

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

STEVEDORING SERVICES OF AMERICA
(SSA), and its successors,

Respondent.

OSHRC DOCKET NO. 98-1909

DECISION AND ORDER

This matter comes up on Respondent's motion to dismiss the Secretary of Labor's citations on jurisdictional grounds. Complainant opposes Respondent's motion. Both parties rely on this judge's decision in *Southwest Marine, Inc.*, OSHRC Docket No. 97-0246, issued May 28, 1998. In that case this judge found that OSHA's attempt to invoke concurrent jurisdiction was improper where the employer had been cited for the same allegedly violative conduct under California's state plan.

The citation in this matter alleges that the personnel basket on a shore based crane was not equipped with a means to prevent its access doors from opening accidentally. It is undisputed that California has an operational state plan, enacted pursuant to §18 of the Act, which has been deemed to provide employee protection equivalent to that provided by federal standards in the issues covered. It is stipulated that CalOSHA has jurisdiction to regulate Respondent's shore based crane pursuant its Operational Status Agreement with Federal OSHA; and that CalOSHA has acted to enforce its regulations, citing Respondent for, in addition to other alleged violations of California's Code of Regulations, failing to positively secure the gates of the crane's personnel basket.

Nonetheless, the Secretary maintains that it exercises concurrent jurisdiction over the cited personnel basket, once it passes from the land over a vertical plane into the navigable waters of the United States. The Secretary cites 29 CFR 1952.172(b) which states, *inter alia*, that the U.S. Department of Labor will continue to exercise authority, among other things, with regard to:

(2)(i) Longshore operations on vessels from the shore side of the means of access to said vessels.

While the Secretary retains jurisdiction to regulate longshoring operations taking place on the navigable waters of the U.S., this judge does not agree that its exercise of jurisdiction was appropriate in this case. It is stipulated that the personnel basket of the shore based crane was conducting longshoring operations, and was being lowered into the hold of a vessel on the navigable waters of the United States. Nonetheless, the violative condition was under the control of the operator of the shore based crane, and so was properly subject to regulation and citation by the state of California. In *Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88 (1992) the Supreme Court, examining §18 of the Act, found that “Congress intended to subject employers and employees to only one set of regulations, be it federal or state. . .” *Id.* at 99. OSHA’s exercise of its jurisdiction, issuing duplicative citations to Respondent for the same allegedly violative condition cited by the State of California, is contrary to Congressional intent expressed in *Gade*, and so is improper.

In an April 23, 1999 submission, California states its willingness to drop its citation addressing the conditions also cited by Federal OSHA, should the Federal citation be sustained in Commission proceedings. California’s case would proceed, however, because California has issued additional citations to Respondent arising out of the same incident. California’s withdrawal of the disputed citation, therefore, would lead to duplicative and wasteful judicial proceedings.

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

Benjamin R. Loye
Judge, OSHRC

Dated: