

FINAL
SAFETY AND HEALTH CODES BOARD
MINUTES
WEDNESDAY, NOVEMBER 5, 2003

The Safety and Health Codes Board ("Board") met on Wednesday, November 5, 2003 in Courtroom A of the State Corporation Commission, Tyler Building, 1300 East Main Street, Richmond, Virginia. The meeting was called to order at 10:05 a.m. by Vice Chairman Richard Schneider, who then introduced the two new members of the Board: Dr. James H. Mundy and Mr. Kenneth E. Rigmaiden.

BOARD MEMBERS PRESENT: Mr. Richard Schneider
Mr. Linwood Saunders
Mr. Frank Owens
Mr. Louis Cernak
Ms. Juanita Garcia
Dr. Khizar Wasti
Mr. Alvin Keels
Mr. James J. Golden
Dr. James H. Mundy
Mr. Kenneth Rigmaiden
Ms. Anna Jolly

BOARD MEMBERS ABSENT: Mr. Chuck Stiff
Mr. Rod Parker
Mr. Roger Burkhart

STAFF PRESENT: Mr. C. Ray Davenport, Commissioner of the
Department of Labor and Industry
Mr. Glenn Cox, Director of VOSH Programs
Mr. Ronald Graham, Health Compliance Director
Mr. Fred Barton, Director, Boiler Safety
Compliance
Mr. Jay Withrow, Director, Office of Legal Support
Mr. John Crisanti, Manager, Planning and
Evaluation
Ms. Nancy Jakubec, Director, Cooperative Services
Ms. Jennifer Cavedo, Regulatory Coordinator
Ms. Regina Cobb, Agency Management Analyst Sr.

OTHERS PRESENT: Ms. Beverly Crandell, Federal OSHA, Region III
Mr. D. R. "Cotton" Sizemore, State Building Trades

ORDERING OF AGENDA

As the first order of business, Vice Chairman Schneider asked for a motion from the Board to accept the proposed Agenda. Mr. Lou Cernak made the motion to accept the Agenda as submitted and Mr. Frank Owens seconded the motion. The motion was carried by voice vote.

APPROVAL OF MINUTES

Vice Chairman Schneider asked for a motion from the Board to approve the Minutes of June 13, 2003 and August 12, 2003. Mr. Linwood Saunders made the motion to accept the Minutes and Mr. Cernak seconded the motion. The motion was carried by voice vote.

ELECTION OF OFFICERS

Vice Chairman Schneider opened the floor for nominations for Board officers. Mr. Cernak nominated Mr. Linwood Saunders as Chairman. Mr. Schneider questioned the procedure taken at this meeting. He stated that usually the Vice Chairman becomes the next Chairman. At this point, Mr. Crisanti asked to address the Board and explained the nomination and voting procedures. Mr. Cernak added that the chairmanship traditionally alternated each year between a labor representative and a management representative. He continued by explaining that there had been a break in the usual procedure and that for the year now ending, representatives from management held both Chairman and Vice Chairman offices. Mr. Cernak opined that for the upcoming year the chairmanship should come from a labor representative because the previous chairman represented management. There were no other nominations for Chairman. A motion was made and seconded and Mr. Saunders was elected as Chairman by voice vote. Next, Chairman Saunders requested nominations for Vice Chairman. Mr. Cernak nominated the current Vice Chairman, Richard Schneider, to be the Vice Chairman again. A motion was made and Mr. Kenneth Rigmaiden seconded that motion. Mr. Richard Schneider was elected Board Vice Chairman by voice vote. Chairman Saunders then selected Ms. Juanita Garcia to serve as Secretary.

PUBLIC COMMENT

Chairman Saunders opened the floor to comments from the Public; however, no one had any comments.

OLD BUSINESS

There was no Old Business.

NEW BUSINESS

16 VAC 25-145-10 through 16 VAC 25-145-50, Safety Standards for Fall Protection in Steel Erection, Construction Industry; Final Adoption

On behalf of the VOSH Program, Mr. Glenn Cox, Director of VOSH Programs, requested the Board to consider 16 VAC 25-145-10 through 16 VAC 25-145-50, Safety Standards for Fall Protection in Steel Erection, Construction Industry, for adoption as a final regulatory standard of the Board.

Mr. Cox explained that adoption of this unique regulatory language, which is more restrictive than what is required by federal OSHA, would require fall protection for steel erection workers from heights starting at 10 feet above a lower level (ie., working surface). He stated that federal OSHA's requirement for fall protection in this situation starts at 15 feet. He stated that a singular exception to the 10-foot fall protection requirement would be for employees working as "connectors." A "connector" is defined in § 1926.751 as " . . . an employee who, working with hoisting equipment, is placing and connecting structural members and/or components."

Mr. Cox continued by explaining that the exception for connectors is based on VOSH's determination that during the interval when structural steel beams are being placed in position for initial assembly and joining, a greater hazard may exist if connectors are tied off rather than giving them freedom of movement to avoid accidental contact with the steel structural pieces as they are hoisted into position. He informed the Board that this final language for the standard would provide connectors with the option of not utilizing a personal fall arrest system only when steel is being placed into position, if they determine that a greater hazard of injury exists from the swinging steel.

He stated that, although controlled decking zones (CDZ) would remain prohibited, this final standard provides that access to leading edge decking operations are limited to only those employees engaged in leading edge work, as is provided in the 29 CFR 1926.760(c), federal OSHA's standard which was not adopted by the Board.

In addition, Mr. Cox explained that this standard, if adopted, would provide that the boundaries of a leading edge decking operation shall be designated and clearly marked. These requirements provide a means of fall protection by restricting access to a leading edge decking area where a fall distance of up to 30 feet could be present. The final standard would also require employees inside the boundaries of a leading edge decking area to be provided with fall protection (e.g., by utilizing a personal fall arrest system or other conventional forms of fall protection).

Mr. Cox continued by stating that at its October 18, 2001 meeting, the Safety and Health Codes Board adopted the preponderance of federal OSHA's revised Safety Standards for Steel Erection (66 FR 5195 and 66 FR 37137) as §§1926.750 through

1926.761 and the amended §1926.500 covering Fall Protection.

He added that, upon the recommendation of the Department, paragraphs (a), (b) and (c) of §1926.760 of the federal rule were not adopted. These paragraphs deal with fall protection requirements for steel erection workers and specifically “connectors” and employees working in “controlled decking zones” (CDZ).

Mr. Cox explained that, in the alternative, VOSH sought Board approval to continue to use its current administrative policy of enforcing federal identical standards §§1926.28(a) and 1926.105(a) to provide 10-foot fall protection for steel workers, except for employees working as “connectors.” In addition, controlled decking zones (CDZ) would be prohibited.

Mr. Cox stated that VOSH has investigated at least 26 fatal construction accidents over the last eleven years involving falls of 15 feet or less. Although none of these accidents involved any steel erectors, they tragically demonstrate the existence of a fatal hazard involving falls of 15 feet or less. He said that VOSH has enforced a 10-foot fall protection requirement in steel erection for over 15 years through the enforcement of §§1926.28(a) and 1926.105(a). He stated that VOSH’s policy is at least partly responsible for the lack of fatal accidents in steel erection from falls of 15 feet or less. In reviewing these 26 construction fatalities, it is significant that the large majority of the accidents involved fatal head injuries, where the use of personal fall arrest systems, guard rails, safety nets, or working from an elevated work platform would have prevented the victim’s head from hitting the ground.

He stated that the CDZ provisions in the federal standard, 29 CFR §1926.760(c)), provide no fall protection for leading edge decking workers other than training on how to avoid falls. The training of decking workers and limiting access to a work area does not provide equivalent protection to an engineering control or a personal fall arrest system when an employee actually does fall, for whatever reason. Although steel erectors are generally better trained than the average construction worker to work at heights, when they do fall, the hazard and risk of serious injury or death are exactly the same for a steel erector as for any other construction worker.

Mr. Cox informed the Board that the intent of this rulemaking, which is at the Board’s request, is to establish in regulation the current VOSH administrative policy whereby VOSH construction standards, §§1926.28(a) and 1926.105(a), are used to require steel erection employers to provide protection for steel erection workers from falls at or above 10 feet.

He added that no additional or adverse impact is anticipated for employers, employees or the Department from the adoption of this regulation because VOSH has enforced, under an administrative policy, this same 10-foot fall protection requirement in steel erection for over 15 years through the enforcement of §§1926.28(a) and 1926.105(a).

Mr. Cox noted that no written comments were received during the APA's required 60-day public comment period that was held from July 14, 2003 through September 12, 2003. The Board also held a public hearing on the proposed regulation on August 12, 2003 in Richmond. There were three commenters. Their comments and the Department's responses were reviewed.

In conclusion, Mr. Cox requested, on behalf of the Department of Labor and Industry, that the Safety and Health Codes Board adopt 16 VAC 25-145-10 through 16 VAC 25-145-50, Safety Standards for Fall Protection in Steel Erection in the Construction Industry, as a final regulation, as authorized by Virginia Code, § 40.1-22(5), with an effective date of January 15, 2004.

Chairman Saunders asked for a motion from the Board to adopt this regulation as a final regulation of the Board, with an effective date of January 15, 2004. Mr. Schneider made the motion and Ms. Anna Jolly seconded it. The motion was carried by voice vote.

Request to Initiate Notice of Intended Regulatory Action (NOIRA) To Promulgate Regulations Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors

Mr. Fred Barton, Director of Boiler Safety Compliance, requested the Board, on behalf of the Virginia Boiler and Pressure Vessel Program, to authorize the Department to initiate the regulatory rulemaking process to promulgate regulations governing the financial responsibility of boiler and pressure vessel contract fee inspectors by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act (§2.2-4007).

Mr. Barton began by stating that the Safety and Health Codes Board is authorized by Title 40.1-51.9:2 C of the *Code of Virginia* to, “ .promulgate regulations requiring contract fee inspectors, as a condition of their doing business in the Commonwealth, to demonstrate financial responsibility sufficient to comply with the requirements of this chapter. Regulations governing the amount of any financial responsibility required by the contract fee inspector shall take into consideration the type, capacity and number of boilers or pressure vessels inspected or certified.”

Mr. Barton explained that the request to begin regulatory rulemaking is to set minimum aggregate limits for professional liability or errors of omission coverage for contract fee inspectors operating in the Commonwealth. It will also examine the other methods of insuring financial responsibility set out in the law, i.e., selfinsurance, insurance, guaranty or surety, or any other method approved by the Board. Mr. Barton further explained that the intent of this financial responsibility is to assure additional protection to the public. This protection includes compensation to third parties, in cases where there is bodily injury and property damage resulting from, or directly relating to, a contract fee inspector's negligent inspection or recommendation for certification of a boiler or pressure vessel.

Mr. Barton stated that this request for proposed rulemaking is necessary as the guidelines for insurance coverage previously issued by the Department did not have the force of law. The Department therefore needs this rulemaking to comply with the mandate and intent of the governing statute, §40.1-51.9:2.

Mr. Barton stated that these regulations would require contract fee inspectors to indemnify boiler owners for any bodily injury and property damage resulting from or directly related to an inspector's negligent inspection or recommendation for certification of a boiler or pressure vessel. Contract fee inspectors are statutorily required to provide documentation of their means of indemnification at the time of their certification or before performing inspections and at renewal of the instrument of insurance, guaranty, or surety.

Mr. Barton also stated that it is anticipated that any additional costs to the contract fee inspector as a result of the requirements of these regulations would be passed on to the boiler or pressure vessel owner who is the end user of the service. He further stated that no significant impact on the Department is anticipated beyond the cost to promulgate these regulations.

On behalf of the Boiler and Pressure Vessel Program, Mr. Barton recommended that the Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to promulgate regulations governing the financial responsibility of boiler and pressure vessel contract fee inspectors, as authorized by § 40.1-51.9:2 C.

Chairman Saunders asked for a motion from the Board to initiate the NOIRA. Mr. Schneider made the motion that was seconded by Ms. Jolly. The motion was carried by voice vote.

16 VAC 25-85-1904, Occupational Injury and Illness Recording and Reporting Requirements, Revised Final Rule, §§1904.12 and 1904.29

Mr. Ron Graham, Director of Occupational Health requested, on behalf of the Virginia Occupational Safety and Health (VOSH) Program, that the Safety and Health Codes Board consider for adoption federal OSHA's amendment to the revised final rule for the Occupational Injury and Illness Recording and Reporting Requirements, §§1904.12 and 1904.29, as published in 68 FR 38601 [June 30, 2003], with a proposed effective date of January 15, 2004.

Mr. Graham explained that federal OSHA deleted two provisions of the Occupational Injury and Illness Recording and Reporting Requirements ("Recordkeeping") rule published on January 19, 2001. The first provision deleted is §1904.12, which required employers to check the musculoskeletal disorder (MSD) column on the OSHA 300 Log if an employee experienced a workrelated MSD. The second provision amended §1904.29(b)(7)(vi) by deleting the MSD requirement that stated MSDs are not considered privacy concern cases.

Mr. Graham stated that since publication of the Recordkeeping rule in January 2001, the effective date of these provisions was delayed by federal OSHA and also by the Safety and Health Codes Board at its June 13, 2003 meeting. As a result, the requirements deleted by this final rule have never been in effect.

Mr. Graham detailed the regulatory actions taken by federal OSHA involving this standard and the corresponding Safety and Health Codes Board actions that occurred on October 18, 2001, December 2, 2002 and on June 13, 2003.

Mr. Graham explained that federal OSHA deleted the MSD column on the OSHA 300 Log because it determined that the record does not support the column requirement. He stated that federal OSHA determined that the MSD column would not be a useful tool in addressing MSDs at the establishment level for the following reasons: 1) the column would show only the total number of MSDs that occurred in an establishment and nothing about the nature or cause of these disorders; and 2) the number of MSD cases in an establishment is easily obtainable without the column requirement.

He added that federal OSHA also deleted the MSD requirement in §1904.29(b)(7)(vi) that states that MSD injuries and illnesses are not to be considered privacy concern cases. He continued by stating that since §1904.12 was also deleted, there is no basis to implement the privacy provisions of §1904.29(b)(7)(vi) that relied upon the MSD definition in §1904.12. He further added that the MSD injuries and illnesses cases are covered by the general rule on privacy cases. When the employer has categorized the case as an occupational illness, and the employee independently and voluntarily requests that his or her name not be entered on the OSHA 300 Log, the case will be considered a privacy concern case.

Mr. Graham indicated that little impact on employers, employees and the Department is anticipated because employers are already required to record all workplace injuries and illnesses that meet the criteria established in §§1904.4 through 1904.7 of the recordkeeping rule, regardless of whether a particular injury or illness meets the definition of MSD in §1904.12. He stated that employees will continue to have access to the information provided in their employer's Recordkeeping Log. VOSH's current policies on recording of MSDs and protecting employee privacy continue.

On behalf of the Department of Labor and Industry, Mr. Graham recommended that the Board adopt the amendment to the revised final rule to 16 VAC 25-85-1904, Occupational Injury and Illness Recording and Reporting Requirements, §§ 1904.12 and 1904.29(b)(7)(vi), as authorized by Virginia Code, §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of January 15, 2004.

Chairman Saunders asked for a motion from the Board to adopt the federal identical Recordkeeping revised final rule. Mr. Frank Owens made the motion that was seconded by Mr. Rigmaiden. The motion was carried by voice vote.

ITEMS OF INTEREST FROM THE DEPARTMENT

Mr. John Crisanti, Manager of the Office of Planning and Evaluation, called the Board's attention to the fact the Board's Bylaws have not been reviewed in 10 or 11 years. He asked if the Board wanted the Department to review the Bylaws and compare them to administrative changes and see what changes may be required for the Bylaws. Mr. Owens moved to allow Mr. Crisanti to review the Bylaws and report back to the Board. Mr. Cernak and Ms. Jolly seconded the motion that was carried by voice vote.

Next, Chairman Saunders introduced Mr. C. Ray Davenport, Commissioner of the Department of Labor and Industry, to the new Board members. Commissioner Davenport welcomed the new members and thanked the Board for acting on his staff's recommendations.

ITEMS OF INTEREST FROM THE BOARD

Vice Chairman Schneider requested the Board and the Department to reconsider the regulation dealing with handwashing facilities [16 VAC 25-160-10 et seq., Construction Industry Standard for Sanitation, §1926.51] to make it better for contractors because of the cost to the construction industry in maintaining these facilities.

Mr. Crisanti responded that before this unique regulation was promulgated in 1991, the Board felt that a certain higher level of sanitation should be required for construction workers on par with what it is required for field workers. He continued by stating that the Board developed a unique regulation that went through the full APA process. He continued by explaining that this unique regulation that has been in effect since 1991. Mr. Crisanti noted that, since that time, federal OSHA has revised its standard. He informed the Board that any change to this regulation in Virginia would require an amendment that would entail going through the full APA process, which could take at least a year.

In responses to Mr. Schneider's concern about permitting workers to use only anti-bacterial soap, Mr. Cox informed the Board that the current federal standard still requires running water, even when anti-bacterial soap is used.

Mr. Schneider withdrew his concern.

There being no further business to come before the Board, the meeting adjourned at 11:05 a.m.