

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Bath Iron Works Corp.) ASBCA No. 54544
)
Under Contract No. N00024-98-C-2306)

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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION
AND TO REOPEN THE RECORD AND CONVENE THE
SENIOR DECIDING GROUP, AND MOTION TO FILE BRIEF OF
AMICUS CURIAE AMERICAN SHIPBUILDING ASSOCIATION

On 9 September 2008 appellant Bath Iron Works Corp. (BIW or movant) timely submitted a Motion for Reconsideration and to Reopen the Record and Convene the Senior Deciding Group with respect to the Board's 8 August 2008* decision in ASBCA No. 54544, 08-2 BCA ¶ 33,936, on remand from the 4 October 2007 decision of the U.S. Court of Appeals for the Federal Circuit in *Winter v. Bath Iron Works Corp.*, 503 F.3d 1346 (Fed. Cir. 2007). The Court's decision vacated and remanded our 22 December 2005 decision, 06-1 BCA ¶ 33,158, *modified in part on recon.*, 06-1 BCA ¶ 33,272. *Amicus curiae*, American Shipbuilding Association (ASA), moved to file a brief in support of BIW's motion on 19 September 2008. On 8 October 2008 respondent submitted an Opposition to BIW's motion, noting that respondent took no position on whether the Board should consider the *amicus curiae* brief, but arguing that "[w]hat is correct in that brief is irrelevant, and what little is relevant is incorrect" (n.1). BIW submitted a memorandum on 9 October 2008 supporting the motion of *amicus curiae*.

* Published in CCH BCA Decisions advance sheets under date of 7 August 2008.

Movant contends that: (1) Findings 54 and 56 in the August 2008 decision – that from their experience on DDGs 76 and 85 BIW’s operating engineers and management knew that prompt flushing of sea water or Kennebec River water, respectively, from DDG FOFT piping by fuel avoided the risk of corrosion – were unsupported by substantial evidence, were contrary to the testimony of BIW’s witnesses, relied on a document (supp. R4, tab 152A) that had “an obvious error” (*viz.*, BIW’s past practice was to “flush with river water just prior to introducing fuel”) and on testimony of experts after incurrence of the DDG 90 FOFT corrosion damage, which was not evidence of what BIW knew before such incurrence (app. memo. at 2-6).

(2) The Board’s decision impermissibly exceeded the court’s mandate by revisiting and contradicting findings 15 and 45 regarding the foreseeability of FOFT corrosion damage due to Kennebec River and salt water flushes, did not answer the remand question the court asked – “determining whether the corrosion was due to the flush *vel non*” – and without notice to the parties answered a question the remanding court did not ask by determining “that the corrosion was due to BIW’s failure promptly to re-flush the DDG 90 FOFT ‘piping by fuel,’ that it ‘failed to do so, instead leaving the stagnant Kennebec River water’ in the piping” (*id.* at 9). BIW’s note 9 states:

BIW notes that at page 5 of the Remand Slip Opinion, the Board stated that “we find that the nonconforming Kennebec River water flush was the cause in fact and proximate cause” of the corrosion. But this statement is utterly disingenuous because it follows the Board’s extensive discussion of the fact that the flush alone was proven *not* to cause corrosion, and that the real cause was the construction sequence changes caused by introduction of the LLTF, leading to stagnant water remaining in the piping for several months.... If the flush alone had been the cause of the corrosion, there would have been no need for the Board’s futile effort to contort and twist the record to support flawed supplemental findings 54, 55 and 56.

(*Id.* at 10)

(3) The Board’s “sudden and unannounced about-face on the foreseeability issue” (*id.* at 10) took BIW by surprise and requires reopening of the factual record to admit: (a) newly discovered, critical evidence that respondent previously had misrepresented did not exist, namely, a 1981-82 “Acknowledgment of Clarification” clause interpreting the “first ‘Provided further’ provision of [¶] (a)” of the contract’s Insurance clause (*id.* at 16-17), (b) additional testimony on foreseeability of risk of corrosion by Kennebec River water flushing of DDG FOFT and (c) evidence of FOFT corrosion on DDG 99 in

November 2005, notwithstanding BIW's compliance with FOFT post-hydro test flushing requirements, after the record in ASBCA No. 54544 was closed (*id.* at 10-22).

(4) Because this motion allegedly raises extraordinary and unprecedented issues of unusual difficulty and significant precedential importance, the Board should convene the Senior Deciding Group to decide, and hear further oral argument on, the motion (*id.* at 22-25).

Respondent argues that BIW's motion should be denied for the following reasons:

(1) Procedurally the Board had every right and reason to determine, from the entire factual record in this appeal, that the cause of DDG 90's FOFT piping corrosion was BIW's nonconforming flush (gov't opp'n at 2).

(2) Board findings 54-56 were fully supported by the record, including the evidence the Board cited and other testimony the Board could have cited (*id.* at 2-3).

(3) BIW's non-conforming Kennebec River water flush was not a brief event ending shortly after 9 September 2002 when most but not all of such water was drained from DDG 90's FOFT piping, but rather encompassed its prolonged presence therein, and hence the Kennebec River water was the proximate cause of the corrosion damage, unbroken by any intervening, new and independent cause (*id.* at 3-4).

(4) The Board should not reopen the record for further evidence because (a) the 1981-82 clarification clause does not address the remand issue of the proximate cause of the DDG 90's FOFT piping corrosion, it is consistent with the Federal Circuit's interpretation of the contract's Insurance clause that is now the established law of the case, and it supports respondent's remand argument that the corrosion defects were due to BIW's nonconforming conduct (Kennebec River water flush) (*id.* at 5-7); (b) BIW employees who previously said they knew about the corrosive effects of brackish water cannot now plausibly say they did not (*id.* at 5 n.2) and (c) with respect to DDG 99's corrosion, BIW has stated: "BIW considers the facts with respect to DDG 99 to be completely distinguishable from those encountered in the case of DDG 90"; although the DDG 99 events occurred in 2005, in time for BIW to have sought to introduce them into the remand record if it had so wished, its attachments 19 and 20 were prepared after, and in reaction to, the Board's August 2008 decision, are uncorroborated hearsay with respect to which respondent has had no opportunity for discovery and submission of contrary evidence, and the contract required fuel oil flushing, not fresh water or Kennebec River water flushing, of DDG 90's FOFT piping (*id.* at 7-9).

(5) The motion for reconsideration does not satisfy any of the Board's published criteria for referral to the senior deciding group (*id.* at 9-10).

DECISION

The Chairman of the ASBCA has denied BIW's motion to convene the senior deciding group with respect to the aforesaid motions. The Board has considered the motion of *amicus curiae* to file a brief in support of BIW's motion and the parties' views thereon, and grants the *amicus* motion. We conclude, however, that no separate discussion of ASA's arguments is necessary to decide the motion for reconsideration. Because the written briefs of the parties and *amicus curiae* adequately address the factual and legal issues, the Board denies BIW's request to hear oral argument on its motion.

Our findings 54(a) and (b) describe the knowledge of BIW's operating engineers Pelerin and Robbins of prompt diesel fuel loading shortly after the ocean and Kennebec River water flushing of the FOFT piping on DDGs 76 and 85, respectively. DDG 76 incurred two FOFT pin hole leaks at welds in March and May 1999, and DDG 85 had no reported FOFT piping leaks (app. supp. R4, tab 212, appx. A at 11-13 of 13, appx. B at 2). Movant is correct that the reference to "past practice" with respect to river water flush in the quotation in finding 54(c) should be limited to DDG 85, and we clarify finding 54(c) to that extent. In addition, we note that the reference to DDG 76 in finding 14 should have been to DDG 75. The testimony of witnesses McNelley and Hays in findings 54(d) and (e) is not probative of what BIW knew about prompt fuel flushing to avoid corrosion damage, but their expert opinions correlate what BIW's operating engineers knew about fueling promptly after flushing FOFT piping with the presence or absence of resulting DDG corrosion damage. With the clarification noted, we reaffirm our findings 54 and 56.

Our findings on the foreseeability of chloride corrosion of DDG FOFT piping were not "sudden and unannounced" as movant suggests. The parties had argued this issue in their February-March 2008 briefs on the remand issue before our August 2008 decision. Respondent contended: "BIW KNEW ITS USE OF BRACKISH KENNEBEC RIVER WATER COULD DAMAGE THE VESSEL," citing, *inter alia*, testimony of Michael Ludwig, BIW's chief welding engineer, that if sea water got into a stainless steel piping system and remained stagnant, he "would fully expect to see some level of...pitting corrosion" (tr. 2/51) (gov't "Due to" br. at 13). BIW argued that: "THE NAVY'S ARGUMENT THAT BIW KNEW THAT USE OF KENNEBEC RIVER WATER COULD DAMAGE THE VESSEL HAS NO SUPPORT IN THE RECORD," because Mr. Gerrish, who flushed DDG 90, was unaware that salty river water could damage FOFT piping (Bd. finding 15) and the knowledge of BIW's more technically educated employees (*e.g.*, Mr. Ludwig) cannot be imputed to Mr. Gerrish (app. reply br. at 4-6). Respondent did not propose to impute such knowledge to Mr. Gerrish, but to BIW's managers. Since the parties, well knowing the foregoing remand contentions, chose to adduce no additional factual evidence with respect to foreseeability, there is no basis for admitting such evidence now on reconsideration.

BIW vigorously argued in oral argument before the Federal Circuit in *Winter v. Bath* that the Court should accept multiple contributing factors causing the DDG 90 FOFT corrosion, as the Board had found (app. br. on remand, attach. 1 at 10-12, 18-19). The Federal Circuit's decision paraphrased our finding 45: "[T]he brackish water flush combined with the FOFT configuration, the accelerated sequencing of the FOFT pipe installation and flushing, and the use of the land level transfer facility to 'cause...the unforeseen, increased incidence of corrosion in DDG 90's piping.' *Id.* at 14-15." 503 F.3d at 1349. In its discussion, the Court stated: "[T]he board explicitly held that, while the nonconforming flush may have contributed to the corrosion of the FOFT piping...it 'was not necessarily the cause in fact or the proximate cause of the corrosion.' *Id.* at 21." 503 F.3d at 1351.

The Court stated that those Board findings were insufficient to determine whether BIW's costs to inspect, repair and replace DDG 90's corroded FOFT piping were subject to the Insurance clause's workmanship exclusion, and thus remanded the case for the Board "to determine whether the corrosion in the DDG 90's FOFT piping was 'due to' the nonconforming flush of the piping." 503 F.3d at 1352. Given the foregoing Federal Circuit statements, revisiting our findings 15 and 45 and including additional findings 54-56 in our remand decision plainly were within the court's mandate.

BIW asserts that our statement in the remand decision: "We find that the nonconforming Kennebec River water flush was the cause in fact and proximate cause of DDG 90 FOFT piping corrosion" (08-2 BCA ¶ 33,935 at 167,935), is "utterly disingenuous" because the Board allegedly found in such decision "that the real cause [of DDG 90's FOFT corrosion] was the construction sequence changes caused by introduction of the LLTF, leading to stagnant water remaining in the piping for several months" (app. mot. at 10 n.9). Such assertion injects into our August 2008 remand decision BIW's proposed supplemental finding 54 (app. br. on remand, attach. 2, ¶ 54), which proposed finding we did not find or adopt in our remand decision.

Respondent argued on 27 December 2007, following the Court's remand, that among the factors described in finding 45, the last two "are really one cause, namely 'prolonged exposure to stagnant brackish Kennebec River water' with its high level of chlorides, sediment, and microbes" (Bd. corr. file). Respondent's opposition to the instant motion argued that the nonconforming Kennebec River water flush was the proximate cause of the corrosion and that prolonged exposure of FOFT piping to such water was an element of such nonconforming flush, and was not an intervening and independent cause of such corrosion. We agree with respondent's latter proposition that the prolonged exposure was an element of the nonconforming flush.

Our remand decision, in effect, answered the remanded question, "Yes" and came under the court's conditional holding, "If [the corrosion was 'due to' the nonconforming flush of the piping], BIW...would be liable for the costs of inspecting, repairing,

replacing and/or renewing the FOFT piping.” 503 F.2d at 1352. Since we found a single proximate cause of the DDG 90 FOFT corrosion in our remand decision, the legal principle regarding converging causes enunciated in our 2005 decision is inapplicable.

We deny BIW’s motion for reconsideration, reopening the record and convening the senior deciding group.

Dated: 24 February 2009

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54544, Appeal of Bath Iron Works Corp., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals