BRB No. 00-1141

ALVIN W. SOWERS, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
METRO MACHINE CORPORATION	)	DATE ISSUED: Aug 22, 2001
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (97-LHC-2103) of Administrative Law Judge Richard E. Huddleston 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a left knee injury at work on March 24, 1993. Employer paid claimant temporary total disability benefits for two and 6/7 weeks, and permanent partial disability benefits for a 15 percent impairment to the left leg. Claimant sought temporary total disability benefits for the period from March 28, 1997 through July 11, 1997. The administrative law judge found that claimant's injury did not occur on a covered situs, *see* 33 U.S.C. §903(a), and thus denied benefits.

Employer has two facilities adjacent to navigable waters. Claimant was injured at the Norfolk facility, called the Mid-Atlantic facility. This facility abuts the river next to the Mid-Town Tunnel,[1] and is used for prefabricating steel components and painting items for Navy ships that are under repair at employer's other facility, where there are wet and dry docks. Tr. at 16-17, 53, 56. Ninety-five percent of the items sent to Mid-Atlantic for repair, or returned to the main shipyard after completion, are sent over land by truck. Tr. at 54, 78. Five percent are sent by barge; these are items that are too large or too heavy to be trucked. *Id.* The Mid-Atlantic facility has a bulkhead on the river where the barge ties up. Tr. at 38. In addition, the facility has a mobile crane used for loading and unloading the barge, as well as for other repair work. Tr. at 24, 70. The two facilities are two miles from each other by water. Tr. at 72. The Mid-Atlantic facility has one large building used for fabrication. Closer to the water's edge there are a sandblasting shop, a sandblasting booth, and a paint booth. Tr. at 49. A jogging/bike path runs between the two areas; unused railroad tracks were pulled up to make this path, and the path is deeded to the city of Norfolk by the railroad company. Tr. at 50. There is a fence around each area, but the crane is able to travel between the two areas. Tr. at 70.

The administrative law judge found that the Mid-Atlantic facility is not a covered situs pursuant to *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998).[2] In *Brickhouse,* the claimant worked for Tidewater Steel Company. This facility was contiguous to the Elizabeth River and there was a dock on the property for loading barges. The facility had three bays: one bay was used exclusively to fabricate steel for maritime-related projects. The other two bays fabricated steel for non-maritime projects. Most of the finished projects were shipped by truck; very large components were shipped by barge. The claimant worked in all three bays, but had spent more than 75 percent of his time in the non-maritime areas, and, in fact, sustained his injury during work on a non-maritime project.

The United States Court of Appeals for Fourth Circuit reversed the Board's affirmance of the administrative law judge's finding that the situs test was satisfied. In

[1]In their pleadings, the parties state that the river is the Elizabeth River.

[2]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See* 33 U.S.C. §921(c).

discussing the situs requirement in general, the court stated that "The link between the navigable waters and the land side facilities [added to the Act in 1972] is thus established under the statute by (1) the contiguity of the land side facility and navigable water, and (2) the affinity of the land side facility to longshoremen's work on ships." *Id.,* 142 F.3d at 221, 32 BRBS at 89(CRT). The court stated that the claimant's injury did not occur on an enumerated situs, that is on a "pier, wharf, dry dock, terminal, building way, or marine railway." The court then held that the site is not an other "adjoining area" used for loading or unloading cargo onto ships on navigable waters, or for building, repairing or dismantling ships. The court emphasized that the employees worked at a steel fabrication plant, and that this work did not routinely or customarily take them from the plant onto the adjoining river. It stated that when the employees worked at the steel plant, their work was unaffected by the plant's contiguity with navigable waters, as such contiguity was merely fortuitous, since the components had to be shipped elsewhere to be installed on the vessels. Quoting the earlier Fourth Circuit case of *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1139, 29 BRBS 138, 143(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), the *Brickhouse* court stated that "the steel fabrication plant where Brickhouse was injured was not a facility, the '*raison d'etre* of which is its use in connection' with the nearby navigable waters." *Brickhouse*, 142 F.3d at 222, 32 BRBS at 91(CRT). The court further emphasized that the plant did not serve ships at the water's edge; rather it manufactured components at its plant and shipped them to be installed on ships elsewhere. The court also was unpersuaded that the occasional shipment of components by barge was significant, stating, "The barge dock on Tidewater Steel's property would be relevant only if barges were the 'customary' method of shipment and if its employees were longshoremen who customarily loaded the barge at the facility." *Id.*

The administrative law judge found the instant case indistinguishable from *Brickhouse* in any material way. He found that 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 Mid-Atlantic facility did not engage in ship repair at the water's edge, and thus the 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, as this was not the customary method of transportation. The administrative law judge noted that Mr. Fisher, employer's Vice President and personnel manager, testified that only five percent of the components were shipped by barge.

The administrative law judge was not persuaded by claimant's argument that the nature of the overall worked performed at the two facilities distinguishes *Brickhouse* from the case at bar. In *Brickhouse*, the employer was engaged in

maritime work at only one of its three bays. By contrast, in the instant case, almost all the work performed at the Mid-Atlantic site was maritime work, done in service of the ships under repair at employer's other facility. The administrative law judge found that this was not significant, as the *Brickhouse* court looked only to the maritime work performed in that case and determined that since that work did not take the employees onto navigable waters and back again, the location of the plant at the water's edge was not significant. The administrative law judge concluded by stating that the

> water is not necessary for the work performed at the facility. The raw materials are shipped in by truck, the parts are fabricated, then they are transported to another location to be installed. No dismantling or installation takes place at the Mid-Atlantic facility . . . Water was not a necessary characteristic of the facility . . . the *raison d'etre* [of the facility is not] its use in connection with the nearby navigable waters. . . .

Decision and Order at 6.

On appeal, claimant contends that the Mid-Atlantic site is covered under the plain language of Section 3(a), as it is an "adjoining area" used for repairing and reconstruction of vessels. Claimant contends that this case is distinguishable from *Brickhouse* in that the *raison d'etre* of the entire company, at both facilities, is ship repair. Employer responds, urging affirmance of the administrative law judge's decision.

Section 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). The Fourth Circuit's decision in *Sidwell* requires than an "other adjoining area" be like the enumerated situses, *i.e.*, like a pier, wharf, dry dock, terminal, building way or marine railway.[3] The *Sidwell* court stated that "Each of

[3]The Fourth Circuit's decision in *Sidwell* also requires actual physical

these enumerated 'areas' is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters." *Sidwell,* 71 F.3d at 1139, 29 BRBS at 143(CRT).

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contiguity with navigable waters. This requirement is satisfied in the instant case, notwithstanding the bike path bisecting employer's property, as *Sidwell* recognizes that it is the entire parcel of land that is the relevant site. *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT).

The crux of the court's holding in *Brickhouse* is that the maritime work performed at that facility did not, itself, have a connection with navigable waters, despite that the parcel of land adjoined navigable waters, *i.e.,* there is a geographical nexus with navigable waters, but there is no functional nexus with navigable waters. The maritime components fabricated there had to be taken elsewhere to be fitted on the ships. The court emphasized that the plant did not serve ships at the water's edge, and that the employees' work was unaffected by the plant's contiguity with navigable waters. Thus, the Fourth Circuit held that the *raison d'etre* of the plant was not its use in connection with navigable waters. *Brickhouse*, 142 F.3d at 222, 32 BRBS at 91(CRT). The court was not persuaded that because some small percentage of the finished product was shipped by barge that the site was covered, as this was not the "customary" method of shipping. Similarly, in *Bennett v. Matson Terminals*, *Inc.,* 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982), the Board addressed a case where the employer's container refurbishment facility was 750 feet from a waterway and ½ mile from the deep water Port of Richmond. The facility, however, had no relationship with the Port of Richmond. Rather, its relationship was with the Oakland terminal which was 12 miles away. Given this lack of a functional relationship to the navigable waters which the site adjoined, and that other factors indicated that the situs test was not satisfied,[4] the Board affirmed the denial of the claims for lack of coverage.

In *Stroup v. Bayou Steel Corp.,* 32 BRBS 151 (1998), and *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992), the Board considered the situs issue in terms of a steel mill with a dock on navigable waters. As the injuries in those cases occurred in the steel mill or shipping bay which was not used for maritime activity, the Board held that the fact that items were shipped by barge from the dock area did not bring the mill within the Act's coverage. No part of the mill was used for loading and unloading, nor was it used in the intermediate steps of storing unloaded cargo. *Stroup,* 32 BRBS at 154-155; *Melerine*, 26 BRBS at 101-102 (stating that the

[4]The site was not particularly suitable for maritime work, was chosen by general economic considerations, and was in a mixed use area. *See* *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

"functional relationship" test of *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), is not met). The Board has recently expounded on this issue, specifically holding that where a site contains both areas used for loading and unloading, and a non-maritime manufacturing concern, the manufacturing portion of the facility is not a covered situs. *See Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). The fact that the employee may have maritime duties at the covered site will not bring the case within the Act's coverage if the injury occurred on the non-covered manufacturing facility. *See Jones,* 35 BRBS 37.

We affirm the administrative law judge's conclusion that claimant's injury did not occur on a covered situs, based on application of *Brickhouse.* As in *Brickhouse*, employer's Mid-Atlantic facility is contiguous to navigable waters, and thus has a geographic nexus to navigable waters. This facility is used to fabricate vessel components for ships undergoing repair at employer's other facility. This activity, however, does not require more than the rare use of the navigable river as the components are not affixed to or installed on the vessels at this facility. The actual ship repair does not take place on the river adjacent to the Mid-Atlantic facility, but at employer's other facility. *See Brickhouse*, 142 F.3d at 222, 32 BRBS at 91(CRT). Thus, that the facility is contiguous to the river is of no import, as the landward facility is not used to repair ships on navigable waters, and therefore it lacks the functional nexus with the river required by the *Brickhouse* court. The administrative law judge therefore rationally concluded that the fabrication of the components could take place at any location. Contrary to claimant's contention, the administrative law judge rationally found that this case is not distinguishable from *Brickhouse* on the basis that the entire Mid-Atlantic facility is used for ship repair. The situs inquiry under *Brickhouse* and *Sidwell* concerns the use of the site in conjunction with the navigable waters to which it is adjacent, not merely the nature of the business enterprise that is adjacent to those waters. *See also Stroup*, 32 BRBS 151.

