In the Matter of:

JAMES CARPENTER, **ARB CASE NO. 07-060**

COMPLAINANT, **ALJ CASE NO. 2006-ERA-035**

v. **DATE: December 31, 2009**

BISHOP WELL SERVICES CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard R. Renner, Esq., *Tate & Renner,* Dover, Ohio

For the Respondent:
Susan E. Baker, Esq., Daniel H. Plumly, Esq., *Critchfield, Critchfield & Johnston, Ltd.,* Wooster, Ohio

ORDER DENYING RECONSIDERATION

James Carpenter filed a complaint alleging that Bishop Well Services Corp. fired him because he engaged in activity protected under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (West 2006); the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 2005); and the Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C.A. 60129 (West Supp. 2005) (the whistleblower statutes).

A United States Department of Labor Administrative Law Judge (ALJ) recommended dismissal of the complaint because, inter alia, Carpenter failed to prove that he engaged in protected activity. On September 16, 2009, the Administrative Review Board (ARB or Board) issued a Final Decision and Order (F. D. & O.) affirming the ALJ because Carpenter failed to prove that he engaged in protected activity pursuant to the whistleblower statutes and thus did not establish an essential element of his retaliation claim.

On October 14, 2009, Carpenter filed a Motion for Reconsideration of the F. D. & O., requesting reconsideration of our ruling. Carpenter argues that the Board failed to apply the correct law to his case, and that our decision represents a departure from our prior rulings. Bishop Well Services filed a Brief in Opposition to the Motion on November 2, 2009, and Carpenter filed a "Reply Memorandum in Support of Motion for Reconsideration" on November 10, 2009.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.[1] As an initial matter, we note that Carpenter filed his Motion twenty-eight days after the Board issued its F. D. & O. Given the Board's rulings in other cases, there is a substantial question whether Carpenter's motion was timely filed.[2] But even if it had been timely, upon consideration of the Motion's merits, we would nevertheless deny reconsideration.

Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."[3] In considering a motion for reconsideration, the Board has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law

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[1] *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

[2] *See, e.g., Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 4 (ARB Dec. 21, 2007), citing *Henrich*, slip op. at 17; *Spearman v. Roadway Express, Inc.*, 1992-STA-001, slip op. at 1 (Sec'y Oct. 27, 1992).

[3] Fed. R. App. P. 40(a)(2).

> after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[4]

Carpenter's Motion alleges that the Board improperly ruled that his May 16, 2006 phone call to the Occupational Safety and Health Administration, in which he complained about the safety of Bishop Well Services' handrails and hoses, did not constitute protected activity under the whistleblower statutes.[5] He also argues that the Board erred by affirming the ALJ's denial of his Motion to Dismiss and request for additional discovery. According to Carpenter, our decision to affirm the ALJ on those rulings represents a departure from our prior decisions, and we failed to explain this departure.[6]

In presenting the allegations contained in his Motion, Carpenter has not demonstrated that any of the provisions of the Board's four-part test apply. He does not argue that there has been a change in the law or that new facts have arisen since we issued our F. D. & O. And he does not indicate that we did not consider material facts prior to issuing our ruling. Instead, he repeats the arguments he presented to the Board and the ALJ. We considered and rejected these arguments in our F. D. & O.[7]

Accordingly, Carpenter's Motion for Reconsideration is **DENIED**.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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4 *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 2 (ARB Mar. 7, 2006).

5 Motion at 1-3.

6 *Id*. at 3-5.

7 F. D. & O. at 8-9.