

FINAL

**SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
WEDNESDAY, AUGUST 18, 2010**

BOARD MEMBERS PRESENT: Mr. M. Frank Hartsoe, Chair
Mr. Jerome Brooks, DEQ representative
Ms. Anna Jolly
Mr. Satish Korpe
Ms. Rebecca Le Prell, VDH representative
Dr. James Mundy
Ms. Eloisa Rea
Ms. Milly Rodriguez, Secretary

BOARD MEMBERS ABSENT: Mr. Louis Cernak
Mr. Chuck Stiff
Mr. Danny Sutton

STAFF PRESENT: Mr. Courtney M. Malveaux, Commissioner, Dept. of Labor
and Industry
Mr. Glenn Cox, Director of VOSH Programs
Mr. Jay Withrow, Director, Division of Legal Support
Mr. Ron Graham, Director, Occupational Health
Compliance
Mr. John Crisanti, Manager, Office of Planning and
Evaluation
Ms. Reba O'Connor, Regulatory Coordinator
Ms. Jennifer Wester, Director, Cooperative Programs
Division
Ms. Beverly Donati, Director, Apprenticeship
Ms. Ashley Mitchell, Staff Attorney
Ms. Regina Cobb, Agency Management Analyst Senior
Mr. Thomas Dash, DOLI/Norfolk
Mr. George Dillon, DOLI/Norfolk
Ms. Fredda Jernigan, DOLI/Norfolk
Mr. Jay Hufton, DOLI/Norfolk

OTHERS PRESENT: Ms. Valerie L. S. May, RPR, Chandler & Halasz, Inc.

ORDERING OF AGENDA

Chairman Frank Hartsoe called the meeting to order at 10:00 a.m. There was a quorum. Mr. Hartsoe then asked for a motion from the Board to approve the Agenda. On proper motion by

Dr. Mundy and seconded by Ms. Rea, the Agenda was approved, as submitted. The motion was carried by unanimous voice vote.

APPROVAL OF MINUTES

Mr. Hartsoe asked the Board for a motion to approve the Minutes for the January 14, 2010, Board Meeting. On proper motion by Dr. Mundy and seconded by Ms. Rodriguez, the Minutes were approved, as submitted, by unanimous voice vote.

ELECTION OF OFFICERS

Mr. Hartsoe explained that the traditional flow of the election is for the Vice Chair to become the Chair and for the Secretary to become the Vice Chair. Mr. Crisanti then explained that the outgoing Vice Chair, Mr. Roger Burkhart, no longer desired to continue his tenure on the Board. He continued by explaining that, if the Board wanted to continue its normal rotation between labor and management, the Board does not have that management person in the Vice Chair position to move to the Chair. He stated that, if the Board chose to continue the usual rotation, the Board members representing the management side are (and you can nominate them in absentia): Chuck Stiff, Danny Sutton, Anna Jolly and Satish Korpe.

Mr. Hartsoe requested nominations for Chair. Mr. Hartsoe nominated Chuck Stiff for Board Chair. There were no other nominations. Ms. Jolly seconded the motion and Mr. Stiff was unanimously elected as Chair. Next, Mr. Hartsoe requested nominations for Vice Chair. Ms. Jolly reaffirmed that ideally this person should be from the labor side, and that typically Ms. Rodriguez would move up from Secretary to the Vice Chair position. Mr. Crisanti added, however, that the Board could do as it pleases on this matter. Dr. Mundy nominated Ms. Rodriguez and Ms. Jolly seconded the nomination. Ms. Rodriguez was unanimously elected to be Vice Chair.

PUBLIC COMMENTS

Mr. Hartsoe opened the floor to comments from the public, however, there were no comments.

OLD BUSINESS

16 VAC 25-60, Revised Proposed Regulation to Amend 16 VAC 25-60, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, 16 VAC 25-60-240 and 16 VAC 25-60-245, Take and Preserve Testimony, Examine Witnesses and Administer Oaths

Mr. Jay Withrow, Director of the Division of Legal Support for the Department of Labor and Industry, began by stating that this regulation already has been before the Board so he does not plan to go into detail about all of the substantive issues involved with this regulation at this time. He explained that the Department has only one relatively minor change that it is recommending in the language of the regulation.

Mr. Withrow then requested the Board to consider for adoption as a revised final regulation of the Board the following two actions to modify the Administrative Regulation for the VOSH Program, including amending 16 VAC 25-60-10, -20, -90, -100, -130 and -240, and adding a new section 16 VAC 25-60-245 to establish procedures for the Commissioner or his appointed representatives under Va. Code §40.1-6(5) to take and preserve testimony, examine witnesses, and administer oaths under Va. Code §§40.1-6(4) and 40.1-10, pursuant to Va. Code §40.1-22(5).

Mr. Withrow stated that the purpose of the regulation is to provide VOSH personnel with procedures on how to exercise the Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where such witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector.

In summarizing the regulatory process, he informed the Board that this rulemaking process began in 2007, and that after the initial rulemaking process, the Registrar of Regulations notified the Department of some changes that needed to be made that were mostly procedural in nature. He stated that an additional issue developed with the Department of Planning and Budget (DPB) concerning 16 VAC 25-90.B., which deals with the ability of a witness to obtain a copy of his interview statement, and was based on the following factors:

- It is a significant change with the potential to impact numerous employees;
- This change is being added at the final stage without the opportunity for extensive analysis and public comment; and
- It is unclear whether a change to a substantive right exceeds the scope of the NOIRA.

Mr. Withrow added that DPB suggested to Department staff that the Board either: (1) consider withdrawing the package and submitting the regulation as a revised proposed regulation, or (2) removing the change to §90.B. and submitting it later as a separate action.

He then referred the Board to page 3 of the briefing package for the new language being considered and added that the Department has gone back and forth with DPB to determine what the language should be. He stated that the Department and DPB finally reached an agreement, and that DPB wanted the Department to publish the final change to solicit public comments again. He informed the Board that no public comments had been received.

At the January 14, 2010 Board meeting, Department staff recommended changing the language in the interview statement section in 16 VAC 25-90.B. Mr. Withrow stated that Department staff recommends the following language:

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner pursuant to § 40.1-49.8 of the Code of Virginia are confidential. Pursuant to the requirements set forth in §40.1-11 of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.

Mr. Withrow made no changes to the Summary of Final Regulation, Basis, Purpose and Impact of the Rulemaking. He then recommended, on behalf of the staff of the Department of Labor and Industry, that the Board consider for adoption as a final regulation of the Board, amendments to 16 VAC 25-60, the Administrative Regulation for the VOSH Program, which include the revision of 16 VAC 25-60-240 and the addition of 16 VAC 25-60-245, to establish procedures for the Commissioner or his appointed representatives under §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10.

The motion to adopt the revised final amendments to 16 VAC 25-60, Administrative Regulation for the VOSH Program was properly made by Ms. Rodriguez, seconded by Dr. Mundy, and unanimously carried by voice vote.

NEW BUSINESS

Revising the Notification Requirements in the Exposure Determination Provisions of the Hexavalent Chromium Standards, Direct Final Rule for General Industry, 16 VAC 25-90-1910.1026, Shipyard Employment, 16 VAC 25-100-1915.1026, and Construction, 16 VAC 25-175-1926.1126

Mr. Ron Graham, Director of Occupational Health Compliance, requested, on behalf of the VOSH Program, that the Board consider for adoption federal OSHA's direct final rule for Revising the Notification Requirements in the Exposure Determination Provisions of the Hexavalent Chromium Standards, paragraph (d)(4)(i) of 29 CFR 1910.1026, 29 CFR 1915.1026 and 29 CFR 1926.1126, as published in 75 FR 12681 on March 17, 2010.

Mr. Graham explained that this federal Direct Final Rule (DFR) amends paragraph (d)(4)(i) of the Chromium (VI) standards (29 CFR 1910.1026 – General Industry, 29 CFR 1915.1026 – shipyard employment, and 29 CFR 1926.1126 – Construction). He added that the final rule established an 8-hour time-weighted average (TWA) exposure limit of 5 micrograms of Cr(VI) per cubic meter of air ($5 \mu\text{g}/\text{m}^3$) for all sectors. He explained that in subparagraph (i) of paragraph (d)(4) of the current final rule -- Exposure notification of determination results -- employers are required to notify workers only of exposures that *exceed* the permissible exposure limit (PEL).

He informed the Board that this revision to paragraph (d)(4)(i) would now require employers to notify workers of *all* hexavalent chromium exposure level monitoring results, not just exposures that exceed the PEL. This change mirrors similar provisions in federal OSHA's other substance-specific health standards including, but not limited to:

- lead (29 CFR 1910.1025(d)(8)(i));
- arsenic, 29 CFR 1910.1018(e)(5)(i);
- methylenedianiline (29 CFR 1910.1050(e)(7)(i));
- butadiene, 29 CFR 1910.1051(d)(7)(i); and
- methylene chloride (29 CFR 1910.1052(d)(5)(i)). [75 FR 12682]

With respect to impact, Mr. Graham informed the Board that this change only amends the notification requirement in the Cr(VI) rule. He added that its requirements will not alter any other substantive requirements of the exposure determination provisions. He noted that federal OSHA determined that the burden on the regulated community as a result this change would not be significant in that it only requires notifying additional employees of exposure. With respect to employees, Mr. Graham stated that federal OSHA anticipates that employee protection will be enhanced by the amended standard which also encourages employees to be more proactive in working safely to control their own exposures through better work practices.

In addressing costs, Mr. Graham noted that federal OSHA did not change any of the monitoring or exposure characterization requirements in the final standard, and the amended notification provision will simply require employers to post more names or send more individual notices after exposure determinations are made.

On behalf of the Department of Labor and Industry, Mr. Graham concluded by recommending that the Board adopt federal OSHA's Direct Final Rule on Revising the Notification Requirements in the Exposure Determination Provisions of the Hexavalent Chromium Standards, paragraph (d)(4)(i) of §§ 1910.1026, 1915.1026 and 1926.1126, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of November 15, 2010.

Dr. Mundy moved to accept Mr. Graham's recommendation. Ms. Jolly properly seconded the motion which was unanimously approved by voice vote.

Safety Standards for Steel Erection; Final Rule; Technical Amendment to Structural Steel Assembly, §1926.754(a)

Mr. Glenn Cox, Director of VOSH Programs, requested, on behalf of the VOSH Program, that the Board consider for adoption federal OSHA's technical amendment to Structural Steel Assembly, §1926.754 (a), of the final rule for Safety Standards for Steel Erection, as published in 75 FR 27428 on May 17, 2010.

Mr. Cox explained that federal OSHA has added a technical amendment in the form of a nonmandatory note to the final rule for the Safety Standards for Steel Erection in 29 CFR 1926.754 (a), Structural Steel Assembly. He stated that this technical amendment provides information on existing Federal Highway Administration (FHWA) regulations that may apply to employers engaged in activities covered by federal OSHA's steel erection standards.

He continued by explaining that the basis of this amendment was a fatal highway accident in Colorado. He stated that in the accident, a passenger vehicle passed under an overpass that was being widened, and the bracing used to temporarily support a partially installed steel girder collapsed. The girder fell to the highway below, shearing off the top of the vehicle, and killing the three occupants of the car.

He added that since this accident could have killed construction employees, federal OSHA added this note and the federal highway regulations incorporate by reference the American Association of State Highway and Transportation Officials ("AASHTO") for bridge construction projects.

He noted that a 1992 specification requires a registered engineer to prepare and to seal working drawings for “falsework,” or temporary framing to support truss structures, in many cases.

Mr. Cox stated that the purposed of federal OSHA added the note to 29 CFR 1926.754 (a) was to inform construction employers of the requirements of the Federal Highway Administration regulations and the standard specifications published by AASHTO to enhance the safety of employees operating on or near structural steel elements used in highway construction, including bridges and other structures.

With respect to impact, Mr. Cox explained there is no impact on employers, employees or the Department in that this technical amendment merely notifies the regulated community of existing federal regulations. He added that it is nonmandatory and disseminated for informational purposes only, does not affect or change any existing rights or obligations, and does not increase regulatory burden.

In closing, Mr. Cox recommended, on behalf of the Department staff, that the Board adopt the Technical Amendment to the Structural Steel Assembly, §1926.754 (a), of the Final Rule for the Safety Standards for Steel Erection, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of November 15, 2010.

Dr. Mundy moved to accept Mr. Cox’s recommendation. Ms. Jolly properly seconded the motion which was unanimously approved by voice vote.

