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: 09/23/2005
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Timothy F. Callaway, III (Callaway, Braun, Riddle & Hughes, P.C.), Savannah, Georgia, for employer/carrier.

Adam Neufield (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2002-LHC-2588) of Administrative Law Judge Richard K. Malamphy rendered 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries on October 4, 1994, while manufacturing connectors for a pontoon to be incorporated into an elevated causeway structure (ELCAS)[1] system that employer was building for the United States Navy. Employer, a manufacturer of ship components and maritime products, operates its facility, The Liberty Works, on a 110-acre site with 150 feet of river frontage, along the Brunswick River in Georgia.[2] Hearing Transcript (HT) at 69-70. Employer relocated its operation from Michigan in 1992 in order "to be on a deepwater site with ocean shipping capabilities," and it advertises "access to shipping by water right off [its] property." Employer's Exhibit (EX) 7. Pilings were installed on the river adjoining employer's property in order to allow barges to dock, and although employer has yet to pursue its plans to build piers alongside its property, it has shipped some products, notably three large cranes and a launch table for Cape Canaveral, by barge from its waterfront. Nevertheless, the majority of its output is delivered by truck or rail. HT at 56, 71.

Employer did the entire construction of the pontoons for the ELCAS system, and claimant was primarily working at the droll and pot location, which is where the connectors are hooked onto the pontoons so that the pontoons can be connected together to make a roadway or pier. HT at 31. Claimant regularly worked inside Buildings One and Two,[3] although his duties on the ELCAS project included testing the connection of the pontoons at various sea states or stages on the river. HT at 32. Specifically, claimant

[1] An ELCAS is a portable modular pier structure that is transported by ship and set up quickly to unload supplies and munitions on military beach landing sites lacking any existing offloading facilities.

[2] Employer's property neighbors Braswell Shipyards and the Georgia Port Authority. Claimant's Exhibit 12.

[3] Building One, where claimant was working at the time of his injury, is identified as the steel processing and fabrication building and Building Two is identified as the assembly and test building. EX 8.

would help load the pontoons via crane onto trucks where they would be transported to the Georgia Port Authority. *Id.* He would then assist in unloading the pontoons into the river, and connect them so that they could be pushed to sea for testing. *Id.* In order to connect the pontoons, it was necessary for claimant to get on them in the river. *Id.* Claimant, however, was not on the pontoons when they were pushed into the ocean for testing. HT at 33.

In his decision, the administrative law judge determined that claimant satisfied the status requirement, 33 U.S.C. §902(3), as he was engaged in maritime employment, but that he did not meet the situs requirement, 33 U.S.C. §903(a), as The Liberty Works is not a maritime facility. Accordingly, he concluded that claimant's injuries are not covered under the Act, and thus denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he did not meet the situs requirement of Section 3(a). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds, advocating that the Board reverse the administrative law judge's finding that employer's facility is not a covered situs. For the reasons that follow, we reverse the administrative law judge's finding that claimant has not met the situs test under Section 3(a).

Claimant asserts that the administrative law judge erred in finding that he did not meet the situs test under Section 3(a), as employer's facility is an "adjoining area" as defined by the United States Court of Appeals for the Fifth Circuit 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). The Director adds that the administrative law judge erroneously ignored the plain language of Section 3(a), as well as relevant precedent from the United States Court of Appeals of the Eleventh Circuit, in whose jurisdiction this case arises. The Director specifically argues that the administrative law judge misconstrued the Eleventh Circuit's decision in *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), *aff'g* 35 BRBS 99 (2001).

To obtain benefits under the Act, an injury must occur on a covered situs. *Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT). To be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel."[4] 33 U.S.C. §903(a); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). An "adjoining area" must have a maritime use, but it need not be used exclusively or primarily for maritime purposes. *Id.*

[4] Section 3(a) of the Act, 33 U.S.C. §903(a), states:

In addressing situs, the administrative law judge addressed the decision of the Eleventh Circuit in *Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT), finding that while it is distinguishable on its facts, its legal analysis is instructive to resolution of this case. In particular, the administrative law judge found the Eleventh Circuit's line of reasoning was consistent with the Board's decision in *Sowers v. Metro Machine Corp.*, 35 BRBS 154 (2001) (Hall, J., dissenting), which, in turn, he found was based on the decision of the United States Court of Appeals for the Fourth Circuit in *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998). Decision and Order at 6. In this regard, the administrative law judge determined that the facts of the instant case are indistinguishable from those in *Sowers*, 35 BRBS 154, and *Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT). As such, he concluded that employer's facility, like those in *Sowers* and *Brickhouse*, bears an insufficient nexus to the navigational water on which it is located, and that it therefore cannot be a covered situs under Section 3(a), as interpreted by the Eleventh Circuit in *Bianco*. The administrative law judge thus denied the claim for benefits.

Contrary to the administrative law judge's analysis, however, *Bianco* applied the controlling precedent of *Winchester*, 632 F.2d at 504, 12 BRBS at 719.[5] Moreover, as employer's facility has both a maritime function and a location adjacent to navigable waters, it meets the *Winchester* criteria and is thus distinguishable from the manufacturing plants at issue in *Bianco* and *Brickhouse*.

In *Winchester*, the Fifth Circuit stated that an area can be "adjoining" if it is "close to or in the vicinity of navigable waters, or in a neighboring area. . . ." *Winchester*, 632 F.2d at 514, 12 BRBS at 727. The perimeter of an "area" is defined by function; thus, the

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> 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).

[5] Decisions of the Fifth Circuit issued prior to close of business on September 30, 1981, are binding precedent in the Eleventh Circuit, wherein this case arises, unless specifically overruled by the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)(*en banc*). As such, *Winchester* is controlling precedent in the Eleventh Circuit. *See generally Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 1392, 31 BRBS 212, 213-214(CRT) (11th Cir.), *cert. granted*, 524 U.S. 982, *cert. dismissed*, 525 U.S. 957 (1998); *Stratton*, 35 BRBS at 4 n. 7.

area must be "customarily used by an employer in loading, unloading, repairing or building a vessel." *Winchester*, 632 F.2d at 515, 12 BRBS at 727; *see* 33 U.S.C. §903(a). Moreover, an "area" is not limited to the pin-point site of the injury; rather, a determination of whether an area is a covered situs requires an examination of both the site of the injury and the surrounding area, and the character of surrounding properties is but one factor to be considered. *Winchester*, 632 F.2d at 513, 12 BRBS at 726; *see Stratton*, 35 BRBS at 4-5; *Uresti v. Port Container Industries, Inc.*, 34 BRBS 127 (2000) (Brown, J., dissenting), *aff'g on recon.* 33 BRBS 215 (2000) (Brown, J., dissenting); *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999). Using these guidelines, the Fifth Circuit held in *Winchester* that an administrative law judge properly found that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a functional nexus to maritime activity in that it was used to store gear which was used in the loading process. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729.

In *Bianco*, 35 BRBS 99, the Board affirmed the administrative law judge's finding that the claimant did not sustain her injuries on a covered situs as they occurred in employer's wallboard and gypcrete production departments which were used solely for manufacturing and not for any maritime activity. The Board rejected the claimant's argument that employer's entire facility must be maritime because some portions of it were used for a maritime purpose[6] and held it lacked the requisite maritime function under *Winchester*. The United States Court of Appeals for the Eleventh Circuit upheld the Board's decision, applying the holding in *Winchester* that the boundaries of a covered area are defined by function and holding that the production plant lacked a maritime function. The court stated that to accept claimant's argument that the entire facility was covered because a part of it is engaged in maritime activity would be tantamount to "writing out of the statute the requirement that the adjoining area 'be customarily used by an employer in loading, unloading, dismantling, or building a vessel.'" *Bianco*, 304 F.3d at 1060, 36 BRBS at 62(CRT); *see also Jones v. Aluminum Co. of North America*, 35 BRBS 37 (2001).

The situs standard used in the *Brickhouse* and *Sowers* decisions, however, is not that of *Winchester* but is premised on the Fourth Circuit's self-described "stringent" interpretation of Section 3(a). *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 116 S.Ct. 2570 (1996). In *Sidwell*, the Fourth Circuit held, with regard to the definition of "other adjoining areas," that non-enumerated areas must actually abut navigable waters and must be similar to the

[6] Raw gypsum was transported to the plant by ship and unloaded by conveyors from the Port of Brunswick to the plant. One set of conveyors was operated by employer's employees.

enumerated areas and customarily used for maritime activity. Thus, the court held that the "*raison d'etre*" for the facility or structure must be for use in connection with the navigable waters in order for a site to be covered. *Id.*, 71 F.3d at 1138-1139, 29 BRBS at 142-144(CRT); *see also Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir. 1998), *cert. denied*, 519 U.S. 812 (1996). The 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).

Applying *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT), the Fourth Circuit, in *Brickhouse*,[7] held that a steel manufacturing plant that was located on an adjoining river was not a covered situs because "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), *quoting Sidwell*, 71 F.3d 1134, 1139, 29 BRBS at 142-144(CRT). In *Sowers*, 35 BRBS 154,[8] a case arising in the Fourth Circuit, the Board followed *Brickhouse* and held that the employer's facility, used to fabricate vessel components for ships undergoing repair at employer's other facility, lacked the functional nexus with the river required by the *Brickhouse* court, as that landward facility was not used to repair ships on navigable waters.

Given the significant differences in precedent, it is clear that, contrary to the administrative law judge's statement, the Eleventh Circuit's "line of reasoning" in *Bianco*, which followed the Fifth Circuit's interpretation of Section 3(a) in *Winchester*, is not consistent with the analysis used in *Brickhouse* or *Sowers*. Thus, the administrative

[7] 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 in that fabrication area.

[8] The facts in *Sowers* establish the following: that the employer had two facilities adjacent to navigable waters; that claimant was injured at the Norfolk facility, called the Mid-Atlantic facility, which abuts the Elizabeth River and is used for prefabricating steel components and painting items for Navy ships under repair at employer's other facility, the Imperial Docks, where there are wet and dry docks; and that 95 percent of the items sent to Mid-Atlantic for repair, or returned to the main shipyard after completion, are sent over land by truck, with the remaining five percent sent by barge.

law judge erred in applying the more stringent standard enunciated by the Fourth Circuit rather than the controlling test adopted in *Winchester.* While the results in *Brickhouse* and *Bianco* were the same under either Fourth Circuit or Fifth Circuit precedent, as both involved non-maritime manufacturing areas, the reasoning and controlling law are significantly different. Moreover, the administrative law judge overlooked the crucial factual distinction between the instant case and *Bianco:* employer's facility is used for a maritime purpose and thus meets the *Winchester* "function" requirement.[9]

Under the controlling standard set out in *Winchester* and followed in *Bianco*, we must reverse the administrative law judge's finding, and hold, as a matter of law, that claimant's injury occurred on a covered situs. In this regard, the record establishes that employer's business is "within the vicinity" of the Brunswick River, and that its facility is used to fabricate and construct marine parts. The administrative law judge herein specifically recognized that "maritime work was performed by claimant at [employer's facility]." Decision and Order at 7. Moreover, the record contains undisputed evidence that employer relocated to the Brunswick River to facilitate its maritime business, EX 7, and that it did, in fact, use the river on a number of occasions in furtherance of said business, *e.g.*, it shipped three large cranes by barge from its facility *and* used the river as a starting point for its testing of the pontoon system.[10] Consequently, the undisputed facts establish both the geographical and functional nexus required under *Winchester*.

Furthermore, the Fifth Circuit, in *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),[11] explicitly rejected the assertion, which employer raises in this case, that the situs element was not satisfied since employer did not construct the entire vessel or completely assemble and launch the

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[9] The instant case is thus factually distinguishable from *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998), and *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992), as the facility in those cases, which involved different parts of the same building at a steel fabrication facility, did not serve any maritime purpose. Claimants, in those cases, did not meet the functional relationship test of *Wincheser,* 632 F.2d at 514-515, 12 BRBS at 726-727; *see also Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003).

[10] Thus, even under *Brickhouse* and *Sowers*, claimant herein might well be covered as the evidence establishes a functional nexus between employer's facility and the Brunswick River.

[11] As *Alford* was also decided prior to September 30, 1981, it is controlling in the Eleventh Circuit. *See* n.5, *supra.*

vessel in or adjacent to navigable waters. The Fifth Circuit held that "such a restrictive approach to the situs requirement is not supported by the language of the [Act], case law or the underlying congressional purpose prompting the drafting of the [1972 amendments]." *Alford*, 642 F.2d at 815, 13 BRBS at 274. The court continued by stating: "Present day realities and a changing economy have altered the picture of the traditionally centrally located American Shipyard operation into an 'ongoing process of shipbuilding' scattered about on the navigable waterways of the continent."[12] *Id.*, 642 F.2d at 815, 13 BRBS at 275. The Fifth Circuit thus concluded that based on the geographic location, the plant history, and the "on-going operation" of the employer in fabricating component parts of vessels, that the claimants therein met the situs test. Based on this assessment, and the applicable standard set out in *Winchester*, and followed by the Eleventh Circuit in *Bianco*, we hold that the undisputed facts in this case establish that claimant's injury occurred on a covered situs. *Bianco*, 304 F.3d at 1060, 36 BRBS at 62(CRT); *Winchester*, 632 F.2d at 513, 12 BRBS at 726.

[12] The *Alford* court further cited with approval the Third Circuit's decision in *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), wherein that court found the situs requirement satisfied in a case which involved an assembly-line barge and towboat construction process where the fabrication shop made large component sections of vessels and sent them on rail cars to another portion of the shipyard for assembly into completed vessels by other workers.

Accordingly, the administrative law judge's finding that claimant did not establish the situs requirement pursuant to Section 3(a) is reversed, and the case is remanded for consideration of the merits of the pending claim under the Act.

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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BETTY JEAN HALL
Administrative Appeals Judge