



MICHIGAN SELF-INSURERS' ASSOCIATION

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Gerald M. Marcinkoski
Executive Secretary

Board of Managers

General Motors Corporation
Susan R. Azar
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Ford Motor Company
Jonathan R. Parker
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Consumers Energy Company
Doug Wright
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C. Michael Healy
Treasurer

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Mari Beth Jelks

Amway
Lorraine K. Climer

Compatico
Libby Child

Wayne State University
Pamela Galloway

AT&T Michigan
Albert Calille

DTE Energy
Douglas A. Green

FinCor Solutions
Janet Kransz

Marathon Oil Company
Barbara Parker

Trinity Health
Susan Cyrulnik

Sherriff-Goslin Company
William Ticknor

Wayne County Airport Authority
Leigh Stepaniak

Kelly Services, Inc.
Lesley Zielinski

MINUTES OF BOARD OF MANAGERS' MEETING

November 21, 2008
Holiday Inn North Campus
Ann Arbor, Michigan

Reminder: Minutes are now only available via e-mail or on the website. If you wish to receive the Minutes via e-mail, please provide your name, company name, and e-mail address to Marianne Melton at mmelton@laceyjones.com

Present:

AZAR, S., General Motors Corporation
CALILLE, A., AT&T Michigan
CHILD, L., Compatico
GALLOWAY, P., Wayne State University
GREEN, D., DTE Energy
MAHAN, S., City of Grand Rapids
PARKER, B., Marathon Oil Company
PARKER, J., Ford Motor Company
STEPANIAK, L., Wayne County Airport Authority
WRIGHT, D., Consumers Energy Company
ZIELINSKI, L., Kelly Services, Inc.

Chairperson's Council:

BLOCK, W., Michigan Chamber of Commerce
SUSSER, D., Smith Haughey Rice & Roegge
ZURVALEC, D., Michigan Manufacturers Association

Not Present:

CLIMER, L., Alticor, Inc.
CYRULNIK, S., Trinity Health
HEALY, M., Little Caesar Enterprises, Inc.
KRANSZ, J., FinCor Solutions
SEDLOCK, D., The Pepsi Bottling Group
TICKNOR, B., Sherriff-Goslin Company
VENET, K., Chrysler LLC

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The meeting was called to order at 11:40 a.m. to discuss the following Agenda:

AGENDA

1. Minutes of Board of Managers' Prior Meeting
2. Treasurer's Report
3. Nominating Committee Report
4. 2008 Final Fall Conference Committee Report
5. 2009 Spring Conference Committee Report
6. Technology Committee Report
7. Funds Trustees' Report
8. *Amicus Curiae* Committee Report
9. Membership Committee Report
10. Health Care Committee Report
11. Legislative Committee Report
12. Old Business
 - a. QAC interviews
 - b. Magistrate evaluation forms
 - c. *Lofton v Autozone*
 - d. *Clark/Billman/Heck* cases
 - e. Other old business
13. New Business
 - a. Senate Bill 1596
 - b. RICO suit
 - c. Other new business

The **Minutes** from the Board of Managers prior meeting were approved upon motion of Ms. Child, seconded by Ms. Zielinski.

The **Treasurer's Report** was provided by means of a handout from Mr. Healy. The report was unanimously approved.

The **Nominating Committee Report** was submitted by Mr. Calille. He reported that his inquiries of the Pepsi Bottling Company relating to their interest in the Board of Managers have not been returned. Consequently, in conformity with the Board's prior discussions with respect to Pepsi Bottling Company's continuing status, Mr. Calille moved to remove Pepsi Bottling Company from the Board of Managers. Ms. Parker seconded the motion. It passed unanimously. Mr. Calille advised that he will report at the next Board meeting with respect to other possible candidates to fill that position on the Board. Mr. Calille said that if any board member cares to suggest candidates, the names of such companies can be forwarded to Mr. Calille. Mr. Calille said the Committee will proceed deliberately as the vacancy is not likely to be filled for a month or two.

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The **2008 Final Fall Conference Committee Report** was submitted by Ms. Azar. She reported that the attendance at the Fall Conference was down, but the conference made a small profit. Ms. Azar reported that, in general, the open room concept with no breakout sessions was well received. The number of speakers through the luncheon hour did, apparently, detract from the opportunity of attendees to visit vending booths. Ms. Climer, by memo, reported having heard two such complaints. One "crasher" at the conference was identified, confronted, and ultimately paid.

The **2009 Spring Conference Report** was submitted by Ms. Child. It will take place at the Grand Traverse Resort in Traverse City (Acme), Michigan. Ms. Child said she envisions a "content rich" seminar with special emphasis on Medicare problems and ADA/FMLA issues. It is anticipated that the Workers' Compensation Agency speakers will address the conference on Friday morning.

The **Technology Committee Report** was submitted by Ms. Child. She reported that Jonathan Parker is working with Mr. Tom Dana, our webmaster, regarding job postings. The website is preparing to post Spring Conference information. Registrants are encouraged to register on-line. The Board then discussed and approved posting of recently discovered old pictures from prior MSIA conferences stretching back many years and includes many famous persons, including Professor Arthur Larson.

The **Funds Trustees Report** was submitted by Ms. Azar. She reported that there had been no meeting of the Funds' Trustees since the last MSIA board meeting. There is another Funds Trustees meeting scheduled for next week that will be the subject of her report at the next MSIA Board Meeting.

The ***Amicus Curiae* Committee Report** was submitted by Mr. Calille. The Board discussed the possibility of filing an *amicus curiae* brief in the RICO case, *Brown v Cassens Transport Company*. This is a case where the federal Sixth Circuit Court of Appeals held that the plaintiffs can pursue an action against their employer, their employer's third party administrator, and the evaluating doctor on the basis that they wrongfully conspired to deprive the plaintiffs of workers' compensation benefits. Board members pointed out that RICO claims could just as easily be brought by employers against claimants' attorneys and their evaluating physicians. After much discussion, Mr. Calille moved that \$2,000.00 be allocated to filing an *amicus curiae* brief supporting the self-insured employer in the case with the brief to emphasize the negative impact on Michigan employers of allowing a RICO suit to proceed insofar as workers' compensation was designed to obviate civil suits. Ms. Child seconded Mr. Calille's motion and the Board unanimously approved. Mr. Calille suggested that the Executive Secretary advise the state Attorney General's office of MSIA's plan to file an *amicus* brief.

Mr. Calille next discussed an *amicus curiae* brief request relating to a case challenging the *Franges* formula. The Board declined to authorize an *amicus curiae* brief with respect to that issue at this time. The Executive Secretary reported that the MSIA *amicus curiae* brief to be filed in *Peterson v Magna Corporation* was in the process of being completed and would be timely filed with the Supreme Court. *Peterson* is before the Supreme Court on leave granted. It presents the issue of whether the employer can be assessed the plaintiff's attorney's fees on unpaid medical expenses owing to medical providers. The Executive Secretary was urged to seek as additional signatories to the brief the Michigan Chamber of Commerce and the Michigan Manufacturers Association.

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The **Membership Committee Report** was submitted by Ms. Child. She indicated that the membership committee would hold a special meeting prior to the next MSIA board meeting on January 9, 2009. The membership committee meeting is to occur between 10:45 a.m. and 11:30 a.m. (The Spring Conference Committee would meet therefore between 9:00 a.m. and 10:45 a.m.) Ms. Stepaniak reported for the Committee that the MSIA had 197 paid members in 2008 and 149 already paid for 2009.

The **Health Care Committee Report** was submitted by Ms. Azar. Ms. Azar reported that committee consists of five people each from the employer, medical provider, and employee communities. The Board discussed what might be done to urge filling the employer vacancy on the committee.

The **Legislative Committee Report** was submitted by Mr. Zurvalec and Ms. Block. Mr. Zurvalec discussed the recent elections with Chief Justice Taylor not being re-elected to the Supreme Court and Justice Hathaway now assuming a position on the Supreme Court. Ms. Block discussed gains by Democrats in the State House in the most recent election. And, the Board discussed SB 1596 which is a bill to amend the outstate jurisdiction provision of the Workers' Disability Compensation Act, MCL 418.845. The proposed amendment to § 845 would change the current language and extend Michigan jurisdiction over work injuries suffered outside the state if the injured employee is employed by an employer subject to Michigan's Act and if the employee is either a resident of Michigan at the time of injury or the contract of hire was made in Michigan. Presently, the statute and case law provide that for Michigan to exercise jurisdiction over outstate injuries the employee must *both* be a resident of Michigan at the time of injury and be employed under a Michigan contract of hire. Members of the Board noted that there was significant employer support for this amendment. The Board was also advised, via Mr. Healy's communication, that a bill would be taken up addressing chiropractic medicine. Ms. Block surmised that the bill would probably pass the House but not the Senate.

Under **Old Business**, the Board was advised that the Qualifications Advisory Committee had completed their interviews and submitted the names of approved candidates for the Board of Magistrates. The Board then discussed evaluations of incumbent Magistrates. Next, the Board discussed *Lofton v Autozone*. This is the case where the Supreme Court remanded the case to the Magistrate for reconsideration of the question of whether the plaintiff is disabled in light of *Stokes* and, more importantly, if the claimant is disabled the Magistrate is directed to determine the amount the plaintiff was capable of earning to set an appropriate partial rate of compensation under MCL 418.361(1). The Supreme Court retained jurisdiction, which means the case returns automatically to the Supreme Court after the magistrate's ruling. The magistrate must rule on the case and submit her decision by February 4, 2009.

The Board then discussed three recent administrative cases and noted a theme in the three cases. In *Clark v Thomas Edison Inns, Inc.* 2008 ACO #242, the Workers' Compensation Appellate Commission noted that, contrary to what had occurred at the trial level on a recusal motion, "The chairperson of the Board of Magistrates does not, as defendants pointed out, have the authority to reassign cases for just any reason. ...What the chairperson does have is the authority to assign and reassign 'workers' compensation magistrates to hear cases at **locations** in the state.' ...The plain terms of § 213(7) do not give the

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chairperson authority to pull individual files from a magistrate on the basis of an ex parte complaint about the magistrate.”

In *Billman v DaimlerChrysler Corporation* 2008 ACO #203, the employer challenged the Director's decision to void a voluntary pay agreement on the basis it was not submitted on the correct Agency form, although that challenge to the voluntary pay agreement had not been raised by plaintiff. The Commission remanded the matter to a magistrate, noting that “For some reason, the agency sent the case to the director,” whereas challenges to the voluntary pay form should go to the Board of Magistrates.

In *Heck v General Motors Corp*, an administrative law judge (ALJ) many years ago had granted the plaintiff an open award of benefits, including the usual boilerplate language saying the employer was responsible for medical expenses. Years later, the plaintiff contended that his condition deteriorated to the point where he now needed nursing care. Rather than filing for nursing care benefits, plaintiff contended that the old ALJ order saying defendant must pay medical expenses should be understood to require payment of nursing care expenses as well. The Director agreed at a Rule V hearing and ordered the employer to pay nursing care expenses and imposed a penalty on the employer for not having paid the nursing expenses. The Board of Managers discussed this case and questioned whether this was a Rule V violation and whether all boilerplate awards, saying the employer must pay medical expenses, are now to be understood as requiring payment of nursing care benefits without further proof that such nursing care benefits are reasonable and necessary.

Under **Other Old Business** the Board was advised that MSIA's storage facility now includes the archival material that had been in the Executive Secretary's possession, including old minutes and the like.

Under **New Business**, the Board noted it already discussed SB 1596 under the Legislative Committee Report. Similarly the RICO suit had been discussed under the *Amicus Curiae* Report.

Under **Other New Business**, the Board discussed the recent scandal relating to medical evaluations provided by claimants in asbestos cases, noting its potential similarity to RICO-like lawsuits.

The Board then adjourned upon motion of Mr. Calille seconded by Mr. Wright. At 4:38 p.m.

Respectfully submitted,

Gerald M. Marcinkoski

Gerald M. Marcinkoski
Executive Secretary