

RISKY BUSINESS



MVRMA Officers	
President	M. Schlagheck, Bellbrook
Vice President	N. Grgory, Kettering
Treasurer	J. Cooper, Englewood
Secretary	J. Trick, Vandalia
Ex. Director	T. Judy

A Publication of the Miami Valley Risk Management Association
Editor: Kathy St. Pierre

4625 Presidential Way, Kettering, OH 45429 937/438-8878
<http://www.mvrma.com>

MAY 2013

From the Board Room...



At the March 18, 2013 Quarterly Board Meeting, the following actions were taken:

- Approved the Open Claims & Incurred Losses Report
- Authorized the Executive Director to sign an agreement with RiskMaster to lease the cloud-based eXpress Claims Management System and use some of the remaining funds in the budget to update the Claims Manager's electronic equipment
- Approved the amended Cash and Investment Policy which allows the purchase of high quality corporate bonds and allows the portfolio to exceed an average duration of three years. Corporate bonds must be rated not lower than A2 by Moody's or A by S&P; no more than 50% of the portfolio shall be invested in corporate bonds and no more than 5% of the portfolio shall be invested with any one corporate insurer.
- Approved the application for compliance with AGRiP advisory standards (best practices)
- Approved closure of LY 14 (2002) and LY 19 (2007) and the distribution of remaining funds in LY 19 to the membership
- Authorized the Executive Director to enter into a new electric generation agreement, selected through the MVCC group purchasing program, if he deems it to be in the best interest of MVRMA

FYI

- Tom Judy

Closure of LY 19 and LY 14

The Board approved the closure of two loss years at its March 2013 meeting. As our members know, when all claims and suits of a loss year are resolved, MVRMA closes that loss year and returns the remaining funds to the members in the same proportion they contributed funds to that loss year.

The two loss years just closed present quite a contrast. Members received refunds totaling more than \$2 million from the closure of LY19; on the other hand, there were no residual funds to distribute from the closure of LY14. These loss years are extremes - the best loss year in the association's history and perhaps its worst - but together they demonstrate the highly variable nature of claims from one year to the next in a small pool. That variability is the reason the Board implemented the Shock Loss Fund (SLF) many years ago. The SLF is a separate surplus fund that acts as a "shock absorber" to cover any deficiencies that may arise in any particular loss year. Fortunately, it has been necessary to use the SLF for this purpose only three times for relatively small amounts. The SLF is funded by member contributions and must be equal to or greater than the funding for the current loss year. The SLF is well-funded, with a balance of \$3,159,000, compared to 2013 loss year funding of \$2.5 million. The SLF is a key component of the conservative financial management of this association.

Since its inception in 1989, MVRMA has closed 18 loss years and refunded more than \$11 million of unspent loss funds to its members.

Instructor Liability

Many of our member cities have very active recreation programs which offer a wide variety of recreation classes and programs, from scrapbooking, to yoga, dance, tennis and karate. Generally, these classes are conducted by contract instructors. While some of these programs are considered low risk, many are not. It is recommended that, at a minimum, our members require the instructors to enter into a written contract containing the scope of work, a hold harmless agreement in favor of the city and a waiver of claims against the city. For those activities not considered to be low risk, it is highly recommended the city require the instructor to carry general liability coverage with the city named an additional insured.

Most instructors teach these classes as a part-time activity and probably do not have commercial general liability insurance coverage. In some cases, the instructor's homeowner's liability insurance may provide coverage sufficient to meet the requirements, but it is more likely their homeowner's policy will not cover these types of activities.

If our members are confronted with this dilemma, they may want to consider the Instructor Liability Coverage through the Alliant Special Events Program. This coverage is available on a class-by-class basis with the instructor the named insured and the city an additional insured. The coverage is affordable and has limits of \$1 million per occurrence and a \$2 million aggregate. Please call the MVRMA office if you have an interest in this program.

