DRAFT

SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
MONDAY, JUNE 19, 2006

A regular meeting of the Safety and Health Codes Board was called to order at 10:01 a.m.

BOARD MEMBERS PRESENT:
Mr. Louis Cernak, Chairman
Mr. Roger Burkhart, Vice Chair
Mr. James J. Golden
Ms. Anna Jolly
Mr. Alvin Keels, Sr.
Mr. Linwood Saunders
Mr. Chuck Stiff
Dr. Khizar Wasti

BOARD MEMBERS ABSENT:
Ms. Juanita Garcia
Mr. Satish Korpe
Dr. James H. Mundy
Mr. Kenneth Rigmaiden
Ms. Milagro Rodriguez, Secretary
Mr. Daniel A. Sutton

DOLI STAFF PRESENT:
Mr. Ray Davenport, Labor and Industry Commissioner
Mr. Bill Burge, Assistant Commissioner – Programs
Mr. Glenn Cox, Director of VOSH Programs
Mr. Fred Barton, Director/Chief Inspector–Boiler Safety Compliance
Mr. Ronald Graham, Health Compliance Director
Mr. Jay Withrow, Office of Legal Support Director
Mr. John Crisanti, Office of Planning and Evaluation Manager
Mr. Robert Field, Staff Attorney Senior
Ms. Reba O'Connor, Regulatory Coordinator
Ms. Jennifer Wester, Director, Cooperative Programs
Mr. Michael MacEwen, Computer Systems Sr.
Ms. Christine Childress, Senior Programmer/Analyst
Ms. Jeannette Peters, Legal Intern
Mr. Michael Barber, Legal Intern
Ms. Regina Cobb, Agency Management Analyst Sr.

OTHERS PRESENT: Mr. Curt Krist, Tidewater Immediate Inspection, Virginia Beach, VA
Mr. Mark Anderson, American Boiler Inspection Services, Inc., Richmond, VA
Christopher Nolen, Esq., representing Valley Boilers
Elizabeth B. Peay, Esq., Office of the Attorney General
Ms. Beverly Crandell, Federal OSHA, Norfolk, VA
Ms. Anne Burkhart
Ms. Kimberly A. Heiser, Court Reporter

ORDERING OF AGENDA

Chairman Lou Cernak called the meeting to order at 10:01 a.m. Mr. Cernak asked for a motion from the Board to approve the proposed Agenda. Mr. Burkhart made the motion to approve the Agenda, as submitted, and Mr. Saunders seconded the motion. The motion was carried by voice vote.

APPROVAL OF MINUTES

Mr. Cernak asked for a motion from the Board to approve the Minutes of the March 7, 2006 Board meeting, as submitted. Mr. Stiff made the motion and Mr. Burkhart seconded it. The motion was carried unanimously by voice vote.

PUBLIC COMMENT

Mr. Cernak opened the floor to comments from the public on matters relevant to the Board. The first speaker was Mr. Curt Krist of Tidewater Immediate Inspections, Inc., Virginia Beach, VA. Mr. Krist expressed his opposition to the proposed three-tiered insurance program and $2 million policy versus $500,000 in the proposed regulation governing the Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors. Mr. Krist inquired as to the Department why one company pays more than another company when they all are doing the same inspection.

The next speaker was Mr. Mark Anderson, President of the American Boiler Inspection, Inc., Richmond, VA, who also spoke regarding the Regulation Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors. Mr. Anderson spoke in opposition to the proposed three-tiered insurance program for boiler inspectors. He stated that he could not find a single example of a government-mandated tiered insurance approach anywhere in Virginia. He stated that the Department of Labor and Industry did not research this issues he has raised, but instead, they sampled other jurisdictions in the U.S. to see what insurance limits they required.

Mr. Anderson stated that if his certificate of insurance does not match what a company wants, then his company won't do the work for them. He wondered why the state is mandating what a company has to carry when the customers are already mandating that.

Mr. Anderson continued by discussing the two kinds of losses that are in issue: one, negligent inspection losses; and two, standard boiler and machinery and insurance losses, for example, big power plants. He added that there have not been any negligent inspections documented by the Department of Labor and that there has never been a single drive-by inspection that has been investigated with any written investigative notes.

Mr. Anderson reiterated his objection to the three-tiered insurance program and stated that everyone should be required to carry $1 million just like the other states, not $2 million for one, $1 million for another and $500,000 for others, when only Mr. Anderson's company, American Boiler, will be required to carry $2 million.

Mr. Keels asked Mr. Anderson about the economic impact, $1million versus $2 million for Mr. Anderson's company. Mr. Anderson responded that it doubles his insurance cost. Mr. Anderson stated that he went to HRH, a large broker, and they could not find someone who would carry it for him. He stated that he could get coverage for $1 million. He also stated that if the state goes to coverage of $2 million and he is unable to find that type of coverage, he will be "out of business" because he cannot inspect without a $2 million policy.

Mr. Anderson admitted that he has had a $2 million policy for two or three years since Mr. Barton first informed him that he needed to get a $2 million policy. He added that it took him three months to find the policy.

The last speaker was Chris Nolen, an attorney at Williams Mullen Law Firm, representing Valley Boiler. He began by encourage the Board to amend the proposed regulation to require a $1million policy instead of a $2 million policy because the regulation has significant shortcomings in the way it was developed.

He stated that Governor Warner's executive order which is still in place on regulatory development requires that regulatory development shall be based on the best reasonably based scientific, economic, and other information concerning the need for and consequences of the intended regulation and the best way to achieve the most cost effective way of implementing a regulation. He added that he did not believe those directives were followed in this case because the agency's responses to the public comments, which appear in the briefing package of the proposed regulation, are based on faulty assumptions. His first example was as follows: the Agency asserts that private individuals have no financial or other vested interest in the boiler as an insurance company inspector would. He states that the agency's assertion is false because if a boiler blows up and there is damage, as an attorney, he would sue the operator, the facility owner, the manufacturer and the boiler inspector. Therefore, their assets are at risk under the current system.

He continued by stating that another assertion was that this regulation would take care of "drive-by" inspections. Mr. Nolen informed the Board that the way to address "drive-by" inspections is to discipline the inspector who is conducting "drive-by" inspections. Mr. Nolen's last point on the Agency's faulty assumptions with respect to the proposed regulation dealt with start-up companies. He stated that if safety is the purpose for the three-tiered system, then no distinction should be made between a start-up company and a company that has been in business for several years and has a significant market share.

Mr. Nolen continued by stating that an appropriate way to measure risk is to look at the probability of any event occurring multiplied by the maximum damage that could be sustained, and that is going to give you a figure that is on average what you're looking at by way of risk exposure or loss. He asserted that such analysis was not performed because there does not appear to have been a comprehensive survey of what other states did in the regulatory development process as that executive order would indicate should have been done.

Mr. Nolen concluded by suggesting that the Board also consider the number of inspections conducted when looking at the amount of damage caused by a boiler accident.

OLD BUSINESS

White Paper on the Statutory Requirement Relating to Public Meetings of Policy Boards as Regulated by the Virginia Freedom of Information Act

Mr. John Crisanti, Manager of the Office of Planning and Evaluation, updated the Board on the status of the Board requested white paper on the statutory requirement relating to public meetings of Policy Boards as regulated by the Virginia Freedom of Information Act. He informed the Board that a draft has been developed internally and it is in the process of being sent to the Attorney General's Office for review. After that review is completed and it is signed off internally by the Department, he will forward the white paper to the Board members directly.

16 VAC 25-55, Proposed Regulation Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors; Final Adoption

Robert Feild, Esq., Attorney with the Office of Legal Support, Department of Labor and Industry, informed the Board that he would present the briefing package, followed by Mr. Barton who would respond to questions that had been raised at the last meeting. He began by requesting on behalf of the Boiler Safety Compliance Program of the Department of Labor and Industry that the Safety and Health Codes Board again consider for adoption as a final regulation of the Board the Regulation Governing Financial responsibility of Boiler and Pressure Vessel Contract Fee Inspectors, with a proposed effective date of October 1, 2006.

