

FINAL

**SAFETY AND HEALTH CODES BOARD
PUBLIC HEARING AND MEETING MINUTES
March 5, 2020**

BOARD MEMBERS PRESENT: Mr. Charles Stiff, Vice Chair
Mr. Travis Parsons, Interim Chair
Mr. John Fulton
Ms. Anna Jolly
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez
Mr. Louis J. Cernak, Jr.
Mr. Courtney Malveaux
Mr. Dwight Flammia

BOARD MEMBERS ABSENT: Ms. Tina Hoover
Mr. Phil Glaize

STAFF PRESENT: Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry
Mr. William P. Burge, Assistant Commissioner
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, and OWB
Ms. Princy R. Doss, Director, Policy, Planning, & Public Information
Mr. Ron Graham, Director, VOSH Health Compliance
Ms. Marta Fernandes, Director, VOSH Safety Compliance
Ms. Diane Duell, Director, Legal Support
Ms. Holly Trice, Senior Staff Attorney
Ms. Tracy Fitzpatrick, VOSH
Ms. Christin Bernhardt, VOSH DLS
Ms. Krystal Tang, DOLI
Mr. Alex West, DOLI
Mr. Adolfo Lopez, DOLI
Ms. Deonna Hargrove, Regional Director
Ms. Austin Sprill, DOLI

OTHERS PRESENT: Mr. Joshua Laws, Attorney General's Office
Ms. Jan Thomas, C.T. Purcell, Inc.
Jerry Rivera, NECA
Mr. Sam Revsinson¹, Eagle
Ms. Danielle Simms, Virginia League of Conservation Voters
Ms. Lisa Wright, Court Reporter, Chandler & Halasz, Stenographic Court Reporters

ORDERING OF AGENDA

¹ Attendees were asked to sign in at the beginning of the meeting. This attendee's handwriting was difficult to read.

Chair Charles Stiff called the Public meeting to order at 10:10 a.m. A quorum was present.

APPROVAL OF AGENDA

Chair Stiff requested a motion to accept the amended Agenda was made, properly seconded, and carried by unanimous voice vote.

APPROVAL OF MINUTES

Chair Stiff asked the Board for a motion to approve the minutes from the September 17, 2019 Board meeting. A motion was made and properly seconded. The minutes were approved by unanimous voice vote.

PUBLIC

Dr. Jan Thomas addressed the board with two issues. First, was the need for heat illness policy and how it is being formulated into policy at the organizational and company levels. She has seen some policies that she does not think they could manage, and hopes that the board could give guidance in the field on how to protect workers when it is extremely hot or cold. California OSHA is a leader in occupational safety and health, but may not work for Virginia. Her second concern is the need to respirators. Lately, she has been unable to find them, and has never had this problem before. Safety glasses are also hard to find. Even though the Attorney General has asked people to stop buy the respirators and hoarding them VOSH need to do something soon. She stated that she has enough now, but is not sure if she will in three months. She contacted Jennifer Rose asking for guidance on what to do, because we need to discuss this today.

Board member asked about her concern regarding company guidance in terms of standards or guidance or both. Dr. Thomas stated that Federal OSHA has some good guidance on their websites. Her worry is that companies make statements such as at 80 degrees heat illness policies are implemented, but humidity and individual acclimation, etc. can affect that. She believes we need better information from OSHA, and can't do policy is such a broad way. Virginia has been a leader in many areas and Virginia can be a leader in terms of extreme heat and extreme cold.

Jerry Rivera with Washington, D.C. NECA, looking at the proposed language and agrees that it adds value as a guidance document. Speaks in favor of the rule, but wants this to be guidance and not regulatory. Thinks that there are good intentions, but that it is challenging at times. For larger folks they have a concept, but the smaller folks are struggling and there is where opportunities lie.

Daniel Simpson League of Conservation Voters. There were some bills in General Assembly, and they were waiting to see what the board would be able to accomplish.

OLD BUSINESS

There was no old business to discuss.

NEW BUSINESS

Respiratory Protection Standard §1910.134

Mr. Ronald Graham, Director of Health for the VOSH program for the Department introduced himself to the board, before proceeding with Virginia Occupational Safety and Health's request for the Board to consider for adoption federal OSHA's final rule for the respiratory protection standard revision for Appendix A, which are the additional ambient CNC quantitative fit testing protocols: Respiratory Protection Standard as published in Volume 84 of the Federal Register page 50739 on September 26, 2019. The proposed effective date is March 31, 2020.

Mr. Graham summarized the final rule as approving two additional fit testing protocols for inclusion in appendix A to the Respiratory Protection Standard. They are, one, the modified aerosol condensation nuclei quantitative fit testing protocol for full-face and half-mask elastomeric respirators, And, also, the modified ambient aerosol CNC quantitative fit testing protocol for filtering facepieces. These standards would apply to general industry, construction, and shipyards.

Mr. Graham explained that prior to the publishing of this final rule, appendix A contained four quantitative fit testing protocols. These were the generated aerosol; the ambient aerosol condensation nuclei; the controlled negative pressure and the controlled negative pressure REDON. This particular rule allows for two more options for testing protocols. Mr. Graham further explained that TSI has been one of the leading industries for quantitative fit testing. TSI submitted two additional protocols to OSHA for adoption, but OSHA chose not to adopt them after further review from the company.

Final Regulation to Amend 16-VAC25-60-260

Ms. Princy Doss, Director of Policy, Planning, and Public Information for the Department's VOSH program introduced herself to the board before proceeding with VOSH's request that the Safety and Health Codes Board consider for adoption, as a final regulation of the Board, the following VOSH proposal to amend the Administrative Regulation for the VOSH Program, 16VAC25-60-260.A.3., pursuant to §§2.2-4006.A.3.

Ms. Doss explained that this amendment was necessary because action by the General Assembly during the 2016 Session amended §40.1-51.1.D of the Code of Virginia, to match the federal OSHA regulatory changes to 29CFR1904.39(a)(2) which required employers:

“Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.”

Governor McAuliffe signed the legislation with an effective date of July 1, 2016. The legislation mirrors

the language contained in 29CFR1904.39:

“§ 40.1-51.1. Duties of employers.

....

D. Every employer shall report to the Virginia Department of Labor and Industry within eight hours any work-related incident resulting in a fatality or within 24 hours any work-related incident resulting in (i) the inpatient hospitalization of one or more persons, (ii) an amputation, or (iii) the loss of an eye, as prescribed in the rules and regulations of the Safety and Health Codes Board.”

VOSH’s Administrative Regulation contained one reference to §40.1-51.1.D which has never been updated to reflect the 2016 legislative change:

“16VAC25-60-260. Issuance of citation and proposed penalty.

....

A.

....

3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality or in the inpatient hospitalization of three or more persons within eight hours of such occurrence as required by § 40.1-51.1 D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.” (Emphasis added).

Ms. Doss summarized that the final regulation, 16VAC25-60-260.A.3, will be amended to reflect the 2016 legislative change to §40.1-51.1.D as follows:

3. Notwithstanding subdivision 1 of this subsection, if an employer fails to notify the commissioner within eight hours of any work-related incident resulting in a fatality or within 24 hours of any work-related incident resulting in (i) the inpatient hospitalization of three one or more persons, (ii) an amputation, or (iii) the loss of any eye, within eight hours of such occurrence as required by § 40.1-51.1 D of the Code of Virginia, the six-month timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.

Ms. Doss stated that The Safety and Health Codes Board is authorized by Title 40.1-22(5) to:

“... adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title.”

“In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity.”

“However, such standards shall be at least as stringent as the standards promulgated by the federal OSH Act of 1970 (P.L.91-596). In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws.”

Ms. Doss noted that the purpose of amending the Administrative Regulation is to update regulatory language to reflect a legislative change that took effect on July 1, 2016. There was no anticipated impact on employers, and the impact on the Department of Labor and Industry, for training DOLI employees on the changes to the regulation was minimal. There were no anticipated additional fiscal or other programmatic impacts for the Department if the final regulation is adopted.

Ms. Doss stated that staff of the Department of Labor and Industry recommended that the Safety and Health Codes Board consider for adoption, as a final regulation of the Board, the final amendments to 16VAC25-60-260.A.3, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, Duties of employers, in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act §2.2-4000, et seq.

