



## OSHA/VOSH Roundup



In an unusual flurry of occupational safety related activity, the Virginia courts decided two cases in the last week relating to either the review of occupational safety regulations

themselves or their enforcement.

In [Nat'l College of Business & Technology Inc. v. Davenport](#) (.pdf), the Virginia Court of Appeals considered what constitutes a "serious" violation of the exposure to asbestos [Virginia Occupational Safety & Health \(VOSH\)](#) regulations. The facts found by the Salem, Virginia Circuit Court were that employees of the petitioner college were exposed to asbestos insulation when they were required to enter a boiler room to retrieve paper files. However, no evidence was presented regarding the length of time or level of exposure at the Circuit Court level. Despite the lack of evidence regarding the level or extent of exposure, the Circuit Court upheld the VOSH citation for exposure *and* the level of violation at a "serious" level with the attendant penalty.

The Virginia Court of Appeals disagreed with the second finding. The appellate court determined that the lack of evidence regarding the level of exposure (whether length or extent) made the serious level violation an error. The Court stated that merely presenting evidence that asbestos is a carcinogen is not enough given the number of carcinogenic materials in existence and then remanded the case back to Circuit Court to reconsider the penalty level.

In a second case, [Steel Erectors Ass'n of America v OSHA](#) (.pdf), the petitioner, [SEAA](#), challenged a 2010 directive from [OSHA](#) regarding the *enforcement* of 2001 safety standards regarding steel construction, claiming that the enforcement change was an illegal regulation. The [4th Circuit Court of Appeals](#), in an exercise of discretion, determined that SEAA or one of its members would need to challenge any attempt at enforcement when OSHA tried to invoke its new policy. What the 4th Circuit said SEAA could not do was to challenge the enforcement policy without any pending enforcement action.

What these two cases show, aside from the fact that, yes, the Courts will occasionally look at these types of cases, is that not all cases are cut and dried. With the assistance of an [experienced Virginia construction lawyer](#), a construction professional may be able to

challenge an administrative enforcement action. Also, the help of such an attorney can certainly help head off a failed challenge such as that by SEAA with its attendant expense and headaches.

Image via [Wikipedia](#)

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