

RISKY BUSINESS



A Publication of the Miami Valley Risk Management Association
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MVRMA Officers

President	N. Gregory, Kettering
Vice President	J. Green, Tipp City
Treasurer	J. Cooper, Englewood
Secretary	J. Trick, Vandalia
Exec. Director	T. Judy

FEBRUARY 2014

From the Board Room...



At the December 16, 2013 Quarterly Board Meeting, the following actions were taken:

- Approved the Open Claim and Incurred Losses Report
- Approved the Liability Coverage Document 2014LY26A
- Approved the 2014 liability renewals with GEM \$2.5M x \$500K and Genesis \$7M x \$3M
- Approved the 2014 crime renewal with National Union Fire Insurance Co. of Pittsburgh, PA
- Approved the 2014 Final Budget, PCF and Objectives/Work Plan
- Approved the amended Cash and Investment Policy which now allows MVRMA to invest in GEM's Flexible Capital Program
- Authorized no more than 10% of MVRMA's portfolio to be invested in GEM's Flexible Capital Program
- Elected the following slate of officers for 2014:
President: Nancy Gregory (Kettering)
Vice President: John Green (Tipp City)
Treasurer: Janine Cooper (Englewood)
Secretary: Julie Trick (Vandalia)
- Agreed to the following meeting dates for 2014:
Monday, March 17
Monday, June 16
Monday, September 22
Monday, December 15

FYI

-Tom Judy

Fleet and Driving Safety

Much of the service provided by a municipality is done from behind the wheel, whether it is in a patrol car, fire apparatus, medic unit or snow plow. Perhaps not surprisingly, a review of MVRMA's ten-year loss history reveals that 56% of the pool's claims are auto-related. Due to an emphasis on fleet and driving safety, MVRMA's members have cut the frequency of such claims nearly in half during the past ten years. Despite this positive trend, fleet and driving safety must remain an area of emphasis.

The average dollar value of auto claims is relatively low due to the ability of local governments, under Ohio law, to offset claims against private insurance. Yet, the operation of motor vehicles still exposes a municipal government to significant liability not only from damages to property, but also possible injury or death of employees, and injury or death of the general public. The Bureau of Labor Statistics reports that 36% of occupational fatalities are associated with the operation of motor vehicles. In Ohio, 52 of 154 occupational fatalities in 2012 were transportation-related, according to the Ohio Bureau of Workers' Compensation. In addition to measureable losses, an erosion of public confidence can result from vehicle accidents and observed poor driving habits.

To manage this risk, each municipality should implement a fleet safety program containing written policies and procedures including, at a minimum, the following:

Driver Eligibility Policy. A policy

defining criteria to determine who is eligible to drive a City vehicle. These criteria should include a valid driver's license of the appropriate class for the type(s) of vehicles, and a definition of what constitutes an acceptable driving record. Job descriptions should reflect if driving is a requirement of the job.

Driver Records Checks. At least annually, check the BMV driver record for each employee and volunteer who drives City vehicles. This process will confirm that these individuals have valid licenses and identify who has received traffic citations in order to determine if their driving records continue to meet the City's acceptability standard.

Driver Agreements. Drivers, including volunteers, should be required to sign a driver agreement that includes an assurance that the driver has read and understands all driving policies and procedures.

Post-Accident Policies and Procedures. The City should define who is to be notified of an accident, who is to perform the investigation and the criteria to determine if the accident was preventable or non-preventable.

Disciplinary Policy. There should be a policy establishing the parameters for disciplinary action for preventable accidents and violations of driver expectations. MVRMA has a sample Policy for Driver Point Limits.

Adherence to driving policies should be considered in all employee reviews. *Driver Training Policy.* This policy should include standards for orienting employees and volunteers to the vehicles they will be driving and the minimum periodic training requirements for each position.

Other policies should include a Seat (Cont. on Page 2 - See FYI)

FYI (Cont./Page 1)

Belt Policy; a Distracted Driver Policy that addresses the use of cell phones and/or hands-free devices, eating, etc.; a comprehensive Drug and Alcohol Policy prohibiting the use of such substances while operating equipment or a vehicle; and a Fleet Safety Program Administration Policy to assign responsibility for reviewing drivers' BMV records, maintaining the driver data base, scheduling training, etc. *Vehicle Selection, Inspection and Maintenance.* Fleet vehicles should be submitted to safety inspections and preventive maintenance on a regular basis in accordance with manufacturers' recommendations. Inspections and repairs should be documented. Vehicle maintenance personnel should receive regular training relevant to the types of vehicles in the fleet.

Certainly, auto accidents are going to occur; however, through an organization-wide commitment to fleet safety best practices, the frequency and severity of such losses can be significantly curbed. Please contact MVRMA staff if you would like assistance in the development of a fleet safety program.

Comings and Goings

-Tom Judy

Administrative Assistant Kathy St. Pierre retired on January 31, 2014 after twenty-one years of service to MVRMA. During her tenure, Kathy has been the "right arm" for three Executive Directors. Her knowledge of the pool's operations has been invaluable to me since I joined MVRMA in 2012. Likewise, former Executive Director Mike Hammond said, "Kathy was instrumental in my orientation to MVRMA. She was always the 'go-to' person when someone needed an answer." A small organization needs committed people with diverse skills. Kathy fits that bill perfectly. She will be sorely missed but we wish her well as she and her husband Rob take time to travel and enjoy their grandchildren.

Terri Zalut joined MVRMA as Office Coordinator in January. Terri comes to

us from Washington Township's Finance Department. She will be a great addition to the team and I am certain that our members will enjoy working with her. Please call or email Terri and welcome her to MVRMA.

Would You Believe...

- Kathy St. Pierre

Would you believe... a part-time job turned into 21 years at MVRMA? How did I get here?

After climbing the corporate ladder at Gem Savings for sixteen years, I "retired" as Regional Branch Manager in 1984 to stay home with my two young sons, ages 4 and 6, something I had missed with my daughter, who was then a senior in high school.

In 1993, my neighbor and the corporate attorney for MVRMA, Bob Surdyk, told me about a part-time opening at Miami Valley Risk Management. And the rest, as they say, is history. After two weeks of part-time hours, John Nielsen, the Executive Director, asked me to work full-time so that he and I could form a "group" for health insurance. After that, we were off and running.

For those of you who weren't around in the early years, John and I shared an office in what was then called the Miami Valley Cable Council. We moved to a suite of offices in the basement of a building on David Road in the summer of 1994. There were no windows, but at least we each had our own private space!

With the additions of Craig Blair as Claims Manager in December 1994 and Danny O'Malley as Loss Control Manager in 1998, the final four positions at MVRMA were solidified. Although the positions have remained essentially the same over the years, some of the faces have changed. John Nielsen left in 1999, to be replaced by Mike Hammond in 2000, who was replaced by Tom Judy in 2012. Danny O'Malley left in 2001, to be replaced by Starr Markworth. With each of these changes, there has been little, if any, disruption of service to our members, and my retirement will be no different.

My last day was January 31, 2014. The new Office Coordinator, Terri Zalut, will be a competent, enthusiastic addition to staff.

During my time at MVRMA, I have witnessed many changes and much growth. When I started in 1993, we had 12 members. A few months later, Sidney came on board, and during the ensuing years, seven additional cities were added to the fold. Our budget increased from \$1.6M in 1993 to almost \$4.3M in 2014. I've worked with at least three different banks, four different insurance brokers, three different auditing firms and numerous Trustees and Alternates from our member cities.

Everyone asks, "What are you going to do now that you're retiring?" Would you believe...travel, spend time with my grandchildren, take up golf, ride my bike, hike, read, volunteer, take a few art classes and so much more. Now that we are both retired and in good health, Rob and I plan to do all the things we never had time for during our first 38 years of marriage.

But, saying goodbye is never easy. As I begin the next phase of my life, I want you to know how grateful I am for having the chance to work with such an incredible group of people, both here at the MVRMA office and in our member cities. Thanks to everyone for your cooperation, support and friendship throughout the years. I will miss you all!

The Claims File

-Craig Blair

From a claims perspective, 2013 was a good year. However, in the state of Ohio, claimants have two years from the date of an incident to file a lawsuit. Unfortunately, we can't predict with any certainty how those suits might impact the year's loss experience.

To date, MVRMA has a total of 344 claims for 2013. This number is consistent with the average for the last ten years. A breakdown of the 2013 (Cont. on Page 3 - see CLAIMS FILE)



The Holiday Luncheon



SPEC Award Winners from left to right: Jim Hanson, Montgomery; Dody Bruck, Miamisburg; Mark Schlagheck, Bellbrook; Nancy Gregory, Kettering; Greg Horn, Centerville and Sue Knight, Troy

At the Annual Holiday Luncheon, which immediately followed the December 16, 2013 Board Meeting, Starr Markworth, MVRMA's Loss Control Director, presented the 2013 Safety Performance Evaluation Checklist (SPEC) Awards. SPEC is an evaluation of each member city's compliance with specific best practices of loss control and risk management.

Annually, Starr meets with each member city's Safety Coordinator to conduct the evaluation. The member with the **most improved** overall percentage of compliance receives the Ascension Award. The member with the **best** overall compliance is presented the Pinnacle Award. The City of Kettering was this year's Ascension Award winner. The Pinnacle Award was given to the cities of Bellbrook, Centerville, Kettering, Miamisburg, Montgomery and Troy (all with 100% compliance). Congratulations to all.

Following the SPEC Awards, MVRMA's President Mark Schlagheck hosted a short program in celebration of MVRMA's Silver Anniversary.

When MVRMA was incorporated December 1, 1988, it had only six members: Beavercreek, Kettering, Miamisburg, Vandalia, West Carrollton and Wilmington. Since that time,

the cities of Troy (1989), Montgomery (1990), Springdale (1991), Blue Ash and Wyoming (1992), Indian Hill and Sidney (1993), Madeira (1994), Tipp City (1996), Mason (1997), Piqua (2002) and Bellbrook, Centerville and Englewood (2004) have joined the MVRMA family. Today we are twenty members strong.

To celebrate the 25 year milestone, all past presidents and executive directors were invited to attend the luncheon (see the picture below). Although Clint Gridley, President from May 1990 - December 1991, was unable to make the trip from Minnesota, he sent his best wishes. He noted, "The creation of MVRMA was difficult, stressful, challenging and exciting all in one. I know the risks and effort have more than paid off with greater service, lowered cost and better training to the member cities. You have my well wishes and congratulations for the 25th anniversary of MVRMA."

In addition to past presidents and executive directors, we had many of our city managers in attendance as well as our retired corporate attorney Bob Surdyk and current members of his firm Ned Dowd and Josh Schierloh. Thanks to everyone for making this day so special.

Front row: John Nielsen Exec. Dir. 1990-1999; Sue Knight Pres. 2005-2008; Nancy Gregory Pres. 2000-2003;
Back row: Mike Hammond Exec. Dir. 2000-2012; Jon Stoops Pres. 1994; Jim Pfeffer Pres. 1997-1999; Tom Judy Pres. 2004-2005 and current Exec. Dir.; Mark Schlagheck Pres. 2011-2013; and Derrick Parham Pres. 1995-1996



Claims File (Cont./Page 2)

claims is as follows: General Liability (43% frequency and 15% severity); Auto Claims (30% frequency and 52% severity); Property (27% frequency and 33% severity). The majority of our lawsuits fall into the General Liability category, and traditionally the severity of these claims will rise as they make their way through the court system. At

this point in time, the breakdown for all claims is fairly consistent with past years.

Of the 344 claims, there were 96 subrogation matters handled at the request of our members, and we recovered more than \$89,000. As always, it is optional to report subrogations, but most of our members prefer to "get it off their desks" and let us handle the paperwork involved in these matters.

Loss Control Lowdown

-Starr Markworth

It's Time for the Law Enforcement Best Practices (LEBP) Site Visits!

It's time again to visit each member city police department to discuss best practices.

While we refer to these annual visits as LEBP visits, some police officers may (Cont. on Page 4 - See LEBP)

LEPB (Cont./Page 3)

not know exactly what that means, why MVRMA makes the visits and how it relates to them.

Historically, police claims account for about one-third of all MVRMA claims. Due to the high liability associated with police work, it's important to implement policies, procedures and training programs that will prevent claims and provide a strong defense for claims that become lawsuits.

The LEBP program was developed as a tool to establish operating standards that could be used to measure police operations against those standards.

The criteria for the standards were established using several law enforcement risk management organizations, MVRMA member exposures and loss experience, as well as feedback from several Police Chiefs and Assistant Chiefs from our member cities. We believe these standards are consistent with both CALEA and Lexipol recommendations.

The LEBP standards are applied to each of the 20 member cities equally. Annually, I conduct a scheduled site visit to meet with representatives from each member police department to discuss their policies, procedures and operations. During this meeting, many hot topics relevant to law enforcement are discussed, and departmental accomplishments are recognized.

Because MVRMA is a self-insured pool, it is to the advantage of all that each member utilizes loss control best practices. For this reason, good loss control ideas and practices are shared among the members.

Following the LEBP visit, information is compiled for each member police department and a summary letter is sent to the Chief. If any of the areas are not in compliance with the LEBP standards, recommendations are given to encourage compliance.

There are no penalties or rewards for this program, but we consider it a strong risk management tool intended to reduce the frequency and severity of police department losses.

Coming Events

March 17
MVRMA Quarterly Board Meeting
MVRMA Offices
9:30am

Visit mvrma.com for upcoming training events

Counselors' Comments



Dinsmore & Shohl

Taser Litigation Update

Electronic Control Weapons (Tasers) remain relatively new technology, hence courts and law enforcement agencies continue to struggle with and debate the risks and benefits of the device. To assist departments and their officers in avoiding the recent influx in civil litigation resulting from the deployment of tasers, last spring, MVRMA presented a "legal update" which included recommended policies and guidelines for agencies who issued tasers to their officers. A sample policy was proposed, which included recommended language based on the 2011 Electronic Control Weapon guidelines from the U.S. Department of Justice, the Police Executive Research Forum and case law from throughout the country. The following is an overview of case law decided since last year's seminar to remind law enforcement agencies they need to continue to pay close attention to when and how their officers may utilize tasers in the field.

A. Active Resistance

Courts in the Sixth Circuit have consistently held that "if a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to "subdue" the suspect. *Hagans v. Franklin County*, 695 F. 3rd 505 (6th Cir. 2012). By contrast, when a suspect is compliant or has stopped resisting, the use of a taser has been found to be an excessive use of force. *Kijowski v.*

City of Niles, 372 F. Appx. 595 (6th Cir. 2010). Determining whether and when a suspect who initially resists has ceased such that the use of a taser is no longer reasonable can be difficult for officers to discern, particularly in the heat of the moment. Hence, this sometimes gray area continues to be the focus of constitutional claims alleging excessive use of force.

In *Brown v. Village of Lincoln Heights*, Case No. 1:11cv835, 2013 U.S. Dist. Lexis 157566 (S.D. Ohio), a trial judge from the Southern District Court of Ohio issued a November 4, 2013 decision holding that an officer who used his Taser was not entitled to qualified immunity on an excessive force claim where the officer tased plaintiff (the vice mayor of a village) multiple times after plaintiff entered his neighbor's yard to investigate a claim that the officer was "badgering" plaintiff's brother. The Court found that based on plaintiff's version of the facts, plaintiff posed no threat to the officers and was not actively resisting when he turned towards a second officer with his arms outstretched trying to talk to him. As such, the Court concluded that the officer who deployed the taser was not entitled to qualified immunity.

Similarly, a California District Court in *Harris v. Simental*, Case No. 11-5306, 2013 U.S. Dist. Lexis 98640 (N.D. Cal.) held on July 15, 2013 that an officer may have acted unreasonably when he used his taser multiple times on a suspect who was brought into the police department for fingerprinting, gave a fake name to the officer, refused to remove his "grill," and allegedly shoved an officer. The Court ultimately determined that the initial use of the taser was reasonable because plaintiff was assaulting another officer. However, the Court held that a reasonable jury could find that the officer's second, third, and fourth application of the Taser was unreasonable because if, as the plaintiff claimed, he was debilitated as a result of the first tasing, then plaintiff was no longer actively resisting the officers, and could no longer appear to cause an

immediate threat to anyone.

Nevertheless, the officer was granted qualified immunity because, as of November 2, 2009, the law regarding multiple applications of a Taser had not yet been "clearly established."

B. Unintended Risks

In addition to the aforementioned case law discussing active versus passive resistance, several Courts have also recently decided a number of cases involving the use of Tasers coupled with obvious but unintended risks, including when the suspect is on an elevated surface or in close proximity to gasoline at the time the Taser was deployed. In *Negron v. City of New York*, Case No. 09-Civ-0944, 2013 U.S. Dist. Lexis 144064 (E.D. N.Y.) a New York District Court ruled on October 4, 2013 that an officer who fired a Taser in the dart mode against a man who then fell from an elevated position, landed on his head, and died was not entitled to qualified immunity from an excessive force claim, nor was the lieutenant who ordered him to do so. Rather, the Court determined that a reasonable fact-finder could conclude that the risk of serious injury to the suspect under these circumstances was substantial and outweighed the government's interest in subduing him. Moreover, the Court concluded that the lieutenant likewise should have known that ordering the use of a Taser under the particular circumstances was unreasonable.

In *Brown v. Burghart*, #10-3374, 2013 U.S. Dist. Lexis 48054 (E.D. Pa.), a Pennsylvania District Court denied summary judgment to a trooper who failed to prevent a fellow trooper from tasing a suspect who was covered in gasoline after his motor scooter crashed during a pursuit. Ultimately, the Court determined that even though the suspect was resisting arrest, a reasonable jury could find that an objectively reasonable officer presented with these circumstances "would have been cognizant of the risk of a gasoline spill or checked for a spill before using a Taser," and intervened if presented with an adequate opportunity.

Although the United States Supreme

Court has yet to decide whether active versus passive resistance will be the primary factor in determining whether a police officer's use of a taser violates the 4th Amendment, it is currently the line of demarcation utilized by the 6th Circuit. Unintended consequences resulting from the use of tasers also remains a source of concern for Courts. As such, those departments whose officers are being issued tasers must be cognizant of the need to train their officers on the use of the weapon, and should review their current policies and guidelines to make certain they take into consideration the most recent court decisions concerning when and how officers may utilize tasers.

Brokers' Beat...



Contractual Risk Transfer

This edition of *Risky Business* will focus on Contractual Risk Transfer using a combination of Hold Harmless/ Indemnification Agreements and Insurance Requirements. Later this year, we will present a follow-up live training session to expand on the scope of these requirements in your city's contracts with vendors and contractors.

As an example: your city hires a local contractor to fix a leaky roof under a \$500 purchase order. The contractor uses a blow torch to dry a puddle on the roof and burns down your building. The contractor has no insurance and there was no requirement in the purchase order for insurance or indemnification. The result is a \$3M property loss paid by MVRMA's property program with little or no opportunity to subrogate against the contractor who has limited financial means and no liability insurance with which to repay these damages.

Don't let a situation like this happen to you. Shift the responsibility for loss or damage to the contractor via insurance and hold harmless/ indemnification.

Making the contractor responsible encourages safety and added

responsibility on his part. Insurance and additional insured protection provide a source of payment for claims against the city, which would in turn positively impact the city's claims history and premium payments to MVRMA.

The first step is to analyze the risk and relationships associated with the contract (i.e., Risk Identification). Once you've identified the risks involved with the work to be performed, the next step is to develop a Hold Harmless/ Indemnification Agreement to establish who is responsible for what under the scope of the contract.

Selecting the Insurance Requirements (i.e., types of insurance and limits) for that particular project is the next step. By assessing the risk associated with the project, you can determine the appropriate coverages and limits of insurance.

We recommend identifying the insurance requirements in your contract bid specs, thus putting the contractor on notice of what will be required should he be awarded the contract.

But how do you know if the contractor can meet the insurance requirements? You do this by reviewing and comparing the certificates of insurance and accompanying endorsements provided by the contractor against the insurance requirements contained in the contract. If they don't match, follow-up until they do.

Proper contractual risk transfer is one of many elements found in a sound risk management program and one of the easiest and most inexpensive risk management techniques available for transferring the risk to others.

This article only provides the basics, but we encourage you to obtain additional resources, including *Alliant's Insurance Requirements in Contracts Manual*, widely used by cities to manage the issue of insurance requirements in contracts. This manual is updated by Alliant as a service to the public sector every few years. For a copy of the manual, visit Alliant's website at www.alliant.com.