Mr. Feild summarized the proposed final regulation by stating that the regulation requires contract fee inspectors in the Commonwealth to demonstrate financial responsibility for bodily injury and property damage resulting from, or directly relating to, an inspector's negligent inspection or recommendation for certification of a boiler or pressure vessel. Financial responsibility in the form of insurance, guaranty, surety, or self-insurance will be required as follows:

> Aggregate limits of $500,000 for any contract fee inspector with less than 1% market share; $1 million for those with 1% up to and including 10% market share; and $2 million for those with more than 10% market share or any contract fee inspector that employs or has an arrangement with other contract fee inspectors.

He explained that, as before, the draft final regulation has one change from the proposed regulation adopted by the Board at its meeting on May 24, 2005. He stated that this change, based on a comment received during the 60-day public comment period, does not change regulatory intent, but is made solely to provide further clarification. The final draft definition of a 'Contract fee inspection agency' is modified to add the word "certificate" to further define the type of inspection being performed under these regulations:

> "Contract fee inspection agency" means a company that directly employs contract fee inspectors or has contractual arrangements with other contract fee inspectors for the purpose of providing boiler and pressure vessel **certificate** inspections to the general public.

Mr. Feild explained that the purpose of the regulation is to set minimum aggregate limits for insurance coverage or other means provided for in the Code of Virginia and approved by the Board to ensure the financial responsibility of boiler and pressure vessel contract fee inspectors operating in the Commonwealth. He continued by explaining that the intent of this financial responsibility is to assure additional protection to the public, including compensation to third parties, in cases where there is bodily injury and property damage resulting from, or directly relating to, a contract fee inspector's negligent inspection or recommendation for certification of a boiler or pressure vessel.

Mr. Feild referred to Section II.B of the Commonwealth's Risk Management Plan which deals with limits of liability carried by officers, employees and agents of the Commonwealth of Virginia which include boiler inspectors employed by the Department as well as members of the Board and provides for liability coverage up to $2 million per each occurrence.

He noted that the required maximum liability coverage required by the proposed final regulation is $2 million in the aggregate.

He then explained the impact of the proposed final regulation on contract fee inspectors, boiler or pressure vessel owners, employers and employees, as well as on the Department of Labor and Industry.

He also explained the benefit/cost of the proposed final regulation. He stated that the benefit of these changes is to ensure a minimum level of indemnification in cases involving bodily injury and/or property damage resulting from, or directly relating to, a contract fee inspector's negligent inspection or recommendation for certification of a boiler or pressure vessel. He also stated that the financial responsibility requirements would cost contract fee inspectors approximately $4,000 - $20,000 per year, costs which are expected to be passed on to the boiler or pressure vessel owner.

Next, Mr. Feild, summarized the public participation efforts for the proposed final regulation by stating that a 60-day public comment period was held from December 26, 2005 through February25, 2006 in accordance with the Virginia Administrative Process Act. He informed the Board that a public hearing on the proposed regulation was held on January 31, 2006 in Richmond, VA. He then referred to the public comments and the Department's responses in the Briefing package which had been received by Department staff and reviewed by the Board at its March 7, 2006 meeting and again provided for this meeting.

Mr. Feild concluded by introducing Mr. Fred Barton, Chief Boiler Inspector for the Department of Labor and Industry. Mr. Barton began by responding to two questions raised at the last Safety and Health Codes Board meeting on March 7, 2006. He stated that those questions concerned providing additional information regarding the $2 million limit and, two to clarify coverage for both property damage and bodily injury. Next, Mr. Barton informed the Board of a video presentation that he planned to show which, among other things, included a survey of cities and states that allow individual inspectors and a comparison of Contract Fee Inspections by Jurisdiction. Mr. Barton also showed slides of the damage caused by various boiler explosion accidents. Mr. Barton stated that the Department surveyed 50 members of the National Board and learned that five other jurisdictions all individual inspectors to provide inspections.

Following Mr. Barton's presentation, Commissioner Ray Davenport informed the Board that the proposed regulation will provide protection to the general public in the event of a negligent inspection. He also stated that three out of four contract fee inspections are conducted in Virginia; therefore, Virginia should be the leader in this area. Commissioner Davenport then stated that boiler insurance companies provide $10 million to $100 million in coverage per occurrence and protection for their employees who may conduct a negligent inspection. He stated that the Commonwealth provides $2 million in coverage in aggregate for state employees who may conduct a negligent inspection and companies who do their own inspections as owner/users agencies are self-insured for this purpose. He continued by stating that this regulation sets out a minimum level of protection for the public for negligent inspections for the remaining boiler inspections not done by the above-mentioned groups.

He concluded by recommending that the Safety and Health Codes Board adopt the proposed regulation for contract fee inspector financial responsibility regulation as a final regulation of the Board, with a proposed effective date of October 1, 2006, as authorized by §§40.1-51.9:2 C. and 40.1-51.6.

Following all questions and discussion, Mr. Saunders made the motion to accept Commissioner Davenport's recommendation. Ms. Jolly seconded the motion which was adopted by the Board by a 7-1 vote.

NEW BUSINESS

Various Corrections and Technical Amendments to: Part 1910 – General Industry; Part 1915 – Shipyard Employment; and Part 1926 – Construction

Mr. John Crisanti, Manager of the Office of Planning and Evaluation, requested on behalf of the VOSH Program, that the Board consider for adoption federal OSHA's revised final rule for Corrections and Technical Amendments to Parts 1910, 1915 and 1926 (except for the revisions relating to §1910.20 at items 1, 22 and 34), as published in 71 FR 16669 on April 3, 2006.

Mr. Crisanti summarized the amendments by stating that federal OSHA amended various safety and health standards in need of corrections, housekeeping changes or technical amendments. He stated that the revisions do not affect the substantive requirements and include updating references and removal of obsolete effective dates and startup dates from existing OSHA standards. He added that VOSH is not requesting adoption of the changes in items 1, 33 and 34 of 71 FR 6672 *et seq*. He explained that the changes covered under items 1, 33 and 34 update references from what was 29 CFR 1910.20 which, in 1988, federal OSHA substantively revised and renumbered as the current 29 CFR 1910.1020. He went on to say that at that time in 1988, the Board chose to continue the enforcement of the old federal standard, §1910.20, and did not adopt the revisions and section renumbering to 29 CFR 1910.1020. He continued by stating that VOSH is also not requesting the changes to Part 1913 as it too changes §1910.20 references to the current federal 29 CFR 1910.1020, which is not in effect in Virginia.

Mr. Crisanti informed the Board that these clean-up housekeeping and technical amendments do not affect the substantive requirements or coverage of the standards involved, modify or revoke existing rights and obligations, or establish new rights and obligations. He also stated that the corrections do not change employers' compliance costs and that OSHA has determined that this rule will not have a significant impact on a substantial number of small entities. He added that OSHA believes that this correction will increase employee understanding and protection and will have no impact on the Department of Labor and Industry.

In conclusion, Mr. Crisanti recommended, on behalf of the staff of the Department of Labor and Industry, that the Board adopt the Corrections and Technical Amendments to Parts 1910, 1915 and 1926 (except for the revisions relating to §1910.20 at items 1, 22

and 34), as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of September 1, 2006.

Chairman Cernak asked for a motion from the Board based on the Department's recommendation. Ms. Jolly made the motion that was seconded by Messrs. Burkhart and Saunders. The motion was carried by a unanimous voice vote.

Items of Interest from the Department

There were no Items of Interest from the Department of Labor and Industry.

Items of Interest from the Board

There were no Items of Interest from the Board.

Adjournment

There being no further business to come before the Board, Mr. Saunders moved to adjourn the meeting and Mr. Stiff seconded the motion, which was carried by a unanimous voice vote. The meeting adjourned at 11:45 a.m.