

SECRETARY OF LABOR,

Complainant,

v.

SYMMS FRUIT RANCH, INC.,

Respondent.

OSHRC DOCKET NO. 98-0228

APPEARANCES:

For the Complainant:

William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:

G. Dar Symms, Symms Fruit Ranch, Caldwell, Idaho

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Symms Fruit Ranch, Inc. (Symms), at all times relevant to this action maintained a place of business at Mountain View ranch on Plum Road near Caldwell, Idaho, where it was engaged in farming. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 26, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Symms' Mountain View worksite. As a result of that inspection, Symms was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Symms brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to the hearing date, the Secretary withdrew citation 1, item 1. On July 10, 1998, a hearing was held in Boise, Idaho on the remaining issues. The parties, having made their closing arguments on the record, declined to submit briefs on the issues; this matter is, therefore, ready for disposition.

Alleged Violations

Serious citation 1, item 2 states:

28 (sic) CFR 1928.57(b)(1)(i): All power take-off shafts, including rear, mid- or side-mounted shafts, were not guarded either by a master shield, as provided in paragraph (b)(1)(ii) of this section, or by other protective guarding:

- (a) Symms Fruit Ranch: On or about 26 November 1997, and at times prior thereto, the John Deere tractor located at the Mountain View Ranch, model 2240, serial number 12482, did not have the power take-off shaft guarded.

The cited standard provides:

(b) *Farm field equipment--(1) Power take-off guarding.* (i) All power take-off shafts, including rear, mid- or side mounted shafts, shall be guarded either by a master shield, as provided in paragraph (b)(1)(ii) of this section, or by other protective guarding.

(ii) All tractors shall be equipped with an agricultural tractor master shield on the rear power take-off except where removal of the tractor master shield is permitted by paragraph (b)(1)(iii) of this section. . . .

(iii) Power take-off driven equipment shall be guarded to protect against employee contact with positively driven rotating members of the power drive system. Where power take-off driven equipment is of a design requiring removal of the tractor master shield, the equipment shall also include protection from that portion of the tractor power take-off shaft which protrudes from the tractor.

Facts

William Bankhead, an OSHA Compliance Officer (CO), testified that when he arrived at Symms Mountain View worksite on November 26, 1997, he observed a John Deere tractor, model number 2240 in use (Tr. 13, 17; Exh. C-1). A leveling blade was attached to the back of the tractor by means of a three point hitch (Tr. 17; Exh. C-3). On the tractor, centered between the three arms of the hitch, was an unguarded power take-off shaft (PTO) (Tr. 17, 28, 31-32; Exh. C-5). CO Bankhead testified that an employee would have been exposed to the unguarded PTO when attaching the implement to the back of the tractor (Tr. 70). Bankhead stated that an exposed employee would catch his or her clothing in the PTO, which, if rotating, could pull the employee into the rear of the tractor (Tr. 71).

CO Bankhead admitted that the PTO was not in use, and so was not rotating at the time of his inspection (Tr. 74). Gerald Weedman, a 20 year employee at Symms, testified that in order to engage the PTO shaft the operator must pull up on a lever between his or her legs (Tr. 89). Weedman stated that it was possible to accidentally disengage the PTO lever, but not to engage it (Tr. 89-91, 94). Jay Carrillo, the tractor operator, testified that the PTO was not used with the leveling blade, and was never engaged while he used the blade (Tr. 100-102). Carrillo had never heard of anyone accidentally engaging the PTO, though he admitted that the PTO could be deliberately engaged with the 3 point hitch and leveling blade attached (Tr. 98-99, 104).

Discussion

Symms argues that because the PTO was not in use at the time of the inspection, there was no hazardous condition to protect against. Symms maintains that, in the absence of a proven hazard the citation should be dismissed (Tr. 78). In the alternative, Symms argues that the PTO was guarded by its location between the arms of the three point hitch (Tr. 83).

Location. Section 1928.57(a)(7)(i) of Subpart D allows guarding by use of a guard or shield, or by location “[e]xcept as otherwise provided in this subpart.” The cited section, however, provides that “[a]ll power take-off shafts, including rear, mid- or side mounted shafts, shall be guarded either by a master shield, as provided in paragraph (b)(1)(ii) of this section, or by other protective guarding.” Because physical guards are prescribed by (b)(1)(i), which applies specifically to power take-off shafts, guarding by location is not permitted here.

Existence of a Hazard. When a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335 (No. 15983, 1978). The cited standard unequivocally requires the presence of a master shield or other guard, except when the design of a PTO driven machine requires their removal, without regard to whether the PTO is rotating.¹ Symms’ evidence, though it establishes that the likelihood of injury is remote, does not excuse Symms’ failure to comply with the mandates of the standard. *Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843 (9th Cir. 1976).

The Secretary has established the violation.

Penalty

The evidence establishes that the PTO poses no hazard to employees unless engaged. Moreover, the record shows that there is no real likelihood of the PTO being activated in the absence of an intentional act. I find that Symms’ noncompliance with the cited standard here posed no real hazard to employees, and that the violation should be reclassified as *de minimis*. Where, as here, an employer’s failure to comply with a standard has been shown to bear a negligible relationship to employee safety or health the assessment of a penalty is inappropriate. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987).

ORDER

¹ The manufacturer’s operator’s manual has the same requirement; it states: **CAUTION: Remove the master shield ONLY when necessary. Be sure that it is in place when the PTO guard is removed, and CAUTION: Always install the guard on the power take-off when the PTO is not in use.** (Exh. C-6, p. 34).

1. Citation 1, item 2, alleging violation of §1928.57(b)(1)(i) is AFFIRMED as a *de minimis* violation without penalty.

Benjamin R. Loye
Judge, OSHRC

Dated: