BRB No. 00-1141

ALVIN W. SOWERS, JR.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: Jan. 3, 2002
	)	
v.	)	
	)	
METRO MACHINE CORPORATION	)	
	)	DECISION and ORDER on
Self-Insured	)	MOTION for RECONSIDERATION
Employer-Respondent	)	*EN BANC*

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 Brian L. Sykes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Claimant has filed a timely motion for reconsideration *en banc* of the Board's August 22, 2001, Decision and Order in the captioned case. *Sowers v. Metro Machine Corp.*, 35 BRBS 154 (2001) (Hall, C.J., dissenting); 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. We reconsider the Board's disposition *en banc*, but we deny claimant's motion that we reverse the Board's previous decision.

To recapitulate, 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, and is used for prefabricating steel components and painting items for Navy ships that are under repair at employer's other facility, the Imperial Docks, 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. 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.

Claimant sustained a left knee injury at work on March 24, 1993. The administrative law judge denied claimant's claim for benefits under the Act, finding that claimant's injury did not occur on a covered situs pursuant to Section 3(a), 33 U.S.C. §903(a). 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). In *Brickhouse,* the employer operated a steel fabrication facility, which was contiguous to the Elizabeth River and had 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 the Fourth Circuit reversed the Board's affirmance of the administrative law judge's finding that the situs test was satisfied. In 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, a "pier, wharf, dry dock, terminal, building way, or marine railway." The court then held that the site is not an "other adjoining area customarily 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. 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 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. Decision and Order at 6.

On claimant's appeal, the Board, in a split decision, affirmed the administrative law judge's finding that claimant was not injured on a covered situs. The panel's majority held that the administrative law judge properly applied *Brickhouse* in determining that claimant's injury did not occur on an "adjoining area" under Section 3(a).[1] Although employer's Mid-Atlantic facility is contiguous with navigable waters, and thus has a geographic nexus to navigable waters, the Board held that the facility does not have the functional nexus with navigable waters required by the Fourth Circuit's *Brickhouse* decision. The facility is used to fabricate vessel components

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[1]Section 3(a) 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).

for ships undergoing repair at employer's other facility, but this activity does not require more than the rare use of the navigable river. The components are not affixed to or installed on the vessels at the facility where claimant was injured; the actual ship repair takes place at employer's other facility. *Sowers*, 35 BRBS at 157-158.

The Board also held that 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 majority emphasized that 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.[2] *Id.*

Finally, 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 held that 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 Board held that the administrative law judge rationally found

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[2]The Board discussed some similar cases previously decided. *See Sowers*, 35 BRBS at 157. 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, 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. In addition, 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).

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. *Sowers*, 35 BRBS at 158.

Judge Hall dissented, and would have reversed the administrative law judge's finding that the situs requirement was not satisfied. In her opinion, the first significant difference between the instant case and *Brickhouse* is that employer's entire facility is dedicated to ship repair. 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. *Sowers*, 35 BRBS at 158-159. The more significant difference, stated Judge Hall, is the existence of a functional relationship of the site to navigable waters. 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). Judge Hall stated that 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. Thus, Judge Hall stated, if all oversized pieces are shipped by barge between employer's two facilities, this is covered work for those who do the loading and unloading at the bulkhead at the Mid-Atlantic facility; it follows, therefore, that a "customary" usage test is discrepant in regard to the situs inquiry. Judge Hall concluded that 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 the necessary functional nexus with navigable waters. *Sowers*, 35 BRBS at 159.

In his motion for reconsideration, claimant urges the Board to adopt the reasoning of Judge Hall. Claimant asserts that the facts that the entire facility is used for ship repair and the river is used to transport some of the repaired items give the facility the necessary functional nexus with navigable waters, and thus distinguishes this case from *Brickhouse*. Employer responds in support of the Board's previous decision.

We reject claimant's contentions. As the majority fully discussed in the Board's initial decision in this case, the use of the Mid-Atlantic facility almost exclusively for the fabrication of ship components and the facility's abutment of a navigable river do not give rise to the holding that the site is an "adjoining area" within the meaning of the Act. The *Brickhouse* and *Sidwell* opinions make clear that use of the river *in connection with* ship repair is needed for there to be a functional relationship between the site and the navigable

waters. *Brickhouse*, 142 F.3d at 222, 32 BRBS at 91(CRT); *Sidwell*, 71 F.3d at 1139, 29 BRBS at 143(CRT). Thus, contrary to claimant's contention, the nature of the ship repair business at employer's facility alone does not render *Brickhouse* distinguishable from the case at bar. The actual repair of the vessels does not take place at the Mid-Atlantic facility. Relying on *Brickhouse,* the administrative law judge aptly observed that the fabrication of the ship components could take place at any inland location; the location of the facility next to a river does not affect employer's business at the Mid-Atlantic facility as the river is rarely used in connection with the repair of vessels at this site.

In this regard, we again reject claimant's contention that employer's minimal use of the river necessitates a holding that the site has a functional relationship with the river. 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). As the Board stated in its initial decision, 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. Claimant has not identified any issues that the Board failed to consider, nor has he persuaded us that the Board's decision is incorrect in view of the Fourth Circuit's precedent. We therefore deny his motion for reconsideration.

Accordingly, claimant's motion for reconsideration is denied, 20 C.F.R. §802.409, and the Board's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

We concur:

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

HALL, Administrative Appeals Judge:

I respectfully dissent from my colleagues' decision, for the reasons expressed in my opinion in the Board's initial decision in this case. I continue to hold to the belief 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), on the ground that the entire facility is dedicated almost exclusively to ship repair. This is not a general steel fabrication facility as in *Brickhouse,* where only approximately one-third of the fabricated parts were used in maritime projects, or a facility with a manufacturing component as in *Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001) and *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Rather, this facility is, essentially, a shipyard; vessel components are produced or repaired at this site. *See, e.g., Alford v. American Bridge Div.*, 642 F.2d 807, 7 BRBS 484 (5th Cir. 1978), *modified in part on reh'g* by 655 F.2d 86, 13 BRBS 268 and 668 F.2d 791 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982).

Moreover, this shipyard has a functional nexus with the adjoining navigable river. As I emphasized in my prior dissenting opinion, five percent of vessel components travel by barge between employer's two facilities. The *dicta* in *Brickhouse* that use of navigable waters must be the "customary" shipping method, *see* 142 F.3d at 222, 32 BRBS at 91(CRT), is inconsistent with the seminal Supreme Court 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. *See* 33 U.S.C. §902(3). 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). It follows, therefore, that a "customary" usage test should not be applied to the situs inquiry. If all oversized ship components are shipped by barge between employer's two ship repair facilities, this is a regular part of employer's business and the site has the necessary functional nexus with navigable waters. The use of this shipping method is not "momentary or episodic;" that five percent of components are shipped by barge certainly is more than the "rarely" used method of shipping by barge as described by the court in *Brickhouse.* In fact, it is the "customary," and only, method of transporting oversized components to employer's other shipyard.

Thus, I again would hold that *Brickhouse* is distinguishable from the instant case, and I would reverse the administrative law judge's finding that the situs element is not satisfied.

BETTY JEAN HALL
Administrative Appeals Judge