

BRB No. 01-0368

STEVEN L. WALKER)
)
 Claimant-Petitioner)
)
 v.)
)
 METRO MACHINE CORPORATION) DATE ISSUED: Jan. 3, 2002
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (99-LHC-3094) of Administrative Law Judge Daniel A. Sarno denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *OKeefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a shipfitter, injured his back at work on October 6, 1998. Employer paid temporary total disability benefits pursuant to the Virginia workers' compensation law from October 6 through November 1, 1998. Claimant sought benefits under the Longshore Act.

Employer has two facilities adjacent to navigable waters. Claimant was injured at the

Norfolk facility, called the Mid-Atlantic facility. This facility abuts the Elizabeth River next to the Mid-town Tunnel, and is used for fabricating components for Navy ships that are under repair at employer's other facility, where there are wet and dry docks. Tr. at 25-26, 75-76. Claimant estimated that 20-25 percent of the items traveling between the two facilities are sent by barge, and that the rest are sent over land by truck. Tr. at 41. Mr. Fisher, employer's Vice President and personnel manager, estimated that only 5-10 percent of the repair work is sent by barge. Tr. at 81. The Mid-Atlantic facility has a bulkhead on the river where the barge ties up. Tr. at 78; EX 1. This bulkhead is wooden, and runs the entire length of employer's waterfront property. Tr. at 78. In addition, the facility has a mobile crane used for loading and unloading the barge, as well as for other repair work. Tr. at 39-40. The Mid-Atlantic facility has one large building on the front of the property used for fabrication. Tr. at 30-31. Closer to the water's edge there are a sandblasting shop, a sandblasting booth, and a paint booth. Tr. at 31, 38. A jogging path separates the two areas; unused railroad tracks were pulled up to make this path, and it is deeded to the city of Norfolk by the railroad company. Tr. at 28, 77. A fence surrounds each area, but a gravel road across the jogging path permits access to both areas during working hours for employees working at the facility. Tr. at 28-29. Claimant was injured on the front parcel of land, that is, the one that is not directly adjacent to the river.

The administrative law judge found that claimant was not injured on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a), for two reasons.¹ First, he found that the front parcel of land is not contiguous with navigable waters, pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), and as applied by the Board in *Kerby v. Southeastern Pub. Serv. Auth.*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir. 1998) (table), *cert. denied*, 525 U.S. 816 (1998); *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998), and *McCormick v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS

¹Section 3(a) of the Act states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a).

297 (1998). Thus, the administrative law judge concluded that claimant's injury did not occur on an "adjoining area" as defined by the Fourth Circuit. Second, the administrative law judge found that the situs requirement was not met based on the Fourth Circuit's decision in *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 590 (1998). The administrative law judge found the instant case indistinguishable from *Brickhouse* in any material way. Claimant was engaged in fabrication of ship components that had to be shipped elsewhere before they were installed on the vessels; the workers at the facility did not engage in ship repair on the water or at the water's edge, and thus the fabrication work could be done at any site. As in *Brickhouse*, the fact that large components occasionally had to be shipped by barge was deemed insufficient to cover the site under the Act. The administrative law judge acknowledged claimant's testimony that he occasionally loaded and unloaded items from barges, but found this insignificant in comparison to the overall land-based nature of employer's work at the Mid-Atlantic facility.

Claimant appeals the administrative law judge's finding that his injury did not occur on a covered situs. Employer responds, urging affirmance of the administrative law judge's decision.

For the reasons stated in *Sowers v. Metro Machine Corp.*, 35 BRBS 154 (2001) (Hall, C.J., dissenting), *aff'd on recon. en banc*, BRBS , BRB No. 00-1141 (Jan. 3, 2002) (Hall, J., dissenting), we affirm the administrative law judge's finding that claimant's injury did not occur on a covered situs pursuant to the Fourth Circuit's decision in *Brickhouse*. As we affirm on this basis, we need not address the administrative law judge's finding that the front parcel of employer's property is not an "adjoining area" pursuant to *Sidwell*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

For the reasons stated in my dissenting opinions in *Sowers v. Metro Machine Corp.*, 35 BRBS 154 (2001) (Hall, C.J., dissenting), *aff'd on recon. en banc*, BRBS , BRB No. 00-1141 (Jan. 3, 2002) (Hall, J., dissenting), I would hold that the instant case is distinguishable from *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 590 (1998), and that the administrative law judge erred in relying on *Brickhouse* to find that the situs test is not satisfied.

In addition, I would reverse the administrative law judge's finding that the front parcel of employer's property, where claimant's injury occurred, is not an "adjoining area," and I would hold that employer's entire Mid-Atlantic facility is an "adjoining area" used for ship repair and thus is a covered situs. I believe the administrative law judge's interpretation of the decision in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), is too narrow in view of the fact that the Fourth Circuit therein recognized that an entire parcel of land may adjoin navigable waters, and not just that small parcel where claimant is injured. *Id.*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT), quoting *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178, [6 BRBS 229,230] (5th Cir.), *cert. denied*, 434 U.S. 903 (1977) and LHWCA Program Memorandum No. 58 at 10-11 (1977) (footnote omitted). There is free access for employees and equipment between the two parcels during working areas, and thus, in my opinion, the fencing off of the jogging path is not significant to the situs inquiry. Thus, I would hold that the situs test is satisfied, reverse the administrative law judge's decision, and remand for findings on any remaining issues.

BETTY JEAN HALL
Administrative Appeals Judge