

surgery and are not intrinsic to the stability of the bony structure.

(b) *Classification.* Class II (special controls). The special control for this device is the FDA guidance document entitled "Class II Special Controls Guidance: Resorbable Calcium Salt Bone Void Filler Device; Guidance for Industry and FDA." See § 888.1(e) of this chapter for the availability of this guidance.

Dated: April 9, 2003.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 03-13592 Filed 5-30-03; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Powered Industrial Trucks

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Final rule; technical amendment.

SUMMARY: This technical amendment deletes a Powered Industrial Trucks Standard covering the use of powered industrial trucks to lift personnel. It is being deleted because it was invalidly promulgated from a non-mandatory provision of a national consensus standard.

DATES: This final rule becomes effective on July 2, 2003.

FOR FURTHER INFORMATION CONTACT: For general information and press contact Ms. Bonnie Friedman, Director, Office of Communications, OSHA, U.S. Department of Labor, Rm. N3637, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693-1999, Fax (202) 693-1634. For technical information contact: David Wallis, Office of Engineering Safety, Room N3609, telephone (202) 693-2064, or Patrick Kapust, Office of General Industry Enforcement, Room N3107, telephone (202) 693-1854 at the above address.

SUPPLEMENTARY INFORMATION: In section 6(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1593; 29 U.S.C. 655(a), Congress authorized OSHA to adopt national consensus standards and established Federal Standards without prior notice and public participation. On May 29, 1971, at 36 FR 10466, OSHA published a final

rule in the **Federal Register** adopting national consensus standards and established Federal standards as OSHA's initial occupational safety and health standards for general industry.

The preamble to that final rule contained the following statement:

I do hereby designate as national consensus standards those standards in Part 1910 which are standards adopted and promulgated by either the American National Standards Institute (ANSI) or the National Fire Protection Association (NFPA). The national consensus standards contain *only mandatory provisions* of the standards promulgated by those two organizations. *The standards of ANSI and NFPA may also contain advisory provisions and recommendations the adoption of which by employers is encouraged, but they are not adopted in Part 1910.* (36 FR 10466) (emphasis added).

Thus, the standards adopted on May 29, 1971, were intended to include only the mandatory provisions of the relevant ANSI and NFPA standards.

The American National Standard for Powered Industrial Trucks, ANSI B56.1-1969, was one of the national consensus standards that the Agency adopted under section 6(a). That ANSI standard was the source standard for 29 CFR 1910.178(e) through (p), the relevant paragraphs of OSHA's Powered Industrial Trucks Standard.

Paragraph (m)(12) of § 1910.178, as it was published in May 1971 and as it still appears today, reads as follows:

Whenever a truck is equipped with vertical only, or vertical and horizontal controls elevatable with the lifting carriage or forks for lifting personnel, the following additional precautions *shall be taken* for the protection of personnel being elevated.

(i) Use of a safety platform firmly secured to the lifting carriage and/or forks.

(ii) Means *shall be provided* whereby personnel on the platform can shut off power to the truck.

(iii) Such protection from falling objects as indicated necessary by the operating conditions *shall be provided*. [Emphasis added.]

The requirement thus appears as a mandatory provision of OSHA's Powered Industrial Truck Standard.

The corresponding provision in the base standard, ANSI B56.1-1969, was contained in section 604L, which read as follows:

Whenever a truck is equipped with vertical only, or vertical and horizontal travel controls elevatable with the lifting carriage or forks for lifting personnel, the following additional precautions *should be taken* for the protection of personnel being elevated.

(a) Use of a safety platform firmly secured to the lifting carriage and/or forks.

(b) Provide means whereby personnel on the platform can shut off power to the truck.

(c) Provide such protection from falling objects as indicated necessary by the operating conditions. [Emphasis added.]

Consequently, OSHA revised the language of this subparagraph in the ANSI standard and, in doing so, made it mandatory instead. If a provision was not mandatory ("should"), in the source consensus standard, the corresponding OSHA provision that was invalidly adopted as ("shall") mandatory is not enforceable [see *Usery v. Kennecott Copper Corporation*, 577 F.2d 1113, 1117 (10th Cir. 1977)]. Consequently, § 1910.178(m)(12) is unenforceable by OSHA.

Because it is unenforceable, OSHA is removing that provision, 29 CFR 1910.178(m)(12), from the Powered Industrial Trucks Standard. Note that OSHA is removing all of paragraph (m)(12), including its subordinate paragraphs (m)(12)(i) through (m)(12)(iii).

This action does not indicate that the underlying hazard addressed by these provisions is not serious. Indeed, if proper equipment, procedures and training are not provided, the lifting of personnel with powered industrial trucks poses hazards likely to cause death or serious injury to employees. As noted in OSHA's 1998 amendment to the Powered Industrial Trucks Standard, a significant percentage (4 to 14% depending on the study) of the 100 deaths and 95,000 injuries per year that involve powered industrial trucks, result from falls from personnel lifting. (See 63 FR 66238, December 1, 1998). The American Society of Mechanical Engineers' (ASME) current standard for powered industrial trucks (ASME B56.1-2000) addresses these hazards. For example, operator-up highlift trucks (order pickers, etc.) are addressed by paragraphs 4.17.1, 4.17.2 and 7.36. Trucks with work platforms which do not fit that category are covered by paragraphs 4.17.2, 4.17.3 and 7.36.3.

Under the Voluntary Consensus Standards Project (RIN 1218-AC08), the Agency has asked various consensus standards organizations to review their standards, compare the latest versions of these standards to the ones currently adopted by OSHA, and to determine which ones are most important for OSHA to update. The organizations have provided considerable information on priorities and other related issues. OSHA is in the process of evaluating the information it has received from the consensus standards organizations and is now considering the possibility of initiating rulemaking to revise and update the Powered Industrial Truck Standard.