

FINAL

**SAFETY AND HEALTH CODES BOARD
PUBLIC HEARING AND MEETING MINUTES
THURSDAY, November 8, 2018**

BOARD MEMBERS PRESENT: Mr. Jerome Brooks
Mr. Lou Cernak, Jr.
Dr. Dwight Flammia for Caroline “Carrie” Holsinger
Mr. John Fulton
Mr. Phil Glaize
Ms. Tina Hoover
Ms. Anna Jolly
Mr. Courtney Malveaux
Mr. David Martinez, Newly Elected Chair
Mr. Travis Parsons, Outgoing Chair
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez
Mr. Chuck Stiff, Newly Elected Vice Chair

BOARD MEMBERS ABSENT: Mr. Tommy Thurston

STAFF PRESENT: Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry
Mr. Jay Withrow, Director, Legal Support, VPP, ORA, OPP and OWP
Mr. Ron Graham, Director, VOSH Health Compliance
Ms. Jennifer Rose, Director, VOSH Safety Compliance
Ms. Diane Duell, Director, Legal Services
Ms. Regina Cobb, Senior Management Analyst
Ms. Marta Fernandes, Regional Safety Director
Ms. Holly Trice, Senior Staff Attorney
Mr. Rob Feild, Senior Staff Attorney
Mr. Harvey Trice, Lead Safety and Health Compliance Officer

OTHERS PRESENT: Ms. Beverly Crandell, Safety Program Coordinator, Tidewater
Community College
Joshua Laws, Esq., Assistant Attorney General, OAG
Mr. Anthony Borers, Colonial Webb
Mr. Joe Wesley, CSUSA
Mr. Sam Revenson, Associated Risk Management
Ms. Lisa Wright, Court Reporter, Chandler & Halasz, Stenographic Court
Reporters

ORDERING OF AGENDA

Chair Travis Parsons called the Public meeting to order at 10:00 a.m. A quorum was present. Mr. Parsons, then, welcomed the two new Board members: Ms. Tina Hoover, Employee Representative for Agriculture, and Mr. Phil Glaize, Employer Representative for Agriculture. He added that Dwight Flammia would be filling in for Dr. Holsinger today.

The Chair then acknowledged the pending retirement of Regina Cobb. On behalf of the Board, Mr. Courtney Malveaux made a tribute in memory of the late John Crisanti, Manager of the Office of Policy and Planning and staff support for the Board. Mr. Malveaux presented Commissioner Davenport with a plaque in Mr. Crisanti's memory. In accepting the plaque, Commissioner Davenport thanked the Board. He stated that Mr. Crisanti was a very special member of the Department and he would be sorely missed. Chair Parsons asked everyone to stand for a moment of silence for Mr. Crisanti.

APPROVAL OF AGENDA

Mr. Parsons requested a motion to approve the Agenda. A motion to accept the Agenda was made, properly seconded, and carried by unanimous voice vote.

APPROVAL OF MINUTES

Mr. Parsons asked the Board for a motion to approve the Minutes from the June 14, 2018 Board meeting. A motion was made and properly seconded. The Minutes were approved by unanimous voice vote.

ELECTION OF OFFICERS

Mr. Parsons informed the Board that it was time to elect a Chair and Vice Chair for a term of one year. He mentioned that traditionally, the Board alternates between representatives of labor and management for the Chair and Vice Chair positions with allowances for the representatives for the general public and the insurance industry. He added that the newly elected chair is expected to select a secretary; however, that does not have to take place at this meeting.

Mr. Parsons asked for nominations for Board Chair. Mr. Parsons nominated Mr. David Martinez as Chair. There were no other nominations. The nomination was properly seconded. By voice vote, the Board unanimously elected Mr. Martinez as Board Chair.

Next, Chair Parsons asked for nominations for Board Vice Chair. Mr. Parsons then nominated Mr. Chuck Stiff for the position of Vice Chair. There were no other nominations. The nomination was properly seconded. By voice vote, the Board unanimously elected Mr. Stiff.

PUBLIC COMMENTS

There were no comments from the public.

OLD BUSINESS

There was no old business.

NEW BUSINESS

Revising the Beryllium Standard for General Industry, §1910.1024; Direct Final Rule (DFR); and Confirmation of Effective Date

Mr. Ron Graham, Director of Occupational Health Compliance for the Department, requested that the Board consider for adoption federal OSHA's standard entitled, "Revising the Beryllium Standard for General Industry, §1910.1024, Direct Final Rule (DFR)", as published in 83 FR 19936 on May 7, 2018, and the Confirmation of the DFR's Effective Date, as published in 83 FR 31045 on July 3, 2018.

Mr. Graham reminded the Board of the Board's adoption of federal OSHA's Beryllium Standards for General Industry, Construction as well as Shipyards for state and local government employers. He added that this particular briefing package only pertains to the General Industry standard.

He stated that on May 7, 2018, OSHA published a direct final rule that amended the text of the Beryllium standard for General Industry. He informed the Board that this particular revision deals with beryllium compounds that contain less than 0.1 percent beryllium, or trace amounts of beryllium. Mr. Graham explained that this revision is part of a settlement agreement based on a challenge to OSHA concerning the standard. He explained that there were three definitions that were either revised or added to the standard: "beryllium work area", "emergency", and "clarification for dermal and beryllium contamination".

He stated that, with this action, OSHA has clarified its intent with respect to provisions for disposal and recycling and with respect to provisions that OSHA intends to apply only where skin can be exposed to materials containing at least 0.1 percent by weight.

With the definition of "emergency", Mr. Graham explained that this change clarified circumstances under which the provisions associated with emergencies should apply, including the requirements that employers provide and ensure employee use of respirators and that employers provide medical surveillance to employees exposed in an emergency. He noted that this definition incorporates situations where there might be equipment failure or ruptured containers or where something breaks down that could result in an uncontrolled or unintended release of beryllium.

Mr. Graham discussed a new definition for "dermal contact," which clarifies that the requirements related to dermal contact in the written exposure control plan, washing facilities, medical examinations, and training provisions only apply where contact may occur with materials containing at least 0.1 percent beryllium by weight.

He continued by explaining that, with the revised definition of "beryllium contamination", OSHA's intent that the standard's requirements should not apply to areas where there are no processes or operations involving materials containing at least 0.1% beryllium by weight.

Mr. Graham informed the Board that OSHA published a Direct Final Rule (DFR) on Beryllium in the Federal Register with a statement that the rule will go into effect unless significant adverse comment is received within a specified period of time. OSHA also published an identical concurrent Notice of Preliminary Rulemaking (NPRM). Since OSHA determined that no significant adverse comment was received in response to the DFR, the rule went into effect nationally on July 3, 2018.

Mr. Graham stated that this action should not have any impact on employers, employees, or the Department. He reiterated that this standard clarifies OSHA's intent concerning coverage of the standard and how it applies to trace amounts of beryllium materials.

Additionally, OSHA's cost and savings analyses determined that it would be a net savings for employers, primarily in the aluminum production and coal fired utilities. OSHA's previous analysis determined that implementation of the standard was technologically and economically feasible.

In conclusion, Mr. Graham recommended that the Board adopt the Direct Final Rule on Revising the Beryllium Standard for General Industry, §1910.1024, and the Confirmation of the Effective date of the Direct Final Rule, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2019.

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

Occupational Exposure to Beryllium in General Industry, §1910.1024(o)(2); Final Rule; Limited Extension of Select Compliance Dates

Mr. Graham requested that the Board consider for adoption federal OSHA's Occupational Exposure to Beryllium in General Industry, §1910.1024 (o)(2); Final Rule; Limited Extension of Select Compliance Dates, as published in 83 FR 39351 on August 9, 2018.

He then reminded the Board that the Beryllium Standard was challenged in court, specifically the portions dealing with trace amounts of beryllium. With this amendment, federal OSHA revised §1910.1024(o)(2) of the Beryllium Standard for General Industry to extend the compliance deadline to December 12, 2018 nationally for the certain ancillary provisions to allow time for OSHA time to draft and publish the Notice of Preliminary Rulemaking (NPRM), and to give employers sufficient time to comply.

Paragraphs of §1910.1024 that were affected include: (e), beryllium work areas and regulated areas; (f), methods of compliance; (h), personal protective clothing and equipment; (i), hygiene areas and practices; (j), housekeeping; (m), communication of hazards; and (n), recordkeeping. He also noted the ancillary provisions that are not affected by this amendment, such as, paragraph (c), permissible exposure limits (PELs) for 1910.1024, 1915.1024, and 1926.1124; (d), exposure assessment; (g), respiratory protection; (k), medical surveillance; and (l), medical removal. Paragraphs (c), (d), (g), (k), and (l) became effective September 15, 2018 in Virginia. Requirements for change rooms and showers were unchanged and remain effective on March 11, 2019, and March 10, 2020, respectively.

Mr. Graham informed the Board that this amendment should not have any significant impact on employers, employees, or the Department.

With respect to benefits, the amendment clarifies the standard's intent which should make it easier for employers to comply. It will provide some cost savings to employers who will have additional time to comply with the affected ancillary provisions. OSHA had already determined that it was technologically and economically feasible to enforce the standard.

When asked about which dates are being extended to December 12, 2018 or February 15, 2019, Mr. Graham responded that Federal OSHA extended the dates to December 12, 2018, and the Department of Labor and Industry is requesting that the Board adopt the extension to February 15, 2019 for the provisions affected. Mr. Graham clarified that paragraph (o) of §1910.1024 provides the compliance dates for the standard.

In conclusion, Mr. Graham recommended that the Board adopt the Occupational Exposure to Beryllium in General Industry, §1910.1024 (o)(2); Final Rule; Limited Extension of Select Compliance Dates, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2019.

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

Amendment to the Cotton Dust Standard for General Industry, §1910.1043, CFR Correction

Mr. Ron Graham, Director of Occupational Health Compliance for the Department, requested the Board consider for adoption federal OSHA's revision to the existing Final Rule for the Standard for Cotton Dust in General Industry, as published in 83 FR 30035 on June 27, 2018.

Mr. Graham began by explaining that OSHA streamlined this standard by removing subparagraphs (i)(1)(i)(A) through (F) of §1910.1043, which detailed the components for the employer's education and training program for employees exposed to cotton dust. Provisions removed included: acute and long term health hazards associated with cotton dust; names and descriptions of jobs and processes which could result in exposure to cotton dust at or above the PEL; purpose, proper use and limitations of respirators as required by §1910.1043(f); purpose for and a description of the medical surveillance program, required by §1910.1043(h); and other information in the standard and its appendices to aid exposed employees in understanding the hazards of cotton dust exposure.

Mr. Graham stated that, for the sake of brevity, OSHA's rationale for eliminating those specific requirements is that the requirements are covered by other provisions of the standard.

With respect to impact, Mr. Graham informed the Board that the adoption of this revision would have no impact on employers, employees, or the Department.

On behalf of the Department, Mr. Graham recommended that the Board adopt the Amendment to the Cotton Dust Standard for General Industry, §1910.1043, CFR Correction, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2019.

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

Amendment to the Flammable Liquids Standard for the General Industry, §1910.106, CFR Correction

Mr. Graham requested that the Board consider for adoption federal OSHA's Amendment to the existing Final Rule for the Flammable Liquids Standard for the General Industry, as published in 83 FR 30539 on June 29, 2018.

Mr. Graham noted that this is a correction to what was published in the Code of Federal Regulations. He stated that this amendment essentially deals with the storage of flammable liquids. The standard has certain requirements concerning what types of containers and the volume of flammable and combustible liquids that can be stored in containers.

He explained that the text of this standard was revised and the word “combustible” was eliminated. The purpose of this revision is to more accurately characterize “flammable” or “combustible” storage containers of a certain capacity. He further explained that the difference between flammable and combustible liquid is that flammable liquids have a flash point of 100 degrees Fahrenheit. He added that flash points below 100 degrees Fahrenheit are more dangerous than combustible liquids that have a flash point at or above 100 degrees Fahrenheit. He stated that flammable liquids can catch fire a lot quicker and burn easier at normal working temperatures, whereas combustible liquids require higher than normal temperatures to ignite.

Ms. Anna Jolly noted that OSHA had pretty much stopped using the old term “combustible.” Mr. Graham agreed, but added that the term is still in use in some standards, but not in the flammable standards.

Mr. Graham stated that no impact on employers, employees or the Department is anticipated with the adoption of this amendment. He stated that the standard is economically and technologically feasible, and there should be no additional costs or cost savings for employers or employees or the Department as a result of adopting this amendment.

He concluded by recommending, on behalf of the Department, that the Board adopt the amendment to the Flammable Liquids Standard for the General Industry, §1910.106 – CFR Correction, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2019.

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

Report on Periodic Review of Certain Existing Regulations

In the absence of Ms. Holly Raney, Regulatory Coordinator for the Department of Labor and Industry, Ms. Regina Cobb, Senior Management Analyst and staff support for the Board, informed the Board that the Administrative Process Act, §2.2-4007.1 D of the *Code of Virginia* requires that regulations of executive branch agencies be reviewed every four years to determine whether they should be continued without change or amended or even repealed, as consistent with the stated objections of applicable law. Additionally, §2.2-4017 of the *Code of Virginia* authorizes the Governor to mandate through executive order a procedure for the periodic review of these regulations – Executive Order 17 (2014), “Development and Review of State Agency Regulations”.

With respect to the current status and process of this regulation, Ms. Cobb reminded the Board that at the June 14, 2018, Board meeting the Board authorized the Department to begin a review process for 16VAC 25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry. She stated that the review process began on July 23, 2018, with the publication of a Notice of Periodic Review in the *Virginia Register and* certified by the Office of the Attorney General. This was followed by a 21-day public comment period from July 23, 2018 through August 17, 2018. The Department received no comments during this public comment period.

She stated that the Department then reviewed the regulation, in accordance with Virginia Code §2.2-4007.1 D and E for 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 the degree to which technology, economic condition, or other factors have changed in the area affected by the regulation.

She noted that the Board adopted 16VAC25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry, in 2004 as a Virginia unique regulation. She explained that, while the regulation closely mirrors the federal OSHA requirements, this regulation has three material differences: First, Virginia requires fall protection at heights of 10 or more feet above a lower level; whereas, federal OSHA requires fall protection at 15 feet above a lower level. Second, Virginia provides connectors the option of utilizing personal fall arrest systems when connecting steel which is lifted in the air; federal OSHA does not. Third, Virginia prohibits the use of controlled decking zones (CDZ), federal OSHA does not prohibit the use of CDZ.

Ms. Cobb reported that this regulation is not overly complex, is clearly written, has no negative impact on the regulated community, and does not overlap, duplicate, or conflict with federal or state law or regulation.

In conclusions, Ms. Cobb recommended, on behalf of the Department, that 16VAC25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry, be retained “as is” with no changes.

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. Jay Withrow, Director of the Division of Legal Support, said he had several different items to address. He thanked the Board for recognizing Ms. Cobb’s service to the Agency and he thanked her for her service as well.

Second, Mr. Withrow assured the Board that, with the loss of John Crisanti and the retirement of Ms. Cobb, the Department will continue to provide full staffing for the Board. He added that Ms. Holly Raney, who was part of John’s staff in helping the Board, currently is on medical leave and is expected back after Thanksgiving. He informed the Board that he has designated two senior staff attorneys, Rob Feild and Holly Trice, in the short-term to help out because John’s position has not been filled yet.

Mr. Withrow also thanked the Board for recognizing John Crisanti for his service. Mr. Withrow added the following:

John took a great deal of pride in serving the Board over the years. It was very important to him. He had many battles with the Secretary of the Commonwealth’s office about getting members appointed and reappointed.

John was a man of many interests. He was a self-described “gear head”. He loved Dodge and Chrysler muscle cars of the ‘60s and ‘70s. He was a motorcycle enthusiast. He owned a Norton motorcycle and loved Japanese racing bikes.

One of the times I ever saw him most excited was when he got that Norton motorcycle which was in parts and he didn't have a truck. He asked me if I could help him move that over to his house. He painstakingly put it together and rode with his brother.

John was a very bright person and highly educated. He had a Master's Degree in Public Administration. While there were many times when I think he despised us attorneys, he sure could argue like one when he needed to. He had a rich variety of work experiences. Beside his work for the Department for over 30 years - he started in 1989 - he worked for the New York legislature as a policy and budget analyst overseeing budgets, including those for higher education that were in the billions of dollars.

In his younger days he and his brother worked on oil rigs in Texas and natural gas pipelines in Pennsylvania. I grew up in western Pennsylvania. John grew up in Buffalo. He was an upstate New Yorker. He was a dyed-in-the-wool New Yorker.

As some New Yorkers tend to be, he was direct; could be blunt at times. Tactfulness was not a strong point for him, but he had a great sense of humor. He thought outside of the box. He would be the first to tell you we did not always agree on things, but I always highly valued his ideas and input and the unique ways he would tackle issues. He will be missed.

Mr. Withrow updated the Board on the safety and health penalty regulation for state and local government employers and employees by informing them that the regulation became effective November 1, 2018. He added that there was a 30-day comment period during October. One comment was received, which the Department is still working through from a policy standpoint. He pointed out a detailed fact sheet that he left for everyone to review.

Next, Mr. Withrow shared the comment from the Assistant Director for Virginia Tech's Environmental Health and Safety. The Assistant Director said that Virginia Tech occupies 13 million square feet and has over 15,000 employees and 34,000 students. The main campus includes 213 buildings, 2,600 acres and an airport. Virginia Tech has 11 agricultural research and extension centers, facilities in more than five metropolitan areas, and employees in nearly every county of the state. Virginia Tech's Assistant Director's stated that it is imperative that violations not be applied to Virginia Tech as a singular entity when it comes to repeat violations. His concern was getting a very large penalty for repeat violations. He expressed concern that every violation eventually would become a repeat violation. This issue needs to be carefully evaluated and guidance provided to stakeholders on how this will be handled.

Mr. Withrow explained that the Department has a regional repeat policy, but there is no statewide repeat policy. He, then, invited anyone to provide suggestion or comments. He reminded the Board that the policy needs to be finalized by December 1. He described the roll out for this regulation: web page with background information and an enforcement directive to be issued December 1. There will be free consultation services in the public sector, regardless of the size of the entity.

Commissioner Davenport thanked the Board again for the presentation on John Crisanti's behalf. He said it was a very significant gesture. He too expressed that John would be missed. Commissioner Davenport added that, in regards to John being a New Yorker, "his disposition was unvarnished at times." He also congratulated Ms. Cobb on her retirement.

Commissioner Davenport also welcomed the new Board members and congratulated the members who had been reappointed to another four-year term: Mr. Cernak, Mr. Fulton, Mr. Martinez, Mr. Parsons and Mr. Thurston.

He thanked the Board members for their service and contributions to the safety and health of Virginia's citizenry.

Next, the Commissioner spoke about the recent VOSH safety and health conference held in Williamsburg. He stated that, in addition to Board members in attendance, there were more than 330 registered participants at the conference, which included 100 new attendees.

Commissioner Davenport updated the Board on the year-to-date VOSH fatality inspections by stating that there have been 30. He also mentioned that the Department continues to be short 12 unfunded compliance officer positions. The Department continues to make the administration and the General Assembly aware of the shortage.

He closed by thanking each Board member for their commitment to safety and health.

Items of Interest from Members of the Board

Mr. Stiff recommended that everyone look at the Department's fantastic website which is packed full of information with links – www.doli.virginia.gov

Mr. Parsons mentioned the buzz about two health issues: heat illness and noise. He referenced an organization called Public Citizen, and also distributed a fact sheet entitled, *Protecting Workers from Heat Stress in a Warming Climate*. He said that there is a lot of push for a federal standard on heat illness. He added that California, Washington and Minnesota have requirements for heat illness in their state programs.

He recommended that the Board consider moving forward with a regulation on heat illness because it's a serious issue. Mr. Parsons also provided some statistics that showed that about 32 to 33 people a year die because of heat-related illness across this country.

Mr. Parsons also made the Board aware of noise levels in construction. He stated that there's a national push to decrease noise construction from 90 to 85 decibels.

Mr. Withrow suggested that the Department could research the issue of heat illness and make a presentation to the Board next time about the states that have their own standards.

Meeting 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 11:22 a.m.