DRAFT
SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
TUESDAY, SEPTEMBER 13, 2016

BOARD MEMBERS PRESENT:
Mr. Jerome Brooks
Mr. Lou Cernak, Jr., Newly Elected Vice Chair
Mr. John Fulton
Mr. Chris Gordon
Ms. Anna Jolly
Mr. Courtney Malveaux
Mr. David Martinez
Mr. Travis Parsons
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez, Outgoing Chair
Mr. Tommy Thurston

BOARD MEMBERS ABSENT:
Mr. Chuck Stiff, Outgoing Vice Chair; Newly Elected Chair

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. Diane Duell, Director, Legal Services
Mr. Warren Rice, Director, Consultation Services
Ms. Regina Cobb, Senior Management Analyst
Ms. Deonna Hargrove, Richmond Regional Health Director
Ms. Mariah Gardner, VOSH Safety/Health Compliance Officer
Mr. Joseph Rick, VOSH Safety/Health Compliance Officer
Mr. Mike Gonzalez, VOSH Safety/Health Compliance Officer Apprentice
Mr. Justin Paxton, Senior Industrial Hygienist
Ms. Zelma Wilkins, VOSH Safety/Health Compliance Officer
Ms. Cathy Brown, Program Support Technician, Senior

OTHERS PRESENT:
Ms. Andrea Pegram, Court Reporter, Andrea Pegram Court Reporting Services
Ms. Beverly Crandell, Safety Program Coordinator, Tidewater Community College
Mr. Sam Revenson
Mr. Ed Boulanger, Safety Response Association
Mr. Bob Naujelis, Landin, Inc.

ORDERING OF AGENDA

Chair Milly Rodriguez called the Public meeting to order at 10:05 a.m. A quorum was present.

Ms. Rodriguez 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

Ms. Rodriguez asked the Board for a motion to approve the Minutes from the March 3, 2016, Board meeting. A motion was made and properly seconded. The Minutes were approved by unanimous voice vote.

ELECTION OF OFFICERS

Ms. Rodriguez asked for nominations for Chair. Mr. Chuck Stiff was nominated, in absentia, as Chair and the nomination was properly seconded. There were no other nominations. By voice vote, the Board unanimously elected Mr. Stiff to serve as Chair.

Next, Chair Rodriguez asked for nominations for Vice Chair. Mr. Lou Cernak was nominated as Vice Chair and the nomination was properly seconded. There were no other nominations. By voice vote, the Board unanimously elected Mr. Cernak to serve as Vice Chair.

PUBLIC COMMENTS

Ms. Rodriguez opened the floor for comments from the public, however, there were no comments.

OLD BUSINESS

Recording and Reporting Occupational Injuries and Illnesses-Reporting Fatalities, Hospitalizations, Amputations, and Losses of an Eye As a Result of Work-Related Incidents to OSHA, 16VAC25-85-1904.39

Mr. Jay Withrow, Director of Legal Support, BLS, VPP, ORA, OPP & OWP for the Department, began by requesting the Board to consider for adoption Correcting Amendments to the Occupational Injury and Illness Recording and Reporting Requirements - and 16VAC25-85-1904.39, as authorized by Chapter 336 of the 2016 Virginia Acts of Assembly.

He referred to this action as a re-adoption of a federal-identical regulation by the Board. He then explained that in 2014, OSHA passed a regulation that changed reporting requirements. The old requirements were that you had to report a fatality or a catastrophe within eight hours of its occurrence. He stated that in 2014, OSHA included some additional categories: amputations, in-patient hospitalizations and the loss of an eye. He continued by stating that Virginia's reporting requirements are in statute, and the department needed to change the statute. In 2015, the Department sent a legislative package to the General Assembly which was adopted. Subsequently, the Department discovered that the legislative package contained an error about the reporting time for the new reporting categories. As a result, the Department came back to the Board for approval to reflect what

was in the statute because the statute trumps what's in regulation. The Board adopted a revised version of the federal OSHA regulation which had an eight reporting requirement in it, and the Department returned to the General Assembly in 2016.

Mr. Withrow informed the Board of the successful amendment of §40.1-51.1.D, signed by Gov. McAuliffe, during the 2016 General Assembly Session, which brought the statute into conformity with the OSHA regulation, with an effective date of July 1, 2016. He added that it is this action which facilitates the Board's option to adopt regulatory amendments requested by VOSH to the Part 1904 changes adopted by the Board last year bringing the Board's Part 1904 requirements into complete conformity with the federal OSHA Part 1904 requirements.

Mr. Withrow informed the Board of the affected timeframes requested for this amendment to become OSHA-identical. They are as follows:

- Every in-patient hospitalization resulting from a work-related incident must be reported with twenty-four (24) hours of the hospitalization;
- All amputations resulting from work-related incidents, resulting from a work-related incident must be reported with twenty-four (24) hours of the incident; and
- Each loss of an eye resulting from a work-related incident must be reported within twenty-four (24) hours of the incident.

He explained that, if adopted, employers would still not be issued a monetary penalty if they report the workplace incident within 24 hours, and that the only change would be that employers would no longer be issued a *de minimis* violation as they would now be in compliance with the regulation if they report the incident within the specified 24-hour period. He added that no impact is anticipated on employees by this change and that impact on the Department would be minimal – VOSH would no longer be required to issue a penalty for a *de minimis* violation of the standard.

With respect to benefits to employers from the adoption of this change, Mr. Withrow stated that, in VOSH's jurisdiction, construction industry employers who operate in several states or jurisdictions will only have to deal with a regulation identical to the federal regulation. He added that there are no additional costs to employers or the Department with the adoption of these requested regulatory amendments. Lastly, he informed the Board that the change is deemed to be technologically feasible as the requested change has been in effect for approximately two years in those jurisdictions under OSHA's direct enforcement.

In conclusion, Mr. Withrow recommended that the Board consider for adoption the amendments to Recording and Reporting Occupational Injuries and Illnesses –Reporting Fatalities, Hospitalizations, Amputations, and Losses of an Eye as a Result of Work-related Incidents to OSHA, 16VAC85-1904.39, as authorized by Virginia Code §§40.1-22(5), 40.1-51.1.D., and 2.2-4006.A.4(c), with an effective date of December 1, 2016.

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

NEW BUSINESS

Updating National Consensus Standards - Eye & Face Protection, Final Rule; Parts 1910, 1915, 1917, 1918, and 1926

Ms. Jennifer Rose, VOSH Safety Compliance Director for the Department of Labor and Industry, requested that the Board consider for adoption federal OSHA's Final Rule on Updating OSHA Standards Based on the National Consensus Standards for Eye and Face Protection, Parts 1910, 1915, 1917, 1918, and 1926, as published in 81 FR 16085 on March 25, 2016.

She summarized the final rule by stating that it updates eye and face protection requirements in OSHA's general industry, shipyard employment, marine terminals, longshoring, and construction standards, and that these changes involved the incorporation by reference of the latest ANSI/International Safety Equipment Protection Devices, and the removal of the oldest ANSI version of the same standard.

Ms. Rose explained that this incorporation by reference will ensure consistency among OSHA's standards, clarify employer obligations, eliminate any confusion, and provide up-to-date protection for workers exposed to eye and face hazards.

Ms. Rose added that, other than improved clarity, no significant impact is anticipated on employers, employees or the Department with the adoption of these corrections.

Ms. Rose stated that the OSHA believes the Final Rule is technologically feasible because protectors are already manufactured in accordance with the 2010 ANSI/ISEA standard. She added that employers are already in compliance with the 1998 and 2003 versions of the ANSI standard, which are incorporated by reference into general industry and maritime standards, and which thereby constitutes compliance with the Final Rule.

In conclusion, she recommended that the Board adopt the Final Rule Updating OSHA Standards Based on National Consensus Standards for Eye and Face Protection, Parts 1910, 1915, 1917, 1918, and 1926, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of December 1, 2016.

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

Occupational Exposure to Respirable Crystalline Silica

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 Final Rule on the Occupational Exposure to Crystalline Silica, Parts 1910, 1915, and 1926 and Other Related Standards, as published on March 25, 2016 in 81 FR 16285.

Mr. Graham informed the Board that federal OSHA amended its existing standards for the Occupational Exposure to Respirable Crystalline Silica because OSHA determined that employees exposed to respirable crystalline silica at the previous permissible exposure limits face a significant risk of material impairment to their health, such as developing silicosis and other non-malignant respiratory diseases, lung cancer, and kidney disease.

He explained that this final rule, which has been issued as two separate standards – one for general industry and maritime and the other for construction, establishes a new permissible exposure limit (PEL) of 50 micrograms of respirable crystalline silica per cubic meter of air (50 $\mu g/m^3$) as an 8-hour time-weighted average in all industries covered by the rule, with the exception of agricultural operations covered under Part 1928. It also includes other provisions to protect employees, such as requirements for exposure assessment, methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping.

Mr. Graham also detailed amendments made to other related standards, such as Air Contaminants, §1910.1000, and in Gases, Vapors, Fumes, Dusts, and Mists, §1926.55.

He described the various uses of crystalline silica, e.g., road building and concrete construction, to form molds for metal castings in foundries, and in abrasive blasting operations, as filler in plastics, rubber and paint to name a few. He also explained that silicosis is an irreversible, progressive disease which affects the lungs and can lead to disability and death.

Next, Mr. Graham detailed key provisions of the standards, as well as employer responsibilities in affected industries. He stated that there are over 30 major industries and operations where exposures to crystalline silica can occur, i.e., foundries, dental laboratories, concrete products and paint and coating manufacture and in the use of heavy equipment during demolition activities involving silica-containing materials.

Mr. Graham provided the background and history of the final rule and stated that its purpose is to reduce the numbers of fatalities and illnesses occurring among employees exposed to respirable crystalline silica in general industry, maritime, and construction sectors. Additionally, he stated that this objective will be achieved by requiring employers to install engineering controls, respirators, training, exposure monitoring, medical surveillance, and other protective measures necessary for them to perform their jobs safely.

With respect to impact on Virginia employers, Mr. Graham informed the Board that the final rule provides flexibility to help employers protect workers from silica exposure, with staggered compliance dates to ensure sufficient time to meet the requirements. He stated that flexible alternatives are also useful for employers. He added that, for most common tasks in construction, OSHA has spelled out in Table 1 exactly how employers can best protect workers. He stated that the final rule would improve worker protection by requiring employers to reduce the PEL by using engineering controls. He added that any impact from the adoption of this final rule on the Department would be negligible.

Additionally, Mr. Graham detailed the benefits, costs, technological and economical feasibilities of the final rule, in addition to the compliance schedule.

Mr. Graham concluded by recommending that the Board adopt the Final Rule on the Occupational Exposure to Crystalline Silica, Parts 1910, 1915, and 1926 and Other Related Standards, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of December 1, 2016.

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

Improve Tracking of Workplace Injuries and Illnesses, §§1904.35, 1904.36, and 1904.41; Final Rule; and Correction to §1904.35(b)(2)

Mr. Jay Withrow requested the Safety and Health Codes Board to consider for adoption federal OSHA's final rule to Improve Tracking of Workplace Injuries and Illnesses, as published on May 12, 2016 in 81 FR 29623; and its Correction, as published on May 20, 2016, in 81 FR 31854.

He summarized this final rule by stating that several changes to the existing recording and reporting requirements under Part 1904 were made. He continued by stating that the final rule requires certain employers to electronically submit the injury and illness information that they are already required to keep under existing OSHA regulations, and the employer groups were determined by the number of employees within the various establishments, e.g., establishments with 250 or more employees; those with 20 to 249 employees; and those establishments with fewer than 20 employees.

He informed the Board of the phased-in implementation schedule of over two years for the new reporting requirements.

Mr. Withrow explained that the purpose of this final rule is to assure completeness and accuracy of injury and illness data collected by employers and reported to OSHA by modernizing injury and illness data collection to better inform workers, employers, the public, and OSHA about workplace hazards. With respect to impact on employers, Mr. Withrow explained that the final rule only requires employers to submit to OSHA electronically information employers have already collected and recorded. He added that employers are not required to adopt an electronic system to record occupational injuries and illnesses. With respect to impact on employees, Mr. Withrow stated that the final rule expands the previous requirement by requiring employers to inform employees how to report work-related injuries and illnesses and by prohibiting employers from retaliating against workers for making those reports.

Lastly, in explaining the final rule's impact on the Department, Mr. Withrow stated that the new rule differs from section 11(c) of the OSHA Act because it is specifically designed to promote the accuracy and integrity of the injury and illness records employers are required to keep under Part 1904. He continued by explaining that, under section 11(c), OSHA may not act against an employer unless an employee files a complaint; however, under §1904.35(b)(1)(iv) of the final rule, OSHA will be permitted to cite an employer for taking an adverse action against an employee for reporting an injury or illness, even if the employee did not file a section 11(c) complaint with OSHA. He stated that these citations can result in orders requiring employers to abate violations. He also added that the rule will provide OSHA/VOSH with data to assist the agency in improving allocation of compliance assistance and enable more rigorous evaluations of governmental impact of injury prevention activities.

Mr. Withrow detailed the numerous benefits of the final rule, which include better information obtained, makes it easier to identify, target, and remove workplace safety and health hazards.

Next, he detailed the costs, and informed the Board of OSHA's conclusion that the final rule is economically and technologically feasible.

In conclusion, Mr. Withrow recommended that the Safety and Health Codes Board adopt the Final Rule to Improve Tracking of Workplace Injuries and Illnesses, §§1904.35, 1904.36, and 1904.41; Final Rule; and the Correction to §1904.35(b)(2), as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c),

with an effective date of January 1, 2017, except for §§1904.35 and 1904.36, which become effective on December 1, 2016.

Mr. Malveaux expressed his concern that this final rule will be a deincentive to honest employers from reporting and the reports in terms of accidents and injuries and illnesses being made available through public information. He stated that employers would be exposing themselves to in the press. He added that state organizations have raised concerns the possible negative impact this final rule will have on honest reporting. Lastly, he stated that there might be a better approach through a voluntary compliance or enhanced abatement.

Mr. Withrow added that Virginia is a State Plan State and is required to either adopt this federal regulation or something equivalent to it, with one exception – Recordkeeping. He stated that OSHA does not allow State Plans to adopt something different when it comes to recordkeeping regulations mostly because the scientific data collection requirements must be the same everywhere; if not, the validity of the data is lost.

A motion to accept the Department's recommendation was properly made and seconded. The motion was approved by voice vote. Mr. Malveaux voted nay.

16VAC 25-60, Notice of Intended Regulatory Action (NOIRA) to Amend Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program

Mr. Jay Withrow requested the Safety and Health Codes Board to consider for adoption federal OSHA's final rule to Improve Tracking of Workplace Injuries and Illnesses, as published on May 12, 2016 in 81 FR 29623; and its Correction, as published on May 20, 2016, in 81 FR 31854.

Mr. Withrow requested the Board to authorize a NOIRA to establish procedures for the application of penalties for state and local government employers in accordance with §40.1-2.1 of the Code of Virginia. He explained that allowing VOSH to issue proposed penalties to state and local government employers for willful, repeat and failure-to-abate violations, as well as serious violations that cause a fatal accident or are classified as "high gravity", i.e., a violation that is classified as "high severity" and "high probability".

To explain the basis for this NOIRA, Mr. Withrow stated that recent incidents, resulting in the death of government employees, as well as other accident situations, have highlighted a need for an additional incentive for compliance with the safety and health laws and regulations. He continued by stating that from January 1, 2007 to August 1, 2014, twenty-nine fatalities and catastrophes occurred in state and local government employment. He informed the Board of the 2016 legislative action by the General Assembly amending the language in the existing statute to allow the issuance of monetary penalties to state and local government employers for certain occupational safety and health program violations. He stated that this statutory change, introduced by DOLI in 2007, was approved by the General Assembly and signed by Governor McAuliffe on March 29, 2016, effective on July 1, 2016.

Mr. Withrow informed the Board that the proposed imposition of penalties has the anticipated deterrent effect, pro-active steps to develop and implement injury and illness prevention programs can have a significant positive impact in reducing injury and illness rates and the significant associated costs for employers. He stated that employees will benefit from the identification and correction of

workplace hazards as a result of cited violations and issued penalties, the development and implementation of injury and illness prevention programs, and the anticipated reduction injuries and illnesses. He added that no significant impact is anticipated on the Department from the adoption of this amendment.

In conclusion, Mr. Withrow recommended that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the Administrative Regulation for the VOSH Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the *Code of Virginia*.

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

Report of Periodic Review of Certain Existing Regulations

Ms. Holly Raney, Regulatory Coordinator for the Department of Labor and Industry, reported on the Board's March 3, 2016, approval to proceed with the periodic review process. She added that no comments were received during the twenty-one day public comment period (May 23, 2016 to June 14, 2016). She explained the periodic review and analysis process for the affected regulations, which considers the following factors: continued need for the regulation; complexity of the regulation; extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and the length of time since the regulation has been evaluated or affected by technology, economic conditions, etc.

On behalf of the Department, Ms. Raney made the following recommendations:

1. 16VAC25-11, Public Participation Guidelines – amend through the fast-track rulemaking process.
2. 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations – amend as a proposed regulation to include the most recent editions of the Documents Incorporated by Reference;
3. 16VAC25-160, Construction Industry Standard for Sanitation – retain with no changes; and
4. 16VAC25-180, Virginia Field Sanitation Standard, Agriculture – retain with no changes.

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

Public Participation Guidelines, 16VAC25-11-50; Fast-Track Amendment

Ms. Regina Cobb, Senior Management Analyst for the Department of Labor and Industry, requested the board to consider for adoption an amendment to Subsection A of 16VAC25-11, Public Participation Guidelines, pursuant to the fast-track regulatory process of §2.2-4012.1 of the *Code of Virginia*.

She explained that Chapter 795 of the 2012 Acts of Assembly amended the Public Participation Guidelines of the Administrative Process (APA) at §2.2-4007.02 of the *Code of Virginia*. She stated that during the periodic review of this regulation, the Department of Planning and Budget informed the Department of Labor and Industry of a required revision to the Public Participation Guidelines. Ms. Cobb explained that the revised amended APA language required the Board to afford interested persons an opportunity to present their views and be accompanied by and represented by counsel or other representative in the promulgation of any regulatory action.

She continued by stating that the fast-track rulemaking process was being used for this regulation because this amendment is expected to be non-controversial, the Board has no discretion over the proposal, and no individual or entity will be adversely affected by this required regulatory change.

Lastly, she stated that the Department does not anticipate any impact on Virginia employers, employees or this Department.

In conclusion, on behalf of the Department of Labor and Industry, Ms. Cobb recommended that the Board consider for adoption an amendment to Subsection A of the Public Participation Guidelines, 16VAC25-11-50, pursuant to the fast-track regulatory process of §2.2-4012.1 of the *Code of Virginia*.

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

Mr. John Crisanti, Manager of the Office of Policy and Planning for the Department of Labor and Industry, addressed the Board to briefly review the venues for Board meetings over the last 25 years and difficulties regarding both meeting room availability and related parking issues as the rationale for holding meetings of the Board at Main Street Centre since 2015. He also apologized for the temporary construction work ongoing in the building on behalf on a new tenant moving in. In closing, Mr. Crisanti asked if the Board decided it had concerns to please let him know.

Next, Commissioner Ray Davenport explained to the Board that the Department was unsuccessful with respect to the General Assembly passing our Agency budget proposals. He stated that the Department still has twelve unfunded compliance positions. He also mentioned an email, with a public service announcement (PSA) attached, was sent to each Board member. The PSA discussed the increase in workplace fatalities in Virginia. He stated that, at the time of the PSA, there were 29 fatalities with which VOSH has been involved. He added that two more fatalities have occurred statewide since the PSA, not including three fatalities not on our list.

He asked each Board member to extend our concern about workplace fatalities through work organizations, other Board memberships, etc., because it is important to get the word out about these workplace fatalities.

Lastly, he thanked the Board for their time commitments.

Items of Interest from the Department or from the Board

A question was asked about OSHA increasing their fines substantially. Mr. Withrow responded that the Department has put in a legislative change to increase penalties.

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 1 p.m.