

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**FINAL STATEMENT OF REASONS**

CALIFORNIA CODE OF REGULATIONS

TITLE 8: Division 1, Chapter 4, Subchapter 7, Article 10, Section 3385(c)(2)
of the General Industry Safety Orders

Foot Protection**MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM
THE 45-DAY PUBLIC COMMENT PERIOD**

There are no modifications to the information contained in the Initial Statement of Reasons.

Summary and Response to Oral and Written Comments:**I. Written Comments**

John C. Vocke, Attorney, Pacific Gas and Electric Company (PG&E), by letters dated April 30 and May 21, 2009 (Mr. Vocke's April 30th letter references attachments that were not received).

Comment No. 1: PG&E employs 20,000 men and women to provide gas and electric service to 15 million customers, and on occasion, both gas and oil workers employ hang-on foot protective devices which would be banned in California if the proposal were adopted. The hang-on and strap-on foot protectors utilized by PG&E comply with the American National Standards Institute (ANSI) and American Society for Testing and Materials standards, even though the testing agencies do not consider them to be an acceptable means of foot protection.

Response to Comment No. 1: Mr. Vocke's comments address matters beyond the scope of this rulemaking. The notice of rulemaking makes it clear that the present proposal is made for the purpose of correcting a clerical error that occurred when section 3385(c)(2) was adopted, and thereby, ensuring that the provision reads as it should have read for the last two and a half years.

Comment No. 2: Federal OSHA permits the use of after-market hang-on foot protection, and the State standard either should be replaced by the Federal standard or should be augmented with a provision, taken from the Federal standard, to the effect that alternative means of foot protection are permitted if the employer demonstrates that those alternative means are equally effective as the means that the State standard specifies.

Response to Comment No. 2: Modifying the proposal in the manner suggested by Mr. Vocke is outside of the scope of this rulemaking. The notice of rulemaking makes it clear that the present proposal is made for the purpose of correcting a clerical error that occurred when section 3385(c)(2) was adopted, and thereby, ensuring that the provision reads as it should have read for the last two and a half years.

Moreover, the recommendation made by Mr. Vocke is unnecessary and contrary to the statutory scheme created for California OSHA regulations. Labor Code Section 143 provides a variance process whereby an employer may utilize measures that differ from the requirements of an OSHA standard if the employer establishes that its measures provide a level of employee safety equal or superior to the level of safety provided by compliance with the OSHA standard. Thus, no addition to that effect needs to be made to the proposal.

Comment No. 3: Mr. Vocke states that the cost impact of the proposal, as stated in the Initial Statement of Reasons is inaccurate, in that PG&E alone would have to spend \$900,000 in initial costs and \$100,000 to \$300,000 annually thereafter if the proposal as currently written is adopted.

Response to Comment No.3: Please see the Response to Mr. Vocke's Written Comment No. 2. If PG&E utilized the variance procedure provided by the Labor Code, it should be spared most or all of those costs, so long as its present foot protection measures are at least as effective as the measures required by the proposal.

Comment No. 4: The "equally effective" clause that he proposes to add to the standard may be added by way of the present rulemaking.

Response: Please see the Response to Mr. Vocke's Written Comments Nos. 1 and 2.

Judith Freyman, Vice President, Western Occupational Safety and Health Operations, ORC Worldwide, by letter dated May 4, 2009.

Comment: Ms. Freyman states she supports Mr. Vocke's remarks and suggests adding the words "... or shall be demonstrated by the employer to be equally effective" to the proposal.

Response: Please see the Response to Mr. Vocke's Written Comment No. 2.

Elizabeth A. Treanor, Director, Phylmar Regulatory Roundtable, by letter dated May 19, 2009.

Comment: Ms. Treanor suggests adding the words "... or shall be demonstrated by the employer to be equally effective" to the proposal.

Response: Please see the Response to Mr. Vocke's Written Comment No. 2.

II. Oral Comments

Oral comments received at the May 21, 2009 Public Hearing in San Diego, California.

John C. Vocke, Attorney, Pacific Gas and Electric Company (PG&E)

Comment: Mr. Vocke stated that the proposal has the effect of banning after-market strap-on or hang-on toe and metatarsal protection devices. This prohibition conflicts with section 1519 of the Construction Safety Orders, which permits such devices.

Response: California Code of Regulations, Title 8, section 1519, part of the Construction Safety Orders, pertains to sanitation and not foot protection. Mr. Vocke might have intended to refer to section 1517 of the Construction Safety Orders, which used to pertain to foot protection, but that section 1517 was repealed in 2000. Please also see the Response to Mr. Vocke's Written Comment No. 2.

William Jackson, Occupational Safety and Health Standards Board Member

Comment: Mr. Jackson expressed general concern about the practice of incorporating ANSI standards by reference and specific concern that the incorporation of this ANSI standard would preclude current industry practice regarding temporary, short-term exposures to foot injuries. He endorsed the idea that, rather than incorporating ANSI provisions by reference, protective footwear requirements should be spelled out in the State standard.

Response: The present standard and its predecessors have been in place for many years. These standards have incorporated various national consensus standards by reference. The national consensus standards are available for reference at the Standards Board's office and very likely at other locations in California. More significantly, it is very likely that rather than possessing the national consensus standards, employers rely on other sources of information, such as footwear manufacturers, in assessing the conformance of footwear with the national consensus standards.

The national consensus standards cited in the proposal cannot practicably be inserted into the proposal, because they are lengthy and because they are copyrighted. Stating requirements in the proposal that mirror the national consensus standard requirements also is not practicable. The resulting State standard would be long and complex and the State paraphrase might not accurately state the national consensus standards requirements.

The process of crafting such a long and complex State standard would itself be long and complex and might well involve an advisory committee. This fact is very significant, since, as a result of the Occupational Safety and Health Appeals Board decision that led to this rulemaking, there essentially is no operative foot protection standard in the General Industry Safety Orders (GISO), and a lengthy rulemaking would drastically increase the amount of time that California workers would remain unprotected in this regard. In addition, as discussed in the Response to Mr. Vocke's Comment No. 2, an extensive overhaul of the GISO foot protection provision is beyond the scope of the present rulemaking. Therefore, the Board declines to alter the current proposal.

Dr. Jonathan Frisch, Occupational Safety and Health Standards Board Member

Comment: After verifying that the purpose of the present proposal is simply to correct the erroneous manner in which an ANSI standard is referenced, Dr. Frisch expressed concern that if the proposal were adopted, the Board will face the unintended consequence of rendering current industry practice illegal.

Response: Current industry practice might have to be subject to the variance process if employers wish to continue practices that do not conform to the requirements of the safety order. Please see the Responses to Mr. Vocke's Written Comment No. 2 and to Mr. Jackson's Comment.

Jack Kastorff, Occupational Safety and Health Standards Board Member

Comment: Mr. Kastorff stated that the Standards Board should not require California employers to acquire ANSI standards in order to be in compliance with California occupational safety and health regulations.

Response: The proposal requires that footwear meet the requirements of certain national consensus standards; it does not require that employers acquire the standards. As in the case of high visibility attire, the ANSI safety footwear standard requires all safety toe footwear to be labeled as meeting the standard further obviating the need for the employer to purchase the standard which is readily available. Please also see the Response to Mr. Jackson's comment.

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

DETERMINATION OF MANDATE

This regulation does not impose a mandate on local agencies or school districts as indicated in the Initial Statement of Reasons.

ALTERNATIVES CONSIDERED

The Board invited interested persons to present statements or arguments with respect to alternatives to the proposed regulation. No alternative considered by the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the adopted action.