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Adopt a Regulation on Health Illness Prevention

Mr. Withrow, Director of Legal Services for VOSH, requested the Board to authorize the Department of Labor and Industry to initiate the regulatory process to adopt a regulation applicable to Heat Illness Prevention by filing a Notice of Intended Regulatory Action (“NOIRA”) pursuant to the Virginia Administrative Process Act, Virginia §2.2-4000. Mr. Withrow discussed the regulatory process involved in adopting a regulation and was asking for approval to start that process. Explaining that once the NOIRA was published and opportunity for public comments, the Department would proceed with researching the issue and developing a recommendation to come back to the Board with a proposed regulation for review.

The VOSH Program intends to conduct a review of existing federal and state regulations as well as national consensus standards and guidelines designed to protect employees from heat illness hazards. The proposal would address indoor and outdoor heat illness hazards experienced by similarly situated employees in all industries covered by VOSH jurisdiction. Mr. Withrow gave an overview of current heat illness protections under a general duty clause and some background to illustrate the need for regulatory action for more specific protections to address the heat illness issues in Virginia. Mr. Withrow provided an overview of the impact on employees, employers, and enforcement of the potential regulations.

VOSH has been sharing information with the delegates and senators that have introduced bills in the 2020 Virginia General Assembly on the topic and will be providing those senators/delegates updates about actions the Board takes on this. It will be up to those members of the legislature to decide whether they want to go and reintroduce the bills this fall for the 2021 session or potentially carry over those existing ones. Mr. Withrow addressed questions from the Board as to the benefits of having a regulation as opposed to going through the legislative process.

The Recommended Action/Motion: That Staff of the Department of Labor and Industry recommends that the Board direct the Department to initiate a Notice of Intended Regulatory Action to adopt regulations applicable to Heat Illness Prevention. The Department also recommends that the Board state in any motion it may make regarding this NOIRA, that it will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation.

This motion was approved with no opposition and all present Board members indicated aye.

Notice of Periodic Review for 2020

Ms. Doss stated that the Department of Labor and Industry requests authorization by the Board to proceed with the periodic review process of the regulations listed below. These two Safety and Health Codes Board regulations are subject to the periodic review process in calendar year 2020.

16VAC25-11, Public Participation Guidelines.

16VAC25-180, Virginia Field Sanitation Standard in Agriculture.

This motion was approved with no opposition and all present Board members indicated aye.

Items of Interest from the Department of Labor and Industry

C. Ray Davenport, Commissioner of the Department of Labor and Industry, reported on the budget and indicated that there will be some additional monies and state funding within the current budget from Federal OSHA and DOLI's goal to claim all of the federal monies beginning next October 1 for the next federal fiscal year cycle. DOLI will also be pursuing the funding of the Agency's 12 unfunded positions and compliance officers that the Governor did include in his budget.

The Commissioner also reported that year to date, this calendar year to date we've experienced two fatalities that VOSH had inspected in their jurisdiction. In 2019 we ended the year unfortunately with 40 fatalities that VOSH had inspected.

Items of Interest from Members of the Board

Board member Kenneth Richardson had a question regarding an email he received regarding the Coronavirus in the workplace and guidance he received from his attorney to log onto the OSHA 300 if determined it was contracted at the workplace. Mr. Withrow provided some background information on coronavirus and indicated that VOSH would probably say from an enforcement agency standpoint it's best to be safe than sorry. If you have reasonable circumstantial evidence that it occurred at the office, you might consider going ahead and logging it onto OSHA 300. I think you need to use some commonsense when you're evaluating it. Do your due diligence. Investigate what you can and make a decision based on the best available evidence that you've got.

Meeting Adjournment

Mr. Stiff asked the Board if there is a motion to adjourn. Mr. Cernak motioned to adjourn. Mr. Parsons seconded that motion. Mr. Stiff asked the board if all were in favor of adjourning the meeting and all indicated aye. Mr. Stiff adjourned the meeting of the Safety and Health Codes Board at 11:41 a.m., on March 5, 2020.