

SECRETARY OF LABOR,

Complainant,

v.

SOUTHWEST MARINE, INC.,

Respondent.

OSHRC DOCKET NO. 97-0246

DECISION AND ORDER

This matter comes up on the motion of Respondent, Southwest Marine, Inc. (Southwest). Southwest maintains that standards promulgated by the Occupational Safety and Health Administration (OSHA), and cited in this matter, are preempted by California's state plan (CalOSHA). Southwest maintains that OSHA has no jurisdiction over the cited conditions and asks that the citation be dismissed. The Secretary argues that OSHA, 1) retains jurisdiction over hazardous conditions on navigable waters, and 2) retains concurrent jurisdiction to cite employee safety and health hazards in California. The parties agree that the issue is solely a question of law, and so submit the matter on a statement of stipulated facts for this judge's determination.

Stipulated Facts. Southwest is engaged in the business of ship repair and refurbishment. On October 28, 1996, as it was being positioned for hoisting, the boom of Southwest's portal crane collapsed onto the USS Benfold, which was moored at Pier 3 at Southwest's San Diego facility. The subject crane is mounted on a raised platform that moves on a fixed rail system running from the end of the pier around the perimeter of Southwest's property. The portal crane is inspected and maintained pursuant to CalOSHA standards. Following the accident, CalOSHA cited Southwest for violations related to the training of the crane operator, the accuracy of the boom angle indicator and the failure of the boom angle cut-off switch. Federal OSHA cited Southwest for an alleged violation of §5(a)(1). The citation states that:

Employees on the USS Benfold were exposed to the hazard of being struck by falling loads and crane equipment when the crane made lifts which were outside the parameters of the manufacturer's boom angle and load capacity chart. The crane operator had lifted loads consisting of 12' by 12' wooden cribbing blocks at a boom angle approximately 6 to 8 degrees from the horizontal, to trim the brow which was located between the USS Benfold and the living barge that was moored at per (sic) 3 in San Diego.

California has a state safety and health plan that was initially approved in 1989 pursuant to §18(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651--678 (hereinafter, the Act). The current level of Federal enforcement is governed by the Operational Status Agreement, set forth at 29 CFR 1952.172(b). That section states, *inter alia*, that:

(a) . . .discretionary Federal enforcement authority under section 18(e) of the Act will not be initiated with regard to Federal occupational safety and health standards in issues covered under 29 CFR part 1910, 29 CFR part 1926, and 29 CFR part 1928, except as set forth below.

Subpart (b) states that [t]he U.S. Department of Labor will continue to exercise authority among other things, with regard to:

(2) The following maritime activities:

- (i) Longshore operations on vessels from the shore side of the means of access to said vehicles.
- (ii) Marine vessels construction operations (from the means of access of the shore).
- (iii) All afloat marine ship building and repair from the foot of the gangway.
- (iv) All ship building and repair in graving docks or dry docks.
- (v) All ship repairing done in marine railways or similar conveyances used to haul vessels out of the water.
- (vi) All floating fuel operations.
- (vii) All afloat dredging and pile driving and similar operations.
- (viii) All diving from vessels afloat on the navigable waters.
- (ix) All offshore drilling rigs operating outside the 3-mile limit.

Discussion. For the reasons set forth below, this judge finds that OSHA should not have exercised enforcement authority in this instance. Respondent's motion to dismiss, therefore, is GRANTED.

Jurisdiction Over Maritime Activities

The Secretary argues that she retains jurisdiction over this matter pursuant to her reservation of enforcement authority over maritime activities, set forth in §1952.172(b)(2). The Secretary maintains that the cited violation occurred on the navigable waters, because Southwest employees aboard the USS Benfold were exposed to the hazard created by the collapsing crane boom.

The citation in this matter alleges that the cited crane made lifts which were outside the parameters of the manufacturer's boom angle and load capacity chart. The violation, thus, arises solely out of the allegedly improper operation of the shore based portal crane. It is stipulated that regulation of the portal crane falls to CalOSHA under the Operational Status Agreement. That the violation created a hazard to employees who were working on the navigable waters does not bring the violation within the scope of §1952.172 (b)(2).

Concurrent Jurisdiction

This judge notes that Section 18(e) of the Act, referred to in the operating agreement, §1952.172(a), *supra*, as the source of OSHA's discretionary enforcement authority, does not apply to §5(a)(1) of the Act. That section grants the Secretary discretion to exercise her authority with respect to standards promulgated

under §6 of the Act. Section 5(a)(1) was not promulgated pursuant to §6. The Secretary, therefore, is granted no discretion to enforce §5(a)(1) by §18(e).

Because the enforcement of §5(a)(1) is not addressed in Section 18, STATE JURISDICTION AND STATE PLANS, that section is helpful only to discern the intent of Congress in affording to the states a means for enacting their own safety and health plans. As noted by Southwest, the Supreme Court has already examined the structure and purpose of §18 and addressed the issue of Congressional intent. In *Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88 (1992) the Supreme Court found that “Congress intended to subject employers and employees to only one set of regulations, be it federal or state. . . .” *Id.* at 99.

It is undisputed that California has an operational state plan which has been deemed to provide employee protection equivalent to that provided by federal standards in the issues covered. It is undisputed that California has enacted and has enforced regulations covering the shore based crane which is the subject of this action. In these circumstances, I find that OSHA’s attempt to invoke concurrent jurisdiction is contrary to Congressional intent expressed in *Gade*, and is improper.

Southwest’s motion is GRANTED, and this matter is DISMISSED.

Benjamin R. Loye
Judge, OSHRC

Dated: