

FINAL

**SAFETY AND HEALTH CODES BOARD
PUBLIC HEARING MINUTES
THURSDAY, APRIL 16, 2009**

BOARD MEMBERS PRESENT: Mr. Roger Burkhart
Mr. Louis Cernak
Mr. M. Frank Hartsoe, Vice Chair
Dr. Diane Helentjaris, VDH representative
Ms. Anna Jolly
Dr. James Mundy
Ms. Eloisa Rea
Ms. Milly Rodriguez
Mr. Linwood Saunders
Mr. Danny Sutton

BOARD MEMBERS ABSENT: Mr. Daryl Hines
Mr. Satish Korpe
Mr. Mike Murphy, DEQ representative
Mr. Chuck Stiff, Chair

STAFF PRESENT: Mr. Ray Davenport, Commissioner, Dept. of Labor and
Industry
Mr. Bill Burge, Assistant Commissioner -- Programs
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. Jennifer Wester, Director, Cooperative Programs
Ms. Reba O'Connor, Regulatory Coordinator
Mr. Eric Delia, Policy Analyst
Mr. Rick Kennedy, Norfolk
Ms. Regina Cobb, Agency Management Analyst Senior

OTHERS PRESENT: Ms. Beverly Crandell, Federal OSHA
Ms. Anne Burkhart
Mr. Kevin Forgue, Asplundh Tree
Rich Savage, Esq., LeClair Ryan
Mr. Joe Crockett, Waco, Inc.
Ms. Nicole Riley, VA Retail Merchants Assoc./LeClair
Ryan
Sam Brumberg, Esq., VA MD DE Association of Electric
Cooperatives

Ms. Julia Hammond, NFIB
Ms. Valarie May, Court Reporter, Chandler & Halasz

In the absence of Board Chair, Mr. Chuck Stiff, Vice Chair, Mr. Frank Hartsoe, called the Public Hearing to order at 10:00 a.m. to receive public comments on 16 VAC 25-60, Proposed Rule for Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program; and 16 VAC 25-73, Proposed Rule for Tree Trimming Operations.

Mr. Hartsoe welcomed new Board member, Ms. Eloisa Rea, and Dr. Diane Helentjaris, who represented the Department of Health.

Mr. Hartsoe then explained that the sole purpose of the hearing is for the Board members to take comments from the public regarding the following proposed regulations:

16 VAC 25-60, Proposed Rule for Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program

There were no comments made.

16 VAC 25-73, Proposed Rule for Tree Trimming Operations

Three individuals appeared to comment: Mr. Kevin Forge of Asplundh Tree; Sam Brumberg, Esq., Counsel for VA, MD, DE Association of Electric Cooperative; and Mr. Jay Withrow, Director of the Division of Legal Support for the Department of Labor and Industry.

The first speaker was Mr. Kevin Forge of Asplundh Tree Care Expert Company, a vegetation management company with over 28,000 employees in the United States, Canada, Australia and New Zealand. He informed the Board that Asplundh offers a variety of services, including: line-clearance tree trimming performed for electric utilities.

Mr. Forge, who stated that he will file written comments on or before May 15, informed the Board that line-clearance tree trimming is already regulated under federal OSHA regulation, 1910.269, which Virginia has adopted. He stated that specifically, line-clearance tree trimming would apparently be the only industry required to comply with two separate vertical standards, and that it is not clear whether Virginia has considered how to reconcile the standards so as to make the compliance obligations transparent to employers.

He also stated that Asplundh understands that there may be a need for a regulation covering residential and commercial tree trimming work since the logging standard is not intended for that purpose; however, line-clearance tree trimming work is already regulated under 1910.269. He asked the Board whether additional regulation is needed. He suggested that, if Virginia believes that additional regulation is needed, then Virginia should include provisions applicable to line-clearance tree trimming in a separate section of the standard.

The next speaker was Mr. Sam Brumberg, an attorney with the law firm of LeClair Ryan, representing the Virginia, Maryland and Delaware Association of Electric Cooperatives. He explained that

cooperatives are not for profit consumer organizations owned and controlled by the customers they serve. He added that cooperatives are focused solely on providing reliable service at the lowest possible cost in a way that advances environmental stewardship. He informed the Board that in Virginia there are thirteen electric cooperatives serving approximately 450,000 electric meters, representing over 1 million consumers.

He stated that he wanted to address the Board regarding the tree trimming regulation to obtain an exemption similar to the one already place in paragraph C for the logging operations regulation. He stated that the work that is performed incidental to right-of-way maintenance or electric utility operations probably should not be covered in the regulation applicable to professional tree service companies. He added that these cooperatives are heavily regulated as electric utilities by state and federal government's rural utility service. He expressed concern about duplicative regulation, potential increased compliance costs where the safety system in place already is functioning well.

In conclusion, he requested that an additional sentence be included in paragraph C similar to the exemptions already available for logging operation, construction/real estate development, etc., and this would cover all electric utility operations performed by the cooperatives and large utilities.

The last speaker was Mr. Jay Withrow, Director of the Office of Legal Support of the Department of Labor and Industry. He referenced a handout in the Board package that he prepared which outlined changes that have been made to the proposed regulation by the Virginia Registrar of Regulations. He informed the Board that: 1) the "Definitions" section was moved to the front of the propose regulation; 2) the Registrar reworked the numbering system; 3) some references to National Consensus standards were deleted because they were no longer published or were not easily available; and 4) some typographical errors were corrected in the definitions section. He stated that the above changes will not have any substantive effect on the regulation.

Mr. Hartsoe thanked all of the speakers, and the hearing ended at 10:15 a.m.

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ORDERING OF AGENDA

Immediately following the Public Hearing, Vice Chair Frank Hartsoe called the Board meeting to order at 10:18 a.m. Mr. Hartsoe asked for a motion from the Board to approve the Agenda. On proper motion and second, 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 of the November 20, 2008, Public Hearing and Board Meeting. On proper motions and seconds, both Minutes were approved, as submitted, by unanimous voice vote.

PUBLIC COMMENTS

Mr. Hartsoe opened the floor to comments from the public. Rich Savage, Esq., LeClair Ryan Law Firm spoke on behalf of the Virginia Hospitality and Travel association, Virginia Retail Merchants Association and Virginia Manufacturers Association, the Virginia Auto Dealers Association and the National Federation of Independent Businesses. Mr. Savage then highlighted some of the comments that he had already submitted to Department staff concerning the amendment to the regulation for Medical Services and First Aid. He summarized his comments as follows: 1) the proposed regulation is legally flawed in that the regulation disregards or does not fully consider that OSHA has defined this area industry-specific scheme based on how dangerous the affected industries are and the application of the CPR standard. He added that Virginia disregards the distinction the federal Code makes between the response time based on the type of injury, life threatening versus non life-threatening. He stated that the error in this first aid regulation is that all injuries are treated as if they are life-threatening responses; 2) The data in the regulation record is insufficient to support such a mandate on most Virginia businesses; 3) The cost associated with enforcing this regulation; and 4) Improper timing – inappropriate to impose such a strict standard which is far above the OSHA standard.

Mr. Savage concluded by stating that the regulation at least deserves further study and further clarification.

Mr. Hartsoe thanked Mr. Savage for his comments. There were no other speakers.

OLD BUSINESS

16 VAC 25-95, Final Regulation to Amend the Medical Services and First Aid Standard for General Industry, §1910.151, and for 16 VAC 25-177, the Construction Industry, §1926.50

Mr. Jay Withrow, Director of the Office of Legal Support for the Department of Labor and Industry, requested the Board to consider for adoption as a final regulation of the Board the amendments of the Medical Services and First Aid standard for General Industry and the Construction Industry. Next, Mr. Withrow summarized the rulemaking process as follows: the Board originally adopted a Notice of Intended Regulatory Action (NOIRA) for this regulation on March 7, 2006; the proposed language was adopted on December 16, 2006, and published in the *Virginia Register* on September 29, 2009, with a 60-day comment period which ended on November 29, 2008; and a public hearing was held on November 20, 2008, and comments were received.

Mr. Withrow listed and briefly discussed the four major changes that are being proposed by the Department: 1) amend the proposed regulatory text to extend the mobile communication option for single employees to employers with work sites where only one employee is permanently stationed because there is no rationale for treating them differently from single mobile employees; 2) amend the proposed regulatory text to add definitions for the terms “serious physical harm” and “serious workplace hazard”; 3) delete the term “job classification” from the proposed regulation; and 4) in different sections of the proposed regulation, replace the word “designated” with the work “selected”, replace the word “render” with “administer”, and delete

the work “immediate”. Mr. Withrow added that these changes will clarify that it is not the intent of the Department to apply the full provisions of the Bloodborne Pathogens standard to employees trained under the final first aid/CPR regulation.

Next, Mr. Withrow referred the Board to page 16 of the briefing package where he discussed the comments from the recent 60-day comment period and the public hearing. Mr. Withrow stated that, in response to a comment, the Department would add the American Heart Association to the regulation as a recognized provider of first aid/CPR. Based on a comment concerning the exception for the single employee mobile crew, Mr. Withrow stated that the Department recommends that the exemptions that were currently in the regulation for a single mobile employee be applied to a single employee who is assigned to a permanent location.

Mr. Withrow mentioned additional concerns raised in the public comments, i.e., lack of definitions for a few terms; incomplete fiscal analysis; and that the regulation appeared to have two different trigger mechanisms to determine whether an employer is covered by the regulation or not. In response, Mr. Withrow stated that to clear up any possible confusion, the Department added a few words to the regulation, such as “could potentially” to deal with the trigger mechanism issue that was raised. He explained that words the Department has included such language as, “serious physical harm” and “serious hazard” because the Department wanted to exempt a fairly significant number of employers from the first aid/CPR regulation by limiting the requirement to situations where employees are exposed to the kinds of hazards where first aid/CPR could be required.

Mr. Withrow explained that federal OSHA has interpreted the first aid/CPR regulations to mean if there is a life-threatening type of situation, there is a three-to-four minute response time from the workplace to a hospital. If that time requirement cannot be met, then there must be someone available onsite with first aid training. According to Virginia’s proposed regulation, employers who do not have serious hazards in their workplaces would not need anybody trained in first aid or CPR. He mentioned that federal OSHA recognizes that a somewhat longer response time of up to 15 minutes may be reasonable in workplaces, such as offices, where the possibility of such serious work-related injuries is more remote.

With respect to costs, Mr. Withrow informed the Board that the Department believes there is enough information in the impact analysis for the Department of Planning and Budget (DPB) to assess how much the regulation would cost an employer to comply. He reiterated that employers who will be exempted from the first aid/CPR regulation are those that do not have workplace hazards that could cause serious physical harm or death. Mr. Withrow added that the Department tried to limit the effect of the regulation by defining the terms “serious physical harm” and “serious hazard”.

With respect to retailers, Mr. Withrow commented that most retailers are not going to be covered by this regulation because their businesses are similar to an office setting, and are not going to have serious hazards in the workplace; therefore, the costs for these retailers will be eliminated. He added that some retailers might be covered because of their exposure to serious hazards, for example, large retail establishments which use forklifts in their warehousing operations to empty trailer trucks.

For truckload operations where drivers spend time loading and unloading, Mr. Withrow stated that, because the drivers are going to be exposed to serious hazards, at least one of the drivers should be trained in first aid/CPR.

Another issue addressed concerned the person trained in first aid/CPR who is late for work or away from the job. Mr. Withrow explained that since the Department is involved in an enforcement action, mitigating circumstances will be taken into account. He acknowledged that the final regulation has a certain amount of flexibility built into it for employers to deal with such situations.

Mr. Withrow explained that the regulation requires an individual to be adequately trained and have a valid certificate from the Bureau of Mines, American Red Cross, National Safety Council, American Heart Association or equivalent training. He added that on-line training can be dealt with through Department interpretation.

Mr. Withrow concluded by requesting that the Board consider for adoption the final regulation to amend 16 VAC 25-95, Medical Services and First Aid standards for General Industry, §1910.151, and for 16 VAC 25-177, the Construction Industry, §1926.50, to require employers to train employees to render first aid/CPR when employees are exposed to serious workplace hazards which result in serious physical harm or death.

Mr. Burkhart spoke in support of the regulation, but cautioned that there is considerable cost involved for small operations. He added that a similar program has been implemented at his small factory and the costs, which include time lost for training and for maintaining the program, are higher than what appears on paper.

The motion to adopt this final amendment was properly made, seconded and unanimously carried by voice vote.

NEW BUSINESS

Electrical Standard, Subpart S of Part 1910, §§1910.303 and 1910.304; Final Rule; Clarifications and Correcting Amendments

Mr. John Crisanti, Manager of the Office of Planning and Evaluation for the Department of Labor and Industry, requested the Board to consider for adoption clarifications and correcting amendments to federal OSHA's final rule on the Electrical Standard, Subpart S of Part 1910, as published in 73 FR 64202 on October 29, 2008, with a proposed effective date of July 15, 2009.

Mr. Crisanti summarized this regulation and explained that, in addition to correcting typographical errors which do not affect the substantive requirements, federal OSHA clarified several questions about the applicability of §1910.304. He explained that, while employers will benefit from the standard's improved clarity to assist them with complying with certain previously ambiguous sections of language, neither employees nor the Department will be additionally impacted by the non-substantive changes.

Mr. Crisanti concluded by recommending that the Board adopt the clarifications and correcting amendments to §§1910.303 and 1910.304 of the final rule for the Electrical Standard, Subpart S of Part 1910, as authorized by the Virginia Code, §§40.1-22 (5) and 2.2-4006.A.4(c), with an effective date of July 15, 2009.

The motion to accept Mr. Crisanti's recommendation was properly seconded and unanimously approved by voice vote.

Clarification of Employer Duty to Provide Personal Protective Equipment (PPE) and Train Each Employee; Final Rule; Parts 1910, 1915; 1917; 1918; and 1926; and Correction

Mr. Ron Graham, Director, Occupational Health Compliance with the Department of Labor and Industry, requested the Board to consider for adoption federal OSHA's Clarification of its final rule on Employer Duty to Provide Personal Protective Equipment (PPE) and Train Each Employee and the correction, as published in 73 FR 75568 on December 12, 2008, and as published in 74 FR 858 on January 9, 2009, respectively, with an effective date of July 15, 2009.

Mr. Graham stated that this revision added a new section to the introductory Subparts of Parts 1910 through 1926 to clarify that standards requiring the employer to provide PPE, including respirators, or to provide training to employees, impose a separate compliance duty to each employee covered by the requirement and that each instance of an employee who does not receive the required PPE or training may be considered a separate violation. He added that these amendments add no new regulatory requirements on employers.

He informed the Board that federal OSHA amended the standards in Parts 1910, 1915, 1917, 1918 and 1926 to provide additional clarity and consistency about the individualized nature of the employer's duty to provide training and personal protective equipment (including eye, hand, face, head, foot and hearing protection, respirators, and other forms of PPE) under standards in these parts.

With respect to impact on employers, Mr. Graham stated that employers will benefit from greater consistency in the regulatory text of the various respirator and training provisions in Parts 1910 through 1926, and they will be provided with clearer notice of the nature of their duty under existing PPE and training provisions. He added that employers would not be required to provide any new type of PPE or training to any employee not already covered by the existing requirements, nor to provide PPE or training in a different manner than that already required. The amendments simply clarify that the standards apply to each employee. He added that employees will also benefit from the further clarification provided and stated that there is no significant impact on the Department.

With respect to benefits and costs, Mr. Graham stated that, if the employer is already obligated to provide PPE and training under a specific OSHA standard, then this clarification should not require any additional cost.

In conclusion, Mr. Graham recommended that the Board adopt the Clarification to the Final Rule

on Employer Duty to Provide Personal Protective Equipment (PPE) and Train Each Employee and its correction, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of July 15, 2009.

The motion to accept Mr. Graham's recommendation was properly seconded and unanimously approved by voice vote.

Longshoring and Marine Terminals; Vertical Tandem Lifts, Subpart 1917.71 and 1918.85, Public Sector Only; Final Rule

Mr. Glenn Cox, Director of VOSH Programs, requested the Board to consider for adoption federal OSHA's final rule on Longshoring and Marine Terminals; Vertical Tandem Lifts, Parts 1917 and 1918, Public Sector Only, as published in 73 FR 75245 on December 10, 2008, with an effective date of July 15, 2009.

Mr. Cox informed the Board that this is a "just in case" adoption because there is no public sector maritime activity in Virginia at this time; however, should this status change, VOSH will be ready to enforce this regulation.

Mr. Cox explained that the new requirements are related to the practice of a container crane lifting two intermodal containers together, one on top of the other, connected by semiautomatic twistlocks – a practice known as a vertical tandem lift (VTLs). He added that the final standard permits VTLs of no more than two empty containers provided certain safeguards are followed.

Since there is currently no public sector maritime-related activity in Virginia, there is no impact on public sector Virginia employers or employees nor on the Department. He added that there is no cost at this time.

In conclusion, Mr. Cox recommended that the Board adopt the Final Rule for Longshoring and Marine Terminals; Vertical Tandem Lifts, §§1917.71 and 1918.85, Public Sector Only, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of July 15, 2009.

The motion to accept Mr. Cox's recommendation was properly seconded and unanimously approved by voice vote.

Periodic Review of Regulations

Ms. Reba O'Connor, Regulatory Coordinator for the Department, informed the Board that the Department recommends that nine of the following ten regulations reviewed, be retained with no amendments. They are as follows:

16 VAC 25-30-10 et seq., Regulations for Asbestos Emissions Standards for Demolition and Renovation Construction Activities and the Disposal of Asbestos-Containing Construction Wastes-Incorporation by Reference, 40 CFR 61.140 through 61.156;

16 VAC 25-35-10 et seq., Regulation Concerning Certified Lead Contractors Notification, Lead Project Permits and Permit Fees;

16 VAC 25-40-10 et seq., Standard for Boiler and Pressure Vessel Operator Certification;

16 VAC 25-70-10 et seq., Virginia Confined Space Standard for the Telecommunications Industry;

16 VAC 25-140-10 et seq., Virginia Confined Space Standard for the Construction Industry;

16 VAC 25-150-10, Underground Construction, Construction Industry;

16 VAC 25-160-10 et seq., Construction Industry Standard for Sanitation

16 VAC 25-170-10 et seq., Virginia Excavation Standard, Construction Industry; and

16 VAC 25-180-10, Virginia Field Sanitation Standard, Agriculture

She stated that the Department is recommending the repeal of 16 VAC 25-80, Access to Employee Exposure and Medical Records and the adoption of the federal version, 29 CFR 1910.1020, to replace the Virginia unique regulation.

Mr. Crisanti added that, if the Attorney General's office determines that the Virginia unique standard, 16 VAC 25-80, is not as effective as the existing federal standard, 29 CFR 1910.1020, then the regulation would not need to go through the full APA regulatory process and could go through the fast-track process.

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

Items of Interest from the Department of Labor And Industry

Mr. Withrow informed the Board that he had forgotten to mention the following things: 1) once the Board adopts the final regulation for Medical Services and First Aid, the regulation goes through the executive branch review process again with the Department of Planning and Budget, the Secretary of Commerce and Trade and the Governor's office before it is published as final; 2) the Reverse Signal Operations final regulation, adopted in November 2008, has no effective date yet because it is still under executive branch regulatory review; and 3) update on the regulation considered for Confined Space in Agriculture -- the Board recommended delaying regulatory action because initial indications were that the technology for manure pits in the dairy industry had changed. The Department agreed to work with interested parties, such as the Virginia Farm Bureau and a National Resources Conservation Service, to provide a survey and develop some training materials and conduct outreach meetings. The survey is expected to be distributed in early May. There have already been outreach meetings in main dairy farms and manure processing facilities.

Mr. Crisanti had two announcements: 1) update on proposed 16 VAC 25-50, Boiler and Pressure Vessels Rules and Regulations – review by the Department of Planning and Budget was completed on January 12, 2009, then it was sent to the Secretary of Trade and Commerce where it is currently undergoing review; 2) today, Dr. Diane Helentjaris is representing the Commissioner of Health in place of Dr. Carl Armstrong, who recently passed away. He noted that prior to his most recent tenure on the Board, Dr. Armstrong had worked with the Board for many years prior to Dr. Wasti, who retired early last year. He added that Dr. Armstrong will be greatly missed by many.

Adjournment

There being no further business, the motion to adjourn the meeting was properly seconded and unanimously approved by voice vote. The meeting adjourned at 11:47 a.m.