Periodic Review of Existing Regulations

Ms. Reba O’Connor, Regulatory Coordinator for the Department, informed the Board in January 2010 it was notified of two regulations that were being reviewed: 1) 16VAC25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry; and 2) 16VAC25-155, General Requirements for Clearances, Construction of Electric Transmission and Distribution Lines and Equipment, Construction Industry – Subpart V (§1926.950 (c)(1)(i)).

She explained that the Notice of Period Review was published in the Virginia Register on June 7, 2010 and the public comment period ended on June 29, 2010. She added that no public comments had been received.

She added that the Department’s recommendation to the Board is that these two regulations be “retained as is” with no changes.

Ms. Jolly moved to accept Ms. O’Connor’s report. Dr. Mundy properly seconded the motion which was unanimously approved by voice vote.

Items of Interest from Members from the Department of Labor and Industry

Commissioner Malveaux thanked the Board members for their time and effort in serving on the Board and his staff for their due diligence. He invited Board members to call on him if he can be of assistance to them.

Mr. Withrow issued handouts concerning regulatory updates and updates about federal OSHA. Although it was not part of the handouts, Mr. Withrow updated the Board about the Tree Trimming regulations which the Board adopted as final and which is currently in Executive branch review. He explained that at the time of the change of state administrations, this regulation was in the Governor's office for review, however, the new administration asked that all regulations under review be returned to the Secretary's office level so the new administration could review the regulations. He stated the Department was just recently notified that the Tree Trimming regulation has been approved by the Secretary's office and forwarded to the Governor's office for review.

With respect to federal OSHA regulatory issues, he stated that a change to the Recordkeeping regulations is expected – a change in the Form 300 and add a column. Federal OSHA will ask State Plan states like Virginia to adopt an identical regulation, therefore, there will probably be a Board meeting this fall to address this issue. He informed the Board that OSHA also just recently adopted the Crane Standard which the Board will have to adopt within six months of publication by OSHA in the Federal Register. He then mentioned a state regulation, First Aid, which was also adopted as final by the board and was at the Governor's office earlier this year and which was returned to the Secretary's office. He added that the Department was recently notified that, at this point, the Secretary's office has disapproved the regulation and the Department has not had a chance to look into the regulation. He stated that the Department plans to brief the Board about options at the next meeting.

He added that the next handout concerns OSHA's Penalty Calculation procedures, with a federal effective date of August 23, 2010. This will have a significant impact if adopted by Virginia. He noted that the next handout was a letter from the Assistant Secretary for OSHA, David Michaels, to grain storage facility operators. Mr. Withrow informed the Board that Virginia would be distributing a similar letter in the next week or so. He stated the last of the handouts is another memo from the Assistant Secretary for OSHA entitled: "OSHA at Forty: New Challenges and New Directions" which lays out the Assistant Secretary's agenda for his term.

Items of Interest from Members from the Board

Dr. Mundy asked why certain Board members are ineligible to hold elected office on the Board and if there is a valid reason for this. Mr. Crisanti responded that it is nothing more than tradition – how the Board has always operated. He stated that he knew of no legal or regulatory requirements prohibiting any Board member from holding an office on the Board. Mr. Withrow agreed that there is no restraint. He added that historically the reason for alternating between labor – management was probably personality-driven at the time. He stated that Board members would try to meet together to get votes. He also mentioned the statutory prohibition about more than two Board members meeting in a non-public forum. He added that after going through a few years of arguments among Board members a compromise was agreed upon to alternate between management and labor.

Mr. Crisanti explained that there are currently two Board positions which fall outside of the plan to alternate elections between management and labor: representative for the general public and the representative of the insurance industry. Mr. Crisanti explained that this issue is for the

Board to exam and address, the Department has no say. He explained that the Board could revise its bylaws to address the issue.

Mr. Crisanti informed the Board that any changes it desires to make to its Bylaws would have to be done within the confines of a public meeting. Mr. Korpe moved to modify election procedures and to have such discussion placed on the Agenda at the next Board meeting. Dr. Mundy seconded the motion which was unanimously approved by voice vote.

Adjournment

There being no further business, Mr. Hartsoe requested a motion for adjournment. Dr. Mundy made the motion to adjourn the meeting. Ms. Jolly seconded the motion which was carried unanimously by voice vote. The meeting adjourned at 10:53 a.m.