

**FINAL  
SAFETY AND HEALTH CODES BOARD  
MEETING MINUTES  
THURSDAY, FEBRUARY 16, 2017**

- BOARD MEMBERS PRESENT:** Mr. Jerome Brooks  
Mr. Lou Cernak, Jr., Vice Chair  
Mr. John Fulton  
Mr. Chris Gordon  
Ms. Anna Jolly  
Mr. Courtney Malveaux  
Mr. David Martinez  
Mr. Travis Parsons  
Mr. Chuck Stiff, Chair
- BOARD MEMBERS ABSENT:** Mr. Kenneth Richardson, II  
Ms. Milagro Rodriguez,  
Mr. Tommy Thurston
- STAFF PRESENT:** Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry  
Mr. Bill Burge, Assistant Commissioner  
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP  
Mr. Ron Graham, Director, VOSH Health Compliance  
Ms. Jennifer Rose, Director, VOSH Safety Compliance  
Mr. Ed Hilton, Director, Boiler Safety Compliance Management  
Mr. John Crisanti, Manager, Office of Policy and Planning  
Ms. Holly Raney, Regulatory Coordinator  
Ms. Regina Cobb, Senior Management Analyst  
Ms. Deonna Hargrove, Richmond Regional Health Director  
Mr. Dave Beville, Safety/Health Compliance Officer Apprentice  
Ms. Monica Vanney, DHRM
- OTHERS PRESENT:** Ms. Lisa Wright, Court Reporter, Chandler & Halasz, Stenographic Court Reporters  
Ms. Beverly Crandell, Safety Program Coordinator, Tidewater Community College  
Joshua E. Laws, Esq., Assistant Attorney General, OAG

**PUBLIC HEARING**

Board Chair, Mr. Chuck Stiff, called the Public Hearing to order at 10 a.m. A quorum was present. He explained that the sole purpose of the hearing is for the Board members to receive comments from the public regarding 16VAC25-60, et seq., Administrative Regulation for Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes and 16VAC 25-200, Proposed Regulation for the Virginia Voluntary Protection Program (VPP).

There were no comments for the public.

Mr. Jay Withrow, of the Virginia Department of Labor and Industry, addressed the Board concerning the proposed Virginia Voluntary Protection Program (VPP) regulations. He stated that when the Board adopted the proposed regulation, there had been a question about the term “nested contractors” for which he now has a definition which will be included in the regulation. He explained that, although there is no specific definition in the VPP Manual or other sources for “nested contractors”, guidance was found in federal OSHA documents. He continued by stating that, in discussing injury and illness data requirements for contractors at VPP sites, “nested contractors” are supervised by host site management and are regularly intermingled with the owner’s employees, are under direct supervision by management, and if there’s doubt about the classification of the contractor, staff should consult contract specifications. Mr. Withrow also called the Board’s attention to another term which is used and already defined in the VPP regulations – “applicable contractor”- who are treated differently than a regular outside contractor because they spend a lot more time at the site, they work at least a thousand hours in any calendar quarter within the last 12 months, and they have to give the same kinds of protections to their employee as the VPP site does.

Mr. Withrow called the Board’s attention to an omission in the proposed regulation – Merit site, which is a worksite that has a very good safety and health management system, they’ve gone through all of the preparation for VPP, but they have to take a few additional steps before they can meet the Star level. He explained that the omission involves a provision that says that merit sites must have three years’ worth of injury and illness rates that are below the national average for the particular industry. Although the Department calculates those rates, Merit sites do not have to be below the industry average while they are still a Merit site, but they will need to establish concrete goals for reducing the rates within two years.

Mr. Stiff adjourned the Public Hearing at 10:10 a.m.

## **BOARD MEETING**

### **ORDERING OF AGENDA**

Mr. Stiff called the Board meeting to order at 10:10 a.m. A quorum was present.

Mr. Stiff requested a motion to approve the Agenda. A motion to accept the Agenda was made and properly seconded. The Agenda was approved, as submitted, and the motion was carried by unanimous voice vote.

### **APPROVAL OF MINUTES**

Mr. Stiff asked the Board for a motion to approve the Minutes from the September 13, 2016, Board meeting. A motion was made to include a correction appearing on p.3, paragraph 3, where the word “hour” was omitted. The motion was properly seconded. The Minutes were approved, as amended, by unanimous voice vote.

### **PUBLIC COMMENTS**

Mr. Stiff opened the floor for comments from the public, however, there were no comments.

## **OLD BUSINESS**

### ***16VAC25-50, Boiler and Pressure Vessel Rules and Regulations; Amendment***

Mr. Ed Hilton, Director, Boiler Safety Compliance for the Department, began by requesting the Board to consider for adoption as a proposed regulation amendments to 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations.

He informed the Board that the Boiler Safety Compliance Program seeks to amend the Boiler and Pressure Vessel Rules and Regulations by updating several boiler and pressure vessel -related “Forms” and “Documents Incorporated by Reference” to their most recent editions.

He explained that the Board is authorized by § 40.1-51.6.A of the *Code of Virginia*, and that the purpose of the proposed regulatory action is to conform to the most current editions of the American Society of Mechanical Engineers (ASME), National Board Inspection Code (NBIC), and the National Fire Protection Association (NFPA) safety and inspection codes.

With respect to impact on employers, employees and the Department, Mr. Hilton explained that these updates would cause little impact on employers because companies utilizing the codes are already required to have and work to the current code editions and, therefore, there would be no financial burden for employers to purchase the most recent editions of the codes. He did add that a major change would be the requirement in the NBIC for signage and metering for CO<sub>2</sub> tank installations.

A motion to accept the Department’s recommendation to adopt these proposed amendments to 16VAC25-50 was properly made and seconded. The motion was approved unanimously by voice vote.

### ***16VAC25-60, et seq., Proposed Amendments to the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program; Issuance of Penalties to State and Local Government Employers***

Mr. Withrow began by requesting that the Board consider for adoption, as a proposed regulation of the Board, language to amend 16 VAC25-60, et seq., Administrative Regulation for the VOSH Program, State and Local Government Penalties.

He explained that, since the Board has already heard most of this information before during the Notice of Intended Regulatory Action (NOIRA), he was not going to repeat much of the information. He informed the Board of the comment period following the NOIRA and that no public comments were received.

He provided a little background information which included the fact that the Department had been unsuccessful when it first introduced legislation in 2007 expressing a need for penalties in certain situations. He stated that in 2016, the General Assembly passed the statute. He stated that the intention of the legislation was to address things, such as willful, repeated, failure to abate situations, and situations where a serious violation resulted in a fatal accident or where the department determined that a violation was high-gravity serious. He added that the Department is not proposing to issue serious violation penalties for non-high gravity serious violations and for other-than-serious violations, which are normally recordkeeping situations or written program-type situations.

He explained that the purpose of the regulation is to establish procedures for application of penalties for state and local government employers in accordance with §40.1-2.1 of the Code of Virginia.

Mr. Withrow estimated that the total impact on employer is approximately \$346,500 in penalties. He stated that a small number of willful and repeat violations are issued on average per year and that they can carry a penalty of up to \$70,000. He informed the Board that approximately five percent of the Department's serious violations are classified as high gravity. He added that employees benefit in that penalties are a good deterrent to encourage state and local government employers to address issues before they get bad. He stated that no significant impact on the Department is anticipated.

Mr. Withrow then called the Board's attention to the changes in the regulation which he highlighted in yellow.

Mr. Malveaux asked why the proposed regulation deals with just high gravity and above penalties and not recordkeeping and other low gravity. Mr. Withrow responded that the Department was uncertain about the kind of reception the proposal would receive in the General Assembly, so the Department focused on the need, which was the fatal accidents and catastrophes, something conservative and reasonable.

Mr. Martinez expressed concern that a fatality has to happen before there is a penalty. Mr. Withrow explained that the Department issues violations for everything, but we will not issue penalties for all serious violations. Employers will be made aware that if a particular situation happens again, such as someone gets injured, the employer will be looking at really significant penalties as well. He added that penalties have a deterrent effect. He then explained the contest process for state agencies.

A motion to accept the Department's recommendation to consider for adoption the proposed amendments to 16VAC25-60 was made and properly seconded. The motion was approved unanimously by voice vote.

## **NEW BUSINESS**

### ***Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness; Final Rule***

Mr. Jay Withrow requested the Safety and Health Codes Board to consider for adoption federal OSHA's Final Rule for the Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness, as published on December 19, 2016 in 81 FR 91792.

Mr. Withrow explained that this is basically a regulation federal OSHA adopted to deal with the Volks decision in the Court of Appeals for the District of Columbia. He continued by stating that OSHA has for a long time interpreted the recordkeeping regulation to require employers to not only record the injuries and injuries that occur, which they are required to do within seven days of the incident occurring, but if they find out beyond the seven days about an incident occurring, employers are required to record the injury or illness in their recordkeeping records. He added that the violation continues every day that the employer fails to update the records. Employers must record every recordable injury or illness on the OSHA 300 Log, throughout the five-year retention period.

Mr. Withrow informed the Board that OSHA does not see this amendment as having any significant impact on employers because this change is simply to clarify the employers' obligations under recordkeeping regulations. The amendments do not require employers to do anything new or in addition to what they were already required by OSHA to do. He stated that employees benefit from accurate and well-maintained injury and illness records which can be used by employees and by consultants and companies to track where hazards are resulting in injuries and illnesses so that these hazards can be corrected to prevent injuries and illnesses. Adoption of this clarification does not impact the Department because its policy is the same as OSHA's. The change provides clarity, reduces confusion over the issue.

Mr. Withrow stated that there is no associated cost with the regulation because OSHA is really not changing what employers are required to do. He stated that the regulation is technologically and economically feasible because there are no new requirements for employers and no additional compliance costs have been imposed.

Mr. Withrow added that when it comes to recordkeeping regulations, the VOSH program is not allowed to differ from OSHA.

A motion to accept the Department's recommendation to adopt this clarification with a proposed effective date of May 15, 2017, was made and properly seconded. The motion was approved unanimously by voice vote.

### ***Walking-Working Surfaces and Personal Protective Equipment (Fall Protection); Final Rule***

Ms. Jennifer Rose, Director of Occupational Safety Compliance for the Department, requested the Board to consider for adoption federal OSHA's Final Rule for Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) and Other Related Provisions, as published on November 18, 2016 in 81 FR 82494.

Ms. Rose explained that the final rule updates the requirements in all of the general industry walking-working surfaces, including but not limited to, floors, ladders, stairways, runways, dockboards, roofs, scaffolds, and elevated work surfaces and walkways. The revised final rule adds requirements on the design, performance, and use of personal fall protection systems in Part 1910, Subpart I-Personal Protective Equipment.

Next, Ms. Rose summarized some of the changes and new requirements which included: inspection of walking-working surfaces; updated scaffold requirements; rope descent systems and certification of anchorages; phase-in of ladder safety systems or personal fall arrest systems on fixed ladders; fall protection flexibility; phase-out of the "qualified climber" exception in outdoor advertising; training; and personal fall protection system performance and use requirements.

She then described walking-working surface hazards that can cause slips, trips, and falls and affected industries, and the number of fatalities and injuries resulting from walking-working surface hazards.

Ms. Rose explained that the purpose of the revised final rule is to update the outdated general industry standard and to significantly reduce the number of worker deaths and injuries that occur each year due to these hazards. She listed numerous ways in which the revised final rule will benefit employers and employees.

With respect to the final rule's impact on the Department, Ms. Rose informed the Board that, since VOSH is already enforcing the existing standard, it is anticipated that any impact on the Department resulting from the adoption of this amended final rule will be negligible.

Ms. Rose stated that the revised final rule will increase consistency between the general industry and construction Scaffolds, Fall Protection, and Stairway and Ladder Standards which will make compliance easier for employers who conduct operations in both industry sectors. Also, the revised final rule updates requirements to reflect advances in technology and to make them consistent with more recent OSHA standards and national consensus standards.

