BRB No. 04-0964

STANLEY E. PEARSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JERED BROWN BROTHERS	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIGCS	)	DATE ISSUED: 02/28/2006
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	ORDER on RECONSIDERATION
Respondent	)	*EN BANC*

Employer has filed a timely motion for reconsideration *en banc* in the captioned case. *Pearson v. Jered Brown Brothers*, 39 BRBS 59 (2005); 33 U.S.C. § 921(b)(5); 20 C.F.R. §§801.301(a), (c), 802.407(a), (b). Claimant responds, urging denial of employer's motion. We consider employer's motion *en banc*, but deny the relief requested.

In its decision, the Board held that the administrative law judge erred in applying Fourth Circuit precedent to the situs issue presented in this case, which arises in the Eleventh Circuit. Pursuant to *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), and *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), the Board held that the undisputed facts establish both the geographical and functional nexus required under *Winchester*. *Pearson*, 39 BRBS at 62-63. The Board thus reversed the administrative law judge's finding that claimant's injury did not occur on a covered situs. 33 U.S.C. §903(a).

Employer disagrees with the Board's holding that the administrative law judge incorrectly addressed the relationship between *Bianco* and *Winchester* and urges the Board to look again at the facts of this claim and the controlling legal authority. Employer additionally contends that the Board disregarded the definition of "adjoining area" as described in *Winchester* since there is not a maritime function to employer's facility or claimant's work therein. Furthermore, employer asserts that the Board improperly substituted its own findings of fact for those of the administrative law judge in this case.

Employer's contentions lack merit. The Board fully discussed all of the relevant case law on the issue of situs. *See Pearson*, 39 BRBS at 61-63. The decision firmly outlines "the significant differences in precedent" on the issue of situs between the Fourth and Fifth Circuits, and thus, the Fourth and Eleventh Circuits.[1] *Pearson*, 39 BRBS at 62. Specifically, the Board stated that "[t]he Fourth Circuit explicitly refused to adopt *Winchester*, finding that the Fifth Circuit therein 'effectively eliminated the situs requirement in favor of a case-by-case, broad and nebulous' inquiry that affords coverage as long as there is some nexus with the waterfront.' *Sidwell*, 71 F.3d at 1137, 29 BRBS at 141(CRT)." *Id.* Moreover, employer's assertion regarding Fourth Circuit precedent is tantamount to a request that the Board ignore the fundamental tenet that we must apply the law of the circuit within which the injury occurred. *See* 33 U.S.C. §921(c); *Dantes v. Western Foundation Corp.*, 614 F.2d 299, 11 BRBS 753 (1st Cir. 1980); *Lepore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990); *see also Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991).

With regard to the controlling law, the Board stated, "the administrative law judge overlooked the crucial factual distinction between the instant case and *Bianco*:

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[1] Additionally, while, as employer notes, the *Bianco* decision cites to the Fourth Circuit's decision in *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998), it did so in agreeing with the Fourth Circuit that "[w]hen Congress addressed a longshoreman's moving into and out of coverage at water's edge as he unloaded a ship or repaired it, Congress did not purport to eliminate the phenomenon of moving into and out of coverage--such a condition necessarily attends any geographical boundary of coverage." *Bianco*, 304 F.3d at 1059-60, 36 BRBS at 62(CRT). It does not, as employer would have us believe, indicate that the Eleventh Circuit adopted the Fourth Circuit's more restrictive situs test. Rather, the Eleventh Circuit, in *Bianco*, explicitly acknowledged the differences in the Fourth and Fifth Circuits' construction of the term "adjoining" in Section 3(a) and specifically applied the less restrictive approach adopted by the Fifth Circuit in *Winchester*, 632 F.2d 504, 12 BRBS 719, in rendering its decision. *Bianco*, 304 F.3d at 1058, 36 BRBS at 60(CRT).

employer's facility is used for a maritime purpose and thus meets the *Winchester* 'function' requirement." *Pearson*, 39 BRBS at 62. In making this assessment, the Board necessarily applied, rather than disregarded, the "adjoining area" standard and maritime function requirement of *Winchester*, 632 F.2d 504, 12 BRBS 719. In its decision, the Board explicitly relied on the administrative law judge's findings that claimant performed "maritime work" at employer's facility in holding, as a matter of law, that the site along the Brunswick River has a maritime function. *Pearson*, 39 BRBS at 63. In this regard, employer's facility is, in contrast to its assertion, not simply a general steel fabrication facility. The administrative law judge discussed claimant's employment in detail and found that his "employment duties in constructing and maintaining component parts of ships and cranes used to load and unload ships. . . were integral to maritime commerce." Decision and Order at 6. This finding was not contested on appeal. Thus, as employer fabricates ship components and cranes used to load and unload vessels, its facility adjoining the Brunswick River satisfies the "maritime function" requirement of *Winchester*. *Pearson*, 39 BRBS at 63, citing *Alford v. American Bridge Div.*, 642 F.2d 807, 13 BRBS 268 (5th Cir. 1978), *modified in part on reh'g* by 655 F.2d 86, 13 BRBS 837 and 668 F.2d 791 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982).

As for the geographic nexus, employer maintains that the fact that it has used the adjoining water for shipping approximately only 1 percent of the time, *i.e.*, employer contends that it ships 99 percent of its material overland by truck, establishes that its brochure was purely promotional and thus, insufficient to establish the requisite geographical nexus. We disagree. Employer's contention that only a small portion of its manufactured goods are shipped by water overlooks the administrative law judge's finding that employer also tested pontoons while they were floating in the river. Decision and Order at 6; *see* Tr. at 30-32; Emp. Ex. 7. The use of the river in this manner, in addition to the small percentage of goods actually shipped via the river, is sufficient to establish that employer's facility has the requisite geographic nexus with the Brunswick River.

Accordingly, employer's motion for reconsideration *en banc* is denied. 20 C.F.R. §802.409. The Board's decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge