WCRP

# County Connection

*News from the Washington Counties Risk Pool* March/April 2010

# BOARD ACCEPTS TASK FORCE RECOMMENDATIONS

In November of 2009, at the direction of the Board of Directors, a Business Model Task Force was formed to address some emerging concerns related to Pool programs.

Commissioner Keith Goehner, Task Force Chair

**Task Force Members and Goal:**

Chaired by Past WCRP President and Chelan County Commissioner Keith Goehner, the members of the Task Force were asked to identify issues, needs and desires, and determine optional models that might be considered to recommend to the membership. Members of the Task Force included Chair Keith Goehner, Mark Wilsdon, Steve Bartel, Jay Winter, Thad Duvall, and Bryan Harrison. Other contributors included Mike Croke, Liz Miser, Kevin Wick, Vyrle Hill, David Goldsmith, Susan Looker, Jill Lowe, and other Risk Pool staff as needed. Their goal was to determine what was in the best long term interest of the Pool and its members.

During the Spring Conference at Suncadia in Cle Elum, the Task Force reported to the Board of Directors as requested with their recommendations.

David Goldsmith, Member Services

**Task Force Meetings:**

Representing the Task Force, David Goldsmith reported the first meeting identified issues to be discussed and determined where additional information was needed. The second meeting established a guiding philosophy for the purpose of recommending any changes to the program. The guiding philosophy included three points:

- All WCRP participants should share in the common or pooled risks to some extent.
- All cases are to be managed under common case management policies and rules, and administration.
- All members should share proportionally in the operational costs of WCRP.

The second meeting also reviewed case management and prompted requests for more information.

The third meeting was devoted to two major topics: 1) Increasing the Pool's SIR, and 2) Case handling practices that have likely contributed to poorer loss history and insurance premium increases. The Pool's actuary presented loss information.

**Conclusions and Recommendations:**

From these meetings and discussions, the Task Force made the following conclusions and recommendations:

1. ***Should WCRP develop an optional SIR program in addition to the deductible program?*** Conclusion: No, as the SIR would not satisfy the guiding philosophy.

2. ***Should the WCRP raise the Pool's SIR to or above the largest deductible level offered?*** Conclusion: No, based on the special actuarial study conducted which shows that the current model of reinsurance is more cost effective at this time. However, the Pool should consider building into its membership assessment structure an allowance for when the "working layer" is no longer insurable or the costs are no longer to the advantage of the Pool.

3. ***Should the WCRP lower the Minimum***

*(Continued on page 2)*

# BOARD ACCEPTS TASK FORCE RECOMMENDATIONS,

**(Continued from page 1)**



***Coverage per Occurrence from $20M?*** Conclusion: Yes, to $10M or $15M with optional $5M layers up to at least $25M provided the cost of the excess optional coverage is not unreasonably more expensive than the present mandatory excess coverage.

4. ***Should the WCRP clarify and strengthen the policies, procedures and practices in the management of claims and lawsuits?*** Conclusion: Yes, recommendations include:

a. Recommendation A-1: Create an infraction-type mechanism to address the untimely reporting or the failure to report tort claims and lawsuits in accordance with the Pool's policy.

b. Recommendation B-1: WCRP is responsible for and will handle all cases that are covered under the JSILP. Members may request permission to handle cases with in-county administration resources, but the permission sought is not automatic, and it must be granted by the Pool's claim management after discussion with the Member County.

c. Recommendation B-2: Insist as a prerequisite to delegation of in-county case handling authority that the Member County's in-county case handling personnel possess qualifications and experience commensurate with those possessed by the Pool's claims staff and/or that are sufficient to address the complexities of the cases the Member County will likely encounter.

d. Recommendation C-1: Clarify the roles of the Pool-designated Defense Counsel and the in-county Defense Attorney.

e. Recommendation C2-3: Clarify the role of the Prosecuting Attorneys in defense of claims/ lawsuits. The Pool will assign all Pool-designated defense counsel. Primary Pool-designated defense counsel assignments for all higher-risk cases should be to attorneys with specialization and experience warranted.

5. ***Should the WCRP develop procedures short of expulsion to deal with a Member County not meeting its obligations as a member of the WCRP?*** Conclusion: Yes, however this topic was deemed to be outside the scope of the Business Model Ad-Hock Task Force and is referred to the Executive Committee to determine the proper venue for addressing this concern.

**Standing Committees To Be Assigned:**

The Board voted to adopt the conclusions and recommendations of the task force during the Board Meeting on 3/26/10; the issues will be assigned to one or more of the standing committees, where proper wording will be developed. Final changes or additions to membership documents will be voted on by the Board.

David Goldsmith,
Member Services

The Spring Meeting of the Board of Directors of the Washington Counties Risk Pool contained a number of firsts:

It was the first time that the Pool had hosted its conference at Suncadia. From all reports the rooms and facilities were top notch and very much appreciated by all. The response was such that the membership encouraged the Pool staff to book the facilities again for next year if again available at government rates.

It was the first time to meet jointly with the member counties' prosecuting attorneys and civil deputy prosecuting attorneys in an effort to discuss issues concerning the roles and responsibilities that each have in the management and litigation of claims. The Pool's coverage counsel provided background about how self-insured pools are both different from and similar to insurance companies. This presentation was a backdrop from which dialogue with and among the prosecutors proceeded. Coverage counsel also suggested specific language to become part of the Joint Self-Insurance Liability Policy articulating the attorney-client relationship between the designated defense attorney (whether the county prosecutor's staff or outside counsel), the Member County and the Pool.

It was the first time that the recommendations from the task force were communicated to and with the entire membership. These recommendations were subsequently adopted by the full membership and will be sent to committee(s) to be fully fleshed out into policy for consideration at this summer's Annual Meeting.

Following the Spring Meeting, Whatcom County became the first county to receive its annual county visit this year. Emphases being placed on the visits this year are the effects of the assessment (premium) increases experienced this policy year, the formation of the task force and the results of its efforts, as well as the general health and vitality of the Pool.

**SAVE THE DATES!!**

**JULY 21-23, 2010**
**WCRP CONFERENCE AND ANNUAL BOARD OF DIRECTORS MEETING**

**RED LION HOTEL**
**WENATCHEE, WA**

**Look for detail in the May-June edition of *County Connection***

## Here are the latest Questions of the Month from the WCRP HelpLine HR *Express* Update:

### March Question:

*We have a higher ranked, long term employee who has smelled of alcohol on several occasions. It is common knowledge, even to his superior, that he drinks heavily on his off-time, and several employees have noted a pungent scent when he is near. He has been a value and an asset to our company and we want to help him. He supervises numerous employees and recently was implicated in a mishap with a company vehicle. He is a diabetic, which makes his substance abuse all the more dangerous. It is imperative to handle this, but how to handle a confrontation is my dilemma. I would appreciate your objective insight so our well-meaning "help" is not discriminatory or any infringement on his rights.*

**Answer:**

If you have a policy prohibiting employees from reporting to work under the influence of alcohol and you suspect an employee has violated that policy because he smells of alcohol (and perhaps exhibits other signs as well, although it is not clear if that is the case), we are not aware of any reason why you could not confront the employee with the fact that the smell of alcohol is present, and take appropriate disciplinary action consistent with company policy and past practice as a result of an actual or potential policy violation.

Indeed, if you do nothing in the face of evidence that an employee may be under the influence of alcohol at work and he has an accident or incident, there could be liability for negligence if there is damage (to person or property) and evidence that the employer knew or should have known that there was a risk and did nothing to mitigate it. If you have a good faith, reasonable belief that the employee has reported to work under the influence of alcohol, even if said employee denies it, we are not aware of any law which would prohibit you from addressing the issue and taking appropriate corrective action as warranted by the circumstances, consistent with company policy and past practice, if any.

Individuals who are addicted to alcohol and/or drugs, have a history of addiction, or are regarded as being addicted are considered to have an impairment under the law, and such impairment is considered a disability under the Americans with Disabilities Act if it poses a substantial limitation on one or more major life activities. Employees who are current users of illegal drugs, however, are expressly EXCLUDED from the protection of the ADA. While the ADA protects recovering and recovered alcoholics and drug addicts from being discriminated against on the basis of their addiction, it does not entitle them to perform poorly or violate company policies (such as by reporting to work under the influence). These violations can and should be addressed through disciplinary action consistent with company policy.



### April Question:

*If we have a supervisor using very inappropriate language with the employees, can he be terminated because of this without us setting ourselves up for a law suit?*

**Answer:**

As a general matter employers are not required by law to tolerate or even retain in employment supervisors (or any other employees) who use inappropriate language in the workplace, so long as the employer's disciplinary or discharge decision in this regard is consistent with employer policy and practice and not contrary to any applicable employment agreement or contract.

Whether an employee who is discharged for improper conduct at work (i.e., including inappropriate language) will seek to challenge the employer's decision as discriminatory or otherwise unlawful by filing a claim against the employer is not something about which we can speculate, but is arguably a possibility, depending on the applicable facts and circumstances and whether the employee believes that his or her rights were violated. If, however, the employer's decision with respect to the supervisor is legitimate, non-discriminatory, non-retaliatory and consistent with company policy and practice (and does not breach any applicable contract), the employer ought to be able to at least mount a defense to any such claim.

If you would like to discuss the facts of your particular situation further, please contact the HELPLINE.

On 4/1/10, The Risk Pool received the following letter via email from Dan Merkle, CEO of Lexipol LLC:

**Another Ninth Circuit Taser Case**
**What Does It Mean To Law Enforcement?**

Regrettably, the Ninth Circuit's third Taser opinion issued in as many months provides little clarity and it will not be surprising if these latest three cases will end up being reviewed by the entire Court (i.e. en banc) or even the Supreme Court. Here are the three cases in the order they occurred:

* Bryan v. McPherson, 590 F3d 767 (9th Cir. 2009) - You may recall from our Client Alert when this decision was issued on December 28, 2009, that the rather liberal Judge Reinhardt held that the deployment of Taser darts somehow constituted an "intermediate level of force." Unfortunately, this is in complete contrast to rather clear mandates from other Ninth Circuit opinions [e.g. Gregory v. Maui, 523 F3d 1132 (9th Cir. 2008)] and the Supreme Court [Graham v. Connor, 490 U.S. 386 (1989) and Scott v. Harris, 550 U.S. 372 (2007)] that the proper analysis in force cases is not what level or alternatives might have been available, but whether the force applied (regardless of type) was "objectively reasonable under the totality of circumstances."

* Mattos v. Agarano, 590 F3d 1082 (9th Cir. 2010) - Just two weeks after the rather disturbing Bryan decision, Judge Kozinski wrote the per curiam opinion which distinguished Bryan and held that the application of the Taser in the "drive stun" mode was objectively reasonable on a domestic violence suspect. Strongly inferring that the analysis of Taser cases warrants further review, Judge Kozinski commented that "another panel might differ," it was also noted that the Eleventh Circuit recently held 8-12 applications of the Taser on a mentally unstable suspect was excessive force [See: Oliver v. Fiorino,
586 F3d 898 (11th Cir. 2009).

* Brooks v. Seattle, 2010 U.S.App. LEXIS 6293 (March 26, 2010) -
Now, in this latest split decision from the Ninth Circuit, Judge Hall wrote for the majority that three "drive stun" applications of the Taser on an uncooperative, pregnant traffic violator was not excessive force. Although this latest decision appropriately recognized that the appropriate inquiry is whether the officers acted reasonably, the Court regrettably felt the need to also determine the "quantum of force" (despite the fact that the Supreme Court has never included this factor in any force analysis). Distinguishing the application of Taser darts in Bryan, Judge Hall held that the "drive stun" amounted to something "less than intermediate use of force." In addition to being a split decision, Judge Hall also noted that the law regarding the use of "drive stun" is not clearly established.

If the Ninth Circuit continues to add this "quantum of force" component to the Supreme Court's more flexible "objective reasonableness" standard, use of force analysis will become far more complex. The Ninth Circuit is wrestling with "intermediate force" for Taser darts and "something less" for "drive stun." We have always advocated the Supreme Court's very simple and straightforward "objective reasonableness" test which will forever adjust to any force application in view of virtually any totality of circumstances.

Lexipol will continue to closely monitor the courts' review of these cases. However, given the substantial scrutiny of these cases in the courts, the media and the court of public opinion, it remains essential that officers continue to exercise sound discretion and carefully articulate the totality of the circumstances giving rise to every Taser application. It is critical that agencies and officers continue to avoid reference to any Taser (or other force) application as "intermediate", "less than intermediate" levels of force in reports, policies or even testimony.

We believe that these artificial classifications will not survive Supreme Court scrutiny and that such references are contrary to current, well-established policy. It is anticipated that officers and agencies will be confronted with these latest "quantum of force" references and even inadvertent or unknowing acquiescence to such terms could prove detrimental. We strongly urge officers and agencies to continue to strictly adhere to existing policy language in accordance with the Supreme Court's single "objective reasonableness" standard and to avoid references to any force "level" reminiscent of the outdated "continuum of force."

As always, we are pleased to bring these latest decisions to your attention and we encourage you to consult with your local legal counsel for further guidance. Should you have any questions about this or any Lexipol issues please do not hesitate to call us at (949) 484-4444 or visit us at www.lexipol.com <http://www.swiftpage1.com/SpeClicks.aspx?X=2T0SLYJXHVAWERE000YBWW> .

Be safe out there.

## Driver Selection: Motor Vehicle Records

Reprinted with permission from Zurich Risk Services, Topic No. AD-6, March 2001

Vehicle accidents cost you money, in many ways - physical damage to third party vehicles, your vehicle, bodily injury claims, workers' compensation and legal defense costs, lost time, lost sales, and damages to your image.

Avoiding accidents by hiring safe drivers is a sound management decision, and a good loss prevention practice. Statistics have proven that drivers with a history of moving violations and vehicle accidents are more likely to have additional violations and accidents. Drivers with multiple traffic violations will have up to approximately twice as many accidents as someone with no violations.

The first step in evaluating a prospective employee's driving record is to verify that the individual has a current, valid driver's license. Next, a Motor Vehicle Record (MVR) for the previous three years should be obtained.

Once it has been obtained, evaluation of the MVR is very important. Management should establish a written criteria for evaluating the driver's records as part of the screening process. Bear in mind when developing this criteria that it must be applied uniformly throughout the organization for all drivers. Many companies follow guidelines that are based on a "point system." A number of points are assigned to violations and they accumulate for a three year period. A designated number of points should trigger refusal of driving duties or predetermined corrective measures. The following is a guide for determining the severity of some violations:

Violations which present a substantial liability exposure:

- Driving under the influence of alcohol or drugs.
- Any license revocation or suspension.
- Reckless driving where bodily injury or property damage resulted.
- Hit and run.

Other violations that present moderate liability exposure if a pattern of violations is shown include:

- Speeding.
- Failure to yield right of way.
- Driving too fast for conditions.
- Operating an unregistered vehicle.
- Using false registration or license.
- Driving while license is under suspension.

Conducting the pre-employment MVR check is a good first step, but it should not be the last time the employee's MVR is reviewed. Check MVRs at least once each year. It is important to monitor driving habits to ensure that drivers maintain a safe driving records. A deteriorating driving records may indicate the need for additional training, counseling or suspension of business related driving privileges.

One word of caution. Seek legal advice prior to implementing an MVR program to ensure compliance with laws pertaining to the use of MVRs in hiring practices.

Use the following Self-evaluation checklist to identify areas of concern:

**Self-Evaluation Checklist (Yes/No)**

- Do you have a documented standard for what constitutes an acceptable record in terms of MVR infractions?
- Is it applied equally to all employees and new hires?
- Are MVRs obtained annually for all persons who may operate company vehicles? Even those who only have occasional entrustment?
- Are all copies of MVRs kept on file?
- Are persons who operate company vehicles required to report all accidents?
- Is there a policy for providing remedial training such as defensive driving for drivers who show a deteriorating MVR history?

All "No" responses are "opportunities" for improvement in your loss prevention efforts.

## Safety Tip of the Month: FORCES AT WORK

By Tim Chace, Director of Risk Control, Arthur J. Gallagher Risk Management Services, Inc.

Force implies the exertion of physical strength. It is the capacity to do work. When we "force" ourselves too much mentally or physically, we experience fatigue. If the force is too great or sustained for too long, then injury or illness can occur.

We exert force to perform all our daily tasks. If we manage the energy or force exerted, then we can prevent fatigue and/or equipment failure or bodily injury. Be aware of the following to prevent on-the-job stress, fatigue and/or injury:

- Avoid lifting heavy manuals from high shelves or from the floor beneath desks. Do not place these materials in such hard-to-reach locations.
- Avoid repeated manual stapling. If possible, use an electric stapler, or try to take intermittent breaks as you perform this task.
- Avoid leaning on or against sharp or hard surfaces such as the desk edge, which puts pressure on nerves and may impede blood circulation.
- Avoid prolonged typing without frequent micro-breaks. Try to incorporate other tasks into your daily routine.
- Tensed muscles while working adds to fatigue. Stay relaxed.
- Do not sit for prolonged periods without varying your posture.
- Avoid sustained, raised holding or gripping of the telephone headset (arm fatigue). Also, do not cradle the headset between your ear and shoulder for long time periods (neck fatigue).
- Avoid excessive keying/typing force. Do not hammer or pound the keys.
- Place objects used frequently within easy reach.
- Objects used less frequently should be placed nearby, but far enough so that you need to get out of your chair to obtain them. This helps limit sustained seating.
- Placing your keyboard too high will cause you to raise your hands, raise your shoulders and outwardly extend your arms. Maintaining this position while typing over a long period of time can be tiring.
- A chair that is too high causes pressure on the back of the thighs, which results in thigh flattening (your thighs become more broad when seated).
- Slouching in the chair or twisting of the torso increases stress on the lower back.
- Use a laptop only for short and intermittent use. If day-long use is required, use a detached mouse and detached full size monitor to help control or reduce neck and arm/wrist stress.

Be mindful that when the body is stretched, the maximum force that can be exerted is generally reduced. When arms are extended to lift/handle objects or when elbows are extended from the body side, arm strength is reduced and the force applied to tendons, bones, muscles and ligaments is greater. Reaching for items behind your shoulder stresses the shoulder joint. If you twist at the waist to reach such items, you stress the lower back. The use of improperly sized tools, sitting in poorly adjusted chairs, and stretching to reach needed materials, results in greater energy expenditures which generate greater forces on the body parts involved.

# TRAINING & EVENTS

**July 21-23, 2010**
WCRP Summer Conference and Annual Board of Directors Meeting, Red Lion Hotel in Wenatchee, WA. More information will be available in the May-June edition of the *County Connection*.

**November 3-5, 2010 (tentative)**
WCRP Fall Conference and Board of Directors Meeting, possibly at Great Wolf Lodge in Grand Mound or Red Lion Hotel in Spokane.

**March 23-25, 2011 (tentative)**
WCRP Spring Conference and Board of Directors Meeting, the Lodge at Suncadia, Cle Elum, WA.

You can get more information, access driving directions, and register for classes and events at:
www.wcrp.info

### More Information Available on Driving and Cell Phone Usage

The National Safety Council published a white paper in March 2010 entitled, *"Understanding the distracted brain: Why driving while using hands-free cell phones is risky behavior."* With their permission, a few pertinent comments are reprinted for you.

"Vision is the most important sense for safe driving. Yet, drivers using hands-free phones (and those using handheld phones) have a tendency to "look at" but not "see" objects. Estimates indicate that drivers using cell phones look but fail to see up to 50 percent of the information in their driving environment. Distracted drivers experience what researchers call inattention blindness, similar to that of tunnel vision. Drivers are looking out the windshield, but they do not process everything in the roadway environment that they must know to effectively monitor their surroundings, seek and identify potential hazards, and respond to unexpected situations.

Today there are more than 280 million wireless subscribers in the U.S. And although public sentiment appears to be turning against cell phone use while driving, many admit they regularly talk or text while driving. The National Highway Traffic Safety Administration estimates that 11 percent of all drivers at any given time are using cell phones, and more than one in four motor vehicle crashes involve cell phone use at the time of the crash.

Cell phone driving has become a serious public threat. Distractions now join alcohol and speeding as leading factors in fatal and serious injury crashes"

To read the entire white paper, please go to: distracteddriving.nsc.org. This is an excellent resource that includes more information about the limitations of the brain, how multitasking impairs driving performance, the inability of the brain to capture driving cues when a person is multitasking and why people do not realize they are, in fact, distracted when using a cell phone while driving.