

August 23, 2010

SUBMITTED ELECTRONICALLY

David Michaels, PhD.
Assistant Secretary of Labor
OSHA Docket Office
Technical Data Center, Room N-2625
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

RE: OSHA Proposed Rule: Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) Docket No.: OSHA-2007-0072

Dear Dr. Michaels:

The American Trucking Associations, Inc. (ATA) is pleased to submit the following comment to the Occupational Safety & Health Administration's notice of proposed rulemaking (NPRM or proposed rule) regarding walking-working surfaces and personal protective equipment (PPE) for fall protection¹. ATA is the national trade association representing the American trucking industry² and is vitally interested in matters affecting workplace safety and health.

ATA's Position

ATA generally supports the proposed rule revising the Walking Working Surfaces standards and fall protection provisions of the Personal Protective Equipment standard. While the proposed rule's provisions have been improved over the 1990 NPRM on Walking Working Surfaces, ATA still has concerns regarding this most recent rulemaking, which are addressed below:

¹ 75 *Federal Register* 28862, May 24, 2010.

² ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its members include more 2,000 trucking companies and industry suppliers of equipment and services. Directly and indirectly, through its affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

I. Fall Protection on Rolling Stock

Issue: The NPRM requests additional information regarding whether specific regulations are needed to cover falls from rolling stock and commercial motor vehicles with heights four feet or greater, defined in the NPRM to include: commercial buses, vans, tractor trailer trucks, tank trucks and hopper cars.

Discussion: ATA is a trade association that represents all segments of the trucking industry (e.g., flatbed operations, less-than-truckload and over-the road.); however, we do not represent commercial buses and have therefore limited our comments relative to proposed fall protection on commercial motor vehicles.

The Department of Transportation's (DOT) Federal Motor Carrier Safety Administration (FMCSA) already regulates steps, handholds, and deck requirements (49 CFR Part 399) for trucks operating in interstate commerce. Any fall protection equipment required for rolling stock within the trucking industry is prescribed by FMCSA under its exclusive jurisdiction. OSHA recognized the challenges that drivers confront with respect to fall protection from rolling stock when it issued a 1996 memorandum from then Directorate of Compliance Programs John Miles, Jr. to all OSHA Regional Administrators. The memo indicated that "rolling stock will not be cited under Subpart D."³

Further, an OSHA Standard Interpretation was issued in 2004, in which a question was posed as to whether fall protection was needed for employees exposed to fall hazards from working on vehicles and trailers in excess of six feet. OSHA replied that 29 CFR section 1926.500 exempted "vehicles or trailers, on which employees must be located in order to perform their duties." The interpretation indicated that "no duty exists to provide fall protection under the General Duty Clause or section 1926.95 (a) where there is no feasible means of providing it. For the type of work described (working on top of trailers), there typically is no feasible means of providing fall protection."⁴

Moreover, ATA is unclear as to why OSHA chose to cede its jurisdiction to one DOT agency and not the other with respect to fall protection requirements in this NPRM .

"With respect to rolling stock, OSHA is not soliciting information relating to personal fall protection equipment used on rolling stock involved in railroad operations....the Federal Railroad Administration's policy statement sets out the respective areas of jurisdiction between FRA and OSHA."⁵

Likewise, the Department of Labor (DOL) and the Department of Transportation (DOT) have had a long-standing Memorandum of Understanding (MOU)⁶ since the early 1970's that sets out regulatory authority between the Department of Labor and the DOT: "the DOT has and exercises authority to prescribe and enforce occupational safety and health

³ Memo, *Enforcement of Fall Protection on Moving Stock*, October 18, 1996.

⁴ OSHA Standard Interpretation – *Fall Protection While Working on Vehicles/Trailers*, March 10, 2004

⁵ 75 Federal Register, 28867

⁶ Memorandum of Understanding between the DOL and DOT , 1972

standards with respect to working conditions of certain employees.”⁷ For this reason alone, FMCSA should be granted the sole authority regarding fall protection, like its sister agency, the FRA.

Because the trucking industry is so diverse, it would be nearly impossible for FMCSA to require a “one-size-fits-all” type of fall protection. For example, just within the flatbed segment, there is the standard flatbed trailer, with average heights of (48” – 54”), “step-downs” which are lower (36”) and, “low boys” which ride even closer to the ground. Further, flatbeds haul freight that requires specific load securement, such as tie-downs or tarping. Affixing these load securement devices often involves climbing on top of the loaded flatbed to perform various functions required to transport the cargo in accordance with DOT safety regulations, including: (1) tarp/untarp the cargo; (2) check the load; (3) periodically re-secure the load during the trip; (4) load/unload cargo; and (5) adjust chains/straps. In a study where drivers were polled as to whether or not was possible to keep drivers from climbing on top of the load, these drivers indicated that it was not possible.⁸

Flatbed drivers receive training in proper techniques for climbing onto a load and proper use of a ladder to do so when available. However, ATA is unaware of a practical method of providing fall protection on flatbeds other than driver education.

The need to access the top of box or van-type trailers, the most common type of trailer on the road, is infrequent. Drivers of these trucks usually have no reason to climb on top of the trailer. Freight is either loaded or unloaded through the rear doors onto a dock. For maintenance purposes, mechanics use specially designed stairs to reach the top of a trailer.

The questions set forth in the NPRM with respect to fall protection for commercial motor vehicles expose a legal inconsistency. While OSHA is asking for public comment on fall protection for commercial motor vehicles,⁹ its *Preliminary Economic and Initial Regulatory Flexibility Screening Analysis C – Profile of Affected Industries, Firms, and Workers*¹⁰ acknowledges the limits of OSHA’s jurisdiction over commercial motor vehicles:

“This section excludes employee tasks on surfaces that, due to location or operational status, fall outside of OSHA’s jurisdiction....an example is employee exposure to fall hazards when railroad rolling stock is traveling on rails, or *trucks are traveling on highways; those operations are regulated by the Department of Transportation.*¹¹”

Underlying this section of the NPRM, is the inference that OSHA may reverse its long standing interpretation as to its jurisdiction concerning fall protection on commercial motor vehicles and the feasibility of providing such protection. Putting aside the

⁷ Ibid. p. 1.

⁸ Professional Safety, *Truck Falls: Examining the Problem* (May 2008), p.31.

⁹ 75 *Federal Register*, 28867

¹⁰ 75 *Federal Register*, 28920

¹¹ *Id.* (emphasis added).

jurisdictional issue for the moment, we note that the NPRM contains no discussion of data to support this inferred change in position.

Recommendation

To provide for greater clarification, the Agency should continue its long-standing practice of allowing DOT to exercise exclusive jurisdiction regarding fall protection for commercial motor vehicles to the Federal Motor Carrier Safety Administration, as it did in this NPRM for the Federal Railroad Administration on this same issue. OSHA should clarify this position by adding a provision to section 1910.21(a)(1) that states: “This subpart [Subpart D – Walking and Working Surfaces] does not apply to surfaces that are an integral part of self-propelled, motorized mobile equipment, other than platforms hoisted or lifted by powered industrial trucks which are covered by paragraph (e) of section 1910.31.”

II. Duty to Provide Protection from Fall Hazards

Issue: The proposed rule would modify the fall protection requirements by lowering the threshold for providing such protection from the current standard of four feet or greater from unprotected sides and edges of walking working surfaces.

Discussion: ATA is pleased that OSHA has excepted loading docks from the fall protection provisions, but is concerned that the exception is conditioned upon the use of certain engineering controls (*i.e.*, guardrails). The proposed rule would place the burden on the employer to prove that use of guardrails on the working side of these platforms is infeasible and ensure that during the work operation for which guardrails are infeasible, access to the platform is limited to authorized employees and the authorized employees have been properly trained. The NPRM further states that “when work operations for which guardrails are infeasible are not in process, the *exception does not apply.*”¹²

Further, the 48” height threshold for requiring fall protection is outdated and lacks significant scientific data to support this trigger height. It is supported by an ANSI standard from 1932¹³ followed by a study performed in 1978.¹⁴ Most commercial vehicle trailers are between 49” to 50”. Newer freight docks reflect these truck specifications and are between 49” to 50” as well. OSHA would do well to adopt these heights as fall protection thresholds to reflect real-life loading dock specifications.

We note that the NPRM is soliciting more recent studies that would support or contradict the 48” trigger height. While we are not aware of specific studies, ATA believes that any such safety standard should be supported by sound science and subject to rulemaking, rather than through incorporation of reference(s) of outdated consensus standards.

Regardless of height, the hazard related to falling off of a loading dock used in the trucking industry is negligible. Motor carriers ensure that all workers are properly trained, including forklift operators who are trained not to operate near the edge of the

¹² 75 *Federal Register* at 28889 (emphasis added).

¹³ 75 *Federal Register* at 28887, (*ANSI A12,1 -1932*)

¹⁴ University of Michigan, *An Ergonomic Basis for Recommendations Pertaining to CFR Part 1910, Subpart D-Walking an Working Surfaces*, 1978.,

dock - usually three feet or more away from the edge of the dock. Furthermore, forklift operators are instructed not to travel near open doors and dock workers are trained not to jump from open doors if they must access the ground level. Most of the time, during work periods, trailers are at the dock and the majority of traffic around the dock are forklifts rather than workers. In most cases, when the dock is empty either the dock's doors are closed or workers are not on the dock when there is no freight to load or unload.

Realistically, the greatest danger in moving freight is a trailer moving away from the dock while the forklift is still in transit toward the trailer which can result in forklifts falling off of the dock. This extremely rare scenario would occur due to a lack of communication between the truck driver and the forklift operator. One ATA member estimated that to provide fall protection strong enough to prevent 5,000 lb. forklifts from falling off of one of their 15,000 dock doors would cost the company approximately \$30 million.

Recommendation: Given the above-referenced information regarding fall protection at truck loading docks, ATA believes that OSHA should fully exempt truck loading docks that are four feet or greater from providing guardrails. This exemption should also extend to circumstances when guardrails are infeasible even when work operations are not "in process."

Additionally, OSHA should revise its 48" trigger height rule with respect to truck loading docks to reflect both truck and dock heights of between 49" and 50". If this is not possible, ATA would ask OSHA to substantiate its 48" trigger height with updated scientific information and subject the trigger height to rulemaking rather than incorporating it by reference of outdated consensus standards.

III. Ramps and Bridging Devices

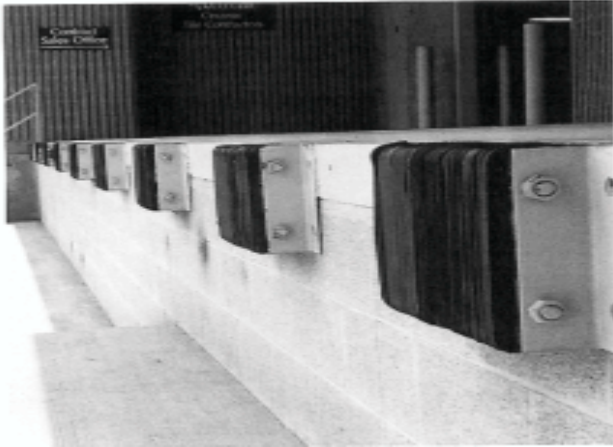
Issue: OSHA proposes the addition of section 1910.26(b) to address various hazards related to ramps and bridging devices.

Discussion: Thousands of portable dockboards and dock levelers are used by the trucking industry every day. They provide for the safe movement of workers and freight handling equipment between loading docks and vehicles. Portable dockboards and dock levelers enhance worker safety by compensating for the difference between the floor height and the floor of the vehicle.

ATA is opposed to the promulgation of a general requirement that "where equipment is used on dockboards (dockplates), the dockboard must be provided with a means, such as edging or curbing, to prevent equipment from running off the edge."¹⁵ This provision is very broad and, if finalized, would be applied inappropriately to the trucking industry.

¹⁵ 75 *Federal Register* at 28883.

To load or to unload, the driver of the commercial motor vehicle backs up to the dock slowly and does not stop until contacting the dock or the installed dock bumper blocks



(Exterior view of dock showing bumper blocks.)

In most cases, the gap between the vehicle and the loading dock is no more than a few inches. Either a dock leveler or portable dockboard is used to reduce even this minimal amount of space. There is insufficient space between the terminal and the truck to permit a powered industrial truck loading or unloading freight to fall to the ground.



(Interior of trailer at dock - note the minimal gap between the side of the trailer and the dock bay opening)

OSHA's proposed requirement that portable dock boards and dock plates be provided with edging and curbing is ill-conceived. Moreover, there is no space between the side of the truck and the edge of dock bay opening to allow for a forklift truck to run off of the edge to cause

death or injury to the employee.



(Interior view showing use dock leveler prior to connection to truck).

Further, this requirement actually would reduce safety for employees in the trucking industry, as providing curbing on dock plates would create a tripping hazard for employees walking on the plates.

