Secretary of Labor, Complainant, v. Tyson Foods, Inc., Respondent.	OSHRC Docket No. **97-1682**

Appearances:

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Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On July 31, 1997, the Secretary issued Tyson Foods, Inc. (Tyson), a serious citation following an investigation conducted by Occupational Safety and Health Administration (OSHA) Compliance Officer William Hodges. Hodges began his investigation on May 30, 1997, in response to a report of the death of Tyson's employee, Freeman Eastwood. The fatality occurred on May 22, 1997, when a 3-wheeled forklift operated by Mr. Eastwood overturned backwards as he removed frozen chicken carcasses from a portable freezer located on a farm in Berryville, Arkansas. Tyson contested the citation.

The Secretary asserts that Tyson violated two provisions of the general industry standards governing operator training and forklift repair, §§ 1910.178(l) and (p)(1), respectively. Tyson contends that the activities cited by the Secretary fall within the "agricultural operations" exception of Part 1928, which preclude issuance of the citation. Alternatively, Tyson argues that it did not violate the standards and that if a violation of item 2 occurred, it was the result of employee misconduct.

During the discovery phase of this case, the parties stipulated to facts which formed the basis for a motion for summary judgment on application of the agriculture exception of Part

1928. On the facts presented in the summary judgment motion, this Judge determined that Tyson was not entitled to the agricultural exception as a matter of law. The hearing in Little Rock, Arkansas, followed, and the parties presented expert and other testimony related to the agricultural exception and to the merits of the alleged violations and the defense. Tyson supplemented the record with a post-hearing deposition. The parties briefed the issues, and the case is ready for decision.

For the reasons stated below, the Secretary's position prevails on the exception, but Tyson is correct that it did not violate the standards.

Background

Tyson is a major integrated poultry producer with a home office in Arkansas. Tyson is involved in raising, feeding, processing, selling, and research/consulting related to poultry-based food products. As a poultry "integrator," Tyson owned the hatchery, feed mill, and chicken processing operations (Dep. p 8).[1] Among other locations, Tyson carried out these activities in several large complexes located in Northwestern Arkansas, including the Berryville Complex, the Green Forest Complex, and the River Valley Complex. The Berryville and Green Forest Complexes processed live chickens, and the River Valley Complex was involved in rendering by-products (Tr. 20, 66).

Tyson contracted out the actual raising or "growing" of the chickens to independent farms owned by "contract growers." Tyson delivered the chicks to the contract growers, who cared for and fed the chickens in the growers' broiler houses. Tyson delivered feed to the contract farms and, as needed, provided them with advice and other assistance. The contract growers furnished labor, the broiler houses, feed bins, and the farm equipment needed for the growing operation. Tyson retained title to the chickens (Stips. 2 - 4).[2]

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[1] "Dep." refers to the post-hearing deposition of Dr. Robert Kenny Page, Tyson's expert witness in the field of veterinary medicine.

[2] As stipulated, ownership of the chickens remained with Tyson even after the birds died. Dr. John Copeland, who testified as an expert witness for Tyson, initially appeared to suggest that ownership shifted from Tyson to the grower when the birds died. Dr. Copeland clarified that his statements were only intended to illustrate the growers' responsibility to comply with State environmental carcass disposal laws (Tr. 346).

Tyson's employees came onto the contract farms for specific purposes. In addition to delivering the chicks and the feed, Tyson's employees collected and caged the "grown-out" chickens and hauled them to Tyson's designated live processing plants (Stips. 1 - 6).

Some of the chickens in the grower's care died before they reached an age to be processed. During the growing cycle, it was not unusual to lose 4 to 5 percent of a flock.[3] The carcasses of the dead chickens had to be properly disposed of to avoid contamination and disease (Tr. 201, 374). Although many states permit disposal of carcasses into pits, since 1993 Arkansas Act 241 prohibited that disposal method. Approved methods include (Exh. R-16) (emphasis added):

> (1) composting of carcasses; (2) cremation or incineration; (3) extrusion, (4) *on-farm freezing;* (5) *rendering*; or (6) cooking for swine feed.

In Arkansas the contract growers had responsibility to comply with Act 241 (Exh. R-16).

Tyson played a major role in developing the technology for the on-farm freezing operations in Arkansas. Its growers began using this newer method of carcass disposal in 1993 (Tr. 211-212). With on-farm freezing, the contract growers placed the dead chickens into one or more of the freezers located on their farms. Tyson provided and continued to own and to maintain the freezers (Stips. 9, 12). Since the freezers were designed to hold the dead of one flock during a complete growing cycle (usually lasting 8 weeks), the freezers were emptied once per flock (Tr. 17, 215).

On May 22, 1997, Tyson employee Freeman Eastwood was collecting frozen chicken carcasses from a contract farm in Berryville, Arkansas, using a specialized three-wheeled forklift. Eastwood made a sharp turn with the forks extended and the freezer still in the air. The forklift overturned, fatally crushing Eastwood in the forklift (Stips. 15 - 16).

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[3] In addition to a 4% or 5% routine mortality, broiler houses are subject to catastrophic mortality, which can kill all or most of a flock (Tr. 374-375). Different disposal procedures are followed after a catastrophic mortality (Tr. 56, 73, 378). The activity at issue here relates to carcass disposal after routine mortality.

Discussion

Does the Agricultural Exemption Apply?

Tyson's employee, using Tyson's equipment, came onto a contract farm to collect chicken carcasses owned by Tyson and stored in Tyson's freezers (Stip. 12). The carcasses had been generated on the farm as part of the process of raising poultry, but were destined to be turned into a protein by-product in Tyson's rendering facility. Tyson is an integrated poultry producer, not a farmer. Qualifying for the exception, however, is not limited to cases where an exposed employee was employed by a farmer or to activities which took place on a farm, although both concepts are significant.[4]

Part 1928 contains the Occupational Safety and Health Standards for agriculture. Section 1928.21(b) provides the following exception:

> Except to the extent specified in [seven standards not at issue here], the standards contained in subparts B through T and subpart Z of 1910 of this title do not apply to agricultural operations.

Tyson need not comply with §§ 1910.178(l) and (p)(1) if the cited activity constituted "agricultural operations." Without dispute, the raising of chickens is an "agricultural operation." Rendering carcasses at a rendering plant is not an agricultural operation. The parties disagree whether removing frozen chicken carcasses from a farm is an integral part of the raising of chickens, as Tyson argues; or whether it is the first step in Tyson's rendering operation, as the Secretary contends. Was the activity carried on as a necessary part of the agricultural function or as some other type of independent productive activity?

The Test for the Exception

The Review Commission considered the agricultural exception in two cases. In the first case, *Chapman & Stephens Co.*, 5 BNA OSHC 1395 (No. 13535, 1977), the Commission held that the agricultural exception applied to the activities of a farmer (a citrus grower) whose employee was electrocuted while removing irrigation pipe from the farmer's land. The Review Commission reasoned that irrigation was needed in the farmer's production of its citrus and, thus,

[4] While not dispositive, employment by a farmer or on a farm are important considerations in the applying the agricultural exception under the OSH Act. Activities which may not fall within the exception when performed by a non-farmer may be exempt if performed by a farmer on a farm.

working on irrigation pipes was a part of cultivating and growing citrus. In addition, the employer was the farmer and the activity took place on a farm.

In the second case, *Darragh Co.*, 9 BNA OSHC 1205 (Nos. 77-2555, -3074, -3075, 1980), the Commission again focused on the cited activity, stating (*Id.* at 1208):

> [T]he Commission must examine the specific tasks that exposed the worker to the alleged noncomplying condition for which the employer was cited and decide whether the task is part of, or integrally related to an agricultural operation.

Like Tyson, the employer in *Darragh* was an integrator, and not a farmer. Darragh's employee climbed a defective ladder to deliver feed into a contract grower's feed bin. The Commission concluded that feeding poultry and, thus, delivery of feed to the farm was "integrally related" to the raising of chickens. *Id.* at 1208. Also, the defective ladder and the feed bin belonged to the farmer and the activity took place on the farm. Significantly different from the present case, the activity in *Darragh* furthered the grower's care of and "raising" of its live poultry. Here, the broilers whose carcases were to be collected were no longer being raised. Because the carcass collection usually came at the end of the grow-out cycle, the raising was over for the rest of the flock as well (Tr. 17).

Other statutes contain agricultural exceptions which use similar, but not identical, terminology. For example, § 2(3) of the National Labor Relations Act (NLRA) and § 3(f) of the Fair Labor Standards Act (FLSA) contain exceptions from the requirements of those statutes for the "agricultural laborer." In the context of the NLRA, the Supreme Court most recently interpreted the term "agricultural" in *Holly Farms Corp. v. NLRB,* 517 U.S. 392 (1996).

The question before the Court in *Holly Farms* was whether the activities of Holly Farms' chicken catchers, forklift operators, and truckdrivers were exempt because they were being performed by agricultural laborers. The Court quickly disposed of the issue for the truckdrivers, ruling that the exemption could not apply to those who transported broilers off the farm. More closely scrutinizing the activities of the catchers and forklift operators (whose work arguably was performed "on a farm" and "incidental to or in conjunction with" the contract grower's farming operation), the Court deferred to the reasonable interpretation of the National Labor Relations Board. The Board concluded, and the Court agreed, that at the point where the broilers had

grown on the farm for seven weeks, the growers' obligation to raise the poultry had ended. Catching and caging the birds began the integrator's nonexempt activities of slaughter and processing. The Court found further support for this conclusion because the duties of the catchers and forklift operators were so intermingled with those of their fellow processing-plant employees.

Because of the factual similarities between *Holly Farms* and the present case, if "agricultural operations" under the OSH Act had the same meaning as "agricultural laborer" under the NLRA an FLSA, the exception could not apply. The Review Commission in *Darragh* compared the two terms and found that they were not identical, with "agricultural operations" being considered the more encompassing term. Thus, in *Darragh*, delivering feed to a contact farm was an exempt activity under the OSH Act, even though the Supreme Court had then recently concluded in *Bayside Enterprises, Inc. v. NLRB,* 429 U.S. 298 (1977) that the activity was not exempt under the NLRA.[5]

Performing the Cited Activity

Tyson's contract growers removed the dead chickens from their broiler houses and placed the carcasses into the freezers. The growers called Tyson when the grow-out cycle was completed and the freezers were full. They could call the dispatcher at the Berryville live haul department, at the grow-out department, or at the Green Forest Service Center. The protein recovery operator checked at all three locations to find out which farms were ready to have the carcasses picked-up.

Pick-up began when the operator loaded a specialized three-wheel Kooi-AAP forklift onto the truck and trailer, all of which were kept at the Berryville Complex. The operator transported the equipment onto the farm, located as level a spot as possible close to the freezer, and drove the Kooi off the truck. Using the Kooi, the operator removed the freezer top, positioned the forks under the freezer, transported the freezer to the trailer, extended the forks up and out raising and inverting the freezer as the mast swiveled around in a complete circle and the

[5] *Bayside Enterprises, Inc. v. NLRB,* 429 U.S. 298 (1977), held that the integrator's delivery of feed to a contact farm furthered the integrator's business and was not incidental to the integrator's agricultural activities. *See also NLRB v. Hudson Farms, Inc.*, 681 F.2d 1105, 1106 (8th Cir. 1982) *(per curiam)* cert. denied, 459 U.S. 1069 (1982).

carcasses fell into the trailer. The freezer was replaced, the Kooi was reloaded onto the tailer, and the same process was repeated at the other farms to be serviced that day (Tr. 16-19, 34-36).

After picking up a "full load" of carcasses, the protein recovery operator took the loaded trailer to the Green Forest Complex in Russellville to be weighed. He took the trailer down the off-haul pad and went to the Green Forest Service Center, from where he called the rendering facility at the River Valley Complex. River Valley dispatched a driver to pick up and bring the trailer load of frozen carcasses back to be rendered (Tr. 19-20, 66-68).

Expert Testimony

Both Tyson and the Secretary presented the testimony of highly respected expert witnesses representing various disciplines of poultry science. Testifying on behalf of Tyson, Dr. Lionel Barton, a poultry specialist in extension services research; Dr. John Copeland, a specialist in legal issues related to agriculture; Dr. Dan Cunningham, professor of poultry science; and Dr. Robert Page, a specialist in veterinary medicine, offered their opinions that removal of the carcasses was integrally related to the agricultural operation of raising chickens. This was so, they suggested, for three primary reasons: (1) the legal responsibility for disposal of carcasses remained with the contract grower; (2) until the carcasses were physically removed from the farm, they constituted a potential source of disease for the flock; and (3) the use of the freezer method of disposal was an economic benefit to the contract grower, and was presently a liability for Tyson. Tyson's experts regarded all activities related to disposal of the poultry carcasses to be an "agricultural operation" until after the carcasses had physically been delivered to the River Valley rendering facility (Tr. 190-195, 213, 228, 265, 270, 382, 389; Dep. pp 10, 13, 21, 53-54).

The Secretary countered with the testimony of Dr. Simon Shane, a specialist in veterinary medicine, who like Tyson's experts had an impressive background in both the academic and practical aspects of poultry production. Dr. Shane characterized the activity as integrally related to poultry rendering because: (1) freezing the chicken carcasses was not critical to growing chickens; (2) freezing carcasses was utilized for disposal because it was the only method which

permitted the carcasses to be rendered; and (3) the freezers were designed to function with machinery not usually found on a farm (Tr. 411-413).

With on-farm freezing, the last activity Dr. Shane saw as an agricultural operation occurred when the grower placed the chicken carcass into the freezer. Tyson's retrieval of the frozen carcasses was considered the beginning of an industrial process and not an integral part of the process of growing chickens (Tr. 423, 497-498).

Analysis

Tyson seeks to claim the exception and bears the burden of proof on the issue. *ConAgra Flour Milling*, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992). It has long been held that exceptions from remedial legislation, such as the OSH Act, must be narrowly construed and applied only to those who "plainly and unmistakenly" fall within the terms and spirit of the exception. *See Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). "Agricultural operations" is not defined in the standard, and the Secretary has not issued any formal interpretation of the term.

The analysis begins with the cited activity. The citation addresses the operation of the three-wheeled forklift as it was used to lift a freezer and empty out carcasses in preparation for their immediate transportation off the farm.

Tyson focuses on the fact that raising poultry entails the loss of some broilers and the necessary disposal of the carcasses. Whether a particular activity is integrally related to agriculture is not determined by how necessary an activity is to the final production of the agricultural commodity. Without disagreement, it is essential to remove dead chickens from the broiler houses to minimize transmitting disease to the remaining live chickens. Some further disposal of these carcasses must be devised as a practical matter. A narrow construction of the exception does not permit an interpretation which places <u>all</u> disposal operations within its terms.

Many states govern disposal of animal carcasses. In Missouri, for example, the disposal of dead animals must occur within 24 hours, either by arranging transport and burial with permitted facilities or by disposal on the owner's premises or any other available premises (Exh. 10, p. 69). Arkansas suggests six methods for disposal. Some disposal methods, such as composting, burning, or burial of carcasses are usually carried out by the farmer or on the farm. Others, such as rendering, constitute a commercial off-site undertaking.

Act 241 lists on-farm freezing and rendering as separate disposal methods, but one method cannot be utilized without the other. The processes, together, achieved the objectives of disposal and rendering. Yet, the specific activities involved in the two operations were not so intermingled that they cannot be separated. The frozen carcasses were to be collected from the grower's farm only because freezing permitted Tyson to engage in the further commercial activity of protein recovery

ugh rendering. According to expert testimony, freezing the carcasses preserved the integrity of the carcasses so that they could become a usable by-product. Bacteria would otherwise completely break down the carcasses (Tr. 212, 218, 397, 400). [6]

The protein recovery operator came onto and left the farm without notifying the grower. He radioed Tyson to send assistance onto the farm, if needed, without seeking the grower's permission. Since the growers were not compensated for the carcasses, they had no remaining financial interest or expense involved in the collection process.

In contrast, Eastwood's activities were highly integrated into Tyson's other non-agricultural activities. Collecting the carcasses was organized as a part of central processing. Each morning Holman checked with three separate Tyson departments for his list of farms. The equipment, kept at the Berryville Complex, was specialized to collect large numbers of carcasses as efficiently as possible from 20 to 35 farms a week (Tr. 72). The carcasses were commingled from the freezers of the various farms collected each day, weighed at one complex and left for pick up by another. According to Holman (Tr. 68-69):

> [T]he Green Forest Complex is where most of the River Valley drivers run to with their off-haul loads, spare parts, whatever we dump on the trailers. That's pretty well where they set it up for the pickup of the load of dead birds.

It is concluded that Freeman's activity in emptying freezers on the contract farm was an integral part of Tyson's commercial activity, *i.e.*, its rendering operation. In reaching this conclusion, Tyson's arguments to the contrary were considered.

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[6] Nor was freezing necessary for biosecurity (Dep. 55). Another acceptable method of carcass disposal was to place the carcasses into closed, non-refrigerated containers. The carcasses became unusable for any other product but did not present a biosecurity hazard (Tr. 420-423).

Tyson is incorrect that the legal responsibility placed on the growers by Act 241 makes all efforts towards carcass disposal (short of the complete elimination of the carcass) part of an agricultural operation. The growers contractual obligation may end when it notifies Tyson that the carcasses are ready to be collected, even if a potential legal liability continues to exist. However, neither the legal nor the contractual liability is determinative. Further, as Dr. Copeland testified, placing the legal liability for carcass disposal on the grower rather than the integrator is becoming more controversial (Tr. 315, 335). Whether in the future the burden of disposal may be shared or shifted does not change the characterization of the activity for purposes of the exception.

On-farm freezing represents a cooperative effort between the integrator and the grower, which is to their mutual advantage. The process yields tangible and intangible benefits for each (Tr. 212, 219, 314, 415-418; dep. p 64). Tyson's rendering plant must have a commodity to render. Other disposal methods may be more burdensome to the grower. Under different market conditions, it is also possible that rendering the frozen carcasses may become profitable to Tyson in strictly economic terms. Although considered, Tyson's arguments are unpersuasive.

Tyson failed to prove that its activity fits within the agricultural exception.

Citation No. 1

Item 1 -- Alleged Serious Violation of § 1910.178(1)

The Secretary asserts that Tyson violated § 1910.178(l) by permitting Eastwood to operate the Kooi-AAP forklift without first having been properly trained. The standard provides:

> Operator training. Only trained and authorized operators shall be permitted to operate a powered industrial truck. Methods shall be devised to train operators in the safe operation of powered industrial trucks.
>
> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standards, (b) the employer's noncompliance with standard's terms, (c) employees access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation.

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1741, 1994).

The standard applies to Tyson's operation of the Kooi forklift. If Tyson failed to adequately train Freeman Eastwood, he would have been exposed to the conditions addressed by the standard. Only the second and fourth elements remain to be discussed.

The Secretary argues that Tyson failed to comply with the standard because: (1) the Kooi operator had not been trained to attach the safety device of a chain and eye hook assemblage; and (2) since Holman (the previous Kooi operator and Eastwood's only trainer) was himself poorly trained and considered the Kooi to be unsafe, he could not train someone else in the forklift's "safe operation."

As discussed below, the Secretary's first contention is wrong. She must first prove that a piece of equipment is, in fact, a safety device before she can prove that the employer failed to train its employees in its use.

Secondly, the Secretary contends that the training given Eastwood's trainer (Holman) was so poor and the operation of the Kooi so troublesome, that the training was defective. The Secretary is correct that Holman received scant training when he was initially assigned to operate the Kooi. She is also correct that operation of the Kooi was difficult. It does not follow, however, that Tyson violated the training standard.

Holman was trained by the previous protein recovery operator, Michael Craig. Craig "didn't say much; just more of less watch and learn." Craig told Holman "to keep [the Kooi] on level ground if possible" because "if you get it on an incline, with all that [freezer] weight in the air, you're liable to overturn the loader as the weight shifts" (Tr. 21, 22). Holman watched Craig for 2 days before he was left on his own to perform the job. Holman was given no other training during the 1½ years that he operated the Kooi (Tr. 54).

As the Secretary points out, Holman did not feel secure operating the Kooi because of repeated operational problems (Tr. 25-26, 57, 63-64). He found the forklift "easy to turn over" (Tr. 62). Finally, Holman asked his supervisor to replace him as the protein recovery operator. Holman explained (Tr. 29-30):

> I was tired of being at risk every day trying to load something that was always breaking down. I was just ready to get off of it . . . Because every time I went out, something was breaking down on it. It was, like I said, the gear box broke and slammed me against

> the truck. I have had the arm that supported the seat come down and jerk me against the steering wheel, I have had the kickers come down on me backwards and I was ready to get off.

When Eastwood was identified as Holman's replacement, Tyson required Holman to train Eastwood to do the job, including operating the Kooi forklift (Tr. 40). First, Eastwood watched as Holman operated the forklift, walking along beside it. The two later exchanged positions, and Holman watched while Eastwood operated the forklift (27).

During this time, Holman showed Eastwood how to use the "hydraulics," the manual switch, and how to raise the kickers before backing up. Holman demonstrated how not to move the forklift with the mast fully extended and the load out (Tr. 49). Holman believed that Eastwood understood how to lower and center the load before he started to turn and move the forklift. He used the kickers "about every time" (Tr. 50). Holman was especially concerned that Eastwood knew how to balance his load so that the forklift would not turn over (Tr. 28, 42, 61-62). Holman did not feel that his supervisors hurried him with the training (Tr. 61).

This one-on-one training lasted 2 to 3 weeks while the two men performed the duties of the protein recovery operator together. After that time, Eastwood told Holman that he wanted to perform the job, and "he thought he could handle it." Holman responded that Eastwood should "never take your mind off the loader, because it will get you" (Tr. 42, 72). The accident occurred a short time after Eastwood became the permanent operator (Tr. 30).

Section § 1910.178(l) does not impose stringent requirements for the safety training of forklift operators. *John W. McGrath Corp.,* 3 BNA OSHC 1092 (No. 6019, 1975) (no formal training program was required when an employer's operators are known to be experienced); *Color Image, Inc.*, 17 BNA OSHC 2115 (No. 1080, 1996) (although no formalized training was required, 10 minutes of oral instruction was *not* enough to cover necessary safety procedures on forklift). Accepting that a greater degree of training must be afforded where a three-wheeled forklift was operated on the terrain of a farm, Tyson's training meets the requirements of the standard.

Although Holman was uncomfortable operating the forklift because of continuing mechanical problems, there was no showing that a mechanical problem contributed to the tragic

fatality. During the 1½ years that Holman operated the Kooi, he became well-versed in the Kooi's operation. Holman was a knowledgeable person to train Eastwood. Holman showed himself to be a safety conscious employee (Tr. 57, 62). Considering the time spent and the level of attention Holman brought to the training, it is concluded that Tyson devised an appropriate method to train operators in the safe operation of the forklift. Accordingly, item 1 is vacated.

Item 2 -- Alleged Serious Violation of § 1910.178(p)(1)

The Secretary asserts that Tyson violated § 1910.178(p)(1), which provides:

> (p) *Operation of the truck.* (1) If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

Compliance Officer Hodges observed the accident scene. He noted that the Kooi forklift had a chain and eye hook assemblage connected at one end at the back of the forklift behind the operator's seat to the bottom rear horizontal portion of the folding overhead cage (Exhs. C-1, C-3, C-4, C-6). The eye hook at the other end of the chain was unfastened.

Neither Holman, the former Kooi operator, nor Eastwood were trained on how the chain assemblage should be used. Holman never understood its intended purpose, although one time he used it as a towing device. No literature was available to Holman (or to anyone) which described the chain assemblage (Tr. 111-112).

Although Hodges had not seen such a chain and eye hook assemblage on a forklift during any of his approximately 560 investigations which involved forklifts, he concluded that the configuration was meant to function as a safety device. Hodges believed that the chain's eye hook was meant to be secured to prevent the seat from moving forward and crushing the operator in the event of an accident (Tr. 77, 84, 89, 167-172).

The problem with the Secretary's theory is that it remained unsubstantiated by any evidence other than Hodges's speculation. The owner's manual did not mention the chain assemblage, and the Swedish manufacturer provided no information regarding any intended use (100). Hodges did not seek to test his theory (Tr. 148). The Secretary presented no expert testimony regarding the purpose of the chain.

To the extent that the Secretary argues that the problems Holman described with the Kooi constituted a failure to correct defects before use, the evidence is to the contrary. Although there were frequent problems, and the Kooi forklift was taken into the Service Center approximately three to six time a month, Tyson regularly repaired the problems that were presented (Tr. 17, 27, 48). The Secretary does not point to a time that the Kooi was placed back into service without specific repairs having been made.

The Secretary failed to establish the violation of § 1910.178(p)(1). Item 2 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

The alleged violations of § § 1910.178(l) and § 1910.178(p)(1) are vacated.

NANCY J. SPIES
Judge

Date: October 4, 1999