Ms. Rose discussed estimated costs and benefits of the revised final rule, and stated that the revised final rule is technologically and economically feasible. Next, she informed the Board of the implementation/compliance schedule of the revised final rule.

A motion to accept the Department's recommendation to adopt this revised final rule, with an effective date of May 15, 2017, was made and properly seconded. The motion was approved unanimously by voice vote.

***Occupational Exposure to Beryllium, Parts 1910, 1915, and 1926; Final Rule; and Other Related Provisions***

Mr. Ron Graham, Director of Occupational Health Compliance for the Department, began by requesting the Board to consider for adoption federal OSHA's Final Rule for the Occupational Exposure to Beryllium, Parts 1910, 1915, and 1926, and Other Related Provisions, as published in 82 FR 2470 on January 9, 2017.

Mr. Graham gave a general summary of Beryllium which is a strong, lightweight metal used in the aerospace, electronics, energy, telecommunications, medical, and defense industries. He stated that the metal is highly toxic when beryllium-containing materials are processed in a way that releases airborne beryllium dust, fumes, or mist into the air in the workplace. This can be then inhaled by workers, potentially damaging their lungs and increasing their risk of developing chronic beryllium disease (CBD) or lung cancer.

He described the key provisions which reduce the permissible exposure limit (PEL) for beryllium from 2.0 micrograms ( $\mu\text{g}/\text{m}^3$ ) to 0.2 micrograms ( $\mu\text{g}/\text{m}^3$ ) as an 8-hour time-weighted average. He informed the Board of other provisions to protect employees, such as requirements for exposure assessment; methods of controlling exposure; respiratory protection; personal protective clothing and equipment; housekeeping; medical surveillance; hazard communication; and recordkeeping.

He added that OSHA issued three separate standard covering general industry, shipyards, and construction, and noted the affected industries.

He informed the Board that the purpose of this revised regulation is to reduce the number of fatalities and illnesses occurring among employees exposed to beryllium.

Mr. Graham discussed the impact of this revised regulation on employers and the resulting protections for employees. He stated that any impact on the Department resulting from adoption of this regulation will be negligible and would be related to additional staff training.

Next, he detailed benefits of the regulation and costs and benefits. He stated that the revised final rule would cost annually approximately \$2 million in Virginia, with approximately \$13million in net benefits.

He explained that the revised regulation is technologically and economically feasible, and he pointed out the implementation/compliance schedule.

A motion to accept the Department's recommendation to adopt this revised regulation, with an effective date of May 15, 2017, was made and properly seconded. The motion was approved unanimously by voice vote.

### ***Occupational Exposure to Respirable Crystalline Silica, Parts 1910, 1915, and 1926; Correcting Amendment***

Mr. Ron Graham, Director of the Occupational Health Compliance for the Department of Labor and Industry, requested the Board to consider for adoption federal OSHA's Correction to the Final Rule on the Occupational Exposure to Crystalline Silica, Parts 1910, 1915, and 1926 and Other Related Standards, as published on September 1, 2016 in 81 FR 69272.

Mr. Graham explained that when federal OSHA published its final rule for the Occupational Exposure to Respirable Crystalline Silica on March 25, 2016 ( §81 FR 16285), it contained typographical errors in the formulas for the permissible exposure limitable its (PELs) in the pre-2016 final rule. He called the Board's attention to an omitted division symbol in the formulas, and the entries for "Silica: Crystalline Quartz" in the headings of various tables. He added that the final rule retained the pre-2016 PELs for respirable crystalline silica in §1910.1000, Table Z-3; §1915.1000, Table Z, and in §1926.55, Appendix A, and added footnotes to clarify that these PELs apply to any sectors or operations where the new PEL of 50 ug/m<sup>3</sup> is not in effect. The pre-2016 PELs apply to operations that are not covered by the new standards.

Mr. Graham stated that no impact is anticipated on employers, employees nor the Department from the adoption of this Correcting Amendment.

A motion to accept the Department's recommendation to adopt the correcting amendment, with an effective date of May 15, 2016, was properly made and seconded. The motion was approved unanimously by voice vote.

