

## SUPREME COURT EXPANDS REACH OF OSHA IN *CHAO V. MALLARD BAY*

By Patrick J. Veters

In a case of significant interest to all maritime employers, the United States Supreme Court recently determined an important issue of maritime law: whether safety regulations under the Occupational Safety & Health Act (OSHA) apply to the working conditions of seamen on “uninspected” vessels, which include fishing vessels, tugs, barges, many oil supply and oil and gas drilling vessels and other vessels that are not “inspected vessels,” *i.e.*, not subject to full inspection by the United States Coast Guard. *Chao v. Mallard Bay Drilling, Inc.*, United States No. 00-927 (Jan. 2002).

The Supreme Court’s decision follows an appeal from a decision by the United States Fifth Circuit Court of Appeals in New Orleans. In its decision, the Fifth Circuit held that the Occupational Safety & Health Administration (“Administration”) lacked the authority to inspect and enforce its regulations with respect to working conditions on a drilling barge. *Mallard Bay Drilling, Inc. v. Herman*, 212 F.3d 898, 2000 AMC 1942 (5th Cir. 2000). After an explosion killed four employees and injured two on an “uninspected” drilling barge, OSHA issued citations against Mallard for violations of OSHA regulations. The Fifth Circuit ruled that the drilling barge was subject to regulation by the Coast Guard and that OSHA had no authority to regulate the working conditions of seamen, irrespective of whether they are employed on “inspected” or “uninspected” vessels.

Federal courts across the country were divided on the issue of whether OSHA regulations applied to working conditions of seamen on uninspected vessels. The Fifth Circuit was among the minority in its view that OSHA regulations did not apply to such vessels. The Second, Ninth, and Eleventh Circuits, on the other hand, had ruled that OSHA regulations can apply to uninspected vessels in the territorial waters of the United States. The rationale of the majority of federal courts is that Coast Guard regulations do not preempt OSHA regulations with respect to uninspected vessels because the Coast Guard has not “exercised” its authority to regulate safety and health conditions aboard such vessels. According to the majority of courts, when another federal agency with statutory authority to regulate the safety and health of employees has, in fact, exercised such authority, OSHA does not apply to the extent the other federal agency has exercised its authority.

In its decision last month, the U.S. Supreme Court unanimously adopted the majority rule of the other federal appeals courts and reversed the

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Fifth Circuit's decision. In reversing the Fifth Circuit, the Supreme Court concluded that the mere fact that another federal agency (*i.e.*, the Coast Guard) has the authority to regulate certain working conditions aboard uninspected vessels and the minimal use of that authority was not enough to entirely preempt the application of OSHA to those vessels. Although the Court recognized that, under OSHA, another federal agency such as the Coast Guard may "exercise" its authority to regulate the safety and health of certain employees by (1) adopting specific regulations or (2) by asserting comprehensive regulatory authority over a certain category of vessel, the Court concluded that the Coast Guard did neither in this case. Although the rig at issue in *Chao v. Mallard Bay* was anchored in navigable waters, the Supreme Court found it was a "work place" under OSHA because it was located within the geographic area covered by OSHA (*i.e.*, "a state" such as Louisiana).

### *Effect of Decision on Maritime Industry*

In addition to the application of OSHA to the working conditions of seamen on "uninspected vessels" and the Administration's ability to assess fines and penalties for noncompliance, the application of OSHA to uninspected vessels could affect an employer's liability under the Jones Act for a seaman's injuries if they result from non-compliance with OSHA regulations. Under the Jones Act, violation of a "safety statute" which has any causal relationship to the injury, no matter how slight, can result in employer liability. Moreover, the employee's contribution to his own injuries will not reduce the amount of damages that may be assessed against an employer.

### *Ignorance is Not a Defense to a Willful Violation of OSHA*

Under OSHA's penalty scheme, a willful violation is subject to the most severe sanctions. OSHA, however, does not define "willful." Nevertheless, the majority of federal circuits that have considered the meaning of willfulness have adopted the approach of the OSHA Review Commission. OSHA defines a "serious" violation as one where "there is substantial probability that death or serious physical harm could result . . . unless the employer did not and could not with the exercise of reasonable diligence know of the presence of the violation." 29 U.S.C. Section 666(k). A willful violation was defined by the Fifth Circuit in *George Electric Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979) as follows: "Intentional disregard of, or plain indifference to OSHA requirements. There is no requirement of bad faith or malicious intent on the part of an employer to constitute a willful violation." The following language

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from the *Georgia Electric* case is illustrative:

Despite its awareness of its obligation to conform to the Act and regulations promulgated thereunder, the company never made any effort to acquaint its supervisory personnel with OSHA standards. Not one employee with responsibility for the highway No. 82 project was aware of the minimum distance requirements . . . instead employees were expected merely to use their “common sense” and not get “too close” to live wires.

The company seeks to turn this fact to its advantage, claiming that it cannot be held liable for willfully violating provisions of which it was unaware. This misses the point. It is precisely because the company made no effort whatsoever to make anyone with supervisory authority at the job site aware of the OSHA regulation that the company can be said to have acted with plain indifference and thereby acted willfully. A company may not, practically as a matter of policy, altogether ignore its known OSHA duties and then plead ignorance when it is caught in violation of an OSHA violation.

595 F.2d 309 at 319-320.

***The Decks of Inspected Vessels Are No Longer Safe from OSHA Intrusion***

In another recent Fifth Circuit case, the court upheld a judgment of civil contempt and an award of attorney’s fees against a vessel owner that refused to honor an OSHA inspection warrant. *Elaine Chao, Secty. of Labor vs. Transocean Offshore, Inc.*, No.00-60535 (5th Cir. Jan. 9, 2002). Transocean Offshore, Inc., owner of the M/V DISCOVERER ENTERPRISE, an inspected vessel, refused to allow the Administration to inspect the work areas of Ingalls Shipbuilding employees, which included the decks of the M/V DISCOVERER ENTERPRISE, in accordance with the warrant. Transocean objected to the warrant on the basis that inspected vessels, such as the M/V DISCOVERER

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ENTERPRISE, were subject to exclusive regulation by the Coast Guard. In rejecting Transocean's argument, the Fifth Circuit noted that OSHA's jurisdiction over longshoremen is uncontradicted and expressly authorized by federal regulation and that OSHA's regulatory power is not displaced as to workers who are engaged in assigned duties aboard a vessel. Accordingly, in certain circumstances, OSHA can perform limited inspections even aboard vessels that are subject to inspection by the Coast Guard.

### *Where Do You Go From Here?*

Due to these important developments, vessel operators should take reasonable steps to educate their employees and, in particular, their supervisory personnel about applicable OSHA standards and regulations. For advice and assistance in complying with these important new court decisions, maritime industry employers should consult their maritime and/or labor counsel.

*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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