OSHA also is proposing to require that “*vehicles onto which a dockboard has been placed must be prevented from moving (e.g, by using wheel chocks). . .*”¹⁶ This proposed requirement is unnecessary as FMCSA’s brake regulations address this condition and preclude OSHA’s wheel chocking requirements. Jurisdiction in this matter was asserted in a 2001 letter from then FMCSA Acting Deputy Administrator Julie Cirillo to OSHA officials¹⁷ The letter clearly asserts FMCSA’s exclusive jurisdiction over the immobilization of parked vehicles in stating that FMCSA’s parking brake regulations were “written specifically to protect truck drivers and anyone else who might be injured by inadvertent movement of a parked commercial motor vehicle... We believe our brake regulations constitute an ‘exercise of statutory authority’ to prescribe or enforce standards or regulations affecting occupational safety or health.”¹⁸

Recommendation: Amend 29 CFR 1910.26(b) to indicate that curbing on dockplates to prevent a vehicle from running off the edge of a ramp or bridging device is not required where there is insufficient space for a vehicle using the device to run off the edge and drop to the ground. Any requirement for curbing on the edges of ramps and bridging devices should be limited to those working environments where a true fall-off hazard exists. Further, the reference to wheel chocking at proposed 29 CFR 1910.26(c) is in conflict with section 4(b) of the Occupational Safety and Health Act and must be deleted in the final rule.

¹⁶ 75 *Federal Register* at 28884 proposed to be codified at 29 CFR §1910.26(d).

¹⁷ Letter from FMCSA to OSHA: *FMCSA’s Jurisdiction on Parking Brake Regulations* (March 30, 2001)

¹⁸ *Ibid.*

IV. Repair/ Assembly Pits

Issue: The NPRM would require that employees exposed to falling a distance between four and ten feet into a vehicle repair pit do not need the level of protection as required in proposed section 1910.28(b)(1) for unprotected sides and edges, provided the employer institutes specific work practices that OSHA believes will provide an adequate level of protection.

Discussion: ATA generally agrees with the provision regarding fall protection around repair/assembly pits. However, we have two suggestions for OSHA's consideration with respect to this section.

In some large motor carrier facilities, there may be two or more adjacent pits in one area of the shop. The distance between pits can vary from 12 to 15 feet. The trucking industry believes that there is no need to separately mark the perimeter area around each pit, if the entire area is marked appropriately.

Also, in a typical pit installation in a shop where trucks are serviced, the vehicle is driven through a doorway and positioned over the pit. When work on the unit is completed, it is driven forward and exits the pit area through a doorway on the opposite side of the building. In many cases, the distance from the doorway to the closest portion of the pit (usually the stairway provided for employee access) is less than six feet. No useful purpose would be served by requiring floor marking or warning signs two or three feet outside the pit entrance.



(Trucks undergoing servicing at repair pits. Under each truck is a repair pit which is adjacent to the truck pit in front of it where the other truck is being serviced. (Note: All trucks are facing exit doors shown in front of picture.)

Recommendation: OSHA should include a provision stating that when two or more pits are in a common area, a perimeter marking and the posting of appropriate warnings around the entire area will meet the requirements of this section. In addition, when the distance from a building

entrance to the pit is less than 6 feet, a floor marking and warning sign at the entrance will satisfy the requirements.

Summary of Recommendations

For purposes of this rulemaking, ATA recommends the following:

- OSHA should continue to exclude the trucking industry from requiring fall protection from rolling stock under subpart D due to the infeasibility of doing so while in transit and because of the infrequent nature of employees needing access to the tops of trailers.
- OSHA should fully exempt truck loading docks that are four feet or greater from providing guardrails. This exemption should also extend to when guardrails are infeasible when dock operations are not in process. Additionally, OSHA should revise its 48” trigger rule with respect to truck loading docks to reflect both truck and dock heights of between 49” and 50”. Otherwise, ATA requests that OSHA substantiate its 48” trigger height with updated scientific information and subject the trigger height to rulemaking rather than incorporating it by reference with outdated consensus standards.
- OSHA should amend 29 CFR § 1910.26 (b) to indicate that curbing on dockboards to prevent a vehicle from running off the edge of a ramp or bridging device is not required where there is insufficient space for a vehicle using the device to run off the edge and drop to the ground. Additionally, OSHA should note that curbing around dockboards is likely to decrease worker safety by creating a tripping hazard to employees.
- OSHA’s reference to wheel chocking at proposed 29 CFR § 1910.26(c) must be deleted in the final rule.
- When two or more repair/assembly pits are in a common area, OSHA should consider perimeter marking and posted warnings around the entire area as compliant.

ATA thanks OSHA for the opportunity to comment on its notice of proposed rulemaking on Walking Working Surfaces Standard and Personal Protective Equipment (Fall Protection Systems). Should you have any further questions regarding ATA’s comments, please contact me at: 703-838-1905.

Respectfully submitted,



Christina Cullinan
Director, Workplace & Fleet Safety