Counselors' Comments



-Surdyk, Dowd & Turner

The Ohio Supreme Court Provides New Definitions for Willful, Wanton and Reckless Under the Ohio Political Subdivision Tort Liability Act

The Ohio Supreme Court recently addressed the often times confused terms of "willful," "wanton" and "reckless" as used in the Ohio Political Subdivision Tort Liability Act in *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266. Originally, Cynthia Anderson filed a wrongful death action against the City of Massillon and two of its firefighters after her husband and grandson were tragically killed in an automobile accident involving a city fire engine. The trial court granted judgment to the city and the two firefighters finding immunity applied to bar Anderson's claim. In so holding, the trial court determined the operation of the fire engine did not constitute willful or wanton misconduct, and the two firefighters did not act with malicious purpose, in bad faith or in a wanton or reckless manner.

Anderson subsequently appealed from the trial court's decision to the Fifth District Court of Appeals in *Anderson v. Massillon*, 193 Ohio App.3d 297, 2011-Ohio-1328, 951 N.E.2d 1063. In reversing the trial court's decision, the appellate court noted the "wanton or reckless" standard applicable to political subdivision employees was the "functional equivalent" to that of the "willful or wanton" standard applicable to political subdivisions. Based upon this finding, the appellate court determined the city and its firefighters were not immune from liability if the firefighters had acted "recklessly" in causing the collision. Finding a genuine issue of material fact remained regarding whether the operation of the fire engine was "reckless," the appellate court concluded summary judgment was not

appropriate.

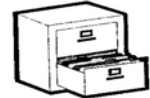
Attempting to resolve any apparent confusion regarding the terms "willful," "wanton" and "reckless," the Ohio Supreme Court accepted the matter for review. Specifically, the Court addressed the issue of whether the term "willful or wanton" is equivalent to "reckless." In its decision, the Court noted numerous cases in which it had inadvertently applied the terms "willful," "wanton" and "reckless" synonymously. Most notable was the Court's own decision in *Thompson v. McNeill*, 53 Ohio St.3d 102, 559 N.E.2d 705 (1990), wherein the Court explicitly stated in a footnote that willfulness, wantonness and recklessness could be used "interchangeably."

However, as a review of the historical developments regarding these terms, the Court determined that "willful," "wanton" and "reckless" were actually intended to describe different and distinct degrees of care that were, in fact, not interchangeable. To that end, the Court provided each term with its own separate definition. As now defined by the Court, "willful" misconduct "implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." In addition, "wanton" misconduct "is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result." Finally, "reckless" conduct is "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct."

These new definitions, although somewhat similar, set forth the Court's clear intent to comply with the historical development of the terms "willful," "wanton" and "reckless" as they are to be used in regards to the Ohio Political Subdivision Tort Liability Act. In turn,

following the Court's decision in *Anderson v. Massillon*, immunity will apply to a political subdivision so long as the alleged conduct does not rise to the newly defined "willful" or "wanton" standard, whereas an employee of a political subdivision will be entitled to immunity so long as his or her conduct does not rise above negligence to encompass "wanton" or "reckless."

The Claims File



- Craig Blair

MVRMA handles claims under Ohio Revised Code 2744, which sets forth guidelines that apply to claims against tax supported public entities. This section of the Code was established to protect the tax dollars to which public entities are entrusted. These protections are often referred to as "governmental immunities" or "sovereign immunities."

While ORC 2744 covers a broad spectrum of city functions and provides many of the legal defenses for our members, the easiest way to explain the benefits is to review a common fender bender accident. When a city truck is determined liable by rear-ending another vehicle, ORC 2744 allows for offsets of available coverage to the damaged vehicle. In other words, if the damages to the other vehicle exceed the vehicle owner's deductible for collision coverage, the vehicle owner's insurance will cover the claim. The city is then liable for any uncovered costs such as the deductible and rental car coverage (if not covered by the vehicle owner's policy). The city would also be liable for an injury claim, but again, would be allowed offsets from any auto or health insurance available to the injured party. In these situations, the insurance company cannot surcharge or raise the rates of the other party's insurance.

With the offsets provided by ORC 2744, MVRMA cities benefit financially. While the insurance industry's average auto damage claim is around \$2,600, MVRMA's average payment for third

(The Claims File con't)

party claims in 2012 was \$595.

As one might expect, when the city is liable for damage to a third party's vehicle, there is generally damage to the city's vehicle. Unfortunately, there are no offsets for this coverage. And, because auto accidents constitute about 28% of our total claims, it is more important than ever to drive safely and avoid accidents all together.

Loss Control Lowdown

-Starr Markworth

Free Online Streaming Videos

All MVRMA members now have access to *free* online streaming videos. This program is being sponsored through MVRMA's broker, Alliant Insurance Services Inc., and uses the Wumbus Corporation's training library.

This exciting new program allows members to provide quality training videos to their employees at their convenience and without any prior planning. These videos can be viewed on any computer or, using a laptop and projector, can be viewed by a group in a classroom setting. Topics include: Behavioral Based Safety; Contractor and Construction; Driving Safety; Grounds Keeping Safety; Health and Safety; Hospitality and Restaurants; Human Resources; OSHA Compliance; Sanitation; Security and Emergency Preparedness and Warehouse.

More information, including a comprehensive listing of online streaming videos, is available on the MVRMA website, www.mvrma.com under Loss Control. Please contact me smarkworth@mvrma.com if you are unsure of your member website login information or to request online video account activation through Alliant.

PRIMA Cybrary

Another valuable resource to which MVRMA members have access is the Public Risk Management Association's Cybrary.

The PRIMA Cybrary is your

members-only resource for a variety of sample documents that every risk manager needs, including: Requests for Proposals; Job Descriptions; Tool Kits; Risk Management Annual Reports and much more.

Use this resource as a starting point for all of your risk management-related projects. All of the documents in the PRIMA Cybrary have been contributed by risk management professionals in public entities. Find out what worked for them and get a head-start on your next project.

Please contact the MVRMA office if you are looking for sample documents and would like staff to research the PRIMA Cybrary for you.

Electricity to Go

Contributed by John Green,
Tipp City

The City Council for the City of Tipp City recently agreed to apply for a grant to purchase and install up to three electric vehicle recharging stations. The charging stations are available through an ARRA grant from the US Department of Energy: Clean Cities Program. The grant will provide up to 50% funding for the purchase and installation of the stations, which cost approximately \$7,500 each.

Tipp City operates its own electric utility, so the charging stations will be installed and maintained by the City. Plans are to install one charging station in the downtown area and one station each at locations on the east and west side of Interstate 75.

The stations operate on a 240 volt circuit, draw power similar to an electric clothes dryer and will be able to recharge a standard size vehicle battery in two to three hours. The stations will be metered and electric consumption reported to the Department of Energy quarterly.

The City does not anticipate a huge demand immediately and plans to provide the electricity free of charge until it is determined the cost is sufficient to require a fee for the service. At that time, the stations can be upgraded with a credit card scanner to

enable charging for the electric consumption.

The city hopes the installation of these charging stations will promote the use of electric powered vehicles and will attract the owners of electric vehicles to the downtown area for shopping and dining.

Staff would like to thank John Green, Tipp City, and Amber Morris, Montgomery, for their contributions to this issue of Risky Business and encourage others to submit noteworthy articles in the future.

Community Parks are Valuable

Contributed by Amber Morris
City of Montgomery

Community parks are valuable. Try to imagine your community without these open spaces, sports fields and places of relaxation. Parks provide a variety of opportunities for people to get outside, enjoy fresh air and wildlife, have fun and socialize with others.

Because they are valuable assets to our communities, we must manage the risks within these public spaces. Liability and claim costs are a concern to all organizations, and good risk management practices help to minimize these expenses while providing for an enjoyable park experience.

The risk management process is to 1) identify the exposure to risk; 2) review current practices; 3) develop enhancements; 4) implement enhanced activities and 5) monitor the results, according to the Insurance Institute of America.

Doug Wyseman, of Municipal Risk Services Limited, developed an effective way to manage park risks he calls the LAW of risk management, by first *looking* for the risks, then *asking* for data from all stakeholders, and finally, *watching* for trends and experiences (*Smart Parks*, copyright 2009).

To *look* means to assess the landscape of your park for any areas of concern using a tracked history of claims or complaints to see where potential risks may be within the

(Community Parks are Valuable con't)

playgrounds, fields and courts, natural features and site amenities. Check visibility, signage, designed use patterns and unintended use patterns. Regular park inspections documented to show the identification of issues and the follow-up maintenance will help establish a good standard of care.

Asking for input helps to build a wider understanding of perceptions and trends. Talking to people in the parks, getting input from insurers and having conversations with professional peers on comparable facilities will help establish common practice and the norms for service. Legal advice also adds to the mix in determining the successes to imitate and the failures to avoid.

Watching trends in park claims and complaints acts as a warning light so that risk management plans can be built into budgets and schedules in a cost effective and timely manner. Knowing what the potential pitfalls are helps to make navigating park risks much simpler.

Doug Wyseman recently taught a Parks and Rec Risk Management class for MVRMA. Following the class, Starr Markworth, the MVRMA Loss Control Manager stated, "Ongoing training, like the one presented by Doug Wyseman, helps us all make better decisions through increased awareness of smart risk management practices."

Brokers' Beat...



With some signs of a recovering economy, we are seeing municipal entities reviewing plans for capital improvement projects. Because MVRMA cities may be considering their own construction projects, now might be an opportune time to review property insurance as it relates to course of construction coverage.

Property coverage for construction projects is generally referred to as

either course of construction or builder's risk insurance. This coverage is often times purchased and carried by the project contractor, and because of the higher risk of property exposures for these projects, MVRMA encourages this arrangement. It insulates both the pool's SIR and the member's experience from such losses.

However, if the construction contract requires the city to purchase and carry course of construction insurance, the coverage is automatically available for projects up to \$25 million in value under the MVRMA property program and extends to include remodeling, additions, alterations and renovations. It should be mentioned that while construction projects are automatically covered, if required by contract, they should be reported or included when updating the annual Schedule of Values at the next renewal cycle.

The coverage includes ALL Risk coverage along with Earthquake and Flood coverage and also includes coverage for uninstalled building materials on the job/construction site. It can also be extended to include transit coverage for building materials prior to their arrival at the job/construction site, but we do not encourage the use of the transit coverage because of geographic and sub-limit restrictions. With the exception of the transit limitations, building materials are covered on the job site prior to the time they are actually installed, and of course, after they are attached to the structure that is under construction. The coverage mirrors the contract terms for the project with respect to the onsite and transit coverage, and coverage can be extended to cover the interest of the contractor with respect to building materials. The program coverage excludes coverage for tools of the contractors or subcontractors. It should be noted that coverage for building materials in transit and contractor tools is readily available for the contractor in the commercial marketplace.

Given the way this coverage is structured around the contract terms,

Coming Events

May 14

Law Enforcement Legal Update
Mason Community Room
8:30 am - noon

May 30

Public Employment: Key Legal Concepts
from Hire to Termination
Centerville Police Department
8:30 am - 4:30 pm

June 17

MVRMA Quarterly Board Meeting
9:30am

the insurance planning for course of construction projects should begin as a part of the RFP or bid process. Should the city desire to use this automatic coverage, the bid documents and resulting contract should clearly reflect that the city will purchase and carry builders risk or course of construction insurance including building materials on the construction site, otherwise, automatic coverage may not be triggered. Given the complex nature of construction contracts, especially for larger projects, we strongly suggest you contact MVRMA early on in the planning and bid process for assistance with insurance requirements not only for property but also for liability, bonding and indemnity considerations.

While project size is limited to \$25 million per project for the automatic inclusion of course of construction coverage, MVRMA is in a position to arrange this coverage for limits up to \$50 million, but this coverage will probably require advance underwriting approval, endorsements and an additional premium (which would be a pass through expense to the city). For projects above \$50 million, consideration might be given to Wrap Up or Owner Controlled Insurance Programs (OCIP's). These and many more are all good reasons to contact MVRMA early in the planning and bid process for any construction project.