employee. Another option available, if the citizen continues to bombard and/or engage in threatening communications with the Road Commission, is to have the employee consider a Personal Protection Order – more commonly referred to as a PPO. A PPO is an injunctive order that protects the person obtaining the PPO from an individual's stalking and/or cyberbullying. The person who files for a PPO is called the "Petitioner". A PPO can be used to prevent a citizen from performing various acts, including entering onto a specific premises, continuing to threaten or injure the petitioner, or approaching the petitioner in public. To obtain a PPO, the petitioner files the appropriate forms with the Court which detail the reason(s) that a PPO is necessary. A PPO will typically be granted only if a reasonable person would feel terrorized, frightened, or intimidated by the citizen's actions. If the Court enters the PPO, the citizen can then be arrested for violating its terms.

While some criticism is expected, Road Commission employees do not have to subject themselves to constant, continued or escalated verbal abuse or threats.

While a PPO may seem like an extreme option, it is certainly worth considering if a Road Commission employee continues to be harassed and threatened by a member of the general public. No member should feel unduly harassed, threatened, or endangered. As the reasons for requesting a PPO can vary greatly depending on the specific facts and circumstances, please contact your Pool Administrator, Gayle Cummings, should you feel you are being threatened by a member of the general public.

* * *

Don't Go Out on a Limb: *Practical Advice for Tree Removal in the ROW*

BILL HENN
HENN LESPERANCE, PLC

County Road Commissions in Michigan are charged by statute with keeping highways under their jurisdiction in reasonable repair. The statutory definition of "highway," however, specifically excludes trees. This makes sense because in most cases – where the public highway is merely an easement held in trust for the public – the trees are the tangible property of the adjacent landowners. Those landowners own the trees, however, subject to the expectation that they can be removed if necessary to protect the public's right to use the easement. In short, Road Commissions have no legal duty to maintain and repair trees within the public right-of-way, and they cannot be held liable for failing to do so, but they have the authority to trim or remove trees where necessary to protect the public's rights.

This authority given to Road Commissions is subject to the adjacent property owner's right to reasonable notice of the intent to remove a tree from the right-of-way. That property owner has the ability to retain the timber if he or she chooses to do so. Although the property owner cannot prevent the Road Commission from fulfilling its mandate to keep the right-of-ways in a condition that is reasonably convenient for travel, notice of tree removal is important to avoid potential liability. We are aware of no cases concluding that a Road Commission is liable for removal of trees from within the right-of-way without notice, and it is certainly possible that governmental immunity would protect Road Commissions from such liability, but as an untested issue we recommend providing reasonable notice so long as the tree or trees are not deemed an immediate and unreasonable hazard to the public.

Irrespective of the fact that Road Commissions have no legal liability for these incidents, the public safety aspects of tree trimming and removal are evident.

Michigan law similarly restricts property owners from removing trees without permission from the "authorities" having jurisdiction over the highway. The use of the plural "authorities" suggests that a landowner would need permission from both the Road Commission, as well as the municipality vested with concomitant jurisdiction over the highway. Removing a tree from the right-of-way without the consent of these authorities is a misdemeanor subject to a $100 fine and up to thirty days in jail.

It seems as if every year we hear stories of trees or tree limbs falling onto moving vehicles and causing property damage and bodily injury. Irrespective of the fact that Road Commissions have no legal liability for these incidents, the public safety aspects of tree trimming and removal are evident. Should you have any questions about your authority with respect to tree removal, please do not hesitate to contact MCRCSIP.

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."

Impact of Legalized Marijuana on Commercial Drivers

WENDY HARDT, ATTORNEY
MICHAEL R. KLUCK & ASSOCIATES

On November 6, 2018, Michigan voters will be determining whether to legalize marijuana in this State. Please note that, even if marijuana is legalized, this will have no impact on whether Road Commission drivers will continue to be tested for marijuana under the DOT regulations.

The testing of commercial drivers in Michigan is governed by the DOT regulations. Such regulations treat marijuana as a Schedule I controlled substance and require commercial drivers to be tested for it. If a driver tests positive for marijuana use, the driver must be removed from safety-sensitive functions, be referred to a substance abuse professional for evaluation and treatment, and undergo a return-to-duty test with a negative result before returning to work. None of this will change even if marijuana is legalized in Michigan.

The only way this will change for commercial drivers is if the Federal government stops treating marijuana as a Schedule I controlled substance. At present, there are no plans for it to do so.

Therefore, if questioned on this issue, you should respond to your drivers that marijuana use will still trigger a positive test under the DOT regulations.

Holiday Safety At Home and the Workplace

MIKE E. SHULTZ
DIRECTOR OF LOSS CONTROL TRAINING

Holiday Tree and Lighting – Keep an eye on lighting and ornaments that could produce a fire or electrical shock. Lighting should be checked each year before use. Avoid routing cords in trip areas or under carpets and rugs. Always unplug lights at the end of the day.

Fire Hazards – Food cooking and heating appliances (i.e., crockpots) are often brought into the home or workplace around the holidays. Check to ensure they are in good working condition. Along that point, do not allow electrical circuits to become overloaded in break areas, kitchens or in the office/shop environments.

Gas grills are often found around homes and garages for cooking during holidays. Grills should be used well away from the buildings and properly shut down when not in use.

Smoke Detectors / Fire Extinguishers – Ensure portable fire extinguishers and smoke detectors are available in kitchens and break areas where cooking/heating sources are used.

Holiday and Alcohol – Simply "Never Drink and Drive!" Remember that any alcohol consumption on company premises is strictly prohibited.

Holiday Traveling – When traveling, allow plenty of time to get to your destinations. Keep all vehicle occupants seat belted and plan for bad weather. Traffic is usually heavier during holidays, so plan your time accordingly. Enjoy your family time in the coming months and remember to…

Have a Happy Holiday!

On Notice: Retroactivity of *Streng*

BILL HENN
HENN LESPERANCE, PLC

By this point, most Members are aware of the 2016 opinion in *Streng v Bd of Mackinac Co Rd Commissioners*. To briefly recap, the *Streng* Court held that written notice of a highway defect claim against a county Road Commission (as opposed to against the State, a city, or a village) must be provided pursuant to the 60-day notice period in MCL 224.21, rather than the 120-day period found under MCL 691.1404. Although the Court of Appeals found that this issue had never been expressly decided by any appellate court, its practical effect was to upend decades of case law applying the 120-day notice period to Road Commissions.

More recently, the natural question following a decision like *Streng* has been hotly contested in the courts: whether *Streng* should be "retroactive," i.e., whether it should apply to all cases pending at the time the *Streng* opinion was issued, or whether it should only apply to cases filed thereafter. Compounding the confusion for the bench and bar, the Court of Appeals has now issued two binding opinions – one finding that *Streng* is retroactive and another finding it to be prospective only. Understandably, this head-scratching sequence of events has become an obstacle for Road Commissions to navigate when attempting to assert immunity.

MCRCSIP has followed this issue closely and, earlier this month, filed an amicus brief on behalf of its Membership in the Michigan Supreme Court case of *W A Foote Memorial Hosp v MACP*. Although Foote has nothing to do with County Road Commissions, the retroactivity question being reviewed in that case is identical to the question that has plagued courts in applying *Streng*. The amicus brief provided the Pool with an opportunity to deliver its unique voice and perspective to these important arguments, in an effort to help shape the law in a way that will benefit Pool Members in several pending tort cases. The Pool invites its Members to review this amicus brief, which can be found at the MCRCSIP website https://www.mcrcsip.org.

In the meantime, MCRCSIP is also pushing for legislative action to correct the apparent conflict between the notice statutes that created the anomaly in *Streng*. Specifically, at the urging of and with help from the Pool, legislation has recently been introduced which would return County Road Commissions to equal footing with other governmental entities with regard to the protections of the written notice requirement found in the Governmental Tort Liability Act. MCRCSIP will continue to monitor and push for corrective measures on both the court and legislative fronts on behalf of its Membership. Of course, you are encouraged to contact MCRCSIP should you have any questions or comments.

CREATIVITY WINNERS – MCRCSIP staff members Kristi Peña and Mike Shultz tied for the most original pumpkin design in MCRCSIP's recent staff creativity challenge. Staff voted on the winning entry.

Disclose Before Closed:
Before Entering a Closed Session, Name the Litigation

CHARLES PIKE
SMITH HAUGHEY RICE & ROEGGE

The Michigan Court of Appeals recently held that to satisfy the requirements of Michigan's Open Meetings Act, a public body must state the name of the specific pending litigation prior to entering a closed session to discuss the litigation with its attorney. By way of background, Michigan Road Commissions must adhere to Michigan's Open Meetings Act ("OMA"). While the OMA contains numerous requirements, the gist of OMA is to ensure that all decisions by a public body are made at a meeting open to the public. However, there are a few circumstances in which a public body may meet in a session closed to the public, more commonly referred to as a "closed session."

One circumstance that allows for a closed session is when the public body wants to consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation. If discussing the case during an open session would have a detrimental financial effect on the public body's litigation or settlement position, then it is permitted to enter a closed session. This exception exists to allow a public body to prepare for litigation without having to broadcast its trial or settlement strategy to the opposition along with the rest of the general public.

A public body must satisfy several requirements prior to entering a closed session. One of the requirements is that the public body state on the record the specific purpose for the closed session before actually closing the session. In *Vermilya v Delta Coll Bd of Trustees*, __ Mich App __; __ NW2d __(2018) (Docket No. 341229), the Court of Appeals held that the Delta College Board of Trustees violated the OMA when it failed to state the name of the specific pending litigation prior to entering a closed session. Specifically, the Court held that the legislature intended for public bodies to identify the specific litigation it would be discussing in justifying its decision to close its meeting to the public.

If discussing the case during an open session would have a detrimental financial effect on the public body's litigation or settlement position, then it is permitted to enter a closed session.

According to the holding from *Vermilya*, in order to satisfy the requirement of stating the specific purpose for entering a closed session, it is not enough to simply state that the public body is closing the session to meet with its attorney to discuss pending litigation. Instead, the public body must state the name of the case that it is going to discuss with its attorney during the closed session. This means that going forward, prior to entering a closed session to discuss pending litigation with its attorney, Michigan Road Commissions must state that they are going to close the session to discuss pending litigation with its attorney and provide the name of the case that will be discussed. Failure to do so will violate the OMA and could result in fines and other penalties.

As always, should you have any questions or concerns regarding this article or any aspects of a closed session, please do not hesitate to contact your Pool Administrator, Gayle Cummings.

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

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Clarifications on the MCRCSIP Master Disconnect Switch Mandate

MIKE PHILLIPS
SR. LOSS CONTROL SPECIALIST

A few questions came up regarding truck fires and the 2017 Master Disconnect Switch Mandate after my presentation at the SAM Seminar this fall. We at MCRCSIP really appreciate all the input we received from the SAM development committee and you, our Members, in making this mandate one that will protect your buildings and equipment. Mitigating risk is the goal of everyone involved, and this Insurance Pool is dedicated to reducing the likelihood of another truck fire and facilities loss. As always, if you have comments or questions, please let us know.

Clarifications…

- Lights should be installed on all equipment to indicate whether or not the Master Switch has been turned off. These lights should be bright enough to be easily spotted from a distance, such as a 2" light or an LED light.

- Rental equipment should be stored outside of the facility unless the equipment is equipped with a properly installed Master Disconnect Switch or the battery cables are disconnected before storing. When parking equipment outside of the facilities, remember to park away from areas where combustible materials are stored, such as fueling stations.

- Trucks rated Class 5 and below that have aftermarket accessories such as a plow or lift gate should have a non-self-resetting circuit breaker. A Master Disconnect Switch is not required unless modifications are made to the factory OEM wiring harnesses.

Once again, MCRCSIP and the SAM development committee would like to thank all our Members for their cooperation in meeting the 2017 Master Disconnect Switch Mandate.

2017 Battery Disconnect Mandate

Each member will be required to install battery electrical disconnect switches on trucks (Classification 6 and larger) and other off-road equipment. Install battery electrical disconnect switches to any non-factory electrical modification to smaller fleet trucks within (Classification 1-5).

1. Elevate the starting point of the existing battery disconnect switch mandate to **(Classification 6)** beginning with F- 650's, GM/Dodge 6500 upward thru Vehicle Classifications 7, 8 and 9.

   NOTE: Including all cab-chassis and large commercial trucks such as semi-tankers and lowboys, bucket trucks, plow/blade trucks, etc.

2. For US Truck Classification 5 and smaller (1-4) passenger style vehicles. (i.e., Ford F-150, F-250, F-350, F-450, F-550. Similar sizes in GM/Dodge.

   - A Battery Disconnect Switch is NOT required provided no vendor or member changes have been made to the factory wire harnesses.
   - Aftermarket powered options installed WILL require a positive (+) or negative (-) disconnect or installation of NON-recycling circuit breaker(s). Low voltage aftermarket accessories (i.e., strobe light) of 30 amps or less are exempt.

APPLICABLE FLEET VEHICLES:

- Required on all owned and rented.
- Positive (+) or negative (-) side cable disconnect located as close to batteries as possible by members.
- Switch indicator lights to be installed or other lights (i.e., overhead, plow, button type) utilized.

APPLICABLE CONSTRUCTION AND OFF-ROAD EQUIPMENT:

- Required on all owned and rented.
- Positive (+) or Negative (-) cable disconnect located as close to batteries as possible.
- Battery Disconnect Switch indicator lights are to be installed and used similar to all applicable vehicles with battery disconnects.

TOWABLE POWERED EQUIPMENT:

- Required if unit is equipped with batteries and fuel.
- NOT required if solar powered.

RENTAL EQUIPMENT:

- Required on all rentals. If not practical, unit(s) are to be parked outside sufficiently isolated away from buildings and other parked vehicles.
- One provisional option allows all batteries to be disconnected while parked within facilities or storage buildings.
- A temporary disconnect switch can be used that doesn't require permanent alterations to the battery and cable system. NOTE: Connect battery cables on rear of switch and use heavy magnets or zip ties to temporarily secure switch onto equipment.