### ***Notice of Periodic Review of Certain Existing Regulations***

Ms. Holly Raney, Regulatory Coordinator for the Department of Labor and Industry, requested authorization to proceed with the periodic review process of regulations, pursuant to §2.2-4017 of the Code of Virginia and Executive Order 17 (2014). The regulations for review are as follows:

1. 16VAC25-20, Regulation Concerning Licensed Asbestos Contractor Notification, Asbestos Project Permits, and Permit Fees

2. 16VAC25-30, Regulations for Asbestos Emissions Standards for Demolition and Renovation Construction Activities and the Disposal of Asbestos-Containing Construction Waste – Incorporation by Reference, 40 CFR 61.140 through 61.156;
3. 16VAC25-40, Standard for Boiler and Pressure Vessel Operator Certification; and
4. 16VAC25-70, Virginia Confined Space Standard for the Telecommunications Industry; and
5. 16VAC25-97, Reverse Signal Procedures – General Industry – Vehicles/Equipment Not Covered by Existing Standards

Ms. Raney explained that, following the Board’s approval, the periodic review process begins with publication of a Notice of Periodic Review in the Virginia Register, which begins a public comment period of at least 21 days, but not longer than 90 days. She concluded by informing the Board that the Department of Labor & Industry will post a report on the Regulatory Town Hall website indicating for each regulation whether the regulation would be either retained “as is”, repealed or amended.

Ms. Raney concluded by recommended that the Board approve the publication of a Notice of Periodic Review in the Virginia Register for the five regulations mentioned.

A motion to accept the Department’s recommendation was properly made and seconded. The recommendation was approved unanimously by voice vote.

#### **Items of Interest from the Department of Labor and Industry**

Commissioner Ray Davenport began by responding to an earlier question from Mr. Parsons concerning OSHA’s maximum penalties of OSHA by stating that the Department is in the process of coming into compliance with federal OSHA. He stated that the maximum penalties increased in August of 2015. Since the Department’s increase is contained in Code section, as is the case in many states, we have a code change which has been working its way through the General Assembly.

Commissioner Davenport continued by stating that there are two identical bills that were proposed. Both Senate Bill 1542, which contained the penalties in the Code sections, as required by the federal increase in the maximum penalties, and House Bill 1883 have passed and the Department anticipates that they will be signed by Governor McAuliffe.

Commissioner Davenport then informed the Board that Gov. McAuliffe had introduced an increase in funding for the Agency for additional staffing resources to the Agency, for VPP, consultation, trainers, as well as six of the twelve unfunded compliance officers positions that would have amounted to more than \$1.5 million; however, that was stripped from the final version of the Senate’s budget. A good portion of it was also stripped out of the final version of the House budget. There was about \$270,000 left in the budget. Commissioner Davenport added that there has been support from business, community and labor for this funding, and hopefully it will come through.

Commissioner Davenport responded to Ms. Jolly’s question concerning any additional information since the federal government placed Beryllium on hold. He responded that since there is no U.S. Secretary of Labor or an Assistant Secretary at this time, it is unclear what may happen.

With respect to Goodyear, Commissioner Davenport informed the Board that the Department issued a pre-citation settlement agreement for the fourth fatality which closed the fourth fatality and some of the violations that had not yet been cited. He added that there were a number of other contested cases



that had been cited previously with the three previous fatalities in the comprehensive inspections that have been settled as well or will be settled. He stated that part of the agreement will result in initial penalties of \$1.75 million to Goodyear at the Danville facility, \$1 million of which will be paid by Goodyear to the Commonwealth. Goodyear will retain \$375,000 to abate hazards in the facility and \$375,000 to use toward achieving VPP status.

Ms. Jolly asked about the number of fatalities in the state in 2016. Commissioner answered that there were 43 last year and unfortunately, there have been two this year. Mr. Parson asked about the rate, but Commissioner Davenport was uncertain about the overall rate.

Lastly, he thanked the Board for their time commitments.

#### **Items of Interest from the Department or from the Board**

There were no items of interest from the Board.

#### **Adjournment**

There being no further business, a motion was properly made and seconded to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 11:45 a.m.