

**FINAL
SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
THURSDAY, OCTOBER 18, 2007**

A Regular meeting of the Safety and Health Codes Board was held in Court Room A, State Corporation Commission, 1300 East Main Street, Richmond, Virginia

BOARD MEMBERS PRESENT: Mr. Roger Burkhart, Chairman
Mr. Louis Cernak
Mr. M. Frank Hartsoe
Mr. Daryl Hines
Ms. Anna Jolly
Mr. Satish Korpe
Dr. James Mundy
Ms. Milagro Rodriquez, Vice Chair
Mr. Chuck Stiff, Secretary
Mr. Danny Sutton
Dr. Khizar Wasti

BOARD MEMBERS ABSENT: Ms. Juanita Garcia
Mr. Rick Linker
Mr. Linwood Saunders

STAFF PRESENT: Mr. Ray Davenport, Labor and Industry,
Commissioner
Mr. Bill Burge, Assistant Commissioner
Mr. Jay Withrow, Office of Legal Support Director
Mr. Ronald Graham, Health Compliance Director
Mr. John Crisanti, Office of Planning and
Evaluation Manager
Ms. Jennifer Wester, Director, Cooperative
Programs
Ms. Reba O'Connor, Regulatory Coordinator
Ms. Regina Cobb, Agency Management Analyst SR
Ms. Julie Jones, Executive Secretary

OTHERS PRESENT: Mrs. Anne Burkhart
Ms. Donna Chandler, Court Reporter, Chandler &
Halasz

ORDERING OF AGENDA

Immediately following the Public Hearing, Chairman Roger Burkhart called the Board meeting to order at 10:05 a.m. He then asked for a motion from the Board to approve the Agenda. Mr. Chuck Stiff made the motion to approve the Agenda, as submitted, and Dr. James Mundy and Ms. Milly Rodriguez seconded the motion. The motion was carried by unanimous voice vote.

APPROVAL OF MINUTES

Mr. Burkhart asked for a motion from the Board to approve the Minutes of the June 26, 2007 meeting. Ms. Rodriguez made the motion and Mr. Stiff seconded it. The motion was carried unanimously by voice vote.

ELECTION OF OFFICERS

Chairman Burkhart asked for nominations for the position of Chairman of the Board and explained that under normal procedure the vice chairman would replace the chairman. Dr. Mundy made the motion for the current Vice Chair, Ms. Milagro "Milly" Rodriguez, to succeed Mr. Burkhart as Board Chair. Mr. Burkhart is a management representative and Ms. Rodriguez is a labor representative. Mr. Lou Cernak seconded the motion which was approved by voice vote. Next, Mr. Cernak made the motion for Mr. Chuck Stiff, a management representative, who was currently serving as Secretary to be elected Vice Chair. Ms. Anna Jolly seconded the motion. Both election results were approved by voice vote.

PUBLIC COMMENTS

In her first order of business, Chair Rodriguez opened the floor to comments from the public, however, no one had any comments.

OLD BUSINESS

There was no old business.

NEW BUSINESS

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Adopt Regulations Applicable to Tree Trimming Operations

Mr. Jay Withrow, Director of the Office of Legal Support for the Department of Labor and Industry, began by explaining what a NOIRA is and gave a brief overview of the regulatory process. Next, on behalf of the Virginia Occupational Safety and Health (VOSH) Program, he requested that the Safety and Health Codes Board authorize the Depart to initiate the regulatory process to adopt regulations applicable to Tree Trimming Operations by filing a Notice of Intended Regulatory Action (NOIRA) pursuant to the Virginia Administrative Process Act (§2.2-4007).

Mr. Withrow informed the Board that VOSH already has a logging standard. He listed general areas from ANSI Z133.1-2006 that the Department may want to include in a proposed tree trimming operations regulation, such as: general safety requirements; electrical hazards; safe use of vehicles and mobile equipment used in arboriculture; portable power hand tools; hand tools and ladders; work procedures; and training. Also, Mr. Withrow mentioned looking at the tree trimming operations regulations of other state-plan states as well.

Mr. Withrow referred to a bulleted list of issues with the ANSI standard, appearing on page two of the briefing package. He stated that one issue is with documents containing “should” or “may” language and added that VOSH could not enforce such language but instead VOSH would have to add prescriptive language, such as “shall” or “will”.

Mr. Withrow reviewed the authority of the Board and the VOSH program to promulgate a tree trimming regulation. He stated that VOSH currently applies the Logging Standard, §1910.266, to arborist/tree trimming operations any time a tree is “felled” or cut down. He continued by stating that the Logging Standard does not apply to tree trimming activities where the tree is not felled or cut down, so there is no specific regulation to address hazards associated with just trimming trees. Mr. Withrow stated also that the Logging Standard does not apply to people who trim trees around high voltage lines.

He informed the Board that, in instances where the Logging Standard does not apply, VOSH has had to use regulations of general application to address some hazards (e.g., noise exposure; personal protective equipment; eye and face protection; head and foot protection; medical services and first aid; and vehicle-mounted elevating and rotating work platforms; etc.). Mr. Withrow stated that VOSH procedures and court case law allow the VOSH Program to issue a “general duty” violation (Va. Code §40.1-51.1(a)) and base it on a national consensus standard addressing tree trimming hazards, since the “general duty” statute does not address the issue of hazards associated with tree trimming operations.

Mr. Withrow stated that problems with the use of the general duty clause include the inability to use it to enforce any consensus standard provisions which use “should” or “may” language, and the inability to cite other-than-serious violations.

Mr. Withrow informed the Board that the arborist industry has complained about the Logging Standard being applied to their industry because their work and the hazards they face are fundamentally different from hazards faced by loggers. He added that the arborist industry is interested in having its own regulation.

Mr. Withrow then called the Board’s attention to non-logging tree-related fatality statistics which showed the percentage of VOSH fatalities that were tree fatalities. He stated that from 1993 through 2007, there were a total of 702 VOSH fatalities, with 46 (or 7%) of those fatalities being tree trimming fatalities.

He explained that the purpose of the proposed change is to reduce or eliminate employee injuries and fatalities by considering for adoption a comprehensive regulation to address non-logging, arborist/tree trimming and cutting operations on residential and commercial work sites.

With respect to impact, Mr. Withrow stated that employers with employees in the affected industry would have to familiarize themselves with the requirements of a new regulation and train employees accordingly. Employers and employees should benefit from increased safety protections provided by a comprehensive regulation, and by reductions in injuries and fatalities associated with current unsafe tree trimming practices. He stated that no significant impact is anticipated on the Department.

In conclusion, Mr. Withrow recommended that, on behalf of the staff of the Department of Labor and Industry, the Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to adopt regulations applicable to Tree Trimming Operations.

Ms. Anna Jolly motioned to accept the Department's recommendation. Mr. Frank Hartsoe seconded the motion which was approved by unanimous voice vote.

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Adopt the Confined Space Standard for Agriculture

On behalf of the Virginia Occupational Safety and Health (VOSH) Program, Mr. Withrow requested that the Safety and Health Codes Board authorize the Department to initiate the regulatory process to adopt the Confined Space Standard for Agriculture by filing a Notice of Intended Regulatory Action (NOIRA) pursuant to the Virginia Administrative Process Act (§2.2-4007).

Mr. Withrow explained that the VOSH Program seeks to adopt a Confined Space Standard for Agriculture which would require agricultural employers to provide protections for employees prior to their entry into a confined space. Next, he listed several protective measures that could be included in the proposed regulation.

He stated that the VOSH Program is aware of similar regulations in other states, for example, California, Oregon, Utah and Washington. Mr. Withrow informed the Board that there is currently no state law or regulation governing safety requirements for work in confined spaces in agriculture, although employees and employers in essentially every other industry in the Commonwealth are covered by confined space regulations.

Mr. Withrow informed the Board that since 1977, VOSH has investigated five fatal accidents involving confined spaces in agriculture. He stated that in the absence of a regulation to cover a hazard in a specific industry, VOSH's only available enforcement tool is the use of the "general duty clause" (Va. Code §40.1-51.1.A), which does not directly address the issue of confined space hazards in agriculture. He also reiterated the problems with using the "general duty clause".

He explained that the purpose of the proposal is to reduce or eliminate injuries, illnesses and fatal accidents associated with confined space hazards in agriculture, and to provide agricultural employees and employers with protective measures to use before and during entry into agricultural confined spaces to prevent entrants from being exposed to toxic or low oxygen atmospheres, hazardous chemicals and engulfment hazards.

With respect to impact, Mr. Withrow stated that employers would have to familiarize themselves with the requirements of any proposed confined space in agriculture regulation and employees would have to be trained on the requirements. He added that the Department would have to designate and train personnel on the proposed standard's requirements.

In conclusion, Mr. Withrow recommended that, on behalf of the staff of the Department of Labor and Industry, the Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to adopt a Confined Space Standard for Agriculture.

Mr. Withrow explained that federal OSHA does not have a specific agriculture standard for confined space partly because of an appropriations rider on the OSHA budget which addresses how OSHA can cite and cannot cite small farms (farms with ten or fewer employees). He continued by stating that Congress, as well as Virginia, has traditionally protected small farmers from overly burdensome regulation.

Mr. Withrow added that when dealing with agriculture, VOSH would first provide some kind of an outreach effort, such as, making new training materials available and working with the Virginia Farm Bureau and agriculture services workers.

Mr. Stiff motioned to accept the Department's recommendation. Mr. Satish Korpe seconded the motion which was approved by unanimous voice vote.

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the Administrative Regulations Manual

On behalf of the Virginia Occupational Safety and Health (VOSH) Program, Mr. Withrow requested that the Safety and Health Codes Board authorize the Department to initiate the regulatory process to amend the Administrative Regulations Manual (ARM), by adding a new section to establish procedures for the Commissioner or his appointed representatives under §40.1-6(4) and §40.1-10, by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act (§2.2-4007).

Mr. Withrow began summarizing the intended regulatory action by stating that the VOSH Program seeks the amendment of the VOSH ARM to establish procedures for the Commissioner or his appointed representatives under 40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10. He called to the Board's attention the Commissioner's limited statutory powers that give him authority when conducting an investigation.

Next, Mr. Withrow mentioned the proposed changes that would address a number of issues, e.g., specify the wording of the oath to be administered and the manner in which it would be administered; explain the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and have the authority to examine witnesses in accordance with the procedures; specify that testimony preserved under the regulation would be recorded by a court reporter; specify the level of confidentiality that would attach to any testimony preserved under the statute; establish a procedure for the Commissioner or his authorized representatives to follow in the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code §40.1-6(4); and establish a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth's Attorney for prosecution of the individual involved.

Mr. Withrow stated that the purpose of the proposal is to provide VOSH personnel with procedures on how to exercise the Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, in instances where witnesses/employees/supervisors refuse requests for interviews or refuse to answer specific questions posed by a VOSH inspector. He explained that refusals or delays in obtaining witness statements immediately is critical because the Virginia Code requires the Department to decide within six months whether to issue citations for violations resulting from an inspection.

With respect to impact, Mr. Withrow explained that employers would have to make employees available for private interviews and employees would have to provide testimony; and the Department would have to designate and train personnel on the procedures implementing the statutory requirements in Va. Code §§40.1-(4) and 40.1-10.

In conclusion, Mr. Withrow recommended that, on behalf of the staff of the Department of Labor and Industry, the Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to establish procedures in the VOSH Administrative Regulations Manual for the Commissioner or his appointed representatives under §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10.

Mr. Hartsoe motioned to accept the Department's recommendation. Ms. Jolly seconded the motion which was approved by unanimous voice vote.

Periodic Review of Regulations

Ms. Reba O'Connor, Regulatory Coordinator for the Department of Labor and Industry, began by explaining that Executive Order 36(06), "Development and Review of Regulations Proposed by State Agencies," requires periodic review or re-evaluation of existing regulations and the regulatory process to promulgate new regulations or amend

current regulations. She described the periodic review process and informed the Board that all regulations promulgated by the Board are included in this review process at least once every four years.

She stated that one regulation, 16 VAC 25-50, Boiler and Pressure Vessel Rules and Regulations, has been identified for review in 2007, and that a notice of periodic review will be published in the Virginia Register. She added that the notice will request public comment for a period of 21 days.

Ms. O'Connor explained that Department staff will review this regulation and prepare the reports with recommendations to be presented for approval at the next board meeting. Ms. O'Connor informed the Board that it can amend, repeal or retain the regulation in question. In conclusion, Ms. O'Connor requested Board approval so that the Department can proceed with this required periodic review.

Items of Interest from the Department of Labor and Industry

There were no items of interest from the Department.

Items of Interest from Members of the Board

Mr. Chuck Stiff shared with the Board and the Department information about a public sector/private sector partnership training course he attended entitled “Critical Incident Protocol” at the Richmond Biotech Park. He informed the Board that the Training and Education Division of the U.S. Department of Homeland Security in coordination with the School of Criminal Justice for Michigan State University offered the course to cities, counties, regions and communities throughout the U.S. He explained that the goal of the program is to provide assistance and guidance to communities in order to build a public agency and business partnership for joint critical incident management incorporating an all-hazards approach. He added that the program is funded by the Training and Education Division and is free to communities and to businesses. For more information, Mr. Stiff said to contact: Brit Weber, Program Director; (517) 355-2227; email address: WeberBrit@MSU.edu.

Next, Dr. Khizar Wasti announced his upcoming retirement on December 31st from the Virginia Department of Health. Dr. Wasti, Director of the Division of Health Hazards Control for the Virginia Department of Health, has served for seven years on the Board as representative for Dr. Robert B. Stroube, Commissioner of the Virginia Department of Health. Dr. Wasti informed the Board that Commissioner Stroube would also retire at the same time. Ms. Rodriguez congratulated Dr. Wasti and thanked him for his service on the Board.

Mr. Korpe requested the Board to make a motion to recognize Dr. Wasti’s long-term service to the Board and to make it an official letter. Mr. Cernak seconded this motion which the Board approved by unanimous voice vote.

Adjournment

There being no further business to come before the Board, Chairman Rodriguez requested a motion for adjournment. Mr. Burkhart made the motion which was seconded by Mr. Stiff. The meeting was adjourned at 11:07 a.m.

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OTHERS PRESENT: Mrs. Anne Burkhart
Ms. Donna Chandler, Court Reporter, Chandler &
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The Public Hearing was called to order at 10 a.m. by Chair Roger Burkhart to receive public comments on Reverse Signal Operation Safety Procedures: For General Industry Part 1910: 16 VAC 25-96, Proposed Regulation to Amend Reverse Signal Operation Safety Procedures dealing with Vehicular Equipment, Motor Vehicles, Material Handling

Equipment and Motor Vehicle Equipment in General Industry, and the related repeal of 16 VAC 25-90-1910.269 (p)(1)(ii) and For the Construction Industry Part 1926: 16 VAC 25-97, Proposed Regulation to Establish Reverse Signal Operation Safety Requirements for Vehicles, Machinery and Equipment for the Construction Industry; and the related repeal of 16 VAC 25-175-1926.601(b)(4), 16 VAC 25-175-1926.602(a)(9)(ii), and 16 VAC 25-175-1926.952(a)(3).

The only speaker to address the Board on this issue was Jay Withrow, Director of the Office of Legal Support with the Department of Labor and Industry. Mr. Withrow provided the Board with a spreadsheet which contained updated data concerning the number of Reverse Operation Fatalities in Virginia from 2006 through 2007. He reminded the Board that when it passed the proposed regulation, there was data in the briefing package that covered the number of reverse back-up fatalities in Virginia Construction and General Industry from 1992 through 2005. He noted that since 2005, there have been 6 additional Reverse Operation fatalities in Virginia.

Since there were no other speakers, Chairman Burkhart adjourned the Public Hearing at 10:04 a.m.