

**FINAL
SAFETY AND HEALTH CODES BOARD
PUBLIC HEARING AND MEETING MINUTES
THURSDAY, November 30, 2017**

BOARD MEMBERS PRESENT: Mr. Jerome Brooks
Mr. Lou Cernak, Jr.
Mr. John Fulton
Mr. Chris Gordon
Ms. Anna Jolly
Mr. David Martinez, Vice Chair
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez
Mr. Chuck Stiff
Mr. Tommy Thurston

BOARD MEMBERS ABSENT: Mr. Courtney Malveaux
Mr. Travis Parsons, 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. Ed Hilton, Director, Boiler Safety Compliance Management
Mr. Ron Graham, Director, VOSH Health Compliance
Ms. Diane Duell, Director, Legal Support
Mr. John Crisanti, Manager, Office of Policy and Planning
Ms. Regina Cobb, Senior Management Analyst
Ms. Deonna Hargrove, Richmond Regional Health Director
Mr. Dennis Edwards, Manager, Consultation Services

OTHERS PRESENT: Mr. Charles Stricker, VMLIP
Mr. Johnny Nugent, DHRM
Mr. Sam Revenson, Armbiz
Ms. Lisa Wright, Court Reporter, Chandler & Halasz, Stenographic Court
Reporters
Ms. Monica Vanney, DHRM/LCI

ORDERING OF AGENDA

In the absence of Board Chair Travis Parsons, Vice Chair, David Martinez, called the Public meeting to order at 10:0 a.m. A quorum was present.

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

APPROVAL OF MINUTES

Mr. Martinez asked the Board for a motion to approve the Minutes from the July 27, 2017 Board meeting and the October 26, 2017 Public Hearing. A motion was made and properly seconded. Both Minutes were approved by unanimous voice vote.

PUBLIC COMMENTS

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

OLD BUSINESS

Final Regulatory Action to Amend 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations

Mr. Ed Hilton, Director, Boiler Safety Compliance Management, began by requesting that the Board consider for adoption as a final regulation of the Board amendments to 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations, pursuant to §40.1-51.6 of the *Code of Virginia*.

He summarized the amendments as additional terms defined for improved clarity, which appear in 16VAC25-50-10, and updated editions of several "Forms" and "Documents Incorporated by Reference (DIBR).

He informed the Board that the purpose of the final regulatory action is to conform to the most current editions of the ASME, NBIC, and NFPA Safety and Inspection Codes.

He stated that there would be little impact on employers as a result of the ASME, NBIC, and NFPA code updates since companies that utilize these codes are already required to have and work to the current editions of these codes. As such, there is no financial burden for them to purchase the most recent editions of the codes. He informed the Board that a major change would be the requirement in the NBIC for signage and metering for CO₂ tank installations.

He stated that any impact on the Department would be minimal as the Department already has copies of, and follows, the most recent editions of the NBIC and ASME when performing reviews of manufacturers and repair shops.

He added that no comments were received during the July 27, 2017 through September 22, 2017 proposed stage public comment period.

Mr. Hilton, on behalf of the Boiler Safety Compliance Program, recommended that the Board adopt the amendments to 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations, as a final regulation of the Board, as authorized by §40.1-51.6 of the *Code of Virginia*.

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

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

Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP, requested that the Board consider for adoption, as a final regulation of the Board, language to amend 16VAC25-60, *et seq.*, Administrative Regulation for the VOSH Program, State and Local Government Penalties.

Next, he summarized the rulemaking process of this regulation.

Mr. Withrow then summarized the issues under consideration for amendment by stating that the final amendment establishes 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 added that, in 2016, the Virginia General Assembly passed and Governor McAuliffe signed into law legislation allowing the Board to authorize the Commissioner to issue penalties to state and local government employers.

Mr. Withrow then presented the Department's response to Public Comments received during the Public Comment period. The first commenter asked that the Board adopt and implement a penalty reduction system similar to the current program in place for application with private businesses, and allow public entities the same manner of consideration when determining final penalty assessments and recording of citations.

The Department responded that it generally agreed with the commenter's request. Mr. Withrow continued by stating that the Department intends to apply the same penalty calculation procedures to state and local government employers as it does to private sector employers, with the exception noted that penalties will not be issued for other-than-serious violations and "non-high gravity" serious violations as was represented to the General Assembly during the legislative process to amend Va. Code §40.1-2.1, whose purpose was to introduce a more serious deterrent effect to significantly reduce occupationally-related accidents, injuries and illnesses in the public sector.

The second commenter opposed this proposal because he feared that the only penalties that would be felt are with those small agencies and municipalities who can ill-afford pre-determined monetary penalties in lieu of penalties in the form of percentages relative to a portion of a select budget of the violator. He also expressed concerns about a culture being created whereby specific violations are ignored in favor of those identified. His final concern was that agency departments with large, geographically separated departments would be penalized for remote violations occurring outside their department and how might municipalities respond after large penalties are assessed. He asked if citizens are expected to pay more taxes because of a public manager's negligence. Lastly, he asked if there are laws that would prevent increased fees and taxes after such penalties.

On behalf of the Department, Mr. Withrow responded addressing each issue of concern. First, he stated that the Department's current penalty calculation procedures from private employers take into account the size of the employer, the history of violations and the good faith of the employer. State and local government employers, in certain situations, may be able to take advantage of some of these reductions.

Next, Mr. Withrow responded that the Code of Virginia contains statutory maximums for penalties that can be issued on a per violation basis (Va. Code §40.1-49.4), which serves to cap the amount of penalties that can be issued in any one case. He added that the Department also uses an informal settlement

conference process with state and local government employers that can be used to take into account the cost associated with correcting violation toward the final penalty levels agreed upon. Then, he stated that the Code of Virginia does not currently allow for a penalty calculation process that would assess penalties relative to a portion of a selected budget of the violator.

With respect to the Commenter's concern that certain violations will be ignored in favor of those identified, Mr. Withrow responded that there is nothing unique in the final regulation that would treat state and local government employers any differently.

With respect to geographically separated worksites, Mr. Withrow explained that the primary purpose of introducing penalties to state and local government employers is to encourage positive and proactive approaches to providing safe and healthy workplaces, particularly in instances where worksites are geographically separated.

The third and last commenter stated that he was in favor of this amendment because the amendment includes penalties on only infractions that have been repeated or are considered "high gravity". He stated that repeated offenses must be rectified and serious infractions dealt with in an appropriate manner. This commenter recommended the creation of a separate fund that these funds are place into so that the money can be appropriated to help disadvantaged workers who cannot afford the medical bills associated with a "high gravity" injury, resulting from the state or local government failing to adequately secure a safe working environment.

Mr. Withrow responded that a separate fund to help disadvantaged workers would have to be set up through a statutory change. He added that state and local government employees injured on the job are covered by workers' compensation which should serve to cover some of the medical bills associated with the injury.

With respect to impact on employers, Mr. Withrow mentioned that penalties from VOSH were increased, effective July 1, and that the Department tried to estimate the number of violations and penalties the Department would issue. He stated that penalties assessed can be reduced during settlement negotiations or vacated if the employer has a legitimate legal defense.

Mr. Withrow stated that the impact of this regulation on Virginia state and local government employees will be positive since there will be fewer fatalities, injuries and illnesses. He added that the injury rate is 79 percent higher for public sector workers than it is for private sector workers.

With respect to impact on the Department, Mr. Withrow indicated that no significant impact on agency operations is anticipated. He added that it is only anticipated that approximately 21 (corrected to 22) violations per year will carry a penalty for state and local government employers.

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

NEW BUSINESS

Occupational Exposure to Beryllium for the Shipyard Industry (Part 1915) and the Construction Industry (Part 1926); Delay of Compliance Date

Mr. Ron Graham, Director of Occupational Health Compliance for the Department, explained that the matter before the Board is a delay of the compliance date. He requested the Board to consider for adoption federal OSHA's indefinite delay of compliance dates for the Occupational Exposure to Beryllium for the Shipyard Industry, Part 1915, and the Construction Industry, Part 1926, as published in 82 FR 14439 on March 21, 2017. OSHA will not enforce the January 9, 2017 Shipyard and Construction standards, without further notice, while it determines whether to amend the January 9, 2017 rule.

He stated that, with the delay of the enforcement for Beryllium in these two industries, VOSH seeks re-adoption of the prior PELs of 0.002 mg/m³ (2 µg/m³) for the Shipyard sector listed in Table Z of §1915.1000, and for the Construction sector listed in Appendix A of §1926.55. The proposed effective date is February 15, 2018.

Mr. Graham reminded that Board of its adoption of federal OSHA's final Beryllium Standard for General Industry, Shipyard Industry and the Construction Industry on February 16, 2017. He informed the Board that the current proposal does not impact the General Industry sector – only the shipyard and construction sectors. He reviewed the history of the delays of the effective dates for this regulation, and stated that on March 21, 2017, federal OSHA finalized a delay of the effective date for Beryllium, but only for the Shipyard and Construction Industries.

He explained that OSHA wants to retain the original lower exposure permissible limits because Occupational Exposure to Beryllium can cause some significant health issues. He added that this places VOSH in a quandary because when the Board adopted the Beryllium Final Rule, the compliance dates for the permissible exposure limit and some of the requirements for the ancillary provisions of the proposed Beryllium regulation (82 FR 19182, June 27, 2017) were to commence on March 2018. He added that the Department does not know, at this point, when an actual decision will come about as a result of federal OSHA's proposal. Rather than the Department having a requirement that is more stringent than federal OSHA's, the Department decided to bring the decision, to consider delaying the actual compliance dates for the permissible exposure limits (as well as the changes to the ancillary provisions resulting from OSHA's proposed Beryllium regulation), to the Board.

He continued by stating that if, the Department does not remove these compliance dates, then we are in a situation similar to the one we were in with the silica standard where federal OSHA delayed it and the Department was unable to convene a Board meeting in order to go back and extend the compliance dates. He suggested that, to make sure that the employees, who are exposed to Beryllium in Shipyards and Construction, are adequately protected, the Department wants the Board to readopt the prior permissible exposure limits to make sure that there is an enforceable standard for exposed employees in the industry sectors.

With respect to impact from the adoption of the delay of the compliance date for the Shipyard and Construction industries, Mr. Graham stated that no impact is anticipated on employers, employees and the Department because there will be the old PEL for employers to comply with, and hopefully, that will at least provide employees the protection that they had before the new standard was published.

When asked if the Department is going back to the old standard, Mr. Graham responded that federal OSHA did not address what level they would be enforcing during this proposal period, and that he wants to make sure that the Department, at least, had something in place.

When asked if there is an impact on the Department for sticking with the lower limit, Mr. Withrow responded that when federal OSHA adopted the Beryllium standard with the lower limits it was to cover the General Industry primarily, before OSHA decided to expand the scope of the regulation to include Construction and Shipyards and the U.S. Department of Solicitor's Office was told that OSHA could do it that way. The construction and shipyard industries were caught off-guard and they have sued about expanding the scope of the regulation and the way it was done. He added that when the Board adopts these federal identical regulations, the Board does not have to go through the normal Administrative Process Act procedures and notice and comments in Virginia.

Mr. Withrow continued by stating that, if the Board wanted to keep the lower level and keep the regulation in effect, construction and public sector shipyard in Virginia, the Attorney General's office should be contacted about the Board's ability to leave this federal-identical standard in place without going through a notice and comment process. Mr. Withrow added that he can recall only one other time this has happened and it was a long time ago when the Hazard Communication standard was adopted only for the general industry. He stated that the Board at that time wanted to expand the standard to cover all employers, construction specifically, and decided to do so at the Board meeting. The Attorney General's office later informed them that they could not do that. He went on to inform the Board that, if they wanted to keep the construction and shipyard regulation, the full notice and comment process would be necessary.

He explained that what federal OSHA has done here is administratively stayed the construction and shipyard regulations by issuing a proposed regulation to mean indefinitely. Mr. Withrow informed the Board that the Board could adopt a stay for a year, and then re-visit it rather than making it indefinite. He stated that this should be run by the Attorney General's Office, if the Board wants to make the stay indefinite.

After much discussion, the Board prepared a motion which reads as follows: "The Board recommends that the Safety and Health Board adopt federal OSHA's delay of compliance date until August 1, 2018, for the Occupational Exposure to Beryllium for the Shipyards Industry, Part 1915, and the Construction Industry, Part 1926, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2018." The Board also moved to accept staff's recommendation that the Board adopt, during the delay of the enforcement for Beryllium in these two industries, the previous PELs of 0.002 mg/m³ (2 µg/m³) for the Shipyard sector listed in Table Z of §1915.1000, and for the Construction sector listed in Appendix A of §1926.55.

The Department also recommends that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person with respect to reconsideration or revision of this or any other regulation which has been adopted in accordance with the above-cited subsection A.4(c) of the Administrative Process Act.

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

Improve Tracking of Workplace Injuries and Illnesses, §1904.41; Final Rule – Delay of Electronic Filing

Mr. Withrow requested the Safety and Health Codes Board to consider for adoption federal OSHA's delay of the date of compliance for the revision of §1904.41 in the 2016 final rule to Improve Tracking of Workplace Injuries and Illnesses, as published on 24 November 2017 in 82 FR 55761.

The proposed effective date is 15 February 2018.

Mr. Withrow explained that this is the online reporting system for OSHA 300 data, which was adopted in May of 2016, for certain companies. He continued by stating that the plan was for federal OSHA to develop an online reporting system by February 2017, and employers were required to enter the data online no later than July 1, 2017. However, OSHA had trouble developing the IT system, which did not go online until August. OSHA is basically asking us for a delay because of how long it will take to get it published in the Virginia Register and the 30 days beyond that, since the delay cannot take effect until February 15, 2018. Virginia employers, instead of having to meet the December 15th deadline, will have a few extra months to do so.

Mr. Withrow closed by recommending that the Safety and Health Codes Board adopt the delay to the Final Rule to Improve Tracking of Workplace Injuries and Illnesses for §1904.41, with an effective date of 15 February 2018.

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

Cranes and Derricks in Construction: Operator Certification Extension of Deadline, §1926.1427 (k); Final Rule

Ms. Jennifer Rose, Director of Occupational Safety Compliance for the Department, requested the Safety and Health Codes Board to consider for adoption federal OSHA's one-year additional extension of its deadline for Operator Certification, §1926.1427(k), for the Final Rule on Cranes and Derricks in Construction, as published in 82 FR 79 51986 on November 9, 2017.

The proposed effective date is February 15, 2018.

Ms. Rose began by explaining that OSHA adopted this delay to further extend by one year the employer duty to ensure the competency of craned operators involved in construction work. She informed the Board that previously this duty was schedule to terminate for federal OSHA and VOSH on November 10, 2017, but now continues for an additional year until November 10, 2018. She added that OSHA is also further delaying the deadline for crane operator certification for one year from November 10, 2017, to November 10, 2018.

Ms. Rose stated that the 2010 federal Final Rule for Cranes and Derricks was adopted by the Board in 2011. She noted that several entities had informed OSHA that crane operators' certification was insufficient for determining whether an operator could operate their equipment safely on a construction site. She explained that the extension was necessary to give OSHA time to address the issues regarding crane operation raised after the publication of the crane standard.

She concluded by recommending that the Board adopt the Extension of Deadline for Operator Certification, §1926.1427(k) of the Final Rule for Cranes and Derricks in Construction, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of February 15, 2018.

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

Items of Interest from the Department of Labor and Industry

Commissioner Ray Davenport mentioned that, during the 2017 General Assembly session, Governor McAuliffe and the General Assembly provided \$650,000 of additional funding for 3 consultants and 3 VPP Coordinators, which became available on July 1st. He stated that those positions have been filled; however, due to a resignation in consultation, the Department will be recruiting to fill that vacancy in the future. He expressed concern that the Department was not successful in securing funding for the 12 unfunded CSHO on the compliance side of the House during the last General Assembly session.

Commissioner Davenport mentioned that OSHA commonly uses statistics to show one CSHO for every 59,000 workers and in Virginia, the ration is currently approximately one CSHO per 80,000 workers. He stated that, adding the 12 unfunded CSHOs would improve the ratio to one CSHO per 63,100 workers. He added that the Department continues to seek help in securing the needed funding for these positions.

Commissioner Davenport informed the Board that year-to-date VOSH has investigated 32 fatalities, which is a little behind last year's numbers at this time. He stated that the Department completed the calendar year of 2016 with more than a 35% increase in fatal workplace accidents over the previous two years.

He closed by congratulating the following recently re-appointed Board members: Anna Jolly, Courtney Malveaux, Kenny Richardson, and Milly Rodriguez. Commissioner Davenport expressed his sincere appreciation to all members of the Board for their commitment to safety and health.

Items of Interest from Members of the Board

Mr. Chuck Stiff moved to draft a letter to the Governor-elect and the Board members' delegates in the General Assembly in support of the additional funding for the Department to fill the 12 needed vacant CSHO positions. It was determined that Mr. Stiff and Ms. Rodriguez would draft the letter to be signed by the Board Chair.

Mr. Stiff reminded the Board that the Chair needs to appoint a Secretary.

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 11:50 a.m.