Moreover, the administrative law judge determined that the fact that a "small fraction" of the components are shipped in each direction by barge is insufficient to confer coverage. Decision and Order at 5. In *Brickhouse,* the court found the rare shipment of components by barge was not sufficient to satisfy the situs test, as this was not the customary method of shipment. *Brickhouse*, 142 F.3d at 222, 32 BRBS at 91(CRT). The administrative law judge rationally found that the instant case is indistinguishable from *Brickhouse* on this point given the evidence that only five percent of the components are shipped by barge. Tr. at 54, 78. Thus, as the administrative law judge's finding that the situs test is not satisfied comports with the controlling law of the Fourth Circuit and is rational and supported by substantial evidence, we affirm the finding that claimant's injury did not occur on a covered

situs.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that the situs requirement is not satisfied in this case. I would hold that this case is distinguishable from *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998), and thus that the situs test is satisfied as a matter of law.

In this case, employer's entire facility is dedicated to ship repair work, in support of the work being done at employer's other facility, where the vessels under repair are actually docked.[5] In contrast, in *Brickhouse*, only one-third of the work at the plant was maritime work, and some of this non-maritime work was what was "rarely" shipped by barge. The Fourth Circuit noted that the employees of the steel fabrication plant "remained in the plant fabricating maritime and non-maritime components, just as they would have done if the plant were located at any inland

[5]Employer occasionally performed some non-maritime work, but this clearly is some small percentage of the overall work performed, based on the testimony of Mr. Fisher. Tr. at 55-56.

site." *Brickhouse*, 142 F.3d at 222, 32 BRBS at 90(CRT). In this regard, the Board's decisions in *Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Stroup v. Bayou Steel Corp.,* 32 BRBS 151 (1998), and *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992), concerning manufacturing concerns with adjacent docks are consistent with *Brickhouse*, as well as with the Fifth Circuit's decision in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), which requires both a geographical and functional nexus with navigable waters in order for the situs test to be met.

This case, however, is significantly different, in my opinion. Employer's *entire* facility is dedicated to ship repair, as opposed to the business concerns in the cases cited above, where the docks are segregated from the manufacturing concern, and no greater than one-third of the manufactured product, in *Brickhouse*, was maritime in nature. The Mid-Atlantic facility abuts a navigable river, and therefore it is an area "adjoining" navigable waters used exclusively for ship repair. Under the plain language of Section 3(a), therefore, this site is covered by the Act. Holding it is not covered based on language from *Brickhouse* ignores the fact that the *raison d'etre* for this facility is ship repair, it is located adjacent to navigable waters, and it requires the ability to use those waters in the normal course of business as some components are too large to be transported between the two sites by land.

Most significantly, I would hold that a functional relationship with navigable waters exists in this case. Employer has a barge that traverses the river between employer's two facilities, and a bulkhead at the Mid-Atlantic facility where the barge ties up. Five percent of the vessel components needing repair or repaired are shipped by this barge between employer's two facilities. In *Brickhouse*, the Fourth Circuit stated that the components in that case were "on rare occasions" shipped by barge, but that the "barge docks on [the] property would be relevant only if barges were the 'customary' method of shipment and if [the] employees were longshoremen who customarily loaded the barge at the facility." *Brickhouse*, 142 F.3d at 222, 32 BRBS at 91(CRT). The latter half of this statement is inconsistent with the Supreme Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), wherein the Court held that those who are engaged in maritime employment "at least some of the time" are covered employees. Such employment need not be "customary" as long as it is more than "momentary or episodic." *See Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24(CRT) (1st Cir. 1984)*; Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Thus, if all oversized pieces are shipped by barge between employer's two facilities, this is indeed covered work for those who do the loading and unloading at the bulkhead at the Mid-Atlantic facility.

See In Re CSX Transportation, Inc. [*Shives*], 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1019 (1998) (maritime work is not "momentary or episodic where 15 percent of claimant's duties are maritime); *see also Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Lewis v. Sunnen Crane Service*, 31 BRBS 34 (1997). It follows, therefore, that a "customary" usage test also is discrepant in regard to the situs inquiry. If five percent of the ship components are shipped by barge between employer's two ship repair facilities, this fact alone gives the site at issue here the necessary functional nexus with navigable waters. The use of this shipping method is not "momentary or episodic," and is certainly more than the "rarely" used method of shipping by barge as described by the court in *Brickhouse.*

As employer's entire operation in the instant case is ship repair, the Mid-Atlantic facility adjoins navigable waters, and the site has a functional nexus to those navigable waters, 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, Chief
Administrative Appeals Judge